CHAPTER X

REPUGNANCY

MEANING OF REPUGNANCY

10.1 Article 254 of the Constitution, and its predecessor, section 107 of the Government of India Act, 1935, use the term repugnancy to describe the incompatibility between the Union and State laws in the concurrent field. Repugnancy seems to have been used to mean inconsistency as the marginal notes to these sections refer to inconsistency between laws. The meaning of both the terms seems to be the same. The terms 'inconsistency' and 'invalid' are used in section 109 of the Australian Constitution instead of the words 'repugnant' and 'void' used in the Indian Constitution. The use of the term 'void' to describe the status of repugnant State law which is capable of becoming valid again if the Union law is repealed is not very apt. Therefore the phraseology adopted in the Australian Constitution in this regard seems to be preferrable.

10.2 Before the tests for determining repugnancy are considered, it is necessary to dispose of certain instances which seemingly involve repugnancy, but which on closer scrutiny are not instances which attract article 254(1) of the Constitution.

1. Repugnancy from latin repugnare. re (against), pugnare (to fight); inconsistency from latin consistere. con (together), sistere (to set, to stand) and therefore that which cannot stand together.
INSTANCES WHICH DO NOT INVOLVE REPUGNANCY

Laws based on exclusive powers

10.3 As we have already seen, if the conflict is between two laws or their incidentally encroaching provisions and one or, both of the laws, belongs to the exclusive field, what is involved is a question of power and not a question of repugnancy.

Laws applying at different periods of time

10.4 If the laws relating to the same matter are not applicable at the same time there will be no question of repugnancy. Thus, when it was argued that the scheme for nationalisation of road transport services made under the U.P. Transport Services (Development) Act, 1955 (9 of 1955) was invalid as that Act was repugnant to the Motor Vehicles (Amendment) Act, 1956 (100 of 1956) which introduced the


3. As far as Australia is concerned, this position is well expressed in the statement that a question of inconsistency under section 109 of the Constitution of Australia is a question not between powers but between laws made under power. See O'Sullivan v. Nearlungs Meats Ltd., (1957) A.C. 1 wherein Privy Council affirming the Australian High Court decision in (1955) 92 C.L.R. 565 held that what was involved in that case was not an inter se question under section 74 turning on the extent of power, but a question of inconsistency under section 109.

"The identity of the field may relate to the pith and substance of the subject matter and also to the period of its operation. When both coincide, the repugnancy is complete and the whole of the State Act becomes void. The operation of the Union law may be entirely prospective leaving the State law to be effective in regard to thing already done. Section 680, 68D and 68E inserted by the Amending Act, clearly show that these sections are concerned only with a scheme initiated after the Amending Act came into force".

Since the scheme framed under the State Act and those that might be framed under the Central Act in the future, operated at different times, there was no question of repugnancy.

Similarly, when the Essential Commodities Act, 1955 which came into force from 1-4-1955, did not include mica as essential commodity and the earlier Central enactment, the Essential Supplies (Temporary Power) Act, 1946, which had included also mica within its scope, expired on 26-1-1955, there was no Central enactment to compete with the Bihar Mica (Amendment) Act, 1949 to raise a question of repugnancy.

One of the laws provides for the application of other laws

If the dominant law expressly or impliedly provides for the application of other laws there is no repugnancy. In

G.P. Stewart v. Brojendra Kishore Roy Chaudhury, one of the arguments was that section 10-C of the Assam Court of Wards (Amendment) Act, 1937 which stayed for a certain period the execution of decrees against property of ward administered by the Court of Wards was repugnant to section 51 and 0.21, R.24 of the Civil Procedure Code. Narasimha Rao J. held that, as section 4 of the Civil Procedure Code clearly envisaged that the provisions of any special law which was applicable should have effect, there was no repugnancy. An argument that section 21 of the Bihar Maintenance of Public Order Ordinance, 1949 (4 of 1949) which authorised arrest without warrant was repugnant to section 54 of the Criminal Procedure Code, 1898 was repelled by the Federal Court as the Criminal Procedure Code expressly laid down in section 1(2) that its provisions would not affect any special form of procedure prescribed by any law for the time being in force.

10.7 Conversely, if the State law has specifically left out matters provided for in the Central law, there is no case for repugnancy. Thus, in Tika Ramji v. State of U.P. it was argued that the U.P. Sugar Cane (Regulation of Supply and Purchase) Act, 1953 (24 of 1953) and the U.P. Sugar Cane (Regulation of Supply and Purchase) Order, 1954 issued thereunder were repugnant to the Industries (Development and

Regulation) Act, 1951 and the Essential Commodities Act, 1955 (10 of 1955) and the Sugar Control Order, 1955 issued under the last mentioned Act. Bhagawati J. on a comparison of the provisions involved found that matters provided for by the Centre had been left out of the State law and, therefore, there was no repugnancy.

Central law provides only for an additional benefit

10.8 There will also be no question of repugnancy if a provision in the Central law makes a provision for an additional benefit. A question was raised whether, on closure of an industrial establishment, a workman was entitled to claim the benefits of section 25 FFF(1) of the Industrial Disputes Act, 1947 (in the case of a closure, compensation under section 25F should be paid as if it were a retrenchment subject to certain restrictions) when the relevant State Act provided only for the payment of compensation for retrenchment. It was held that since the State law did not make any provision for compensation in the case of closure, and the Central law supplied the lacuna, there was no repugnancy between the State law and the Central law, and the workman could avail himself of the beneficial provisions of the Central law.

TESTS FOR DETERMINING REPUGNANCY

10.9 From the days of the Government of India Act, 1935 references have been frequently made to Australian decisions

for determining the tests of repugnancy. In the Australian Constitution, there is a provision similar to the one in section 107(1) of the Government of India Act, 1935 and article 254(1) of the Constitution of India. Naturally the principles evolved in Australia have been borrowed by analogy for application in India. Following Australian precedents Subba Rao J. said that repugnancy between two statutes may be ascertained on the basis of the following three principles:

1. whether there is direct conflict between the two provisions;
2. whether parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature, and
3. whether the law made by the Parliament and the law made by the State Legislature occupy the same field.


12. Section 109. "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and former shall, to the extent of the inconsistency be invalid". There is no parallel provision in the Constitution of Canada or in the Constitution of the U.S.A. In the former judicially-evolved doctrines are available for settling conflicts while in the latter, the supremacy provision in article VI of the Constitution has been invoked for the purpose.

13. Inconsistency within the section 109 may arise because it is impossible to obey both laws, or there is a direct collision between the laws, or because the Commonwealth permits what the State prohibits, or because the Commonwealth covers a field on to which the State trespasses. P.H. Lane, The Australian Federal System, The Law Book Co. Ltd., Sydney, (1972), p.693.

Direct conflict

10.10 If the provisions of the two laws are such that both cannot be given effect to at the same time, there is direct conflict between the provisions. There is a clear instance of such a repugnancy when one law prohibits what the other requires to be done with respect to the same conduct. Such a situation was involved in Mati Ial Shah v. Chandra Kanta Sarker before a Special Bench of the Calcutta High Court according to the characterisation of the concerned laws by that Bench. The conflict was between sections 20 and 34 of the Bengal Agricultural Debtors Act, 1936 as amended by Act 8 of 1940 on the one hand and section 31 of the Presidency Small Cause Courts Act, 1882, an existing Indian law, on the other. The former provided for the staying, on the service of a notice, of the execution of certain decrees against agricultural debtors, while the latter provided for the execution, through other courts if necessary, of decrees passed by the Small Cause Court. Speaking for the Bench, Chakravarti J. held that all the provisions of the Bengal Act were not in pith and substance relatable to subjects in the Provincial List. Some were relatable to the entries in the Concurrent List. He observed:

16. Chakravarti, Biswas and Blank JJ.
17. 20 Agriculture.... 21 .... agricultural loans....27 .... money lending.... 32 Relief of the poor....
18. 4 Civil Procedure.... 5 ... recognition of ... judicial proceedings. 10. Contracts.... 15. Jurisdiction and powers of all courts....
...while s.31 of the Indian Act directed that the decree should be executed by the Civil Court, s.34 directed that it must not be executed for the time being, and, in certain events, might no longer be executed at all....The position, therefore, is that while s.31, Presidency Small Cause Court Act, enables and even requires the transferee Court to execute the decree, s.34 of the Bengal Act, read with s.20, disables it altogether from doing so, as soon as it is served with a notice..."19

The provisions of the Bengal Act was therefore held be void for repugnancy.

10.11 How a direct conflict proved fatal to the rent control measure of a State is illustrated by Mangtulal v. Radha Shyam. The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (3 of 1947), which was to be in force till 14-3-1952 with the assent of the Governor-General under s.107(2) of the Government of India Act, 1935, was extended till 14-3-1954 by an Act of the same title in 1951 but without the President's assent under article 254(2) of the Constitution. A Full Bench of the Patna High Court held that the Act

19. Ibid. at p.9.
20. This piece-meal treatment of the provisions of the Bengal Act for characterisation, it is submitted, is wrong. There seems to have been no difficulty in saying that the pith and substance of the Act was in the Provincial List, and only the incidentally encroaching provision affected the Concurrent List., and therefore the provisions were valid. On the basis of the court's approach the provisions afford an example of repugnancy on account of direct conflict.
22. Das, Ramaswami and Narayan JJ.
was referrable to entry "8. Transfer of property...." of the Concurrent List. While the provisions of the Transfer of Property Act, 1882, an existing Indian law with respect to the above entry, gave to the lessor the rights to terminate a lease on notice to quit and to be put in possession of the property on the determination of the lease, the Bihar Act not only curtailed these rights, but also prevented a landlord from evicting even a trespasser. Section 11 of the Bihar Act was therefore held void.

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10.12 In Vishwanath v. Harihar Gir it was alleged that section 16 read with section 17 of the Bihar Money Lenders Act, 1938 (Act 3 of 1938) was repugnant to 0.21, R.66 of the Civil Procedure Code. According to the Bihar Provisions, when a property was brought to sale, the Court should fix the price of the property and should not allow it to be sold at a lower price. According to the Civil Procedure Code, the Court should only mention the price stated by the decree holder and the judgment debtor, but need not vouch for the correctness of either. Mohammed Noor J. said:

"For the purpose of this case I will construe it (repugnancy) very strictly and hold that in order that two provisions of law may be called repugnant to one another, they should be so contradictory that it will be impossible to carry out both of them; in other words if one says "do" and the other says "don't".

23.1.I.R.1939 Pat. 90.
24.Ibid. at p.94
to the actual conflicting provisions. On any other test of repugnancy, like covering the whole field, or giving an exhaustive code, perhaps, the whole provision of the State Act would have been held as repugnant.

10.14 In providing for revision only in the case of non-appealable order the Central law seems to have aimed at statutory superintendence by designated authorities over quasi-judicial orders and thus hoped to exclude the general control by "executive" government in "judicial" decisions. The Bihar State wanted to circumvent it. Thus in substance, it is submitted, there was repugnancy. The judicial eagerness to limit the area of repugnancy, however desirable it may be, when coupled with a rather mechanical reconciliation of the provisions, without considering the values involved, may not always prove beneficial to the community.

10.15 There have been interesting instances of repugnancy on account of the direct collision of the provisions involved under the Australian Constitution.

Exhaustive code

10.16 The direct conflict test may at times prove to be too narrow for the fuller realisation of the policy of the

28. See for example, R v. Brisbane Licensing Court, ex parte Daniell, (1920) 28 C.L.R. 23. A State statute provided that a State vote on liquor licensing should be taken on the same day as that fixed for a poll at an election for the Senate of the Commonwealth. A Commonwealth statute provided that no vote of electors of a State should be taken under the law of a State on any day appointed for election of the Senate. There was direct conflict between the two statutes and the State law was therefore inoperative.
dominant legislature. Another principle was therefore evolved which stated that, if the Union legislation showed an intention to lay down an exhaustive code for regulating the subject-matter on hand, it would be inconsistent for the State Legislature to legislate for the same matter. This test provides ample scope for the judiciary to uphold the values envisaged in the paramount legislation and to defeat narrow arguments which could be raised on the basis of the direct collision test.

10.17 The subject of industrial disputes comes under entry 22 of the Concurrent List. At the time when the Industrial Disputes Act, 1947 of the Centre was extended to Part B States in 1950, there was in existence in the Part B State of Travancore-Cochin an Industrial Disputes Act with provisions similar to those of the Central Act. In the State Act also there was a provision, as in the case of section 10 of the Central Act, for referring an industrial dispute for adjudication. When an industrial dispute was referred to a tribunal under section 10 of the Central Act, it was argued that the reference was incompetent as the State Act which was not repugnant to the Central Act in the matter of reference held the field and the reference should have been made under the State Act. But Koshy J. held that the Central law was

29. 22- Trade Unions; industrial and labour disputes.
intended to be an exhaustive code on the subject. The State law in its entirety was for that reason repugnant to the Central law and the reference to the tribunal was therefore valid.

10.18 In *State of Assam v. Horizon Union* the Supreme Court had an occasion to deal with the exhaustive code test. In the matter of appointment of a Presiding Officer of an Industrial Tribunal the provision in the State Act was to the effect that the person should have worked for three years as a District Judge or was qualified for appointment as a Judge of a High Court provided that appointment would be made only on consultation with the High Court. When the appointment of a person as the Presiding Officer not in consultation with the High Court was challenged, the Supreme Court held that the Central Act was intended to be an exhaustive code on the subject-matter, i.e., the appointment of District Judges as Presiding Officer and the appointment was valid. However, if a person qualified to be appointed as a Judge of the High Court were to be appointed as the Presiding Officer, the provisions in the State law for consultation with the High Court was still valid. This shows on what narrow field the Union Government was held to have laid down an exhaustive code.

10.19 While the direct collision test insists on a more rigorous test for repugnancy, the exhaustive code test is more

liberal towards the Union law. When the court comes to a conclusion that the policy expressed in the State law is incompatible with that of the Union law, the exhaustive code test is quite handy to uphold the Union law. This test was developed in Australia following the inadequacy of the direct collision test.

32. In Ex parte Mc Lea (1930) 43 C.L.R. 472, at p.483 Dixon J. spelt out this test as follows: "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes and s.109 applies. That this is so is settled, at least when the sanctions they impose are diverse (Hume v. Palmer (1926) 38 C.L.R. 441). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention it is inconsistent with it for the law of a State to govern the same conduct or matter". Applying this test, the provision of section 52A of the Metropolitan and Export Abattoir Act 1936 to 1952 of the State of South Australia was held inconsistent with the Commonwealth Commerce (Meat Export) Regulation issued under the Customs Act 1901 to 1953. See O'Sullivan v. Noarlunga Meat Ltd., (1955) 92 C.L.R. 565 confirmed by the Privy Council on appeal in (1957) A.C. 1.
Occupying the field or covering the field

10.20 Closely allied to the principle of laying an exhaustiv e code is the principle of covering the field. If the Union legislature by its law has shown an intention to cover the whole field, it would be inconsistent for the State to legislate in the same field.

10.21 In Zaverbhai Amidaes v. State of Bombay, a person convicted of an offence under a law relating to essential supplies pleaded that he was convicted by a court which had no jurisdiction. The provision in the State law prescribed 7 years imprisonment for the offence committed by him, namely, transporting foodgrains without permit. The provision in a subsequent Central law prescribed only 3 years for that offence with a provision that there would be enhancement of the punishment up to 7 years for certain offences like possessing more than double the allowed quantities of foodgrains. The person argued that he should be governed by the provision in the Bombay law rather than by the Central law which provided only for 3 years. If this were accepted, the Magistrate who punished him would have no jurisdiction as that was confined to cases involving maximum

33. This is also related in a sense with the doctrine of occupied field developed in the Canadian Constitutional law for the purpose of solving conflict of incidental encroaching powers. This has been considered along with the interpretation of article 254(1) of the Constitution. See, para 9.10 ante.

punishment of 3 years imprisonment. But to sustain the State law it had to be accepted that the State law and the Central law were not on the same subject matter. At least one of the judges in the High Court had thought that the subject matter of the Central law was punishment for the offence, and that of the State law was enhanced punishment for the offence and, hence, the subject matter of the two laws were different. In the Supreme Court, Venkitarama Ayyar J. rejected this plea and held that both constituted a single subject matter and could not be split up in the manner suggested. Since the two laws covered the same field the State law was repugnant, and hence the punishment under the Central law was proper.

10.22 This test was also developed in Australia.

Difficulty of formulating tests

10.23 The cases considered above reveal the difficulty of formulating the tests for finding out when the Union law may be said to show an intention to lay down an exhaustive code or to cover the whole field. The cases also do not suggest any helpful test for this purpose. The judiciary has got a wide

35. Bavdekar J.
36. See Clyde Engineering Co. Ltd. v. Cowburn, (1926) 37 C.L.R. 486. The New South Wales Wages Act (the 44 hours week) Act 1925 provided for maximum working up to 44 hours in a week. The award of the Commonwealth Court of Conciliation and Arbitration pursuant to the Commonwealth Conciliation and Arbitration Act 1904 to 1921 prescribed up to 48 hours in a week; held there was inconsistency.
legislation on that matter subject to the condition that the previous sanction of the Governor-General in his discretion was necessary for introducing the amendment in question. The Constitution of India also has made provision for the prevalence of the State law with the assent of the President. Specific provision has also been made enabling Parliament to enact a law amending or varying or repealing the State law which had gained predominance because of President's assent.

In the Government of India Act there was no provision enabling the Federal Legislature to repeal a Provincial law in the Concurrent field. The Federal Legislature could supersede the Provincial law only by enacting subsequent and inconsistent legislation.

The State law that may be repealed by Parliament

10.25 In Tika Ramji v. State of U.P. it was held that the law that could be repealed by the Parliament under article 254(2) was a law made by the State Legislature with the President's assent with reference to a matter in the Concurrent List containing provisions repugnant to an earlier law made by Parliament or an existing law. If the State law did not relate to any matter which was the subject of an earlier legislation by Parliament, then there was no scope for Parliament to repeal that State law. So, if the State law made fresh provisions touching any matters and did not contain anything inconsistent

38. Article 254(2).
with any law enacted earlier by Parliament, such law could not be repealed by Parliament. On this view the provision of certain Central laws which repealed State laws were held to be void.

10.26 Bhagawati J. also held that the power to repeal the State law had to be exercised by the Parliament and not delegated to any executive authority.

10.27 Though an Act passed by a State Legislature is reserved for the President's assent and thereby gains precedence over any Union law, there is no need for any amendment made by the State to such a law also to be reserved for the President's assent unless the amendment also relates to a matter in the Concurrent List.

10.28 In order that the State law may prevail over the Union law with the President's assent, there should have been an operative inconsistency between the two laws. Thus forward contracts in groundnuts were illegal under the Central laws. Then the Bombay Forward Contracts Control Act, 1947.

40. Section 16(1)(b) of the Essential Commodities Act, 1955 and clause 7 of the Sugar Control Order 1955 issued thereunder, in so far as they sought to repeal the U.P. Sugar Cane Regulation (Supply and Purchase) Act 1953.


42. The Essential Supplies (Temporary Powers) Act, 1946 (as a result of which the Oil Seeds (Forward Contracts) Prohibition Order, 1943, was continued in force) deriving its force from the India (Central Government and Legislature) Act, 1946 was in operation.
was passed which received the assent of the Governor-General. According to this Act all forward contracts were to be made subject to certain conditions. Otherwise, such contracts were to be illegal. It was argued that a forward contract in groundnut made according to the stipulation of the Bombay Act would be valid as the provision of the Bombay Act had prevailed over the Central laws under section 107(2) of the Government of India Act, 1935. This argument could not prevail as the operation of the Central and State laws was different and therefore could not lead to any repugnancy and hence there was no scope for the application of section 107(2). The State Act made certain valid contracts illegal if certain stipulations were not complied with whereas the Central law had declared certain forward contracts to be illegal. The provisions of the two Acts applied to different fields and there was no repugnancy between them. Therefore there was no question of an illegal forward contract in groundnuts being rendered valid by the Bombay Act.

EFFECTS OF REPUGNANCY

10.29 A State law repugnant to Union or existing law would be void. Here void means only inoperative. So long as the Union law remains in the field the State law is eclipsed. Once the Union law is repealed the State law will revive.

Further, the State law in the concurrent field is void only to the extent of the repugnancy and not in its entirety. So there is scope for applying the principle of severability.

45. For the tests for determining whether a provision is severable or not, see R.M.D.C. v. Union of India, A.I.R. 1957 S.C. 628. Summarising the tests Venkatarama Ayyar J. said as follows, at pp.636–37:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol.82, p.156; Sutherland on Statutory Construction, Vol.2, pp.176–177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol.1 at pp.360–361; Crawford on Statutory Construction, pp.217–218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole, Vide Crawford on Statutory Construction, pp.218–219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different section; (Vide Cooley's Constitutional Limitations, Vol.1, pp.361–362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

(contd....299).
in the case of State law that has become void on account of repugnancy.

(f.n.45 contd.)

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, than the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol.2, p.194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol.2, pp.177-178.