CREATION OF THE CONCURRENT FIELD

9.1 The Constitution provides for the creation of the concurrent field in three ways. Article 246(2) creates a concurrent jurisdiction in respect of matters enumerated in List III, the Concurrent List, in the Seventh Schedule. This concurrent field in which both the Union Parliament and the State legislatures are competent to enact laws is hierarchically subordinate to the Union field but above the State field. This is achieved by making the Concurrent field subject to the Union field and by the use of a 'noscitur a natura' clause capable of overriding the State field.

9.2 If the Council of States (Rajya Sabha) has declared by a resolution supported by not less than two-thirds of its members that in the national interest Parliament should make laws with respect to matters in the State List specified in the resolution, Parliament gets competence to make laws for such subjects. Such resolutions would remain in force for one year, but could be extended by further resolutions similarly passed by the Council of States. The laws made by Parliament under the above provision would remain in force for a period of six months after the expiry of the supporting resolution except as respects things done or omitted to be done. But the effect of the resolution passed by the Council

1. Article 249 of the Constitution.
of States, and of the laws made by Parliament on that basis, is not to restrict the power of the Legislature of a State. Therefore the effect of the resolution is to temporarily transfer the subject covered by it to the concurrent field.

9.3 When a Proclamation of Emergency is in operation Parliament is competent to pass laws with respect to matters in the State List. Such laws would remain in force for a period of six months after the Proclamation of Emergency has ceased to operate except as respects things done or omitted to be done. The competence conferred on Union Parliament by the Proclamation of Emergency does not detract from the competence of the State legislatures to pass laws on the subjects concerned. In other words, a temporary concurrent jurisdiction is created in this case also.

RESOLUTION OF CONFLICTS IN THE CONCURRENT FIELD

9.4 If two valid enactments stand side by side regulating the same matter differently it will lead to confusion and it would be impossible to enforce the legislation. Such conflict is avoided by the principle of repugnancy which makes the Union legislation paramount whether passed before or after the State legislation. In respect of the temporary concurrent sphere created by the Council of State resolution or by the Proclamation of Emergency, this is specifically provided for in article 251. In respect of the concurrent field created

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2. Article 251 of the Constitution.
3. Article 250 of the Constitution.
by article 246(2) read with List III in the Seventh Schedule, article 254 provides for the resolution of conflicts. Here also the usual principle is to make the Union law prevail, except in cases where a State law is reserved for, and has obtained, the concurrence of the Union President. It may be noted here that while conflicts in exclusive fields raise a question of power, these conflicts in the concurrent field raise a question of inconsistency or repugnancy, both legislatures being competent. However, the provisions of article 254(1) have been invoked indiscriminately for resolution of both the above types of conflicts. It is therefore proposed to deal with question of proper interpretation of article 254(1) before the question of repugnancy is taken up for consideration.

INTERPRETATION OF ARTICLE 254(1)

9.5 Article 254(1) of the Constitution and the corresponding section of the Government of India Act, 1935, section 107(1), are extracted below:

"Article 254(1). 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, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void".
Section 107(1) of the Government of India Act 1935:

"If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of any existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void".

9.6 The question is whether the words "Federal law which the Federal Legislature is competent to enact" refer only to laws of the Federal Parliament with respect to the Concurrent List or whether they refer to legislation of the Federal Parliament with respect to the exclusive Federal List and the Concurrent List.

9.7 Various reasons have been suggested for holding that section 107(1) of the Government of India Act, 1935 (similar to section 254(1) of the Constitution) refers to both the Federal and Concurrent Lists.

Literal reading

9.8 In Sadananda Jha v. Aman Khan, Dhevale J. did not accept the suggestion to read words "with respect to one of the matters enumerated in the Concurrent List" along with the expressions "any provision of a Provincial law" and "any provision of Federal law" occurring earlier in the sub-section.

and thus to limit the scope of sub-section (1) to conflict in the concurrent field. He held that such a construction was opposed the plain grammar of that sub-section and there was nothing in the scheme of the legislation laid down in the Act to indicate that Parliament intended it. If the Parliament had intended that section 107(1) to be restricted to conflicts in the concurrent field it could have adopted phraseology similar to the one in sub-section (2) thereof. He thought that the true scope of section 107(1) was to be supplementary to section 100 and deal with the effect of repugnancies between provincial and federal legislation (whenever passed) without any reference to the fields to which the conflicting enactments related.

9.9 However, this way of literal reading is not free from difficulty. It would seem that a literal reading would equally provide other ways of reading the sub-section. Thus, Pal J. in Bikrem Kishore v. Tafzzal Hossain observed as follows:

"Reading section 107(1) Government of India Act, 1935 by itself there is some difficulty in seeing the exact bearing of the words 'with respect to one of the matters enumerated in the Concurrent Legislative List'. As the section stands, these words may be taken with (1) 'an existing law' or (2) any provision of an existing Indian law or (3) 'repugnant'. In sub-section (2) of the section,

5. Ibid at p.65.
however, these words are taken with 'a Provincial law and 'an existing Indian law.' He also gave an analysis of the conflicts that might possibly be covered by section 107(1). Meredith J. thought that the correct way of reading section 107(1) would be to read the

8. "1.(a) The Provincial law must be with respect to one of the matters enumerated in the Concurrent List; (b) the existing Indian law must also be with respect to the same matter; (c) a provision in (a) must be repugnant to a provision in (b); (i) these provisions themselves are not required to be with respect to any particular matter; or (ii) these provisions must also be with respect to one of the matters enumerated in the Concurrent Legislative List;

2.(a) The Provincial law need not be with respect to one of the matters enumerated in the Concurrent List; (b) the existing Indian law must be with respect to one of the matters enumerated in the Concurrent List; (c) a provision in (a) must be repugnant to a provision in (b); (i) these provisions themselves are not required to be with respect to any particular matter; or (ii) these provisions must be with respect to one of the matters enumerated in the Concurrent Legislative List or (iii) the provision in the existing Indian law must be with respect to one of the matters enumerated in the Concurrent Legislative List, the provision in the Provincial law is not required to be with respect to any such matter;

3.(a) The Provincial law is not required to be with respect to any of the matters enumerated in the Concurrent Legislative List; (b) the existing Indian law also is not required to be with respect to any of the matters enumerated in the Concurrent Legislative List; (c) a provision in (a) must be repugnant to a provision in (b), the repugnancy being with respect to one of the matters enumerated in the Concurrent List. This can happen only when the provisions are with respect to the same matter and that matter is one of those enumerated in the Concurrent Legislative List". ibid, at p.591.
words "with respect to one of the matters enumerated in the Concurrent List" as qualifying not only "any provision of an existing Indian law" but also the words "provision of a Federal law which the Federal Legislature is competent to enact" occurring earlier. Therefore it is submitted that a grammatical reading of the sub-clause is not conclusive either way.

Incidental encroachment and the doctrine of occupied field

9.10 It has sometimes been suggested that unless the sub-section is read to cover also the laws passed by the Union and the State Legislatures in the exclusive fields, there will be no means of solving conflicts due to incidental encroachment of laws in the exclusive Union and the exclusive State fields. Thus Ivor Jennings, wanted the sub-section to be revised omitting all references to the Concurrent List, so that it could apply to all conflicts between Union and State laws.  

Suleiman J. also thought that along with the doctrine of incidental encroachment, which permitted the provinces to encroach on the exclusive field of the federation, the doctrine of unoccupied field in favour of the federation, which would not allow such incidental encroachment when the field was already occupied by the Central or Federal legislation, should also be imported from Canada. It seems that Jennings and

Sulaiman J. were influenced by the Canadian experience to suggest the application of the principle of occupied field for the resolution of conflicts arising out of an incidental encroachment in the case of legislation in the exclusive fields. It is true that the doctrine of occupied field is not limited to the concurrent field in Canada, United States and possibly in Australia. But in none of these federations the jurisdictions have been arranged hierarchically with non-obstante and subjection clauses, as in section 100 of the Government of India Act, 1935 and article 246 of the Constitution. The provisions of these sections are quite sufficient for resolving

12. "Paramountcy (or the occupied field doctrine or the overlapping doctrine, call it what one will) has a two-fold operation in Canada. It applies by express stipulation to the exercise of concurrent powers under section 95 of the British North America Act, and it applies by implicit recognition to the exercise of the mutually exclusive powers of Parliament and Provincial legislature under sections 91 and 92". Bora Laskin, "Occupying the Field : Paramountcy in Penal Legislation", (1963) 41 Can. B. Rev. 234 at p.237.


14. The Queen v. Philips (1970) 44 A.L.J.R. 497 (section 109 is inappropriate when the exclusive power of the Commonwealth is concerned) However, see W. Anstey Wynes, Legislative, Executive and Judicial Powers in Australia, Law Book Co. Ltd., Sydney, (4th Ed.) (1970) p.101, where it is said that section 109 applies equally where Commonwealth Act is passed under the exclusive or concurrent power.
any conflict between incidentally encroaching provisions of laws in the mutually exclusive fields. In India, therefore, the doctrine of occupied field may properly be confined to the resolution of conflicts in the concurrent field. This is considered later in the chapter on Repugnancy.

Transfer of exclusive field and the doctrine of repugnancy

9.11 It has sometimes been thought that, when a part of the exclusive State field is transferred to the exclusive Union field, any conflict between the law that may be passed by the Union in the field so transferred and any State law existing in that field could be solved only by applying the principle of repugnancy and that for this purpose the scope of article 254(1) has to be construed as necessarily applying to the concurrent field as well as to the exclusive fields. Four types of such instances have been noticed:

(i) Transfer of the field when a new Constitution is introduced

9.12 When a legislative field is transferred and brought under the power of a legislature for the first time as a result of constitutional changes it seems that all the existing laws would automatically become invalid. To avoid such a result when a new Constitution is brought into effect and legislative powers are conferred on the new legislatures, provision is made for continuance of the existing laws in spite of the repeal of the previous Constitution enactment. Such provisions
have been made in articles in the Government of India Act, 1915, in the Government of India Act, 1935, in the Indian Independence Act, 1947 and in the Constitution of India, 1950. The new legislature will be competent to repeal any old law which is continued in that field. Without appreciating the fact that the continuance of the old laws in a field which is transferred to another legislature is fully subject to the power of the new legislature, it has sometimes been suggested that to resolve a conflict between the Provincial law and an existing law with respect to the exclusive Federal List, it is necessary to invoke article 107(1) of the Government of India Act 1935. However, after noting that the Government of India Act, 1935, section 107, seemed to have left a gap in that it did not provide for the resolution of conflicts between Provincial law and existing laws with respect to matters in the exclusive Federal List, Suleiman J. correctly observed as follows:

" Apparently, it was thought that as the Provinces had been given any authority to legislate with respect to matters falling in List I, all cases where there is an encroachment would be met by section 100 itself."21

15. Section 130.
16. Section 292.
17. Section 18(3).
18. Section 372.
19. In A.B. Abdul Kadir v. State of Kerala, A.I.R.1962 S.C.922 it was hold that an extension of the Central Excise and Salt Act 1944 to the Travancore Cochin area with effect from 1.4.1950, the Cochin Tobacco Act, 1084 and the Travancore Tobacco Act 1087 which previously applied in those areas were repealed.
9.13 It is submitted that this view is correct and there is no need to invoke section 107(1) for settling a conflict between Provincial law and existing laws referable to matters in the Federal List.

(ii) Transfer of field by Parliamentary declaration

9.14 Another instance involving the transfer of legislative field which might suggest the application of the principle of repugnancy is that of the transfer of the State fields under mines and mineral development, industries, education etc., by virtue of Parliamentary enactments. In these cases there is no scope for applying the principle of repugnancy. The effect of Parliamentary enactment on the existing State law has been stated by N. Rajagopala Iyyanger in the following terms: "The Parliamentary enactment supersedes the State law and thus it virtually effects a repeal". The invalidity of the State law in such case would arise "not because of any repugnance between two statutes but because...the State Legislature has no jurisdiction to pass the law".

23. Per Gajendragadker J. in Hingir-Rampur Coal Co. v. State of Orissa, A.I.R. 1961 S.C. 459 at pp.457-70. It is true that he speaks of the Federal law covering the same field occupied by the State law, and the judgment in State of Orissa v. M.A. Tulloch & Co., A.I.R. 1964 S.C. 1284 has also used similar language vide para 15 of the judgment, which would have been apt for describing conflicts in the concurrent field. However, the judgments have made beyond doubt that the invalidity of the State law arises not from repugnancy but from lack of power.
In these cases also therefore the principles applicable to the resolution of conflicts in the exclusive fields are sufficient for resolving the conflict.

(iii) **Transfer of field by delegation by State Legislatures under article 252**

9.15 We have seen that the Union Parliament gets competence to pass laws on subjects mentioned in the State List when authorised by resolutions passed by the house or houses of State Legislatures under article 252 of the Constitution. The field so transferred is an exclusive one in favour of the Union. There is possibility of a conflict between the laws passed by Parliament under article 252 and the laws passed by the States before the transfer of legislative competence to the Union. It has been suggested that such conflicts cannot be solved unless article 254(1) is interpreted as applicable not merely to the concurrent field but also to the exclusive fields. But since the State Legislature loses its competence on the transfer of the field to the Union, State laws in the transferred field should be considered to have been impliedly repealed. Then there would be no scope for invoking article 254(1).

(iv) **Transfer of field on enacting legislation by Parliament to implement treaties under article 253**

9.16 As has already been seen Parliament has exclusive

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24. para 2.2 ante.
26. para 2.2 ante.
power to implement under article 253, any treaty, agreement or convention made in the course of international relations. It has been argued that a conflict between a law passed by the Parliament to effectuate a treaty and an existing State law on that subject can be resolved only by giving a meaning to article 254(1) which would make it applicable also to the exclusive fields. However it seems that a conflict of this type also is resolvable without invoking article 254(1). The rule of implied repeal of existing State law in the transferred field would apply here also.

9.17 In all cases where a part of exclusive State field is transferred to the exclusive Union field, any existing State law in that field would "wither away" leaving no possibility of a conflict with the law that the Union may pass thereafter. If, however, the Union Parliament continues any existing State law in the transferred field, such law is as good as a law made in exercise of the Union legislative competence and would be subject to repeal, amendment etc. by the Union Parliament. This would not of course create any problem of legislative conflict. Any conflict between incidental encroachment of the laws referrible to the exclusive jurisdiction could be solved under article 246 itself.

The view that the sub-section refers only to the Concurrent List

9.18 The view advanced that section 107(1) of the Government of India Act and article 254(1) of the Constitution refer

only to conflicts in the concurrent field has been supported by various reasons. The presence of sub-section (2) in section 107 of the Government of India Act 1935, according to which a State law repugnant to a Federal law or an existing Indian law with respect to one of the matters in the Concurrent List could have precedence if the assent of the Governor-General was obtained, has been taken as indicative of the correct scope of sub-section (1). Thus Pal J. in *Bikram Kishore v. Tafazzal Hossain*, observed:

"In my opinion, therefore, only that kind of provincial law is contemplated by sub-section (1) as is covered by sub-section (2). Sub-section (2) clearly contemplates only a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List".

9.19 Similar views have been expressed by others too with reference to article 254 of the Constitution. Dhavale J. has held that such a construction would be opposed to the plain grammar of the sub-section and that there was nothing in the scheme of legislation laid down in the Act to indicate that the Parliament intended it.

9.20 In fairness it may be conceded that, since what is referred to in sub-clause (2) is only an exception, there will

30. "The words 'subject to the provisions of clause (2)' which occur in clause (1) support this construction. This would have no meaning if clause (2) is dealing with something completely different from clause (1)". V.N. Shukla, *The Constitution of India*, 5th Edn. (1969), at p. 447.
be no difficulty even if it referred only to a part of what is mentioned in sub-section (1). So while sub-section (1) refers to Federal law referable to the exclusive Federal List and the Concurrent List the exception of Provincial law prevailing over the Federal law with the Governor-General's assent could refer only to that part of the Federal law referable to the Concurrent List. So this argument is not decisive of the question.

Supporting judicial dicta

9.21 Judicial dicta are available to support the view that the scope of the sub-section is confined to the Concurrent List. Thus, Lord Wright observed that section 107(1) of the Government of India Act 1935 had no application in a case where the Province could show that it was acting wholly within its power under the Provincial List and was not lying on any power conferred on it by the Concurrent List.

9.22 In Subramanyan v. Muttuswami Sulaiman J. noticed that section 107(1) of the Government of India Act, 1935 did not provide for the resolution of a conflict between a Provincial law and an existing Indian law with reference to matters in the Federal List. He thought that this gap could be filled if the words "with respect to one of the matters enumerated in the Concurrent List" were held to qualify only "existing Indian law" and not "the Federal law" mentioned

33. A.I.R. 1941 F.C. 47. See also para 9.12 ante.
earlier. However, according to him the normal way of reading that sub-section would be to read the words "with respect to one of the matters enumerated in the Concurrent List" as qualifying not only "existing Indian law" but also the Federal law occurring earlier.

9.23 In Bar Council of Uttar Pradesh v. The State of U.P. A.N. Grover J. observed: "The question of repugnancy can only arise in matters where both Parliament and the State Legislatures have legislative competence to pass laws. In other words when the legislative power is located in the Concurrent List the question of repugnancy arises." There are also dicta of the High Courts of Mysore and

34. Ibid. at p.62. The opposite view attributed to Suleiman J. in Satischand archa v. Sudhir Kirshna, A.I.R. 1942 Cal. 429, at p.434, is submitted, is incorrect.


36. Ibid. at p.238. Similar observations in Prem Nath Kaul v. State of Jammu & Kashmir, A.I.R. 1959 S.C. 749, at p.763, have been referred to in this judgment. But the judgment clarifies that the decision in State of Jammu & Kashmir v. M.S. Ferrooj, A.I.R. 1972 S.C. 1738, where a Jammu & Kashmir law governing the disciplinary action was held repugnant to the Union law is not applicable as a general precedent as there was no Concurrent List for Jammu & Kashmir as the Constitution applied to that State at that time. In view of this it is not clear whether, the dictum in the earlier decision Prem Nath Kaul is fully reliable. See also, the dictum of Alagiriswami J. in K.S.E. Board v. Indian Aluminium Co., A.I.R. 1976 S.C. 1031, at p.1039, "That the question of repugnancy can arise only with reference to a legislation falling under the Concurrent List is now well settled". But the laws involved in this case were held to belong to the exclusive fields.

37. In State of Mysore v. Mohamed Ismail, A.I.R. 1958 Mys. 143 at p.145 M. Sedasivayya J. observed as follows: "Under article 254, any question of repugnancy can arise only as between a law made by the Legislature of a State in regard to a matter in the Concurrent List and a law made by the Parliament in regard to the same subject in the Concurrent List..."
Andhra Pradesh to the effect that article 254(1) applies only to questions of the Concurrent List.

Suggested interpretation

9.24 It is submitted that the interpretation that article 254(1) and section 107(1) of the Government of India Act, 1935 apply only to conflicts in the Concurrent List is the correct one. Such a result would also be reached on a true literal interpretation of the section. This section was designed to solve conflicts between (1) Provincial law in the concurrent field and Federal law in the same field, and (2) Provincial law in the concurrent field and existing Indian law with respect to a matter in the concurrent field. Stated fully, these could be put in the following two clauses:

(1) if any provision of a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact with respect to one of the matters enumerated in the Concurrent Legislative List, and,

(2) if any provision of a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List is repugnant to any provision of an existing Indian law

38. In Sesharatnam v. Gift Tax Officer, A.I.R. 1960 S.P. 115, Chandra Reddy C.J. observed: "the question of occupied field is absolutely irrelevant in the context of the present enquiry since we are concerned here with Lists I and II and not with the Concurrent List". at p.119.
with respect to one of the matters enumerated in the Concurrent Legislative List. Avoiding repetition and using the words "with respect to one of the matters enumerated in the Concurrent Legislative List" only once in each of the two clauses, the clauses may be rewritten as follows:—

(1) If any provision of Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact with respect to one of the matters enumerated in the Concurrent Legislative List, and

(2) If any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List.

9.25 What section 107(1) attempted, was to combine the above two clauses. This combination was achieved by using "if any provision of a provincial law is repugnant" and "with respect to one of the matters enumerated in the Concurrent Legislative List" each only once and by synthesising the two by using the disjunctive "or" without any comma. It seems therefore that the words "with respect to one of the matters enumerated in the Concurrent List" should qualify not merely "existing Indian" law but also the "Federal law which the Federal Legislature is competent to enact" and "Provincial law" occurring earlier in the sub-section. Read in this way section 107(1) would clearly indicate that the conflicts envisaged therein are between Provincial law and existing law or Federal laws within the Concurrent List.
9.26 The insertion of the comma after the phrase which Parliament is competent to enact before the disjunctive "or" in article 254(1) of the Constitution may make it literally more difficult to read the provisions in the way suggested above. But it is significant that in section 107(1) Government of India Act, 1935 there was no comma to separate the clauses after the words "which the federal legislature is competent to enact" and before the words "or to any provisions of an existing Indian law with respect to one of the matters enumerated in the Concurrent List", as we find in article 254(1) of the Constitution. It is also well-known that punctuations have no place in legislative enactments and should not stand in the way of a proper reading of the legislation to give effect to the intention of the legislation.

9.27 It is submitted that the true scope of article 254(1) is confined to the resolution of conflicts in the concurrent

39. "On the parliament roll there is no punctuation, and we are not bound by that in the printed copies". per Cockburn C.J. in Stephenson v. Taylor, (1861) 1 B & S 101 at p.106; 121 E.R. 652 at p.654; "The truth is, that, if the article is read without commas inserted in the print, as a Court of law is bound to do, the meaning is reasonably clear". per Lord Warrington in Lewis v. Ashutosh Sen, A.I.R. 1929 P.C. 69 at p.71; "Punctuation is after all a minor element in the construction of a statute...and cannot be allowed to control the plain meaning of a text", per B.K.Mukherjea J. at p.383, and "...the comma, if it may at all be looked at, must be disregarded as being contrary to this plain meaning of the statute", per S.R.Das J. at p.389 in Aswinig Kumar v. Arabinda Bose, A.I.R. 1952 S.C. 369; Maxwell on the Interpretation of Statutes, 12th Edn. (1969) by P.St.J. Langan, pp.13-14.
field. The clear provisions of article 246 are sufficient to solve all conflicts relating to the exclusive fields including conflicts between State law and the Union law when a part of the exclusive State field is transferred to the Union or for settling conflicts on account of the incidental encroachment of Union and State law in their respective exclusive fields.

40. Such as the instances of industry, mining, article 252, 253 etc.

41. According to this view, the passage in H.M. Seervai, Constitutional Law of India, (1967) at p.36: "The prevalence of the Federal or State law in respect of mutually exclusive powers of legislation is secured by the non-obstante clause of article 246(1) and by article 254(1)", would be correct if, instead of the words "article 254(1)", the words "subjection of the State field to the Union field provided for in article 246(3)" are substituted.