

Allocation of powers between the Union and the States under the Indian Constitution

Nicolas de Sadeleer

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History

- The structure of the Allocation of powers stems from the India Act 1935, which was the constitution and governing document of British India until its independence, provided the basis for the constitution of India.

Federal structure

- The Constitution features a **federal structure** with unitary features. **Article 1** declares that India is a "Union of States".
- Each state and union territory has its own government.
- At the Union level, the states are represented in the Rajya Sabha or Council of States. The Rajya Sabha is coequal with the lower house or Lok Sabha, and its consent is required for a bill to become a law.
- Analogous to the president and prime minister, each has a Governor and a chief minister.

Indian Federal structure

Two-fold distribution of legislative powers

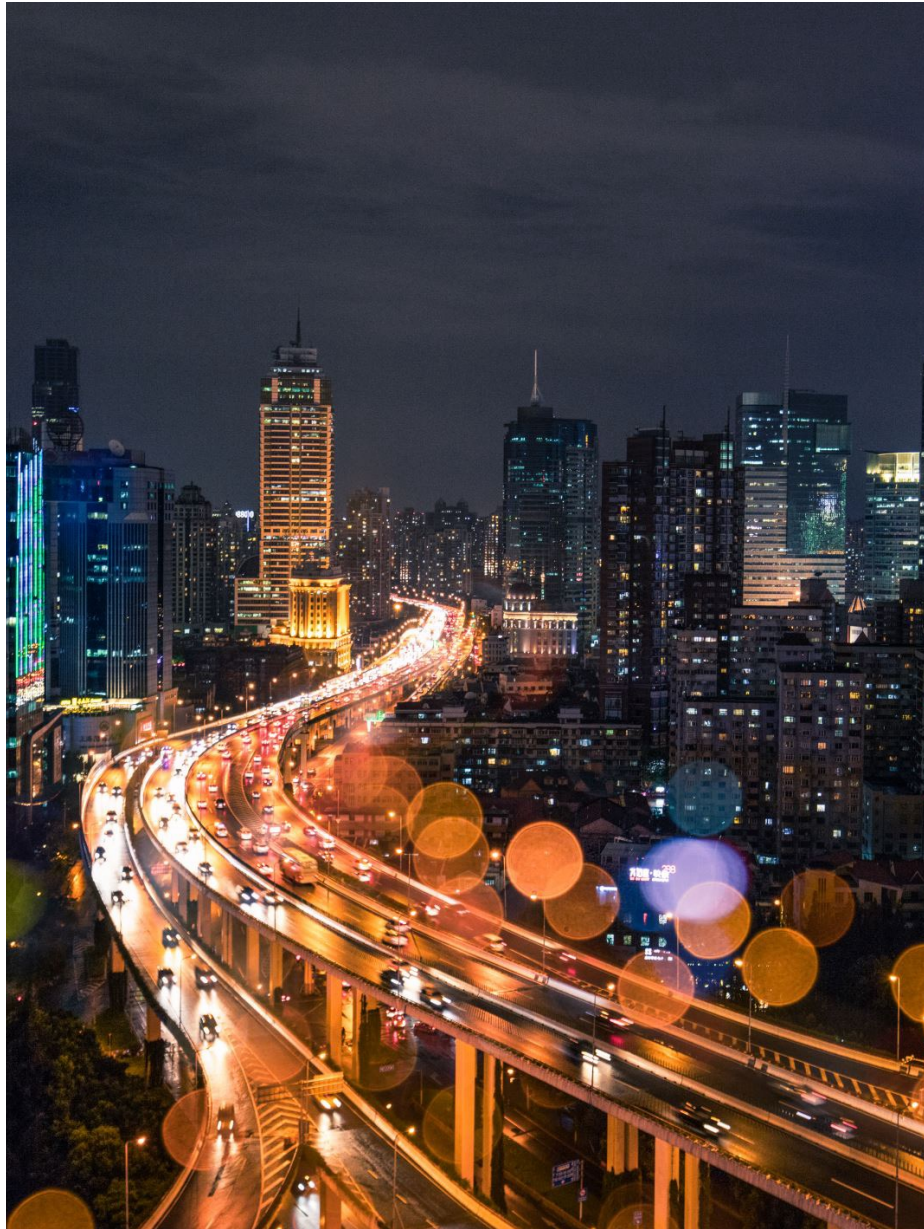
1. with respect to **territory**; and
2. with respect to **subject matter**.
 - 2.1. **Union List**,
 - 2.2. **State List**,
 - 2.3. **Concurrent List**.
 - 2.4. **Jurisprudential Principles**

1. Territorial Jurisdiction

- Union Parliament can legislate for the whole or any part of India, including extraterritorial laws.
- State legislatures can only legislate for their respective States.

Theory of Territorial Nexus:

- The Legislature of a State may make laws for the whole or any part of the State. Accordingly, State Laws are void if they have extra-territorial operation i.e. it is applied to subjects or objects located outside the territory of the state. However, there, is one exception of this general rule.
- A State law of extra-territorial operation will be valid if there is sufficient nexus between the object and the State. It is done by the application of “*doctrine of territorial nexus*”.



Territorial Jurisdiction: Theory of Territorial Nexus

State of Bombay v. R. M. D. C.s

In this case, the Bombay State levied a tax on lotteries and prize competitions. The tax applied to a newspaper printed and published in Bangalore but had wide circulation in Bombay.

The Court held that there existed a sufficient territorial nexus to enable the Bombay State to tax the newspaper. If there is sufficient nexus between the person sought to be charged and the State seeking to tax him, the taxing statute would be upheld. For the application of the doctrine, there must be:

- connection between the State and the subject matter of law which must be real and not illusory and,
- the liability sought to be imposed must be pertinent to that connection.

2. Distribution of legislative powers with respect to subject matter

The Constitution of India establishes a clear framework for the distribution of legislative powers between the Union and the States, reinforcing the Federal System of India.

Article 246 of the Indian Constitution addresses the division of legislative powers between the Union and State governments and establishes a **hierarchical structure** among the three lists:

- **Clause (1):** Parliament has exclusive authority to legislate on subjects listed in the Union List.
- **Clause (2):** Both Parliament and State Legislatures can legislate on matters in the Concurrent List.
- **Clause (3):** State Legislatures have exclusive powers over subjects in the State List.
- **Clause (4):** Parliament holds the right to legislate on State List matters for Union Territories.

Seventh Schedule of the Constitution

The Seventh Schedule of the Constitution contains thus three lists:

- a **Union List**,
- a **State List**,
- and a **Concurrent List**.

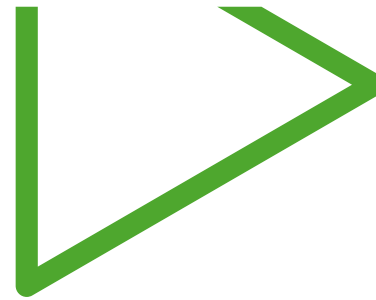
These lists set out the various subjects on which Parliament and State Legislatures are empowered to make laws.

2.1. The **Union List**

- It contains the areas of exclusive jurisdiction for which the **Indian Parliament** is competent to make laws.
- The states are prohibited from legislating.
- 97 items of national importance.

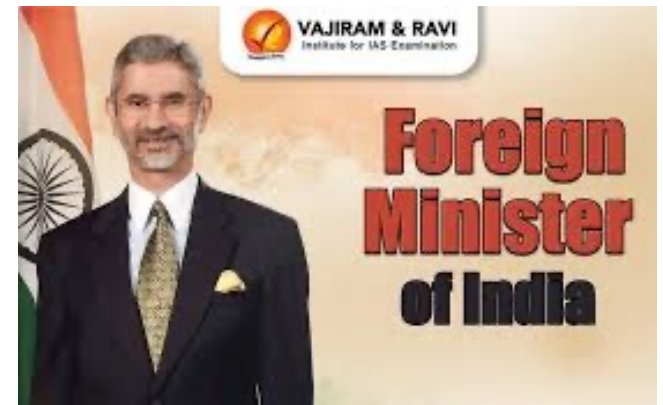
(Article 246) Union List 1

- 1. Defence of India
- 2. Naval, military and air forces; any other armed forces of the Union.
- 2A. Deployment of any armed force of the Union ...
- 3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
- 4. Naval, military and air force works.
- 5. Arms, firearms, ammunition and explosives.
- 6. Atomic energy and mineral resources necessary for its production.
- 7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
- 8. Central Bureau of Intelligence and Investigation.
- 9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.



(Article 246) Union List 1

- 10. Foreign affairs; all matters which bring the Union into relation with any foreign country.
- 11. Diplomatic, consular and trade representation.
- 12. United Nations Organisation.
- 13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
- 14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
- 15. War and peace.



Comments

- In federal States, sovereign powers (*pouvoir régaliens*) (defence, internal security and foreign affairs) are conferred to the federation and not to the constituent entities.
- These matters are therefore included in Annex 1 and are exercised by the Indian Union and not the States.

(Article 246) Union List

- 17. Citizenship, naturalisation and aliens.
- 18. Extradition.
- 19. Admission into, and emigration and expulsion from, India; passports and visas.



Comments

- A State is characterised by the existence of a territory, a population and sovereign powers.
- The granting of nationality is at the heart of State sovereignty. It is therefore logical that this matter should be included in list I.

(Article 246) Union List

- 21. Piracies and crimes committed on the high seas or in the air;
- 22. Railways.
- ((other transport issues))
- 35. Public debt of the Union.
- 36. Currency, coinage and legal tender; foreign exchange.
- 37. Foreign loans.
- 38. Reserve Bank of India.
- 39. Post Office Savings Bank
- 40. Lotteries ...
- 41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.
- 42. Inter-State trade and commerce.
- 45. Banking.
- 46. Bills of exchange, ...
- 47. Insurance.
- 48. Stock exchanges and futures markets.
- 49. Patents...
- ((other economic issues))

2.2.(Article 246) State List

- **State Legislatures** are competent to make laws on matters enumerated in the **State List**.

List II—State List

- 1. Public order
- 2. Police (including railway and village police)
- 4. Prisons, reformatories, Borstal institutions
- 5. Local government
- 6. Public health and sanitation; hospitals and dispensaries.
- 7. Pilgrimages, other than pilgrimages to places outside India.
- 8. Intoxicating liquors ...

Comments

- The jurisdiction of Indian States over **municipalities** does not present any particularities. In Belgium, the three Regions are competent for organising and regulating the provinces and municipalities.
- However, it should be noted that Indian States are competent for **health policy**. In Belgium, this is a federal residual competence. On the one hand, the Communities are responsible for health prevention and, on the other hand, the Regions are responsible for health aspects related to environmental policy.

List II—State List

- 14. Agriculture
- 17. Water
- 18. Land
- 21. Fisheries

Indian farmers do not seek charity; they seek dignity, knowledge, and fair opportunity.

Agricultural policy must evolve from short-term welfare to long-term empowerment.



Comments

As with most other federal systems, competences relating to the exploitation and conservation of natural resources (air, water, soil) are entrusted to the federal sub-entities (the Indian States).

Accordingly, Indian constitutional law is no different from other federal systems in this respect.

It should be noted that environmental issues have not been expressly included in List II, as there was no environmental policy in the 1940s.

List II—State List

- 40. Salaries and allowances of Ministers for the State.
- 41. State public services
- 43. Public debt of the State
- 46. Taxes on agricultural income.
- 47. Duties in respect of succession to agricultural land.
- 48. Estate duty in respect of agricultural land.
- 49. Taxes on lands and buildings

Comments

It makes sense to enumerate on List II competences 40, 41, 43 (State civil servant salaries, organization of State public services, Public debt of the State).

The listing of duties in respect of succession to agricultural land (47) and estate duty in respect of agricultural land (48) can be explained by the agricultural competence conferred to the States according to (14).

Taxes on lands and buildings is linked to the main State competence regarding land (18).

2.3. List III— Concurrent List

- Both the Union and the States have the power to legislate on the 47 matters enumerated in the **Concurrent List**.
- Education, marriage and divorce, transfer of property other than agricultural land, education, contracts, bankruptcy and insolvency, trustees and trusts, civil procedure, contempt of court, adulteration of foodstuffs, drugs and poisons, economic and social planning, trade unions, labor welfare, electricity, newspapers, books and printing press, stamp duties etc.

List III— Concurrent List

- Criminal law, ...
- Criminal procedure,
- (...)
- Marriage and divorce; infants and minors; adoption; wills, intestacy and succession
- 9. Bankruptcy and insolvency.
- 10. Trust and Trustees.
- 11A. Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts.]
- 17. Prevention of cruelty to animals.
- 17A. Forests.
- 17B. Protection of wild animals and birds
- 25. Education,



Comments on Concurrent Powers

- Since competences in Belgium are exclusive, there is no list of concurrent powers. The Indian system is therefore highly specific.
- Within the European Union, Article 4 of the Treaty on the Functioning of the EU lists **shared competences**, such as agriculture, the internal market, energy and the environment, which are similar to concurrent powers.
- Thus, as long as the European Union lawmaker has not legislated on economic, energy or agricultural matters (secondary law), Member States are entitled to regulate. As soon as the Union legislator intervenes, national legislation must comply with Union law.

Comments on Concurrent Powers

- It should be noted that Indian States may intervene in cases of concurrent powers without having to comply with the principles of subsidiarity and proportionality.
- These principles apply to EU Member States that intervene in cases of shared powers. Article 5 of the Treaty on the Functioning of the EU.

2.4. Residuary Powers (Article 248).

“Matters not enumerated in any list fall under Parliament's jurisdiction.

- (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.*
- (2) Such power shall include the power of making any law imposing a tax not mentioned in ei »*

It follows from Article 248 that the Union may intervene in all areas not included in list II enumerating the Indian States competences and list III on concurrent competences. ther of those Lists.

2.5. Jurisprudential Principles

- 2.4.1. Broad interpretation of each entry
- 2.4.2. Doctrine of pith and substance
- 2.4.3. Colorable Legislation
- 2.4.4. Repugnancy Between an Union Law and a State Law



2.5.1. Broad interpretation of each entry

Entry in the various lists should be interpreted broadly.

In Calcutta Gas Ltd. V. state of Bengal, the Supreme Court held that the “widest possible” and ‘most liberal” interpretation should be given to the language of each entry. A general word used in an entry.....must be construed to the extent to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.

2.5.2. Doctrine of pith and substance

The courts determine if a legislature has encroached upon the field assigned to another entity. They will apply the doctrine to determine whether the legislature concerned was competent to pass that law.

In case of encroachment, the law should be held to *ultra vires*.

In order to ascertain the true character of the legislation the court pays heed to

- the enactment as a whole,
- to its object,
- and to the scope and effect of its provisions.

Doctrine of pith and substance

- The Bombay, Prohibition Act prohibited sale and possession of liquors in the State.
- This Act was challenged before the Supreme Court on the ground that it incidentally encroached upon import and export of liquors across custom frontier- a central subject (List I). The applicants contended that the prohibition, purchase, use, possession and sale of liquor will affect its import in Bombay.
- The Supreme Court held that Act valid because the pith and substance of the Act fell under the State List (List II) and not under the Union List (List I) even though the Act incidentally encroached upon the Union Powers of Legislation.
- The Act was in resonance with the subject-matter assigned to the States. Incidental trespass does not amount to an ultra vires encroachment.

2.5.3. Colorable Legislation

- A legislature passes a law with respect to a matter outside its legislative competence by giving to the legislation a “different color” so as to bring it within its competence.
- In *K.C.G. Narayan Dev v. State of Orissa*, the Supreme Court explained the meaning and scope of the doctrine of colorable legislation in the following terms:-

*“Such transgression may be **patent, manifest or direct**, but it may also be **disguised, covert or indirect**, or and it is to this latter class of cases that the expression colourable legislation has been applied in judicial pronouncements.”*

Colorable Legislation

“The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter is substance which is beyond.

*The whole doctrine of colourable legislation is based upon **the maxim that you cannot do indirectly what you cannot do directly**. In these cases, the Court will look in the true nature and character of the legislation and for that its object, purpose or design to make law on a subject is relevant and not its motive. If the legislature has power to make law, motive in making the law is irrelevant.”*

2.5.4. Repugnancy Between an Union Law and a State Law

This test revolves around conflicts between Union and State laws in the Concurrent List. Article 254(1) only applies where there is inconsistency between an Union Law and a State Law relating to a subject mentioned in the Concurrent List.

It reads as follows: “*if any provision of law made by the legislature of the state is **repugnant** to any provision of a law made by parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent List, then the law made by the 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.”*

Repugnancy Between an Union Law and a State Law

In *Deep Chand v. State of Uttar Pradesh*, the Supreme Court laid down the following tests for determining the repugnancy between the Union Law and a State Law.

“Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

- *Whether there is direct conflict between the two provisions;*
- *Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and*
- *Whether the law made by Parliament and the law made by the State Legislature occupy the same field...”*

The Three Principles of the Repugnancy Test

- (a) **Direct collision:** There may be absolute between two Statutes. It is impossible to obey one law without violating the other. “One says "do" and the other says "do not"”.
- (b) **Intention of Parliament:** If Union Parliament intended to create an exhaustive code on the subject, any state law is considered repugnant.
- (c) **Same subject-matter:** Both the State and the Union regulate the same entry in the Concurrent List.

=>**Coexistence test:** If both Acts can operate without conflicting, there is no repugnancy.

=> Under Article 254(2), a State law prevails if it received **Presidential assent**, unless a subsequent central law overrides it.

The Three Principles of the Repugnancy Test: West Bengal Housing Industry Regulation Act

The Supreme Court on May 4th 2021 in *Forum for Peoples Collective Efforts v State of West Bengal*, ruled on the constitutional validity of the West Bengal Housing Industry Regulation Act, 2017 (WB-HIRA).

The petitioner argued that the WB-HIRA heavily overlapped with, and often simply included identical provisions from, the parallel Central legislation on Real Estate, 2016 (RERA).

As both Acts dealt with subjects from the Concurrent List, the petitioner claimed that the State enactment (WB-HIRA) was constitutionally impermissible.

The Three Principles of the Repugnancy Test: West Bengal Housing Industry Regulation Act



- The Supreme Court applied the rules of interpretation based on Article 254 in order to determine ‘repugnancy’ between State and Union legislations.
- The Court applied the ‘three tests of repugnancy’. A statute is deemed ‘repugnant’ when it covers the same subject area as another statute but contains contradictory provisions.
- West Bengal's WB-HIRA was virtually identical to the Central RERA. As a result, the entire WB-HIRA was unconstitutional.



SUPREME COURT OF INDIA



Comparison with Belgian constitutional law

- Pursuant to Article 134 of the Constitution, the special legislator adopted the Special Law on Institutional Reforms of 8 August 1980, which establishes a comprehensive list of competences that are conferred to the Regions (gewesten) and the Communities (Gemeenschappen).
- The division of powers between the federal authority and the Regions is based on a **system of exclusive powers**, which means that, in principle, any legal situation is governed by a single legislator.
- This principle of exclusivity leads the courts to interpret the powers assigned to the federated entities (Regions and Communities) broadly. As a result, this broad interpretation leads to a strict, even restrictive, interpretation of the residual powers vested in the federal authority.

Comparison with Belgian constitutional law

Regional powers are defined according to the matters assigned to them by the special legislator.

Thus, jurisdiction is determined by reference to the **main purpose** of the regulation and **not by its potential effects** on other administrative policies that would fall within the remit of other jurisdictions.

The objective pursued by the adoption of a norm cannot, in principle, determine on its own whether the norm falls within the material jurisdiction of the sub-entity from which it originates. CE, 29 juin 2023, *Belplant c Etat belge*, 25.986.

Implied powers under Belgian law

According to Article 10 of the special law, competences are not immutable. Where necessary, the Regions may marginally encroach on the residual competences of the federal State.

- **Article 10** « Decrees may include legal provisions relating to matters for which the (Parliaments) are not competent, insofar as these provisions are (necessary) for the exercise of their competence ».

The exercise of these implied powers must comply with the case law of the Constitutional Court. The Court authorises the Regions to reckon upon Article 10 subject to three conditions:

- the provisions encroaching federal competences must be necessary for the exercise of the regional competence; in other words, there must be a direct link;
- the matter addressed by the Region must lend itself to differentiated regulation;
- the impact on the national matter must be only marginal.

No implied powers under Indian law.

Summary

Belgian Constitutional Law

- Exclusive competences (the special law lists the competences conferred on the Regions and Communities)
- Implied powers
- The Belgian Constitutional Court adjudicates the conflict between the federation and the sub-entities (Regions and Communities)

Indian Constitutional Law

- Exclusive + concurrent competences (3 lists in the constitution)
- No Implied powers
- The Indian Supreme Court adjudicates the conflicts between the Union and the States