

# The Indian Supreme Court and Federalism



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## 1. Indian Federalism: origins, features and the federal nature of the judiciary

India is a union made up of 29 states and 7 union territories. India emerged as the largest and most populous country from the partition of British India in 1947. During the Raj (British rule, 1857-1947), India came to be governed as a quasi-federal state. The Government of India Act (1935) conferred a degree of self-rule on indigenously ruled provinces but combined this with a strong (and British-controlled) center which held most of the legislative and taxation powers and could wield emergency powers such as the right to intervene in and suspend provincial powers in the case of a breakdown of provincial law and order.

Prior to independence, British Indians never obtained the right to vote in national elections, but provincial elections took place in 1937 based on a restricted franchise (which involved about 15 percent of the indigenous population). These elections confirmed the dominant position of the Congress movement/Party in the sub-continent, but they also laid bare the weakness of the Muslim League. The prospect of independence heightened Hindu-Muslim tensions. To save the territorial integrity of British India as an independent state, representatives of the British government, Congress and the Muslim League put forward a very loose federal structure in which a weak center with power-sharing mechanisms among Hindu and Muslim representatives would co-exist with strong Muslim or Hindu-majority provinces.[1] The failure of this (or similar) proposals made Partition all but inevitable and they help to explain why independent India (without the Muslim majority provinces of Pakistan) introduced a relatively centralized constitution.[2] This constitution had much more in common with the Government of India Act (1935) in terms of the distribution of powers between the center and the states (the word provinces is no longer used) than with the loose confederal constitutional proposals that were proposed immediately prior to independence. Schedule VII of the constitution sets out the distribution of legislative powers in a union list, concurrent list (with central paramountcy) and state list. Residual powers reside with the centre. Legislative and fiscal powers weigh heavily in favor of the centre, though the states are responsible for implementing the most important laws and they also dominate important fields such as policing, education, land, agriculture and health. A summative list of the distribution of legislative competencies can be found in Table 1 below.

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[1] ADENEY., K. *Federalism and Ethnic Conflict Regulation in India and Pakistan,* Basingstoke, Palgrave-Macmillan, 2007 and SWENDEN, W., 'Governing Diversity in South Asia. Explaining Divergent Pathways in India and Pakistan', *Publius: the Journal of Federalism,* 48, 1 (Winter 2018), 102-133.

[2] For a historical overview, see for instance, SAXENA, R., *Situating Federalism: Mechanisms of Intergovernmental Relations in Canada and India*, Delhi, Manohar, 2006

Table 1: The distribution of Legislative Powers under the Indian constitution

| Union (Centre) List | State List | Concurrent List |
|---|---|---|
| Foreign affairs, defense, atomic energy, citizenship, currency, foreign exchange, foreign trade and commerce, immigration, highways, railways, shipping post and telecommunications, institutes of national importance (including central universities), income tax, corporation tax, excise duty, customs, sales tax | Public order, local government, public health and sanitation, agriculture, fisheries, police, water supply, irrigation, land rights, land tenure, taxes on agricultural income, tolls and capitation taxes | Criminal law, forests, economic management, economic and social planning, trade unions, education, marriage, preventive detention, wildlife protection, population control and family planning, social security, property management |

Source: Indian constitution, Schedule VII (own summary).

India inherited provinces (though renamed them as states), but also integrated more than 500 princely states (sometimes forcefully) into its territory. Articles 2 and 3 of the Indian constitution set out the process for remapping the internal boundaries of the 'federal' units, which can be done unilaterally by the central government with the consent of the national Parliament. India occupies a unique position among contemporary federal states in that new states have been carved out of existing states since 1947. The most profound reorganization took place between 1953 and 1966 and made states linguistically more homogeneous. For the above reasons, it has been said that India is not a 'coming-together' federation of the traditional type (such as the US, Australia or Switzerland). Rather, a centralized 'union' was meant to 'hold India together'.[3] For the same reason, except for Jammu and Kashmir, Indian states lack their own constitution and the format of their state institutions is prescribed within the lengthy Indian constitution.

With independence also came the responsibility for organizing the judiciary, a function which had been entirely preoccupied by the British before. The Constituent Assembly paid considerable attention to judicial independence, the role of the Supreme Court and judicial review.[4] The Government of India Act (1935) already set up a 'Federal Court' with limited powers on centre-provincial issues. The founding 'fathers' of the Indian Constitution extended its remit by establishing a Supreme Court which would not only resolve 'federal' disputes between the states and the centre or Union government but also have broad appellate jurisdiction in civil and criminal cases. The constitution further stipulates that states should have High Courts. In 1956, when India only had 14 states, 14 state High Courts existed. Although the number of states has risen to 29 in present-day India, the country only has 24 High Courts. For instance, the states of Punjab and Haryana share a High Court and the same holds for Assam, Mizoram and Nagaland.

Arguably, the very detailed and relatively centralized provisions of the Constitution, have constrained the leeway of the Supreme Court in strengthening the states under Indian federalism. Even

[3] STEPAN, A., LINZ, J.J. AND YADAV, Y., eds., *State-Nations. India and other Multinational States,* Baltimore, Johns Hopkins, 2011.
[4] AUSTIN, G., *The Indian Constitution. Cornerstone of a Nation,* Delhi, Oxford University Press, 1966, p. 164-85.

so, judicial review has both weakened and strengthened federalism, sometimes even in interpreting the scope and nature of judicial intervention when reviewing the same constitutional article as the example of President's Rule (Article 356) attests (see section 4).[5]

## 2. Organization of the Supreme Court

The Indian Supreme Court can review federal statutes as well as statutes of the states. Unlike the US states, the Indian states, -with the exception of Jammu and Kashmir - do not have their own constitution. From a comparative perspective, the Indian Supreme Court stands out because the input of the President, national executive and legislature in the nomination of its justices is rather limited. Article 124(2) stipulates that the President appoints the judges by warrant but 'after *consultation* with such of the Judges of the Supreme Court and of the High Courts in the states as the President may deem for the purpose'. Seeking to maximize its influence in the appointment process at a time when India had faced a nation-wide Emergency, the Supreme Court in *Union of India v. Sankalchand Himmatlal Seth* (1977)[6] argued that while consultation did not imply a Supreme Court veto, it entitled the Court to an examination of the 'circumstances [which] entered into the verdict of the executive if it departs from the counsel given by the Chief Justice.' Although in *SP Gupta* (1981)[7] the Supreme Court appeared to confirm the primacy of the central government (President) in the appointment process, this decision was decisively overruled in 1993 in the so-called '*Second Judges*' case.[8] In it, the obligation to consult had to be understood as 'binding' on the central executive. The case also established what is effectively a 'collegium' of senior judges since the advice of the Chief Justice must take cognizance of the preferences of at least two of the most senior judges in the Supreme Court, a number which increased to four following another ruling in 1998.[9] Judicial review therefore progressively contributed towards a situation in which the Indian Supreme Court wrested autonomy from the national executive and legislative branches in its own appointment; something which the latter have sought to redress through the 99th constitutional amendment (2014) which would have established a National Judicial Appointments Commission of whom half the members would have been made up of non-judges. In 2015, the amendment was struck down by the Supreme Court[10] because it violated the 'basic structure' of the Indian constitution of which judicial independence is regarded as an integral part.[11] Due to the (increasing) primacy of the judiciary in its appointment, the Supreme Court could be expected to remain relatively insulated from direct political pressure.[12]

In terms of regional representation, the Supreme Court draws for its composition from justices from state high courts, and within that, quite substantially from high courts from states which are further removed from the centre in a political sense. For instance, in India, regional sentiments are higher in the non-Hindi belt states, given their often linguistically and religiously distinctive nature. Adeney has drawn our attention to the majoritarian character of India's central executive and legislature, despite an informal but limited practice of incorporating members of distinctive castes, religious groups or regions

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[5] BHANU MEHTA, P. "India's Judiciary: The Promise of Uncertainty", in KAPUR D. and BHANU META, P., eds., *Public Institutions in India: Performance and Design,* Delhi, Oxford University Press, 2005, 158-93.
[6] Union of India v Sankalchand Himatlal Sheth (1977) 4 SCC 193
[7] *S.P. Gupta v. Union of India* (1981) Supp SCC 67 [710-11]
[8] *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441
[9] SRIKRISHNA, R., "Judicial Independence", in CHOUDHRY, S., KHOSLA, M. AND BHANU MEHTA, P., eds., *The Oxford Handbook of the Indian Constitution,* Oxford, Oxford University Press, 2016, p. 349-66.
[10] *Supreme Court Advocates-on Record Association v Union of India* 2015 SCC OnLine SC. 964
[11] SRIKRISHNA, R. op.cit., 352-58
[12] On this point, see also GAUTAM K., 'Semi Presidentialism under the Indian Constitution', 4 July 2015, Available on line at https://works.bepress.com/khagesh_gautam/6/ ; accessed 23 December 2017

in cabinet.[13] In a recent study of appointments to the Indian Supreme Court, Chandrachud argues that from a formal point of view there is no requirement of regional representation in the court either.[14] In fact, the constitution of India, in article 124 stipulates that candidate justices must have five years of experience as a (state) high court judge, ten years standing as a (state) high court advocate, or be a 'distinguished jurist'. In six decades, 'distinguished jurists', i.e. faculty of Law Schools without experience as lawyers or judges have *not* been appointed to the Supreme Court, making the link with state high courts very important. Based on interviews and quantitative analysis, Chandrachud finds indeed that there is a wide geographic diversity on the Supreme Court bench. Using 'the state to which a high court judge was first appointed as a criterion to mark the regional designation', Chandrachud observes that not more than two (or in very few cases three) judges of the same high Court serve on the Supreme Court at the same time.[15] The growing size of the Supreme Court bench (from 8 seats in 1950 to 14 seats in 1960, 18 in 1977, 26 in 1986 and 31 today) has facilitated regional representation. By 2012 nearly all states had former high court justices represented on the bench. Of all the 'state' high Courts only the Delhi High Court has delegated a disproportionate number of justices to the Supreme Court, reflecting its reputation as one of the most distinguished high courts in the land with a disproportionately high case load. The 4 (now 5) Southern states have always had between 22 and 35 percent of bench members, whereas the Northern states (which includes Jammu and Kashmir but not Bihar which is classified as East) usually held between 30 and 35 percent of the seats, reflecting percentages that are regionally more balanced than the distribution of seats in the main political institutions (in particular, the central executive and cabinet).[16]

Despite the increasing autonomy of the Supreme Court in terms of its own recruitment, a procedure was put in place by which justices could be removed prior to their retirement age of 65 by the President of India on grounds of incapacity of proven misbehavior on receipt of an address by both houses of Parliament adopted by two-thirds majority.[17] To protect the independence of the judiciary, it was decided that the salaries of justices should be laid down in Schedule 2 of the Indian constitution (a similar provision applies to High Court judges). Schedule 2 itself can only be amended with the concurrent consent of the union Parliament and half of the state legislatures; subjecting it to the highest procedural threshold for constitutional change. In contrast, parliament can legislate on the allowances, leave and pensions of Supreme Court justices. Similar provisions in relation to the salaries, allowances, leave and pensions of administrative personnel and officers of the Court are determined by the President of India in consultation with the Chief Justice of the Supreme Court. Expenses of the Court are chargeable to the revenues of the country[18]

## 3. Supreme Court competencies

Approximately eighty percent of the Supreme Court's workload consists of appellate jurisdiction in relation to civil matters (Article 133), criminal matters (Article 134) questions of constitutional interpretation (Article 132) and (especially) appeals by special leave of the court (Art 136).[19] Most

[13] ADENEY, K., "A move to majoritarian nationalism? Challenges of Representation in South Asia", *Representation,* 50, (1), 2015, p.7-21

[14] CHANDRACHUD, A., *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India,* Delhi, Oxford University Press, 2014,

[15] ibid., p. 244

[16] Ibid., 236-254

[17] AUSTIN, G., *op.cit.*, p, 178-9

[18] ibid., p. 179, p. 183-4

[19] Approximately eighty percent is the figure given by VAKIL, R., 'Jurisdiction' in CHOUDHRY, S., KHOSLA, M. AND BHANU MEHTA, P., eds., *The Oxford Handbook of the Indian Constitution,* Oxford, Oxford University Press, 2016, p. 368 and in turn derives from quantitative analysis in ROBINSON, N., 'A Quantitative Analysis

appeals are dependent on a referral by a state High Court although criminal appeals exist as a matter of right and appeals by special leave can proceed from any court or tribunal.[20] Appeal cases can be decided in benches of two judges, which, in the view of Vakil explains a certain degree of arbitrariness, for instance in how the Court has applied restrictions on the rights to appeal and determine principles on the exercise of its own discretion.[21] The other activities of the Court are linked to constitutional matters and have a more direct significance for federalism. Constitutional issues are decided in benches of at least five judges. Dissenting opinions are always expressed in the judgements of the Court, so it is possible to discern which judges concurred or dissented with a majority opinion and on which grounds. Article 143 of the Constitution enables the President to consult the Court 'on any question of law or fact of 'public importance'. Since its inception and until 2016, the Court has rendered opinions in 12 cases.[22]The capacity to render advisory opinions has been criticized because the advice of the Court is binding upon lower courts, yet the central government defines the reference and advisory opinions are not open to appeal or review. Therefore, there is a central executive bias in terms of which questions the Court is asked to render an opinion on and the Court may even be asked to reconsider its own previous judgements.

On federal issues, the Court deals with 'legal' disputes between a state or states and the union or between states. Article 131 of the Indian constitution confines such questions to 'legal' issues, not political disputes, which normally should be addressed through intergovernmental means (Prime Ministers Conference, Inter-State Council, or intergovernmental channels of an administrative nature more widely). Disputes of this matter must be brought to the Court by the government of India, or the state governments acting through their ministers. Article 262 of the Constitution puts inter-water river disputes beyond the purview of the Court. Such disputes are settled by specifically set up Tribunals and the role of the Court is limited to the enforcement of a river sharing award enacted under the Inter-state River Water Disputes Act (1956) or to disputes which cannot be brought under the IWDA's remit of what constitutes a 'water dispute.' [23]

Finally, the Court also considers appeals on cases involving 'a substantial question of law as to the interpretation of this Constitution' (Article 132). In the view of Vakil, the Court has limited its powers in this regard since it has refused to hear appeals from the judgements of single judges in state High Courts, including civil appeals (which, so the Supreme Court seems to argue, could be appealed to a wider bench of the same Court first).[24]

In each of the above matters, the Supreme Court acts in a responsive mode: it needs to be faced with an appeal, asked to render its advice or consider a question of a federal or other constitutional nature. Yet, much of the activism with which the Supreme Court has come to be associated since the 1980s is linked to so-called 'Public-Interest-Litigation' for which Article 32 of the constitution provides the basis. This article enables any party with sufficient interest ('person aggrieved') to petition the Court for enforcement of any fundamental rights in the constitution. Although still responsive, in a sense that the Court will not act unless a petition is brought to its attention, in time the Court has relaxed its requirements for 'locus standi'; i.e. it gave access not only to those individuals whose constitutional rights were endangered over and above the rights of the public in general, but also to those citizens, for instance civil rights activists, who decided to sue on behalf of a discriminated group, e.g. the underprivileged. This enabled the Court to play a key role in the protection of human rights, a role it

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of the Indian Supreme Court's Workload' (2013), 10 (3), *Journal of Empirical Legal Studies,* 570 and DHAVAN R., *The Supreme Court under Strain: The Challenge of Arrears,* NM Tripathi, 1978 which cover respectively the Supreme Court's workload from 1993 to 2011 and from 1950 to 1980.

[20] VAKIL, R., *op.cit.*, 367-85.

[21] ibid., p. 372

[22] ibid., p. 374

[23] ibid., p. 376.

[24] Ibid., p. 377-8/

particularly sought to play to make good on its record during the Emergency when the Court was complicit in sanctioning the denial of civil and political rights.[25] The 'judicial activism' with which the Supreme Court of the last few decades has been associated relates to this dimension in the main. Yet, as this activism does not touch upon 'federal' issues per se, we will not further elaborate on it in the remainder of this overview.[26]

## 4. Supreme Court jurisprudence on federal issues

As mentioned in section 1, the jurisprudence of the Court has altered the direction of centre-state relations in India. Over time, the Court has become more appreciative of state rights, a feature which many observers see as compliant with the stronger position of the states in economics and politics.[27] In political terms, India has had a pluralized party system in which state-based parties were needed to prop up a central parliamentary majority for much of the period between 1989 and 2014. This created the conditions in which central governments became more accepting of political state autonomy. Simultaneously, the Indian economy became less heavily planned from the top and liberalization enabled the states to court private investment (domestic or foreign) to stimulate their economies. Although this process started during the 1980s, it very much accelerated during the 1990s.

However, a more favorable reading of state rights is not confined to all areas. For instance, in the overview below we observe that this has been the case for the policing of Presidents Rule (Article 356), the inclusion of federalism as a part of the basic doctrine which places federalism beyond the purview of constitutional amendment, and in recent decades also disputes on the distribution of legislative powers between the union and the states. However, the Supreme Court has been less supportive of increasing the rights of the states in foreign affairs or state reorganization. In the following sections, we briefly review the jurisprudence of the Court in those five areas.

In relation to **President's Rule,** the power of the President of India to take over the administration of a state in case of breakdown of constitutional machinery has persistently been a bone of contention between the union and the states. When the Janata Party came to power in 1977, it issued a directive/letter to Congress ruled states governments to resign or face the risk of proclamation of emergency under article 356. The states challenged this directive before the Supreme Court. The matter was decided by a seven-judge bench. In *State of Rajasthan vs. Union of India* (1977), Justices P.N. Bhagwati and A.C. Gupta firmly observed :*"The court cannot, in these circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. That would be a dangerous exercise for the court, both because it is not a fit instrument for determining a question of this kind and also because the court would thereby assume*

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[25] DIVAN, S. "Public Interest Litigation", in CHOUDHRY, S., KHOSLA, M. AND BHANU MEHTA, P., eds., *The Oxford Handbook of the Indian Constitution,* Oxford, Oxford University Press, 2016, p 662-79.

[26] See DESAI, A.H. and MURALIDHAR, S., 'Public Interest Litigation: Potential and Problems' in KIRPAL, B.N., DESAI, A.H., SUBRAMANIUM G., DHAVAN, R. and RAMCHANDRAN, R., eds. *Supreme but not Infallible. Essays in Honour of the Supreme Court of India,* Oxford: Oxford University Press, 2004, 159-92 and SATHE, S.P., *Judicial Activism in India. Transgressing Borders and Enforcing Limits,* Delhi, Oxford University Press, 2nd ed., 2002.

[27] On the role of the Supreme Court in centre-state disputes, see TEWARI, M. and SAXENA R., 'The Supreme Court of India: the rise of Judicial Power and the Protection of Federalism' in ARONEY N. and KINCAID J.,eds., *Courts in Federal Countries. Unitarists of Federalists?,* Toronto, University of Toronto Press, 2017. For a recent collection of essays debating the rise of the states in Indian Politics and its effect on intergovernmental relations, public policy and the management of ethnic conflict, see Chanchal Kumar Sharma and Wilfried Swenden, eds., Continuity and Change in Indian Federalism, *India Review,* 16, (1), 2017, 42-65; also published as Chanchal Kumar Sharma and Wilfried Swenden, eds., *Understanding Indian Federalism: Competing Perspectives, New Challenges and Future Directions,* London, Routledge, 2018.

*the function of the Central Government and in doing so, enter the 'political thicket', which it must avoid if it is to retain its legitimacy with the people*[28]. Yet, *A.K. Roy vs. Union of India,* (1982) the Supreme Court ruled that the constitutional position under which the Rajasthan case was decided, "cannot any longer hold good".[29] A more definitive judicial stamp on this interpretation came in the Supreme Court judgement in *S.R. Bommai vs Vs. Union of India*, 1994 in which the Supreme Court ruled that *"The exercise of power by the President under Article 356 (1) to issue proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried out in accordance with the provisions of the constitution."*[30] Since this judgement was delivered, the frequency of the Presidential takeover of a state administration has markedly declined. Furthermore, the Supreme Court has upheld its activist stance in cases which have followed since. For instance, in *Rameshwar Prasad v. Union of India* (2006)[31] the Supreme Court invalidated the Presidential dissolution of the Bihar Legislative Assembly a few months after the elections in 2005 on the advice of the governor who anticipated the formation of a non-Congress government.

In two very recent cases which emerged in a context in which the BJP had recaptured an absolute parliamentary majority in the 2014 general elections, the Supreme Court held on to its previous position in defensive of the states. A crisis emerged in Uttarakhand on 18 March 2016 when nine Congress Party leaders rebelled against Congress Chief Minister Rawat, and joined the opposition camp. The central government imposed President's rule just the day before the floor test was scheduled to ascertain whether the ruling party had a majority or not. When the matter reached the Uttarakhand High Court it quashed President's rule. Subsequently, the Supreme Court stayed the High Court decision and ordered a floor test disqualifying the nine members who had defected from the Congress Party. The Uttarakhand Government won a vote of confidence and therefore the government was reinstated.[32] In October 2016, the Supreme Court also restored Congress rule in Arunachal Pradesh and declared the Governor's decision to dismiss the government illegal. The apex court said that the Governor's decision to advance the state Assembly session by a month violates the Constitution. All five judges of the Supreme Court bench were unanimous in setting aside the Governor's orders. The case also dealt with the issue of whether the Governor had the power to advance the session of the Assembly without consulting the cabinet. The verdict restored the political status quo in the northeastern state as of December 15, 2015. The verdicts regarding imposition of President's rule in Arunachal and Uttarakhand hold special place because in both states the governments were reinstated. In two earlier cases, despite the court proclaiming that President's Rule was wrongly issued, the dismissed governments were not reinstated. In the case of Bommai, the previous government was not restored because of the passage of time, whereas fresh elections were notified in the Rameshwar Prasad's case.

In relation to the **amendment process of the Constitution**, Supreme Court jurisprudence has become similarly receptive to the rights of the states. The Supreme Court in *Keshavananda Bharati vs. State of Kerala* (1973) argued that the parliament has the power to amend any part of the Constitution including the fundamental Rights.[33] However, the judgment carried a caveat asserting that amendment is not an absolute power over the Constitution. Hence, it does not include the power to alter the "basic structure or features" of the Constitution of which the parliamentary federal form of government was a

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[28] State of Rajasthan vs Union of India 1977, Para 150, Supreme Court Cases (SCC), 3, 1977, 603.
[29] A.K. Roy vs. Union of India, All India Reporter (A.I.R.) 1982, Supreme Court, p.710.
[30] S.R. Bommai vs Union of India, 1994, All India Reporter (A.I.R), 1994 Supreme Court, p. 1918
[31] Ram Prasad v State of Punjab, AIR 1966 SC 1607
[32] See, Sharma, Betwa: 'Modi Governemnt to Withdraw President's Rule, Congress back in Uttarakhand, 11 Mat 2016, Huffington Post, http://www.huffingtonpost.in/2016/05/11/modi-government-to-withdraw-presidents-rule-congress-back-in-u/ Accessed on 2/10/16
[33] Kesavananda Bharati v State of Kerala (1973) 4 SCC 225

part. Since then, several rulings of the court, especially the *Minerva Mills vs. Union of India (*1980), *S.R. Bommai vs. Union of India* (1994), and *I.R. Coelho v. State of Tamil Nadu* ( 2007) reiterated this constitutional position, illustrating federalism, secularism, judicial review as important constituents of what has come to be known as the judicial theory of the "basic structure" of the Constitution.[34] This theory makes the constitutional courts in India the only courts in the world that review not only laws and executive orders but also constitutional amendments. The theory of the basic structure of the constitution was bolstered and consolidated in the I.R. Coelho (2007) verdict that fortified the one-vote majority of the Kesavananda Bharati bench by a unanimous ruling.

In relation to jurisdictional conflict between the Union and States, some – albeit no uniform-evolution towards a more favorable reading of state powers can be observed. Among the earliest cases decided include two suits related to the state of West Bengal. In *State of West Bengal vs. Union of India* (1963), the state challenged the constitutionality of the Coal Bearing Areas (Acquisition and Development) Act (1957) enacted by the Parliament because the ownership of the land was vested in the state government. The Supreme Court ruled that the state right in the matter was subject to the Union right and national interest under the Constitution.[35] Another important case related to the Parliament's competence to levy wealth tax on agricultural land since agriculture is a state subject. In the *Union of India V.H.S. Dhillon* (1972) the Supreme Court affirmed Parliament's power in the matter as a residuary subject.[36] However, in a subsequent case, *International Tourism Corporation Vs. State of Haryana* (1981) the Supreme Court decided not to lean too heavily on residuary power of the Parliament under entry 97 of the Union List, and thought it desirable to give a "broad and plentiful interpretation" to the entries in the state list so as not to "whittle down the power of the state" to the detriment of the federal principle. A few additional cases dealing especially with industries may be sampled here. In B. *Vishwanathiah vs. State of Karnataka* (1991) the Supreme Court ruled that the legislative power of the State regarding industries other than those falling under the Union List is exclusive. However, in the case of mines that figure in union as well as the State List in their different aspects, if their regulation and development by the union is declared by the Parliament to be of "public interest", the field is abstracted from legislative competence of the state legislature (*Baijnath vs. State of Bihar*, Supreme Court, 1970; *State of Tamil Nadu vs. Hind Stone*, Supreme Court, 1981; and *Naniyanayaka vs. State of Karnataka,* Karnataka High Court, 1990). [37] Laying down a broad principle of constitutional interpretation, the Supreme Court in *Ujagar Prints (II) vs. Union of India* (1989) observed: "*Entries in legislative lists, it may be recalled, are not sources of legislative power, but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression with respect of article 246 brings in the doctrine of pith and substance in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised, the test is whether the legislation looked at as a whole is substantially with respect to the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic."*[38]

In a more recent case, *State of West Bengal vs. Keshoram Industries Ltd*. (plus a group of similar cases) (2004), the Supreme Court examined the constitutional allocation of legislative *and* taxation powers between the Union and the States at great length. A five-judge bench chaired by Chief Justice V.N. Khare delivered a 4:1 verdict. The matter related to coal, tea, brick-field, and minor minerals in which entries in the State List are subject to the Union's power of regulation and development in the

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[34] Minerva Mills v Union of India (1980), 3 SCC 625; IR Coelho v State of Tamil Nadu (2007), 2 SCCC 1 (for Bommai judgement see footnote 21

[35] State of West Bengal v Union of India AIR 1963 SC 1241

[36] BHATIA, R., "Federalism in India and the Supreme Court Rulings" in DUA B.D. AND SINGH, M.P. eds., *Indian Federalism in the New Millenium,* Delhi: Manohar, 2003 (chapter 10).

[37] All cited in BAKSHI, P.M., *The Constitution of India. Selective Comments,* Delhi: Universal Law Publishing Co, 8th edition, 2007, p. 223

[38] ibid., p. 222.

public/national interest. Some important points of interpretation that emerged from this judgement are as follows: (1) "The various entries in the three lists [under Schedule VII of the constitution which specifies the union, state and concurrent list of legislative powers] are not 'powers' of legislation, but 'fields' of legislation….*taxation is regarded as a distinct matter and is separately set out* (emphasis in the source); (2) "The Union's power to regulate and control does not result in depriving the States of their power to levy tax or a fee within their legislative competence without trenching upon the field of regulation and control." (3) "Every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the state legislation and the union legislation. Unless the court forms an opinion that the extent of the alleged invasion by a State Legislature into the field of the Union Legislature is so great as would justify the view that in pith and substance the impugned tax is a tax within the domain of the Union Legislature, the levy of tax would not be liable to be struck down".[39]

The relatively favorable interpretation which the Supreme Court had adopted in relation to state rights in the cases referred to above does not apply however to **Treaty making powers and state reorganization.** In part, the hands of the Supreme Court judges are more tied in both instances. Under the text of the Indian constitution treaty-making power is a prerogative of the union executive. Similarly, article 3 of the Constitution authorizes the central parliament to redraw state boundaries unilaterally, without the prior consent of the affected state(s). With the rising role of the states in foreign (economic) policy and their increasing relevance as political communities in the pluralized party system of the 1990s, the Supreme Court may be expected to find ways in which a stronger input of the states in both processes could be found. Yet, thus far, the Supreme Court held on to its ruling in *Maganbhai Ishwarbahi vs Union of India* (1970), according to which "…if a treaty, agreement or convention with a foreign state deals with a subject within the competence of the state legislature, the [union] *Parliament alone has*, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at the international conference, association, or other body... thereby power is conferred upon the Parliament which it may not otherwise possess."[40] Similarly, on the issue of state reorganization, the Court has upheld its earlier ruling in the *Babulal Parate vs State of Bombay (1960*) case[41]. In this case, the Supreme Court was asked to address the validity of the Parliament which unilaterally amended a previously sanctioned bill by the Bombay state assembly to split the state in three parts: Maharashtra, Gujarat and the Union Territory of Bombay. Instead, the Union Parliament revoked its earlier proposal and decided to include Bombay within the State of Maharashtra. In justifying this decision, the Supreme Court argued that the states had no rights under the Indian constitution. The Supreme Court maintained the same line of argument in more recent cases. For instance, the Uttar Pradesh Reorganisation Act 2000, which led to the creation of Uttaranchal was challenged in *Pradeep Chaudhary Vs Union of India case*.[42] According to Article 3, the President must refer the Bill to create a new state to the parent legislature to solicit its views. The issue pertained to the Schedule to the referred Bill creating the new state of Uttaranchal including Haridwar city but not the entire Haridwar district. After the state legislature approved the bill, it was amended by Parliament to include the entire Hardiwar district.[43] The Petitioners sought a referral of the amended bill to the state legislature as its consent on the eventual state boundary adjudication was not properly sought. The Supreme Court dismissed this view and argued that 'substantive compliance with the proviso was sufficient and even in a case where substantive amendment is carried out, the amended Parliamentary need not be referred to the State Legislature again for obtaining its fresh views.'[44]

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[39] State of West Bengal v Keshoram Industries, 2004, 10, Supreme Court Cases, pp. 206-207
[40] Maganbhai Ishwarbai Patel v Union of India (1970), 3 SCC 752
[41] Babul Parate v State of Bombay AIR 1960 SC 51
[42] Pradeep Chaudhary v Union of India (2009) 12 SCC 248
[43] KRISHNASWAMY, S., 'Constitutional Federalism in the Indian Supreme Court' in TUSHNET, M. and KHOSLA, M., eds., *Unstable Constitutionalism. Law and Politics in South Asia,* New York: Cambridge University, p. 355-380, in particular p. 364
[44] ibid., p. 364

In sum, these cases demonstrate that the Supreme Court *has become* an effective guardian of federalism through its jurisprudence on President's Rule and the constitutional entrenchment of federalism as part of the basic structure. The same (though not uniformly) appears to hold true for those cases which dealt with centre-state conflicts on legislative competencies. One may assume that the political climate which had become more favorable to state rights since the 1990s enabled the Supreme to adopt more state-favorable positions in those recent rulings. In contrast, the Court has upheld a restrictive reading of the powers of the states in treaty-making powers, state reorganization and (of increasing relevance but beyond the purview of this paper) in matters of national security. The reemergence of a majority government headed by the Hindu nationalist Bharatiya Janata Party may put it under pressure to read some state rights more restrictively, especially where they could be interpreted as strengthening India as a pluralized and multiculturally diverse country and not just as a 'federal' state. This will require closer scrutiny of where the Court is headed in years to come, particularly in cases relating to federal asymmetry, national identity and citizenship.