DOCTRINE OF REPUGNANCY: EVOLUTION, APPLICATION AND EMERGING TRENDS

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I. INTRODUCTION

English law knows what may be called two doctrines of repugnancy, the genuine and the spurious; the one bases upon true logic and other upon false. The genuine doctrine is easy to understand, because it is largely a matter of logical necessity. If a document contains mutually inconsistent provisions, it is said to be repugnant. Repugnancy in this sense presents a problem that is faced by every legal system howsoever mature it may be.

The doctrine of repugnancy in the Indian context generally refers to Article 254 of the constitution which gives supremacy to the laws made by the center. However, the scope of Article 254 has been controversial due to its judicial interpretation which is textually incongruent with the plain language of the Article. Over the period judicial interpretation of Article 254 has considerably whittled down the supremacy of central laws over the State laws which the said Article seeks to establish. In this article, we shall try to ascertain the true scope of Article 254 comparing it with the relevant provisions of the American constitutional law. First, we shall refer to the relevant statutory text i.e., Article 254 including the corresponding provisions of Government of India Act, 1935 which will highlight two things: (a) how much of the current language of the former has been borrowed from the later, (b) what changes the doctrine has undergone since its adoption in our constitutional scheme of things. After considering the scope of Article 254 this paper shall discuss the controversy surrounding it. This controversy mostly relates to the narrow interpretation of Article 254 by the judiciary which has the potential to limit the law-making power of the union. Thereafter, we shall seek to answer the question as how to identify the instances of repugnancy. The identification of the instances of repugnancy is important because the method adopted to identify such repugnancy may increase or decrease the instances of repugnancy which in turn will affect the application of Article 254. Here an analysis of the relevance of the doctrine of pith and substance regarding Article 254 will also be made. Few illustrative cases of the application of the doctrine of repugnancy will give us insight into the issues that arise while resolving actual problems. After this the effects of repugnancy will be spelled out. The exception to the doctrine of repugnancy which is given under Article 254 (2) and the proviso to the said clause have been analyzed keeping in mind their practical implications. This paper also refers corresponding provisions of American law which pertains to the supremacy clause and the principle of preemption.

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II. ARTICLE 254: THE SCOPEOF DOCTRINE OF REPUGNANCY

Article 254 was on the same lines as section 107 of the Government of India Act, 1935.[1]The first problem in the application of Article 254 is to identify the cases to which its provision applies.[2] The problem is compounded due to the wide language used in the Article 254. It refers to a law made by Parliament, which Parliament is competent to enact.[3]

Article 246, as it appears, is sufficient to deal with inconsistencies between a law in List I and List II, List I and List III and List II and List III as the Article contains self-serving provisions. Article 251provides principle to resolve inconsistency between a Union law made under Articles 249,250 and a State law. Now, if constructionof the expression *"a law made by Parliament, which Parliament is competent to enact"*proposed to include the laws made by Parliament under Articles 246, 249 and 250 then a large part of Article 246 and 251 would be rendered impractical and without any meaning. Naturally we need to narrow down the above expression to the laws made by the Parliament under Articles 252,253, 262 and the like provisions put together in one category and the laws made by Parliament under List III i.e., the Concurrent List in the other category. Surprisingly, the Supreme Court construes that the above expression refers only to the competence of the Parliament to legislate under List III.[4] This is atremendously narrow interpretation of the said expression. As if it was not enough, the scope of Article 254 (1) was further constricted down by the court when it held that the existing law or a law made by the parliament and the law made by the state legislature must necessarily be on the same entry of the Concurrent List. Article 254(1) will not be applicable if laws are on different entries of the concurrent list.[5] Likewise, phrase *"law made by the Legislature of a State"* used in Article 254(1) was curbed only to the laws passed by State legislature on matters enumerated in the Concurrent List.

III. JUDICIAL APPRECIATION OF DOCTRINE

Let us try to appreciate the reasoning advanced by the Supreme Court for the above interpretation and to examine how far it is justified in the light of pertinent legal literature. The courts reasoning was best explained in *HoechstPharmaceuticals Ltd.*v. *State of Bihar*[6] in following words:

> "*The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State Legislature*

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[1] D. D. Basu, II *Shorter Constitution of India*1700 (Lexis Nexis, Nagpur, 14th edn., 2009).

[2] Tony Blackshield, "Working the Metaphor: The Contrasting Use of Pith & Substance in Indian & Australian Laws" 50(4) *Journal of the Indian Law Institute*518-568 (Oct.–Dec., 2008).

[3] The Parliament draws its competence to enact laws from Article 246(1) i.e., List I of the Seventh Schedule, Article 246(2) i.e., List III of the Seventh Schedule, Articles 248, 249, 250, 252, 253, 262 and many other provisions of the Constitution.

[4]See*Premnath*v. *State of J & K*, AIR 1959 SC 749.

[5]See *Vijay Kumar Sharma* v. *State of Karnataka* (1990) 2 SCC 562.

[6] (1983) 4 SCC45; AIR 1983 SC 1019.

arises only in case both the legislations occupy the same field with respect to the matter enumerated in the Concurrent List, and there is direct conflict between the two laws…. Article 254 has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any case, the State law will be ultra-virus because of the non-obstante clause of Article 246(1) read with opening words "subject to" in Article 246(3). In such a case, the State law will fail not because of repugnancy with the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament, which Parliament is competent to enact", in Article 254(1) is susceptible of a construction that repugnancy between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as List I. But if Article 254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List only. In other words, if clause (2) is to be the guide in determiningthe scope of clause (2), the repugnancy between Union and State law must be taken to refer only to the concurrent field."

The reasoning of the Court appears to rationalize the narrow interpretation of Article 254(1) on two grounds:

Firstly, by reference to clause (2) of Article 254 the court argued that it is an exception to clause (1) and since clause (2) refers only to laws in the Concurrent List, this should control the scope of clause (1) also. This to Prof. P. K. Tripathi is hardly convincing. He rightly points out that the scope of an exception is invariably narrower than that of the main provision, because the function and object of an exception is to retrieve a part of the subject matter from the operation of the main provision. There is nothing unusual, much less objectionable, therefore, in the subject matter of clause (1) having a larger content than that of clause (2) of Article 254.[7]

Secondly, the Court treats the words *"with respect to one of the matters enumerated in the Concurrent List"* as qualifying not only the expression *"existing law"* but also the expressions *"a law made by Parliament, which Parliament is competent to enact"* and *"law made by the Legislature of a State"*.However, in the opinion of Prof. P. K. Tripathi words *"a law made by Parliament, which Parliament is competent to enact"* which the court finds embarrassing are not to be treated as an instance of remiss draftsmanship to be loftily forgiven. They are purposely chosen to include not only laws enacted by the Parliament on the Union and the Concurrent List, but also those which Parliament may make on subjectsitemized in the List II as envisaged, for example, by

[7] Prof. P. K. Tripathi, "The Text is Explicit",AIR 1986 Vol. 33(J) p.no. 17.

Articles 249, 250, 252, or 253. What other language could have covered these Articles better?

Again, the words *"law made by the Legislature of State"* constituting, in grammar, the subject of the sentence cannot be saddled with the words qualifying a phrase in the predicate. To clarify this grammatical point and bring home the fallacy of Supreme Court's argument Prof. Tripathi gives a very fascinating illustration: *"If a short man is in love with a tall woman in an advanced stage of pregnancy"*, it would be ironical to insist that the sentence will apply only when both, the man as well as the woman is in advanced stage of pregnancy.[8] With due respect, our supreme court seems to be so techno imaginative that it took note of a technology in 1983 which would make it possible for both man and woman to be in advanced stage of pregnancy only in the 21st century.

Here it is submitted that if the intention of framers of the constitution was to limit the scope of Article 254 to concurrent list only then it would have been put right after Article 246. The fact that Article 254 have been put after Articles 252 and 253 and that it incorporates wide language goes on to show the clear intention of the drafters of the Constitution to cover these Articles and similar other provisions of the Constitution.

The matter may also be looked at from a different perspective. The *existing laws* referred in Article 254 are not laws made either by state legislature nor by parliament instead they are laws made by legislatures not known to the constitution, which cease to exist as soon as the constitution came into force. But for the saving provision of Article 372, the existing laws would have ceased to exist; they have been saved only to give the legislatures created under the constitution time and opportunity to decide which of them are to be retained and which to be repealed or amended. Now, the legislature of a state could not repeal or amend a law on a matter enumerated in List I, because it is not the competent legislature referred to in Article 372 for these matters. Therefore, there could be no need to make provision for limiting or taking away the power of the states to repeal or amend a law on a matter enumerated in List I. Also, for obvious reasons, there was no question of limiting or taking away the power of the States to repeal or amend existing laws on subjects enumerated in Concurrent List. But the position was different regarding existing laws on subjects in the List III. Here the State Legislatures being the competent legislature under Article 372 would be able to repeal or amend say the Indian Contract Act, 1872 or the Indian Evidence Act, 1872 which fall under List III like the Parliament itself. A policy decision, therefore, had to be taken as to whether the States were to be permitted to go ahead with programs of their own about these existing laws. The policy decision taken in this regard was incorporated in the text of Article 254. Broadly speaking, the policy was not to let the States tamper with these laws except when and to the extent, approved by the Center by giving the Presidential assent; and there too, subject to Parliament's corrective authority deemed in the proviso to clause (2) of Article 254. In this sense Article 254 (1) is an exception to Article 372, restricting the power of the State to repeal or amend existing laws in the Concurrent List.[9]

[8] *Id*. at 19.
[9] *Id*. at 22.

The problem which may arise by embracing the narrow interpretation of Article 254 (1) can be understood with respect to power of the Parliament to legislate on a State matter to effectuate an international treaty.[10] It might happen that when Parliament enacts such a law under Article 253, it may contradict an existing State law on that subject. Beyond any doubt, in such a situation the law made by the Union would prevail over the State law but this can be attained only if we invoke the broader interpretation of Article 254(1). Moreover, Article 254 can also be pressed into service when, law made by the Parliament and State Legislature in their exclusive jurisdiction incidentally encroach upon each other but in pith and substance lies within their exclusive domain.[11]

IV.HOW TO DETERMINE REPUGNANCY?

Repugnancy between a Unionlaw and a State law within the meaning of Article 254 may arise in the following ways:

A. Direct Conflict

It means that there is a tangible and real inconsistency in both the Acts i.e.,one Act says "do" and the other says "don't" in the same set of facts.[12] In other words,when it is unmanageable to follow the one without defying the other. This is known as direct conflict test.[13] In ITC case[14] the Apex Court found direct conflict between the Union lawi.e.,*the Tobacco Board Act* and a State lawi.e.,*the Agricultural Produce Markets Act*and ruled that the "question of allowing both to operate would not arise." In such a condition, the Union law would prevail over the State Law. The court observed:

> "*…we hold that the Tobacco Board Act and the Agricultural Produce Markets Actcollide with each other and cannot be operated simultaneously. Necessarily, therefore, the Tobacco Board Act would prevail and the Agricultural Produce Markets Act, so far as it relates to levy of fee for sale and purchase of tobacco within the market area must be held to go out of the purview of the said Act.*"[15]

B. Occupied Field

There may be repugnancy because both Union and State law cover the same field regardless of the fact that, there is no apparent conflict between two provisions of Union and State Law.[16] Repugnancy will not arise when provision of one law does not exist in

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[10]SeeThe Constitution of India, art. 253.
[11] Prof. M. P. Jain, *Indian Constitutional Law*540 (LexisNexis Butterworths Wadhwa Nagpur, 5th edn., 2009).
[12] See *Deep Chand* v. *State of Uttar Pradesh*, AIR 1959 SC 648.
[13]*Supra* note 1.
[14]See *I.T.C. Ltd.* v. *Agricultural Produce Market Committee*, AIR 2002 SC 852.
[15]*Supra*note 9.
[16]See*Zaverbhai*v. *State of Bombay*, AIR 1954 SC 752.

other, where provisions of both the laws are mutually exclusive and does not overlap. As a general rule, when a Union law and State law can exist together because their operational area are different, there would not be any repugnancy. The Legislature of Uttar Pradesh enacted a law in 1955 empowering the State Government to frame nationalization scheme for motor transport. Later, in the year 1956, the Parliament in order to bring uniformity in law, amended the Motor Vehicles Act. The Supreme Court in *Deep Chand* v. *State of U.P.*,[17] found that both State law and Union law are made on same subject and have same operational field. They diverge on many vital particulars, e.g., *power to initiate the scheme, method of doing it, power to hear objections, principles concerning payment of compensation* etc., and therefore, the State law would have to clear the way for the Union law to the extent of repugnancy.

C. Intended Occupation

If a competent legislature, in this case the Parliament, explicitly or discreetly displays its intention of occupying the entire field, it would be a conclusive proof of repugnancy, when state legislature chooses to enter in the same field.[18] When two enactments pertain the same subject matter and Parliament decides to make its law a complete code on the subject and exhibits its intention to occupy the complete field, the repugnancy will be applicable and the State law whether passed before or after the Union law, to the extent of repugnancy be void.[19]The Supreme Court has observed in a case:

> "*It cannot, therefore, be said that the test of two legislations containing contradictory provisions is the only criterion of repugnance. Repugnancy may arise between two enactments even though obedience to each of them is possible without disobeying the other if a competent legislature with a superior efficacy expressly or implied evinces its intention to cover the whole field.*"[20]

D. Relevance of Pith and Substance

The Supreme Court in *Vijay Kumar Sharma* v. *State of Karnataka*[21] held that the test rule of pith and substance can be applied to determine whether the State law has substantially transgressed on the field occupied by the law of Parliament. Thus, the doctrine of pith and substance can be invoked at the threshold stage for the limited purpose of finding out whether Article 254 is relevant to resolve the dispute. Its corollary is that the doctrine of repugnancy cannot be applied in case of Union and State laws under different entries of List III.

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[17]*Supra* note 12.
[18]Mahendra P. Singh, *V.N. Shukla's Constitution of India*677 (Eastern Book Co., Lucknow, 10th edn., 2004).
[19]See*State of Orissa* v. *M.A. Tulloch & Co.*,AIR 1964 SC 104.See *also Kulwant Kaur* v. *Gurdial Singh Mann*, AIR 2001 SC 1273.
[20]See*ThirumurgaKirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust* v. *State of Tamil Nadu*, AIR 1996 SC 2384 at 2391.
[21] AIR 1990 SC 2072.

V. EFFECT OF REPUGNANCY

Where a State law is repugnant to a Central law within the meaning of Article 254(1), what becomes void is not the entire Act but only insofar as it is repugnant to the Central law subject to the doctrine of severability.[22] Thus those parts of impugned Act which can be severed from the repugnant parts will remain valid and enforceable. Only the repugnant part of the impugned legislation will be held void.

VI. EXCEPTION TO THE DOCTRINE OF REPUGNANCY

Article 254(1) lays down the general rule while Article 254(2) creates an exception to the general rule.Clause (2) crafts a mechanism by which a State law repugnant to a Union law on anysubject of the Concurrent List can be saved and, thereforeeases the rigor of doctrine of repugnancy incorporated in Clause (1) of Article 254. Article254 (1),while accepts the supremacy ofthe Center, Clause (2) recognizes the peculiar local circumstances prevailing in a State and providesacomponent of elasticity to make it possible to have a State law suitable to the local circumstances kept alive in the face of a Central law to the contrary on a matter in the Concurrent List.Article 254(2) provides that where a State law with respect to a subject of the Concurrent List is repugnant to any of the existing Union law with respect to same matter, the State law would prevail over the Union law in the state concerned, if it has received the assent of the President.The Supreme Court has explained the effect of Article 254(2) in the following words:

> "*In short, the result of obtaining the assent of the President to a State Act which is inconsistent with previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only*".[23]

Regarding the federal character, Article 254(2) provides space to the provincial legislature and the State law if assented to by the Center would prevail in the State to the extent of inconsistency with the Central law; though, the State law would not override the whole of the Central law. However, the final authority rests with the Center to decidewhether the State law should be given antecedence over central law in that state or not. In Article 254(2), the words *"with respect to that matter"* are very relevant. As the Supreme Court, has observed in *Zaverbhai*v. *Amaidas v. State of Bombay*[24]:

> "*The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the same matter which formed the subject of the earlier legislation but with other and distinct matters*

[22]*Supra* note 1 at 1706.
[23]See*supra* note 6.
[24]*Supra* note 16.

> *though of a cognate and allied character, then Article 254(2) will have no application.*"

The State of Punjab passed the Punjab Village Common Lands (Regulation) Act, 1953. Some of its provisions were found inconsistent with the Administration of Evacuee Property Act, 1950, an earlier Union law. The State law was reserved for the Presidential assent but it was obtained under then Article 31(3) and the first proviso to Article 31-A (1) to protect the law from challenge for violation of fundamental rights. The Court in *Gram Panchayat* v. *Malwinder Singh*[25], held that the Presidential assent obtained for that purpose could not be pleaded in defence when an attack is made on ground of repugnancy between the Union and State laws. In the words of Chief Justice Y. V. Chandrachud[26]:

> "*The assent of the President under Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be appraised of the reason why his assent is sought, if there is any special reason for doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise. But if, as in the instant case, the assent of the President is sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it.*"

However, Presidential assent is required only for the parent Act and not for the notifications issued under it.[27]

VII. THE PROVISO TO CLAUSE (2): LAST INTENTION OF LEGISLATURE

Article 254(2) proviso, once again empowers the Parliament to supersede State law passed under Clause (2) by making a law on the same matter. This was a departure from Section 107 of the Government of India Act, 1935. While proviso to Article 254(2) has expanded the powers of the Parliament, the Dominion Parliament had no authority to enact a statute repealing directly any provincial act concerning the matters mentioned of Concurrent List. The present proviso to Article 254(2) empowers Parliament to enact a law adding to, varying or repealing a State law when; it relates to a matter mentioned in the Concurrent List. But where it does not expressly do so, even then the State law will be void under that proviso if it conflicts with a later law with respect to the same matter that may be enacted by Parliament. However, it is pertinent here to mention that the later enactment must deal with subjects which form the subject of the previous law. The proviso will not be applicable, if the later Union law deals with a distinct matter, though of alike and connected nature.[28]

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[25]*Supra* note 18 at 673.
[26]See*Gram Panchayat* v.*Malwinder Singh,*AIR 1985 SC 1394.
[27]See *Kerala State Electricity Board* v. *Indian Aluminum Co.*, AIR 1976 SC 1031.
[28]See i*nfra*note.

*Zaverbhai*v. *State of Bombay*[29], is another landmark verdict which expounds on the application of the Article 254(2) proviso. The Union Legislature passed Essential Supplies (Temporary Powers) Act, 1946. Section 7 of Act provided that if any person violates any order made under Section 3, he shall be punished with imprisonment for a term which may extend to three years or with fine or with both. Considering the maximum punishment inadequate, the State of Bombay passed Act 36 of 1947 and enhanced the maximum punishment i.e., imprisonment for a term which may extend to seven years but shall not, except for reasons to be recorded in writing, be less than six months. The law also made it mandatory to impose fine. As the subject matter lies within the Concurrent List, the State of Bombay attained the assent of the Governor–General and hence the Act came into operation in the province.

Later, Essential Supplies (Temporary Powers) Act was amended in the years 1948, 1949 and 1950. The amendment replaced section 7 of the Act and a new scheme of punishment was incorporated for offences under the Act which were grouped under three categories. The new provision was thus a comprehensive code jacketing the entire field of punishment for offences categorised according to the commodity and nature of the offence. The Supreme Court held that the Bombay Act was obliquely repealed by amended section 7 of the Essential Supplies (Temporary Powers) Act, 1950.[30]

Whether the power to repeal a law passed by the State legislature is incidental to enacting a law concerning same subject as is dealt within the State legislature without enacting substantive provisions on the subject would be within the purview of proviso? The question was raised in *Tika Ramji* v. *State of U.P.*,[31] but not decided. Bhagwati, J. conceded that:

> "*…there is considerable force in this contention, and there is much to be said for the view that a repeal simpliciter is not within the proviso. But it is unnecessary to base our decision on this point, as the petitioners must, in our opinion, fail on another ground.*"

It was further clarified by the Supreme Court that power to repeal an earlier law is conferred on the Parliament under the proviso and the same cannot be delegated to executive. *Tikaramji* case is animportantverdictonIndian federal system because it confiscated the opinion that Parliament can explicitly repeal any State law on the subject of Concurrentlist even if it is not repugnant to the Union law. The Supreme Court using literal rule of interpretationclarified that the Parliament can repeal a State law only when the above mentioned conditions are satisfied.[32]

VIII. REFLECTION OF SARKARIA COMMISSION

[29] *Supra* note 16.
[30] *Supra* note 18 at 674.
[31] AIR 1956 SC 676.
[32] *Supra* note 11 at 574.

In response to demands of some States to dilute the principle of Union Supremacy as incorporated under Articles 246 and 254 being anti-federal, the Sarkaria Commission[33] has made following observations:

> "*The rule of Federal Supremacy is a technique to avoid the absurdity of simultaneous operation of two inconsistent laws, each of equal validity. If the principle of Union Supremacy is excluded from Article 246 and 254, it is not difficult to imagine its deleterious consequences. There will be every possibility of our two-tier political system being stultified by internecine strife of legal chaos and confusion caused by a host of conflicting laws, much to the bewilderment of the common citizens. Integrated legislative policy and uniformity on basic issues of common Union –State concern will be stymied. The very object of putting certain matters in the Concurrent List is to enable the Union Legislature to ensure uniformity in laws on their main aspects throughout the country. Therefore, the principle of Union Supremacy is indispensable. It is indeed the kingpin of the federal system. Draw it out the entire system falls to pieces.*"[34]

IX. AMERICAN EXPERIENCE

It is well established[35] in the United States that the Congress has the power to avert state law in a givenfield.[36]The provision analogous to Article 254 is known as the principle of Preemption in the American Constitutional law.It is generallypresumed that the Congress derives thepower of preemption from the Supremacy Clause[37] of the Federal Constitution which reads as under[38]:

> "*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made; or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution Laws of any State to the contrary notwithstanding.*"[39]

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[33] A Commission under the chairmanship of Justice Sarkaria was set up by the Union Government toexaminethe Centre-state relationship and to make recommendations within the constitutional framework. The Commission submitted its extensive 1600 pages Report in January 1988.

[34]*Ibid.*

[35]See*Pacific Gas & Elec. Co.* v. *State Energy Comm'n*, 461 U.S. 190, 203 (1983).

[36]See Stephen A. Gardbaunt, "The Nature of Preemption" 79 *Cornell Law Review* 767 (1994).

[37]See,The Constitution of the United States of America, art. VI.

[38]Critics however, raises two straightforward problems with this view. Firstly; it does not explicate as how the Federal Supremacy Clause which is a kind of dispute resolution mechanism, can grant any powers at all. Secondly; supremacy and pre-emption are two separate legal concepts instituting two distinct means of regulating the concurrent federal and state relationship.

[39]The Constitution of the United States of America, 1789.

This clearly explains that federal law in the United States can outdo any incompatible state law. Preemption may be explicit or implicit. When Congress selects to explicitly preempt a State law, the only question for Courts to examine is whether the challenged State law is one that the federal law is intended to preempt. In implied preemption, the courts have to look beyond the express language of federal statutes to determine whether Congress has "occupied the field" in which the State is attempting to regulate or whether a State law directly conflicts with federal law, or whether enforcement of the State law might frustrate federal purposes.[40]

The Supreme Court of United States visibly and unambiguously recognized the congressional power of preemption in the beginning of the 20th Century. *Gibbons* v. *Ogden*[41]is considered as the first case in which the Supreme Court avowed the power of preemption.[42] However, the period from 1912-1920 is marked for the clear and explicit statements of candid preemption rules. Under this rule, it was not just incompatible state laws that are superseded by federal law on the same subject, but any state laws even those that are consistent with and supplement federal law. The impact of congressional assertion was possibly to terminate the concurrent power of the states and to create exclusive federal power. This phase perceived supersession of many state laws by the Court overtly on the newly created preemption power.[43] By the 1930s, another movement to extend federal powers was under way. In this new context the automatic element of preemption power was qualified with a prerequisite that a federal law would be considered to have taken over a given field only if Congress clearly manifested its intent to do so.[44] This was a logical result of the rearrangement of American federalism that commenced with the New Deal in 1933[45] and that was judicially affirmed in 1937.[46]

The Court in *Pennsylvania* v. *Nelson*[47]held that federal "occupation of the field occurs, when there is no room" left for State regulation. Courts must look to the pervasiveness of the federal scheme of regulation, the federal interests at stake, and the

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[40] The Supremacy Clause and Federal Preemption. See http://law2.umkc.edu/faculty/projects/ftrials/conlaw/preemption.htm (last visited on Sep. 30, 2019).
[41]22 U.S. 1 (1824).
[42]William Cohen, "Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption", in Terrance Sandalowand Eric Stein (eds.),*Courts and Free Markets: Perspectives from the United States and Europe*523, 537 (Clarendon Press, 1982).
[43]See Alexander Bickel and Benno Schmidt, *The Judiciary and Responsible Government1910-1921*, 264-76 (Macmillan Publishing Company, 1984).
[44]*Supra* note 36.
[45]During 1933 and 1938, U.S. President Franklin D. Roosevelt started a more aggressive series of federal programs carrying immediate economic relief as well as reforms in industry, agriculture, finance, waterpower, labour, and housing etc. It immensely amplified the scope of the federal government's activities. The expression "New Deal" as it was named, was borrowed from Roosevelt's speech on July 2, 1931 generally embraced the concept of a government-regulated economy designed at attaining a balance between conflicting economic interests. Seehttps://www.britannica.com/event/New-Deal (last visited on Sep. 30, 2019).
[46]See Bruce Ackerman, "Constitutional Politics/Constitutional Law" 99(3)*Yale Law Journal*510-15 (1989).
[47]350 U.S. 497 (1956).

danger of federal goals being defeated in making the determination as whether a challenged State law can stand.[48]

Thus, we find that the principle of Preemption in American constitutional law is much more forceful than the doctrine of repugnancy as understood by Indian Constitutional law. The language of the Supremacy Clause further corroborates the approach of academicians like Prof. P.K. Tripathi who seek to extend the scope of Article 254. Moreover, unlike Indian Law, American law does not recognize any exception to the principle of preemption. Federal supremacy is at the core of the principle of preemption and it is guided only by the protection of federal interests.

It has however been argued, in the American context, the most common and consequential error is the belief that Congress's power of preemption is closely and essentially connected to the Supremacy clause of the Constitution. Statements of preemption law almost routinely *"start from the top"* with a reference to the Supremacy clause, although the exact connection that is claimed to exist between the two often varies.[49] In fact, in order of descending frequency and significance, three different theories are constructed: *First*, Congress's constitutional power to preempt state law derives from Supremacy Clause.[50]*Second*, regardless of the source of preemption power, the Supremacy Clause operates to preempt state law where it conflicts with federal law.[51]*Third*, each case of preemption involves a conflict between Congress's intent to displace state regulation in a given area. According to this view, the supremacy Clause operates to resolve this conflict in fovour of Congress.[52]

In India on the other hand, it is only in the concurrent sphere the doctrine of repugnancy operates. In our country Union supremacy in legislative field is established by Article 246 read with Article 254. However, this supremacy is cautiously established by certain Constitutional principles guided by the elaborate provisions for division of powers between the Center and the States. This ensures that States are not kept in dark about their respective domains of legislation.

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[48] Vincent Ostrom, *The meaning of American federalism: Constituting a Self-Governing Society* 206 (ICS Press, California, 1st edn., 1994).

[49]However, there are contrary arguments that these two are separate and distinct legal conceptsand provides two alternative methods of managing the centre-state relation. For instance, when Congress has exclusive power,preemption cannot arise because there is no state legislative power to be pre-empted. Similarly, in such areas, the Supremacy Clause is redundant as there can in principle be no conflict between a valid state and federal laws where the states have no power to act and vice-versa. Federal supremacy does not deprive states of their pre-existing, concurrent law-making powers in a given area; rather it means that a particular law in conflict with a particular federal law will be trumped in cases where both apply. State legislation has full effect as along as it is not in conflict with federal law, and state legislative competence in a given area fully survives. Preemption, by contrast means (a) that states are deprived of their power to act at all in a given area, and (b) that this is so whether or not state law is in conflict with federal law. Preemption is thus jurisdiction-stripping or jurispathic. See*supra* note 36.

[50]*Supra* note 37, para. 2. Commonly referred to as the Supremacy Clause.

[51] The exposition of preemption doctrine in virtually every modern preemption case includes a statement to this effect. See, e.g., Cipollone, 112 S.Ct. at 2617 (State law is preempted if that law actually conflicts with federal law).

[52]*Supra* note 36.

X. CONCLUSION

The doctrine of repugnancy as incorporated in Articles 254 has not received liberal interpretation that it deserved. It is indeed necessary to give liberal interpretation to this Article. The attack on Article 254 as being anti-federal has been beautifully repelled by Sarkaria Commission. In fact, we see more stringent corresponding provisions in American Constitutional law which is a role model of federal polity. It is sometimes extremely important to preserve the uniformity of laws in certain areas of common concern in a federal structure. The principle of supremacy of federal laws serves this purpose very well.

No doubt the rights of States to take care of their local needs requires due consideration. However, we cannot stretch it so far as to create confusion and chaos. We should draw some lessons from the greatest Federation of the world and borrow its best practices which America has mastered over a long period. Therefore, there is no need to be unduly alarmed by the liberal interpretation of Article 254.The analysis of scholars like Prof. P.K. Tripathi also merits due consideration as it would help to resolve certain outstanding issues pertaining to Article 254. Most importantly if we accept the submission of Prof. P.K. Tripathi that Article 254 should be treated as a residuary provision for the resolution of any conflict between Union and State laws we can get a uniform principle for addressing such conflicts.