

# NOTES TOWARDS A THEORY OF IMPLIED POWERS IN (INDIAN) CONSTITUTIONAL LAW

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*“Implied powers” pose difficult conceptual problems for legal scholars. They are invoked in many contexts and appear to comprise several distinct legal phenomena. Yet there is no clear understanding of what we mean by an “implied power” - apart from the very basic notion that it is not an express power – and of what forms it may take, and no existing theoretical framework that can help us in this respect. This article takes a first step towards creating such a theoretical framework by identifying criteria – the content of the power, the authority holding it, and the nature of the implication involved – that may be used to classify all references to “implied powers” in the positive law. The article focuses on Indian constitutional law to see how the relative paucity of implied powers in the Supreme Court’s jurisprudence on constitutional matters may be analysed using the proposed framework. In this perspective, the paper suggests that the separation of powers and the judicial emphasis on restricting governmental powers vis-à-vis citizens are relevant factors in explaining both the absence of a general implied powers doctrine and its specific use in an intergovernmental context.*

## I. INTRODUCTION

The problem of “implication” – in the ordinary sense of the word<sup>1</sup> – is omnipresent in the legal interpretation of texts. This is because of the open texture of legal rules or norms, which is linked to the indeterminate meaning of the words used to embody and describe those rules or norms. While the present paper does not aspire to a proper discussion of these well-known issues in legal theory, it is important to emphasize that they underlie all discussions of rules or norms that one may consider to be “implied” directly or indirectly from legal texts. Indeed, to say “directly or indirectly” may be misleading: to be more precise, in any legal concept of “implication”, there is a movement from the text itself to the rule we derive from it to the further rule that we imply

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<sup>1</sup> Implication in formal logic of course has a different meaning, and it is important to not conflate the two. While in legal reasoning we often use a kind of logical reasoning, or at least a form of reasoning inspired, often unwittingly, from formal logic, it is neither possible nor helpful to claim a more rigorous correlation.

from the first. We will see that this is not an abstract conception, but one very useful in understanding the concept of implication as it actually appears in the positive law.

This paper focuses on the concept of “implied powers” in constitutional law. This concept is an elusive one in legal theory and practice. Some legal systems contain clear doctrines of implied powers that appear in judicial decisions and are analysed in scholarly works. Others appear to have few references to implied powers in their constitutional discourse: no mentions in case-law or chapters in textbooks. At the same time, implied powers are the subject of significant debate in international law and distinct legal systems such as European Union law.<sup>2</sup> Despite – or perhaps because of – the wide range of legal contexts in which one invokes the notion of implied powers, there is hardly any theoretical work that attempts to propound general principles of the use of implied powers in a legal system, or even simply propose a framework for classifying and analysing different kinds of powers that may be considered to be “implied”.<sup>3</sup> The present article undertakes this latter exercise by elaborating a few criteria around which typologies of implied powers may be created, and using the proposed framework to explore the presence (or absence) of implied powers in the context of Indian constitutional law. The suggested typologies will also facilitate comparative studies of implied powers in different legal systems; the parentheses in the title of this paper is meant to indicate that while it mainly discusses Indian law, the proposed framework would be applicable to other jurisdictions as well. While no full-fledged comparative analysis is attempted here, I will refer briefly to U.S. constitutional law because of the extensive implied powers doctrine(s) one finds there.

## II. A FRAMEWORK FOR UNDERSTANDING IMPLIED POWERS

The first question that needs to be answered is: what is an “implied power”? What kind of legal phenomena are we referring to when we say

<sup>2</sup> International and supranational organisations/institutions have certain powers granted to them, usually through international treaties. The question of whether or not they have any further “implied” powers is often a controversial one because the sovereign powers of the participating nation-States may be negatively affected; *See generally* N.D. WHITE, *THE LAW OF INTERNATIONAL ORGANISATIONS* 70-107 (2nd. ed., 2005); D. Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 437 (1998); A.I.L. Campbell, *The Limits of the Powers of International Organisations*, 32 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 523 (1983).

<sup>3</sup> This observation is limited to the English-language literature. There are sophisticated theoretical studies of the notion of implied powers in other languages; *See, e.g.*, C. Beaugendre, *La notion de compétences implicites: étude de droit comparé*, (Doctoral thesis) University of Picardie-Jules Verne (2003); E. Loebenstein, *Der Implied Power-Theorie im Völkerrecht und in der Verfassungsordnung eines Bundesstaates* (B.-Ch. Funk et. al. ed.), *STAATSWISSENSCHAFTEN IN ZEIT DES WANDELS*, VIENNA, SPRINGER 339-360 (1992).

of a power that it is “implied”? It is surprisingly difficult to come up with a precise answer. For one thing, the terminology itself is far from uniform; this is true not just when we compare different legal systems but also within the constitutional discourse of a single system. The following terms are all used at different times,<sup>4</sup> mostly in United States law: *implied powers*, *unwritten powers*, *inherent powers*, *ancillary powers*, *incidental powers*, *resulting powers*, *secondary powers*. A U.S. Supreme Court judge once observed: “Loose and irresponsible use of adjectives colors ... much legal discussion ... ‘inherent’ powers, ‘implied’ powers, ‘incidental’ powers are used, often interchangeably and without fixed ascertainable meanings.”<sup>5</sup> One scholar identifies six different concepts of implied powers in U.S. constitutional law.<sup>6</sup> Indeed, the richness of American law on this point is the main reason why it offers an instructive point of reference.

In order to analyse “implied powers” in coherent terms, it is necessary to propose a conceptual framework for identifying them. Further, to justify any claim that one’s framework is “universal” – and thus suitable for comparing two or more jurisdictions – one needs “universal” concepts that are not purely dependent on or unique to any one jurisdiction (but may be derived from a study of several). The approach chosen here is to identify certain criteria that may be used to classify implied powers, with the intention of then combining the schematic classifications arrived at in order to propose more precise definitions of the legal phenomena involved. The criteria can loosely be described as those of the form of the implied powers, their content, the nature of the authority holding them, and the nature of the “implication” involved. After briefly discussing the first parameter, I will focus on the others and suggest that the following three classifications may be used to create the necessary framework for studying the phenomenon of implied powers: procedural/substantive powers, legislative/executive/judicial powers, and incidental/inherent powers. All three together provide a comprehensive “grid” for analysis.

It should be kept in mind that while this paper focuses on the “implied” in “implied powers”, the meaning of the second term – “power” – is not a given. Here, it is used in a broad sense that includes both material and functional aspects of legal capacity, i.e. both the power to effect a legal action and the more general power “over” or “with respect to” a certain field or subject-matter. This is of course the way in which the term “power” is ordinarily used in constitutional discourse; it is, however, important to clarify this

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<sup>4</sup> Needless to add, the problem of uniting a disparate terminology becomes magnified when we are dealing with more than one language, where it may not be possible to find exact synonyms for English words, and – more significantly – it is even harder to determine whether the words are being used in the same manner.

<sup>5</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 96 L Ed 1153 : 343 US 579, 646-647 (1952).

<sup>6</sup> W.W. van Alstyne, *Implied Powers*, 24 SOCIETY 56 (1986).

definition – to say what a power is – before we attempt to unravel the concept of implied powers.

### A. FORM

It may appear meaningless to speak of “form” in a discussion of implied powers. After all, to say a power is implied is in a sense to say it has no form, i.e. no formal or textual existence; this may seem to be the very definition of an implied power. However, there are sometimes general textual authorisations for invoking powers that are not expressly given – the Necessary and Proper Clause<sup>7</sup> (also known as the Sweeping Clause) in the U.S. Constitution is the classic example. It empowers Congress “to make all laws which shall be necessary and proper for carrying into execution” its attributed powers. The meaning and the significance of this provision have been the subject of extensive scholarly debate.<sup>8</sup> According to an influential early commentator, it does not add to Congress’ powers but merely points out what should be obvious, i.e. that Congress needs to be able to do whatever is required for it to exercise its powers.<sup>9</sup> It may be considered a sort of “express implied power”; indeed, some think it inappropriate to call it an implied power at all.<sup>10</sup> However, this problem disappears once we realise that a *general* express implied power is a mere authorisation or justification for the exercise of specific powers that are *not* express; this is in fact its very purpose. Whatever the case may be, insisting on the question of form – or rather on the absence of form – as a basis for analysis would not be a very promising approach. The richness of American implied powers doctrine is indeed partly due to the existence of the Sweeping Clause.

The Indian Constitution does not contain any such express provision. However, other examples may be found in Section 51(xxxix) of the Australian Constitution<sup>11</sup> and Article 352 of the Treaty on the Functioning of the European Union.<sup>12</sup>

<sup>7</sup> Article I §8, ¶18.

<sup>8</sup> See generally J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 109-126 (1833); L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW 798-807 (3rd. ed., 2000); R.E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, Boston University School of Law, Public Law and Legal Theory Working Paper No. 03-11, available at <http://papers.ssrn.com/abstract=410542> (Last visited on October 29, 2015); G. Lawson and P.B. Granger, *The ‘Proper’ Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE LAW JOURNAL 267 (1993).

<sup>9</sup> STORY, *supra* note 8, 113.

<sup>10</sup> See e.g. ALSTYNE, *supra* note 6, 58-59.

<sup>11</sup> Parliament is given the power to make laws with respect to “(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth”.

<sup>12</sup> “Article 352(1). If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a

## B. CONTENT

Implied powers may be substantive or procedural. The classification may appear banal, however we find that a number of implied powers cases hinge on procedural matters and not substantive ones. This may be because it is easier to admit a procedural power as “implied” in the grant of an express power than it is to admit another substantive power.<sup>13</sup> Procedural powers are more obviously “necessary and proper” to the exercise of a given express power; the absence of certain procedural powers may well render a substantive power ineffective.

The distinction between “procedural” and “substantive” is often an artificial one. It may happen that either adjective seems appropriate in a given case. This is particularly true in the case of judicial powers, but it should be kept in mind in other contexts as well. For present purposes, I will include under the broad category of “procedure” not just the rules for the functioning of public bodies but also all “internal” aspects relating to their composition or otherwise concerning only their members.

Implied procedural powers are common in Indian law when it comes to the interpretation of statutes.<sup>14</sup> However, implied *constitutional* procedural powers are quite rare. Only a handful of instances were found in this research. *State of Punjab v. Salil Sabhlok*<sup>15</sup> (‘Salil Sabhlok’) is a recent one, where the Supreme Court held that Article 316 of the Constitution, which grants the Governor of a State the power to appoint the Chairman and other members of the State Public Service Commission, also grants the implied power to lay down the procedures for such appointments. The Court expressly referred to this as a “constitutional power”.<sup>16</sup> In *Union of India v. Gopal Chandra Misra*,<sup>17</sup> (‘Gopal Chandra Misra’) the Court held that a High Court judge had an implied power under Article 217(1)(a) to revoke his resignation even after his resignation letter had been received. The Court repeatedly referred to the “doctrine of implied powers”, without defining or explaining this doctrine.

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proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures....”

<sup>13</sup> Implicit in this formulation is the assumption that we are indeed speaking of two distinct “powers”. This question of delimitation and its implications for the notion of implied powers will be discussed further on.

<sup>14</sup> See e.g. *ITO v. M.K. Mohammad Kunhi*, AIR 1969 SC 430 (Income Tax Appellate Tribunal’s implied power under the Income Tax Act, 1961, to stay recovery of penalty imposed on assessee pending appeal); *Hochtief Gammon v. Industrial Tribunal*, AIR 1964 SC 1746 (Industrial Tribunal’s implied power under the Industrial Disputes Act, 1947, to summon persons not parties to the dispute before it); *Swastik Gear Ltd. v. ITO*, (1989) 175 ITR 384 (All) (Income Tax Department’s implied power under the Income Tax Act, 1961, to obtain photocopies of account books).

<sup>15</sup> (2013) 5 SCC 1.

<sup>16</sup> *Id.*, ¶30.

<sup>17</sup> (1978) 2 SCC 301 : AIR 1978 SC 694.

In *Raja Ram Pal v. Speaker, Lok Sabha*,<sup>18</sup> ('Raja Ram Pal') the Court looked at Parliament's privileges under Article 105 of the Constitution and concluded in a majority decision that Parliament has the power to expel one of its members. This power is not expressly provided for in the Constitution. Interestingly, the Court mentioned that this power was not associated with Parliament's other historical powers or prerogatives (specifically, those relating to its own composition), but was an independent power (in other words, the power was inherent and not incidental to another power; see *infra*). The distinction was pertinent because the minority judgement carefully examined the express powers of Parliament and concluded that the power of expulsion could not be read into them.

Apart from such occasional appearances, procedural implied powers have not been very significant in Indian constitutional law. One possible explanation is simply that the Constitution lays down sufficient express powers, i.e. the Constitution itself expressly provides for most procedural aspects that would otherwise have to be deduced by implication as being included in the express grant of a substantive power. This provides a clue as to why implied powers in general – whether procedural or substantive – are so rare in India; the Indian Constitution is one of the longest in the world, and the drafters' wish to lay down the rules of government in minute detail means that there is much less left open to judicial interpretation than there is, for instance, in the U.S. Constitution. Sufficient detail in the express grants of power reduces the need for invoking a doctrine of implied powers. This is particularly true in the context of procedure; the Indian Constitution makers clearly intended to themselves provide for detailed procedures so that there was less scope for dispute (and for manipulation<sup>19</sup>) later. This indirectly reduced the need for establishing procedural powers by way of implication.

However, substantive implied powers are even rarer. The large amount of detail in the express constitutional provisions is also relevant in the case of substantive powers. The Constitution itself attempts to fully and exactly determine the scope of government power, and there is thus not much systematic use of a doctrine of implied powers. The one significant example of such use is in the context of the interpretation of State and Union legislative powers allocated in the Lists of competence in the Seventh Schedule of the Constitution. This will be discussed in detail in the next two sections of this article.

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<sup>18</sup> (2007) 3 SCC 184.

<sup>19</sup> See C. Bjørnskov & S. Voigt, *Constitutional Verbosity And Social Trust*, 161 Public Choice 91 (2014) for an argument that constitutional length is inversely proportionate to the amount of "trust" in society; See also T. Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* in CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS 66-93 (A. Sajo and R. Utz ed., 2010).

### C. THE AUTHORITY HOLDING POWER

We typically consider that Constitutions allocate powers to legislative, executive and judicial bodies.<sup>20</sup> Powers may be implied for each of them. Indeed, by coincidence the three instances of procedural powers mentioned above – Salil Sabhlok, Gopal Chandra Misra and Raja Ram Pal – involve executive, judicial and legislative organs respectively.

However, when we speak of the relationship between the different organs or branches of government, we do so mostly with reference to substantive powers, not to issues of procedure. How have the courts looked at the implied substantive powers of these organs? Generally speaking, they have – perhaps unsurprisingly – been more willing to accept the presence of implied substantive powers for the judicial branch than they have been for the legislative and executive branches (with one exception: see *infra*). For instance, in *Rupa Ashok Hurra v. Ashok Hurra*<sup>21</sup> ('Rupa Ashok Hurra') the Court held that it had an inherent power or "inherent jurisdiction" that enabled it to review its own decisions (that would otherwise be final with no further remedy). This could be done through a "curative petition" under certain special circumstances, such as when there had been a denial of natural justice. Of course, it could be argued that this was more procedural in nature than substantive: the distinction often breaks down in the case of judicial functions and should not be considered as absolute. These implied judicial powers will be further discussed below.

The only context in Indian constitutional law where one finds a very clear doctrine of implied powers is that of the division of legislative competence between the Union and State governments. Under Article 246 of the Constitution read with the Seventh Schedule, legislative power is attributed to Parliament and to the State Legislatures in three lists, viz. the Union List, the State List and the Concurrent List. Each list contains a large number of entries identifying different fields or matters of legislative competence. Parliament is given a residual power under Entry 97 of the Union List as well as in Article 248. The arrangement of powers into lists (whether one or two or three) is a feature of practically every federal constitution, but the amount of detail in the Indian Constitution is exceptionally large: the Union, State and Concurrent Lists have an astonishing 210 entries between them.

Since the matters of competence listed out are nothing but markers or delimitations of categories of subjects with reference to which the validity of State or Union legislation may be grounded, and since these markers are formed with words, problems inevitably arise with respect to the interpretation

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<sup>20</sup> For the purposes of this paper I am ignoring the distinction between functions and organs or bodies. Of course, we know that executive bodies may sometimes have judicial functions and so on.

<sup>21</sup> (2002) 4 SCC 388 : AIR 2002 SC 1771.

of the ambit of the entries in each List. The indeterminacy of terms such as “trade and commerce” or “public order” means that courts are forced to determine the boundaries of the categories created by the Lists. Indeed, it can be argued that the inclusion of such detail in the Indian lists is aimed at reducing this indeterminacy as much as possible; this may be deemed successful to the extent that division-of-powers disputes have not been nearly as significant in Indian federalism as they have been in, say, the U.S., Canada or Australia.<sup>22</sup>

The doctrine of incidental or ancillary powers was evolved as one of the interpretive techniques used to help determine the scope of the Entries in the Lists.<sup>23</sup> Inspired by a similar doctrine in Canadian law (which along with Indian and Australian law came under the jurisdiction of the Privy Council at one time), it allowed for certain powers to be impliedly admitted by virtue of other, express powers in the lists of competence. These powers could be substantive or procedural, although the former category is obviously more significant. In the words of the Indian Supreme Court:

“... it is necessary to bear in mind that we are interpreting the words used in the Constitution and it is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a Constitution. A general word used in an entry like the present one must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.”<sup>24</sup>

And again:

“The entries should not be read in a narrow or pedantic sense but must be given their fullest meaning and the widest amplitude and be held to extend to all ancillary and subsidiary

<sup>22</sup> Of course, the level of centralisation in the Indian federation may itself be one of the reasons for this relative lack of federalism-related constitutional litigation. See generally A. Sagar, *Les relations fédérales-fédérées : Etude comparative des rapports juridiques fondamentaux dans le contentieux des compétences*, Doctoral Thesis, Université de Rouen (2013); The only in-depth English-language comparative study of this issue that includes India is G. Taylor, *Characterisation in Federations: Six Countries Compared*, Berlin, Springer (2005).

<sup>23</sup> M.P. SINGH, V.N. SHUKLA’S CONSTITUTION OF INDIA 798-799 (2013); Report of the Sarkaria Commission on Centre-State Relations, Chapter II, §2.9, available at <http://interstatecouncil.nic.in/Sarkaria/CHAPTERII.pdf> (Last visited on October 29, 2015); after mentioning the aspect discussed here, the Report takes a different approach and discusses how certain Entries in the Lists are themselves “ancillary” to other, broader Entries.

<sup>24</sup> Jagannath Baksh Singh v. State of U.P., AIR 1962 SC 1563 : (1963) 1 SCR 220, 228-229.



matters which can fairly and reasonably be said to be comprehended in them.”<sup>25</sup>

This position is interesting for several reasons. *First*, as I have mentioned above, this appears to be the only doctrine of implied powers systematically developed in Indian constitutional law. The Supreme Court clearly limits the operation of the doctrine to the context of the Lists; no general principle of constitutional interpretation is being laid down in these passages. Thus, no presumption may be drawn that ancillary powers are *always* to be read into an express grant of power. *Second*, the declaration that those ancillary matters should be included that can “fairly and reasonably” be said to be comprehended, shows that relying on a doctrine of implied powers does not in any way reduce the need for a subjective evaluation of the need for and the appropriateness of a certain legislative measure. One still needs to determine whether or not a law can be justified on the basis of an express grant of power; the reference to ancillary or subsidiary powers (or matters<sup>26</sup>) may have rhetorical value but does not seem to provide much analytical help.

Finally – and this is nothing but an extension of the previous point – the line between admitting a power as *incidental* to an express grant and simply *including* it within the express grant (through a “wide” interpretation) is blurred.<sup>27</sup> In the first extract, the Court specifies that ancillary matters should be included while construing *general* words in the Lists, but it is not clear whether they should otherwise be excluded; the Court does not discuss this, here or elsewhere. In the second extract, the qualification “general” is absent: the principle thus applies to each and every Entry in the Lists, even those that seem much narrower in meaning. Either way, the Court stresses that words need to be “extended” or given their “fullest meaning” or “widest amplitude” so as to include all ancillary and incidental matters: there is no real distinction between the wide interpretation of the words in the Lists and the inclusion of ancillary or incidental matters (or of ancillary or incidental *powers*<sup>28</sup>). And so here, ironically, when the Supreme Court actually adopts an explicit doctrine of implied (incidental) powers, it does so in terms that lay bare the absence of any technical, interpretive need for such a doctrine.<sup>29</sup>

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<sup>25</sup> Express Hotels (P) Ltd. v. State of Gujarat, (1989) 3 SCC 677 : (1989) 2 SCR 893, 906.

<sup>26</sup> I am once again leaving aside the difference between material and functional competence (an ancillary *power* need not necessarily be equivalent to a power over an ancillary *matter*.) This distinction is an important one for a proper conceptual understanding of division-of-powers issues. However, it is not essential in the present context.

<sup>27</sup> See M.P. JAIN, INDIAN CONSTITUTIONAL LAW 520-522 (2008).

<sup>28</sup> (2002) 4 SCC 388 : AIR 2002 SC 1771.

<sup>29</sup> See also P.M. BLAIR, FEDERALISM AND JUDICIAL REVIEW IN WEST GERMAN 114-115 (1981); It is not surprising that this argument appears in a study of German constitutional law, which is particularly nuanced and complex in this regard: there are no less than three different types of implied powers in German doctrine.

Apart from this aspect, the adoption of a doctrine of implied powers in the specific context of the interpretation of the Lists of competence fits into the overall approach taken by the Supreme Court towards the interpretation of Constitutional provisions granting powers to the State as a whole. The crucial difference here is that the interpretation of the Lists involves a delimitation of power between governments and not between a government and its citizens. The Union-State federal relationship is a relationship between two loci of public power *inter se*, and so the Court is not as concerned with limiting power – limiting the legislative competence of one level of the federation simply expands the other level's sphere of legislative competence. The Court has not systematically accepted any notion of implied powers in contexts involving the relationship between the entire State and those who are subject to State power.<sup>30</sup> The focus has been not on implied *powers* but on implied *limitations*.

There are too few cases to firmly establish these propositions, but two clear examples may be cited. In *State of W.B. v. Union of India*,<sup>31</sup> the Supreme Court refused to accept an implied limitation on Parliament's power to acquire State property. In *Express Newspapers (P) Ltd. v. Union of India*,<sup>32</sup> the Court refused to accept an implied power for the Lieutenant Governor of a Union Territory to administer property (in the facts of the case, this would have adversely affected certain private interests). Both examples support the idea that when the powers of governments *inter se* are concerned, there is less emphasis on limiting power than there is in other situations.

While having few cases to examine, it is significant that I found no counter-examples. The relative paucity of cases with implied legislative and executive powers may be contrasted with the greater occurrence of the implied judicial powers mentioned above. The courts have declared the presence of judicial implied powers – whether procedural or substantive – on a number of occasions.<sup>33</sup> Further, the inherent jurisdiction of constitutional courts is regularly cited when reading various procedural statutes along with the constitutional provisions granting writ jurisdiction. The admission of *judicial* implied powers fits in with the narrative of the judicial tendency to limit or restrain the exercise of legislative or executive power, or rather the absence of any implied powers doctrine regularly extending the scope of such power except when federalism issues are involved. Since judicial power acts as a check on legislative and

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<sup>30</sup> The fact that the interpretation of the Lists often involves taxing powers does not contradict this statement. The power to tax is usually implied: the courts are often asked to not determine its presence but to determine which Government holds it.

<sup>31</sup> AIR 1963 SC 1241.

<sup>32</sup> (1986) 1 SCC 133 : AIR 1986 SC 872.

<sup>33</sup> See e.g. *Union Carbide Corpn. v. Union of India*, (1991) 4 SCC 584 : AIR 1992 SC 248; *Harbans Singh v. State of U.P.*, (1982) 2 SCC 101 : AIR 1982 SC 849; *High Court of Patna v. Ramawatar Singh*, (1993) 1 BLJR 690; *Pragyasingh Chandrapalsingh Thakur v. State of Maharashtra*, (2014) 1 Bom CR (Cri) 135.

executive action, there should be no rights-based objections to the extensive exercise of judicial power by reference to a doctrine of implied powers.<sup>34</sup>

#### D. THE NATURE OF THE IMPLICATION INVOLVED

Apart from the “incidental” or “ancillary” powers invoked in the interpretation of the Lists, there is another kind of power that is said to be “implied.” Unlike those incidental powers, this second kind of implied power is not linked or associated to an express grant of power, but is independently assumed to exist as it is “inherent” in the functions of the authority seeking to exercise it.<sup>35</sup> It does not depend on any textual implication or interpretation, though it may result from an overall analysis of a certain text. Indeed, such powers are sometimes cited in U.S. constitutional law under the name “resulting powers”. German constitutional law also has a specific doctrine of inherent powers.<sup>36</sup>

The distinction is an important one.<sup>37</sup> Accepting certain powers as being natural or intrinsic to a certain authority involves a very different relationship to the text of the constitution than that involved in saying that they are implied due to the existence of another power. Here, one looks not at text but at context: the nature of the claimed power, the ordinary functions of the authority claiming it, and – most importantly – the overall scheme of the constitution and its organisation of governmental power. All references to implied powers have a teleological aspect, but in these cases one does not put the emphasis on the purpose of an express grant of power; instead, the emphasis is on the goals and intent of the entire framework of government created by the constitution.

Among the cases cited so far, the Raja Ram Pal case and Rupa Ashok Hurra case fall under this category. The former involved a procedural power; the latter a power that could be termed either procedural or substantive; both show how inherent powers are naturally wider than incidental powers because one does not need to tie them down to a text. One says that they are inherent, and that is enough.

Apart from the regular references to the courts’ “inherent jurisdiction”, however, inherent powers are hard to find in Indian constitutional

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<sup>34</sup> With the possible exception of objections to the law of contempt.

<sup>35</sup> See *Nirmal Bose v. Union of India*, AIR 1959 Cal 506, ¶18 for a rare observation along these lines by an Indian court; for an in-depth analysis of the distinction; see generally C. Beaugendre *supra* note 3.

<sup>36</sup> BLAIR, *supra* note 29, 137-142; P. SCHWACKE P. AND G. SCHMIDT, STAATSRECHT 167 (5th ed., 2007).

<sup>37</sup> In one or two cases, the Courts have equated “implied” and “incidental” powers in the context of the Lists: see e.g. *Debabrata Basu v. State of W.B.*, 85 CWN 133; however, in these cases they simply mean that there is no separate implied (inherent) power apart from the well-established incidental powers. This is perfectly coherent with the conceptual framework used here.

jurisprudence. This may appear surprising at first glance, because as every student of Indian constitutional law knows, the Supreme Court does not shy away from adopting a broad teleological approach to interpreting the Constitution. Indeed, it hasn't always felt itself constrained by the text. The most obvious example is its very generous approach to interpreting the fundamental rights provisions of the Constitution. These of course deal not with powers but with limitations on power. Similarly, the basic structure doctrine<sup>38</sup> is another example of a constitutional limitation arrived at by a process of teleological reasoning: the Court held that Parliament could not amend the Constitution so as to take away its democratic and secular nature, its basic rights, and so on: these aspects of the Constitution govern the substantive parts of the State's relationship with its citizens. The approach taken in this context is one of limiting State power to prevent its abuse vis-à-vis society at large. These are inherent *limitations*; inherent *powers* are not easily admitted for the executive and legislative branches.

However, this balancing of public and private interests is not directly relevant in the context of interpreting the lists of Union and State competences, which instead involves a balancing of two different public interests on the basis of detailed textual provisions; hence the presence of a regularly-invoked doctrine of implied incidental powers. Both the presence and the absence of references to notions of implied powers thus seem to fit the larger pattern of a judicial tendency to limit the expansive use of legislative and executive powers when individual rights are at stake.

### III. CONCLUSION

What is the significance of the classifications developed in this article? Like all classifications of legal phenomena, they do not correspond to an empirical "reality" but are tools that help order our perception of these phenomena. The "types" of implied powers they suggest may be considered as ideal-types in the Weberian sense, i.e. hypothetical models that are meant to emphasize the common features or elements of certain real-life situations. It should be stressed, therefore, that the schematic categorisation of implied powers undertaken here aims to provide an analytical tool and not a precise and "absolute" description of all possible cases. It has however permitted us to make certain preliminary observations regarding the occurrence of implied powers in Indian constitutional law.

The three criteria used (ignoring that of form) lead us to determine that implied powers may be substantive or procedural, that they may be held by legislative, judicial or executive bodies, and that they may be incidental

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<sup>38</sup> Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : AIR 1973 SC 1461.

or inherent. This triple classification allows one to describe the characteristics of each occurrence of the courts invoking a concept of implied powers.

What patterns, if any, can we identify from the analysis conducted here? A brief summary is in order. It should be repeated, however, that the sample size here is very small, and hence these ‘notes’ are far from conclusive. Indeed, the first, obvious finding is more of a non-finding: there are very few contexts in which implied powers are invoked in Indian constitutional law. The simplest explanation for this is the length of the Constitution itself, which leaves much less scope or need for any concept of implied powers than there would be in a shorter text where procedural rules and grants of power are much less detailed.

What about the references that do exist? We have seen that the Supreme Court has on occasion allowed for implied procedural powers for all organs of government, but that the distinction between procedural and substantive powers is not always easy to maintain in the case of judicial powers. Nor is it useful to further classify legislative and executive procedural powers into the categories of incidental or inherent powers. In any case, procedural powers are obviously less significant for the larger balance of power between the branches of government or for the relationship between public and private actors.

This article has suggested that these trends can be explained in the light of the judicial intent to curb the expansion of legislative and executive power when private rights are concerned. Both the presence of the incidental legislative powers in the federalism context and the greater willingness to accept implied judicial powers can be justified – ignoring any cynical explanation – by this hypothesis. This should of course be seen in conjunction with the earlier point about the length of the Constitution; text and context have together influenced the way judges approach the task of interpreting and delineating constitutional powers.

These preliminary conclusions may form the basis for a more elaborate study of implied powers in India. An important methodological limitation of this article must be pointed out. The decision to restrict myself entirely to a study of implied *constitutional* powers does not stand up to rigorous scrutiny, and may be justifiable only on practical grounds. There are a large number of cases dealing with implied statutory powers of all kinds for all branches of government, including statutory powers of constitutional bodies. Any comprehensive and holistic account of the judicial use of implied powers in India must study this case-law, which will provide a large amount of material from which more concrete conclusions may be drawn.

Finally, a word about the comparative possibilities of this research. While this article did not attempt a comparative analysis apart from

a few references, the approach taken here provides a framework that should prove useful for such analyses in the future. How does U.S. constitutional law look at the differences between legislative and executive implied powers? Does the German Constitutional Court apply its principles of incidental and inherent powers in the same way in the context of federalism as in that of individual rights, and does this lead to consequences different from those found in Indian law? Are Canadian and Australian judges as reluctant as Indian judges to admit substantive legislative and executive implied powers? The proposed classifications are basic tools that allow for more precise questions, which is an essential first step for any rigorous comparison. The field of implied powers is a rich one, and as yet quite unexplored.