CHAPTER XII

CONCLUSION

12.1 This study was aimed at an examination of the principles used by the judiciary in India for the resolution of conflicts in the legislative sphere arising out of the division by the Constitution of the total legislative fields into an exclusive Union field, an exclusive State field and a concurrent field. The conclusions and suggestions are given at the respective places where each problem is discussed. Still a brief survey of the more important points may be attempted here.

12.2 For the resolution of inter-jurisdictional conflicts, the doctrines of pith and substance, and of incidental encroachment are pressed into service. The doctrine of pith and substance or of characterisation of legislation is of somewhat uncertain content though eminently suited to preserve State powers which on a literal reading of the Constitutional provisions would otherwise have been substantially whittled down. It is said that in order to determine the pith and substance of legislation "one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions". But in practice it has been seen that the basis of characterising the legislation to find out its

pith and substance is often inarticulate. It has been submitted that the judges should canvass more openly the policy considerations involved.

12.3 The problem of incidental encroachment between the exclusive fields can be solved by the supremacy of the Union over both the concurrent and State fields and of the concurrent over the State field provided for in article 246 of the Constitution by the hierarchical arrangement of the jurisdictions and by the use of the 'non obstante' and 'subjection' clauses. However, the judiciary has not been consistent in their devotion to this principle. Particularly, in cases where a part of the exclusive State field is transferred to the exclusive Union field, as in the case of industry, mining and education, the decisions reveal the confusion between the principles that are to be applied in the resolution of conflicts between exclusive fields and the resolution of conflicts in the concurrent field. It has been pointed out that there is no scope in such cases for bringing the conflicts under the principle of repugnancy or of the doctrine of occupied field.

12.4 In the area of colourable legislation the attempt to levy taxes under the guise of fees has revealed the weakness of the judicial process in this area. It has been suggested that having regard to fundamental principles and the interest of certainty of law, the judiciary should adopt a criterion according to which, wherever the element of force is present
it should be treated as tax and not as a fee. This might perhaps mean that the fees that are being at present levied by the State under the doubtful doctrines evolved by the judiciary may have to be discontinued which might affect State finances. The answer to this is that the Union should, where considered necessary, exact the levies as taxes, and distribute the shares to the States, and not continue the present practice of going to the rescue of the States by retrospective legislation to validate in effect the levy of illegal taxes by the States in the guise of fees.

12.5 In the field of industry and mining, where there is provision for transfer of part of a field from the State to the Union on parliamentary declaration, the effects of such a declaration have not been properly understood. The view that on such a declaration the State's power to acquire or requisition the property of the undertaking in question ceases to be effective has been shown to be untenable. It has been submitted that in the absence of repugnant Union legislation, the States would be free to exercise their powers of acquisition and requisition. A mere prohibition as in section 20 of the Industrial Disputes Act, 1951 which says that the State shall not exercise the power of taking over of the management of an industrial undertaking of a controlled industry has been shown to be unconstitutional. The Union Parliament cannot merely prohibit the States from legislating in the concurrent field, but if necessary should override State legislation by its power of paramount legislation. In interpreting the
meaning of 'industry' the need for a broader perspective has been suggested. The interpretation restricting the meaning of the term industry to the process of production or manufacture and excluding raw materials and the products of manufacture might create difficulties for the smooth realisation of the Union policy. Therefore, it has been pointed out that an interpretation which would concede a broader scope for the Union power under the doctrine of ancillary powers could be adopted.

12.6 Though the approach of the courts to the relation between the co-ordination and determination of standards in institutions of higher education in entry 66 of Union List and of education in entry 11 of the State List has been satisfactory, the difficulty of an unregulated area being there in view of the inherent difficulties of abstractly determining in advance the contents of co-ordination and determination of standards has been pointed out. To avoid this, it has been submitted that the Union instrumentalities should actively cover the area to the extent uniformity of policy is desired and delegate to the States power to regulate the remaining matters.

12.7 Since there are no taxing powers in the Concurrent List, the problem of conflict in this area has been confined to the exclusive fields. The solutions of the court have been satisfactory. However, it has been submitted that, in the interest of fostering of export trade, not merely the last sale which in a highly technical sense occasions export,
other, has been considered in the light of the doctrine of immunities of instrumentalities, the provisions of the Constitution and the judicial decisions. It has been submitted that the majority decisions in the cases of State of West Bengal v. Union of India and In re Sea Customs Act, section 20(2) are correct. The minority judgments and the criticism of certain writers have been shown to be untenable and as based on a view of competitive federalism which is out of tune with the modern world and of the Indian context.

12.10 Regarding conflicts in the concurrent field, it has been shown that on a true interpretation of article 254(1) it applies only to the concurrent field and not to the exclusive fields. It has also been shown that the doctrine of occupied field is properly applicable only to the concurrent field, though that has sometimes been improperly invoked in the case of conflicts in the exclusive field. The uncertainties involved in the application of the tests of repugnancy, namely, exhaustive code test, and covering the field test, have been brought out. It has been submitted that the judiciary should discuss more openly the policy perspectives in coming to the conclusion that the Union Legislation has laid down an exhaustive code or that it has evinced an intention to cover the whole field.

12.11 As regards questions of conflicts between exclusive and concurrent fields it has been pointed out that they could be solved by applying the principles of pith and substance and the supremacy of the fields resulting from hierarchical arrangements.

12.12 A word may be said about the need for constitutional amendment. In so far as such a step may be ventured from the conclusions of this study, this writer is of the opinion that the provisions regarding the distribution of powers and for the resolution of conflicts are well drawn. Though there may be scope for refinement in the application of certain principle there seems to be no need for any radical change. In the difficult question whether the powers of the Union ought to be curtailed in favour of the States it may be submitted that the limited support available from this study does not disclose any such need. The decision of the Union Government endorsing the view of the Administrative Reforms Commission (A.R.C.) that no changes in the Constitution are called for to ensure proper and harmonious Centre-State relations is therefore welcomed as far as the problem of legislative conflicts is concerned.