Policing the federation

Policing the Federation: the Supreme Court and Judicial Federalism in India

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Introduction

This article assesses the extent to which the Indian Supreme Court has been a safeguard of federalism. Despite the vastness of its territory and the diversity of its population, the Indian Constituent Assembly (hereafter CA) adopted a constitution which emphasized the territorial integrity of the Indian state and established a powerful centre (Austin, 1966)[i]. Partition (during which approximately a million citizens were killed and about ten million were displaced) and the Congress Party ideology, which considered a strong centre essential for the modernization of the country, generated a 'union', not a 'federal' state (Talbot and Singh, 2009). This 'union' has been marked by inbuilt flexibility with a constitution which, according to Dr Ambedkar, could be read as either '*federal'* or '*unitary*' 'according to the requirements of time and circumstances' (Raju, 1991; Sáez, 2002).

In interpreting the constitution, an important role was potentially set aside for the judiciary (Tewari and Saxena, 2017). Indeed, Supreme or Constitutional Courts can shape a federal system through their interpretation of the distribution of powers or other elements which affect the structure of the federal system, for instance the representation of

constituent units in the federal state (Aroney and Kincaid, 2017: 8). In this sense, Courts also become 'political actors.'

In attempting to assess the relationship between federalism and the Indian Supreme Court we critically examine a number of assumptions which derive from the comparative literature on Constitutional or Supreme Courts in federal systems. These assumptions can be summarized as the 'political supremacy assumption', the 'judicial safeguard assumption' and the 'judicial doctrine assumption'. The political supremacy assumption emphasizes the extent to which Courts are pliable to the wishes of political forces controlling the executive and legislative branches of the central government. The judicial safeguard assumption starts from the opposite expectation: Courts defend the States *more* when the central government has few inbuilt mechanisms to express the voice of the States in the process of executive and legislative decision-making; either through the operation of a second chamber or other (in)formal channels of intergovernmental collaboration, such as the party system. Finally, the judicial doctrine assumption starts from the premise that Supreme Court jurisprudence is influenced primarily by endogenous factors, for instance the weight of previous case-law; or more generally the significance attributed to legal sources and interpretation (Baier, 2011; Popelier and Bielen, 2019).

In what follows we first review the theoretical assumptions on which this paper is built, referencing the comparative literature on Courts in federal states. Next, we translate these assumptions to the Indian context. Subsequently we assess their validity on the basis of a sample of 40 Supreme Court rulings since 1950. Overall, we find mixed evidence for the political supremacy and judicial safeguard assumptions, but considerable support for the judicial doctrine assumption. However, there are important variations which emerge

when dissecting the jurisprudence of the Court along the four dimensions which we have identified for comparative research. The conclusion summarizes our main findings, acknowledges the limitations of this study, and identifies avenues for future research.

Courts in Federal States: the weakest safeguard of federalism?

What role do Supreme or Constitutional Courts play in supervising and potentially influencing the constitutional distribution of authority between the national and subnational levels of government? The conflicting views on this are expressed by two statements of leading constitutional thinkers of their age. While Albert V. Dicey once argued that 'federalism … means legalism- the predominance of the judiciary in the Constitution', Alexander Hamilton, in Federalist 78, was of the view that even in a federal state, the judiciary remains 'the least dangerous branch' of government with 'no influence over either the sword or the purse' (both citations are taken from Palermo and Kössler, 2017: 266-67). These different expectations are also borne out by varying evidence of how Courts performed across a range of federations and sometimes generated different interpretations of identical judgements (for instance on the role of the Canadian Supreme Court in the *Quebec Secession Reference* case by Brouillet (2017), Roach (2011) and Erk (2011).

Supreme Court jurisprudence is affected by wider strategic considerations as well as by factors that relate judgements to the ideological attitudes or territorial origins of judges (Popelier and Bielen, 2019). We are not concerned with the latter here (but see our conclusion) and focus primarily on strategic motives and endogenous factors instead.

Strategic considerations anticipate the wider resonance of judgements and how they will be perceived by the broader political class and citizens. Supreme Court justices never operate in a political, ideological or popular vacuum. They are not just concerned with the 'inner structural coherence' of their judgments, but also with the 'way in which law will be rendered legitimate in society' (Choudhry, Khosla and Mehta, 2016: 11). A focus on strategic considerations allows us to examine two assumptions in more detail, which building on Popelier (2016), we can summarise as the *political supremacy* and *judicial safeguard* assumption.

The *political supremacy* assumption posits that Courts are generally deferential to the executive and legislative branches of government. They need broad-based legitimacy on the ground for their judgements to carry weight and executive support to implement them (law enforcement). In broad terms, this assumption suggests that Supreme Courts rarely contradict political processes for which there appears to be widespread support on the ground. In the context of federalism cases, the political supremacy thesis assumes that where the political context favors centralization, Courts will adopt a centralizing interpretation. Conversely, in a 'State favourable' political context, for instance, when faced with a highly decentralized party system, the Supreme Court may well 'read' the constitution in ways which expand subnational autonomy.

In contrast, the *judicial safeguard* assumption starts from the premise that Constitutional Courts seek to defend the federal attributes of the political system as a whole. Therefore, they are more likely to interpret the constitution in a State-favourable way when they view the capacity of the States to influence politics at the centre as *weak*. Federations usually provide 'shared rule' mechanisms; enabling subnational units to

protect their interests collectively or individually (Marks, Hooghle and Schakel, 2008; Bolleyer, 2009). Such mechanisms may take the form of a second chamber - if they possess sufficient powers and their composition provides a clear link with the sub-state level (Swenden, 2010), - or of intergovernmental relations involving senior members of the federal and subnational executives, civil servants or legislators. In addition, States can strengthen their political safeguards when they operate in a highly regionalized party system or when polity-wide parties have strongly decentralized party organizational structures which influence party and government decision-making at the centre.

Unlike the political supremacy assumption, the judicial safeguard assumption argues that Constitutional or Supreme Courts will defend federalism where political safeguards (shared rule mechanisms) are seen to fall short. This may be a systemic feature of certain federal states (for instance those federal states which provide *very weak* shared rule mechanisms) or a periodic feature (political safeguards may be stronger in the context of a regionalized party system than under *one-party dominance*).

However, jurisprudence is not just affected by external political factors alone. Judges also interpret the constitution or other legal sources (previous case law or original intent, in the Indian case, based on an analysis of the CA debates). Some constitutions leave more scope for interpretation than others, for instance, on disputes relating to the distribution of competencies between levels of government. While the US constitution is notoriously short in this regard (enumerating the powers of Congress only in broad terms), the German and Indian constitutions are much more detailed. As Popelier and Bielen (2019: 590) assert: 'judges are trained to perform legal analyses, their decisions are scrutinized by legal communities and the legitimacy of the court depends on the legal

correctness of its reasoning and the predictability of its case law… reliance on legal-technical expertise helps courts shape their image as neutral arbitrators rather than political actors.' Although we are political scientists, not lawyers, we also consider the extent to which Supreme Court judges base their judgement on legal doctrine, case-law and original intent.

Application to India and Case Selection

To assess the *political supremacy thesis*, we must take cognizance of the Indian party system and the broader support for State agency in the economy and society. Until the 1980s, India had a one-party dominant system and a state-led command economy, both of which supported a centralized reading of the constitution. The demise of one-party government since 1989, and its replacement until 2014 with minority and/or multi-party coalition governments turned Indian political practice decisively more 'federal.' (Saxena and Singh, 2016; Schakel and Swenden, 2018). Central coalition governments relied on the support of small regional parties whose leaders were more reluctant to encroach upon State autonomy. The States also benefited from a transition to a more liberalized economy (Sinha, 2005)

However, the 'federalization' of India 'in practice' occurred *despite* a lack of profound constitutional change (Singh, 2019). Coalition-government (1996-2014) brought together a group of parties which *as a whole* were more supportive of decentralization, but also complicated the formation of large enough parliamentary majorities to amend the constitution in a decentralizing fashion. For one, the key nodes within each of the coalition

set-ups was made up of politicians representing the Congress Party or the BJP (Bharatiya Janata Party), parties with a decisively more 'national' outlook. In turn, State or regional parties often had conflicting interests, given the starkly heterogeneous needs of the States, territories or constituents with which they have been linked (Thakurta and Raghuraman, 2007; Sharma, 2017). As such, the dependence of political actors on the Court to sanction a 'decentralizing' interpretation of the constitution can be expected to have increased during this period, heightening the relevance of judicial review. Based on the political context, we can formulate the following assumption:

Assumption 1: During the demise of one-party dominance and the rise of State-based parties (1989-2014) the Supreme Court of India sided *increasingly* with the States, reflecting the growing support for State-based parties and the ascendancy of the States in politics, economics and society. In contrast, during one-party dominance (1952-1989; 2014-present) the Court has sided more often with the Centre.

To assess the *judicial safeguards assumption* we need to understand the strength of structural and political safeguards (Bednar, 2008) in the Indian multi-level system first. *Structurally*, the States have relatively weak safeguards in Indian federalism. The Rajya Sabha (federal second chamber) is more or less composed on the basis of proportionate State representation, similar to the Lok Sabha (federal lower house), and its powers are inferior to the latter. Intergovernmental forums are relatively weak, gather infrequently and are usually convened by the central government. They do not render binding decisions and except for the Inter-State Council lack statutory footing. *Party political* safeguards, as set

out above, strengthened with the advent of coalition government (1996-2014), although both the BJP and the Congress Party, are relatively centralized parties with a 'centric' view and with limited input of State party organs in candidate and leadership selection and the making of national party policy (Farooqui and Sridharan, 2014). Therefore, we can derive the following two assumptions from the judicial safeguard theory:

Assumption 2a: Given the weakness of structural safeguards, the Supreme Court is more likely to emerge as an advocate of the States, offsetting the relative weakness of their voice in the political process;

Assumption 2b: With the pluralization of the party system between 1989 and 2014, the Supreme Court has adopted a *less* State-favourable reading of the constitution compared with the period before because the States strengthened their political safeguards in this period (thus in contradiction with assumption 1 above).

Finally, to assess the *judicial doctrine* assumption we engage with legal reasoning underpinning a particular judgement and the extent to which it invokes certain principles which are rooted in (comparative) legal practice, common law principles or techniques and engages with 'origin of intent' or previous case-law. Importantly, judges here primarily rely on legal precedent, rather than on how their judgements relate to the wider political context of the day. For that reason, unlike assumptions 1 and 2, there is no clear anticipated direction of the judgements, other than what can reasonably be expected from a legal

interpretation and taking into consideration the overall centralized bias built into the text of the Indian constitution.

Assumption 3: On federalism disputes, Supreme Court justices are influenced less by the political context of the day than by principles of legal reasoning, judicial doctrine and original intent.

We examine the validity of these assumptions on the basis of a qualitative approach. This enables us to relate a sample of 40 judgements to each of the three assumptions on the basis of their outcome (pro-State, pro-centre or balanced), *and* of their judicial and political reasoning. The number of judgements is not exhaustive. Therefore, we acknowledge that our analysis cannot provide solid proof of our assumptions, but merely indications or suggestions. A statistical analysis based on a much larger sample could do so in future research. That said, a large N-analysis would leave less scope to engage with the (counter)arguments which underpin the judgements of the justices. Furthermore, our sample contains the most relevant disputes from Indian case law and the federalism literature (Choudhry, Khosla and Mehta, 2016b). They are relevant either because they have emerged in response to politically contentious issues (President's Rule, asymmetry) or because they have established a certain doctrine in relation to more 'mundane' federalism disputes, for instance on the distribution of legislative competencies between the centre and the States.

For analytical purposes, we have divided these judgements into four categories (1) 'Emergency powers', more in particular the suspension of 'State autonomy' through the

application of so-called President's Rule (Art 356) and the reading of federalism into the 'basic structure' of the Indian constitution; (2) politically less salient disputes, linked to the distribution of legislative competencies between the centre and the States, (3), disputes related to asymmetric federalism (4) the representation of the States (shared rule), in the processes of State reorganization, the making and implementation of treaties and the procedure for appointing members of the Rajya Sabha.

Per category we produce a list of cases and the full annotation thereof in a corresponding table. Subsequent in-text citations only refer to the page of the judgement as per the official annotation in the corresponding table. Each judgement is identified based on how State-favourable, centre-favourable or balanced it is (starting from the status quo) and is linked to the wider party-political context of the day (centralizing-decentralizing/one party dominance v coalition or minority government at the centre).[ii]

The role of the Indian Supreme Court in 'federal' cases: Evidence

President's Rule and reading Federalism into the Basic Structure

Article 356, or President's Rule (PR) is an Emergency Provision in the Indian constitution, which enables the 'President' as the constitutional head of state (on receipt of a report from the Governor- i.e. the constitutional head of *a* State, appointed by the President) to assume to himself [sic] all or any functions of the Government of the State' in case of a failure of the constitutional machinery in the States. The provision was meant to protect 'responsible government' at the State level, acknowledging that at the time of

independence 'suffrage is unknown in certain [especially princely] States… [and therefore that] in the interest of the sound and healthy functioning of the Constitution itself, it is necessary that there should be some check from the Centre so that people might realise their responsibility and work responsible government properly' (Krishnaswami Ayyar, CAD, 3 August 1949: CAD 9:151). There was a general expectation that PR would be used sparingly. In reality, during the 1970s and 1980s, PR was imposed recurrently, especially on States led by central opposition parties (Adeney, 2007; Swenden, 2016).

Overall, the Supreme Court's stance on PR provides support for the political supremacy thesis (see Table 1). The Court sided with the Centre during most of the one-party dominant regime and adopted a more State-favourable interpretation during the coalition era. However, despite the return of one-party dominance in 2014, the Court largely held onto its State-favourable reading in more recent judgements.

Table 1 About Here

During one-party dominance (1952-1989) the Supreme Court followed a hands-off policy in disputes relating to PR, considering this a *political* question left to the union executive. During the brief period in which the Janata Party displaced the Congress Party from power at the centre (1977-79), it threatened with a proclamation of emergency against six Congress-ruled states unless they resigned. In a legal challenge, the Supreme Court upheld the centre's right to impose PR. In *State of Rajasthan v Union of India* (1977), Justices P.N. Bhagwati and A.C. Gupta stated:

> "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… the court would thereby assume 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. In fact, it would not be possible for the court to undertake this exercise, apart from total lack of jurisdiction to do so." (603)

A slow change in this position emerged in *A.K. Roy v Union of India,* (1982). However, this was in response to a constitutional amendment in 1978 as a result of which the decision by the executive to impose President's Rule was no longer final and conclusive. Instead, *unless* approved by Parliament, a state of emergency would lapse after two months. Furthermore, parliamentary approval was made contingent on 1) the presence of a national emergency under article 352 (i.e. an emergency which threatens the security of India or a part thereof), and 2) a certification by the Election Commission (a statutory body supervising the conduct of elections) that under the prevailing conditions State assembly elections in the affected State cannot be held. The amendment also enabled the state of emergency to be extended for a further six months subject to Parliamentary approval.

The most significant stap in the judicial policing of PR was delivered in *S.R. Bommai v Union of India*, 1994. By then Congress led a minority government and the party

system witnessed a sharp rise in the support for regionalist parties and the BJP. Justice P.B. Sawant (also on behalf of Justice Kuldeep Singh and Justice S.R. Pandiyan) observed

> "The exercise of power by the President under Article 356 (1) to issue a proclamation is subject to 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." (p.1931)

Justice P.B. Jeevan Reddy (also speaking on behalf Justice S.C. Aggarwal) observed:

> "The power conferred by article 356 upon the President is a conditional power. It is not an absolute power. The existence of material, which may comprise of or include the report of the governor is a pre-condition. The satisfaction must be formed on relevant material" (p.1939-40)

The Bommai judgement marks a sea change in the judicial interpretation of Article 356. Since its delivery, the frequency of PR has markedly declined. Significantly, Bommai also incorporated 'federalism' into the 'basic structure' of the Indian constitution. The doctrine of a 'basic structure' was developed in *Keshavananda Bharati v. State of Kerala* (1973)[iii]. It posits that Parliament cannot amend the "basic structure or features" (including federalism) of the Constitution. Since then, several rulings of the court reaffirmed this

position, especially *Minerva Mills v. Union of India (*1980)[iv], *S.R. Bommai v Union of India* (1994), *I.R. Coelho v State of Tamil Nadu*[v] (2007). Significantly after *Bommai*, the Supreme Court held on to restrictive reading of President's Rule, for instance in *Rameshwar Prasad v Union of India* (2006). This activist stance of the Supreme Court has continued with the return of one-party dominance in 2014, thus contradicting the political supremacy assumption.

For instance, shortly after nine Congress-leaders in Uttarakhand joined the opposition in March 2016, the State Governor invoked President's Rule *before* the Congress-led state government could prove its majority in the State Assembly. This hasty imposition of President's Rule was first quashed by the Uttarakhand High Court; after which the Supreme Court disqualified the nine defecting members and ordered a floor test (*Union of India v Harish Chandra Singh Rawat* 2016). The Congress-led State government was reinstated as a result.

About half a year later, the Supreme Court also dismissed the imposition of President's Rule in Arunachal Pradesh, as in Uttarakhand, forcing the reinstatement of an illegally sacked Congress-led government. The Court argued that the Governor had acted unconstitutionally by advancing a session of the State Assembly without consulting the state cabinet first (Saxena and Swenden, 2017: 7). It affirmed that a Governor exercising discretionary powers to summon or dissolve State Assembly sessions without the support of the Chief Minister and his Cabinet is unconstitutional (*Naban Rebia & Bamang Felix v Deputy Speaker* 2016).

By reinstating two unconstitutionally ousted State governments, the Supreme Court went further than in previous rulings on Article 365. In the case of *Bommai*, sacked State

governments were not reinstated due to lapse of time, whereas in *Rameshwar Prasad* the Court ordered new State assembly elections. It is difficult to see the Arunachal and Uttarakhand cases as sufficient evidence for the judicial safeguard thesis, i.e. the Court standing up for the States in a politically more hostile environment for federalism since the return of one-party dominance. Rather, the Court appears to have built on *Bommai,* its reading of federalism into the basic doctrine, and dominant interpretations on the role of the Governor in this context.

However, it is also noticeable that the Supreme Court in 2017 has *not* interfered in the process of State government formation in Goa and Manipur, even though the Governors of both States broke with a convention of first inviting the largest party in terms of seat share after the elections (in both cases Congress) to form the State government (Dhavan, 2017). According to Dhavan, the then Supreme Court Chief Justice is alleged to have said that 'rather than relying on the Supreme Court and asking it to put itself into the position of the Governor, the Congress and its supporters should have sat on a *dharna'* (sit-in-protest; ibid.)

Centre-State Disputes on Legislative Competence

Articles 245-300A of the Indian constitution specify the relations between the Union and the States. The distribution of legislative competencies is listed in Articles 245-6, and the Seventh Schedule of the Constitution. Unlike most federal constitutions, the Indian constitution specifies three lists of legislative powers: List I, the longest of the three contains 97 exclusive union legislative powers, including the power to legislate in non-

constitutionally allocated or residual powers (also specified in Article 248); List II (the second longest) enumerates 66 exclusive State legislative powers and List III specifies 47 concurrent legislative powers. During the CA debates, the preponderance of the centre in legislative and fiscal terms was justified by a desire to modernize Indian politics, the economy and society at high speed (Khilnani, 2004; Thiruvengadam, 2017). In time, the Supreme Court was asked to pronounce judgement in a number of Centre-State disputes on the distribution of legislative competence.

Table 2 About Here

Overall, the political supremacy and judicial safeguard theories cannot adequately explain the direction of the Supreme Court judgements in these cases (see Table 2). Of the 10 selected judgements delivered during the one-party dominant and centralizing phase, 5 sided with the centre (as expected by the political supremacy thesis) and 5 with the States. Of 8 selected judgements which the Supreme Court delivered in the era of coalition-government (and economic liberalization), 5 judgements sided with the centre and only 3 with the States. In these matters the Supreme Court appears to have built its reasoning more on judicial doctrine linked to 'pith and substance', 'national public interest', or its interpretation of residual and concurrent powers.

A number of cases addressed what needs to happen when a law relates to entries in more than one list. In this case, the Court has been guided by 'pith and substance' (i.e. what is the substantive purpose of the law?).[vi] In *FN Balsara* (1951), the Court upheld a Bombay prohibition legislative act, arguing that its impact on the import of liquor (a central

competence in list I) is nonetheless incidental to the act's overall intent (Khosla, 2012: 61). However, when faced with a dispute of competence on the medium (language of instruction) in State universities in *Gujarat University v Krishna Raganath Mudholkar* (1963) (entry 11 of List II), the Court argued that "to the extent of overlapping, the power conferred to the centre by Item 66 List I [on the coordination and determination of standards in institutions for higher education or research and scientific and technical institutions] must prevail" (p 22). Similarly, in *Federation of Hotel and Restaurant Association v Union of India* (1989), the Supreme Court sanctioned the centre's right to levy a tax on hotel expenditure, which it did not consider 'in pith and substance' a luxury tax under Entry 62 list II (a State power) as 'sums expended at hotels may be taxed in their expenditure aspect by the Union and in their luxury aspect by the State' (Niranjan, 2016: 475). Likewise, in *State of Orissa v. Mahanadi Coalfields* (1996), the Supreme Court assessed the State's tax on mineral and coal bearing lands in substance as a tax on mineral rights and struck it down as it was pre-empted by a previous act of Parliament.

However, in *State of West Bengal v Keshoram Industries* (2004), the Supreme Court effectively overturned the Orissa ruling. In justifying its verdict, the Supreme Court mentioned the need to interpret the flexible provisions of the Constitution in a way which leans towards 'the weaker or more needy'. Since the 'Centre consumes the lion's share of revenue… the interpretation of entries can afford to strike a balance… Any conscious whittling down of the powers of the State can be guarded against by the Courts. (p.50, direct quotation from judgement). The latter judgement is in tune with the political and economic context at the time, which favoured decentralization; at the same time, in this

instance, it also invokes the role of the Supreme Court as a judicial safeguard protecting the powers of the States against an already relatively centralized constitution.

In a number of cases the Supreme Court assessed the '*broader national or public interest*' to support central legislative action. In *State of West Bengal vs. Union of India* (1963), West Bengal challenged the constitutionality of the central Coal Bearing Areas (Acquisition and Development) Act (1957) because ownership of land is placed in the State legislative list (list II). The Supreme Court dismissed this view and ruled the matter subject to the Union right and national interest under the Constitution (Saxena and Swenden 2017: 8). The Court also elaborated on the federal distribution of competencies which weighted heavily in favour of (central) parliamentary sovereignty (Singh, 2016): 'to assume the absolute sovereignty of individual States', so the Court argued, was 'to envisage a Constitutional scheme which does not exist in law or in practice' (p. 36, judgement)

In contrast, during the coalition era, the Court reached the opposite conclusion in *State of West Bengal vs. Keshoram Industries Ltd*. (2004). Although the State legislative powers in coal, tea, brick-field and minor minerals are subject to the Union's power and regulation and development in the public/national interest, the Court read the latter powers in a restrictive way (Saxena and Swenden 2017: 8). In a judgement which involved a detailed examination of the constitutional allocation of legislative and taxation powers between the Union and the States, it argued that

> "The Union's power to regulate and control does not result in depriving the States of their power to levy tax or fee within their legislative competence without trenching upon the field of regulation and control."

> [Furthermore] "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".

In a number of cases, the Supreme Court gave a restrictive or broader reading to the *residual power clause*, with a consequence of narrowing or broadening the ambit of federal legislative powers respectively. In the *Union of India v. H.S. Dhillon* (1972) the Supreme Court sanctioned the Union's power to levy a wealth tax on agricultural land (despite agriculture being a State subject), partly on the grounds that it is compatible with entries 86 and 97 in List I (Centre list), but also because of a wide reading of Article 248, which places residual powers with the centre. However, in *International Tourism Corporation v. State of Haryana* (1981: 326) the Supreme Court, despite the continued presence of one-party dominance, gave 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. Yet, 7 years later, the Supreme Court did not strike down the Armed Forces (Special Powers) Act 1958 in *Naga People's Movement of Human Rights v Union of India* (1988), on the grounds that 'in the absence of a specific entry in list II, Parliament would always have legislative competence to pass a law with its residuary powers' even without specific entries in List I and III. In *Kartar Singh v State of Punjab* (1994), the Supreme Court upheld the Terrorist and Disruptive Activities (Prevention) Act invoking

Articles 248 and Entry 97 in list I, obliviating the need for a closer test to consider whether the legislation falls in list I or III. This echoes Ujjwal Singh's assertion in this special issue that the Indian Supreme Court has sanctioned a predominant role of the centre on issues related to securitization, despite the listing of public order and policing as State subjects.

In areas of concurrency (i.e. both levels have a right to legislate, but in case of overlap Parliament prevails), the Supreme Court in *Tika Ramji v State of Uttar Pradesh* (1956) upheld a State law on the grounds that the mere *possibility* that Parliament could, legislate in the same matter is no sufficient reason for a State law to be made '*repugnant.*' A federal law must exist in fact (Niranjan 2016: 477). Yet, Khosla observes that based on early case law, direct conflict was not always necessary for a State law to be declared repugnant (simply the different wording of a federal and State law, but leading to similar outcomes, was sufficient ground for repugnancy). Only later, the Supreme Court asserted that repugnancy can only arise where *direct* conflict is obvious (Khosla 2012: 50). The Supreme Court seemed to lower the bar for repugnancy yet again though in *Mar Appraem Kuri* (2012), when it declared a Kerala act repugnant on the grounds that it overlapped with a 1982 Parliamentary Act which was *not* in force; thus overturning *Tika Ramji* and strengthening the hand of the centre.

Finally, in two cases the Court considered what happened to agreements between the Centre and a State, should the latter be split or reorganized (e.g. merged). In *Mullaperiyar* (2006), the Court argued that such agreements remained in force and 'cannot be questioned on the ground of legislative competence with reference to Lists of the Seventh Schedule' (p21). However, in *State of Himachal* (2011), the Court argued that notwithstanding the absence of such a right in the Punjab Reorganization Act (which trifurcated Punjab into

Punjab, Himachal Pradesh and Haryana), Himachal Pradesh could claim a set share of power generated by hydro-electric projects in the State, since under Article 3 (State reorganization), 'Parliament cannot take away… powers .. in respect of matters enumerated in List II (State list) of the Seventh Schedule' (93; also Singh, 2016: 459-60).

Jurisdictional Conflicts between the Union and the States on Asymmetric Federalism

Federalism in India is often interpreted as a mechanism to manage the country's internal diversity, particularly where social cleavages (such as language or tribe) are territorial in nature (Adeney, 2007; Adeney and Bhattacharyya, 2018). To accommodate (especially tribal) diversity, the Indian constitution lists special provisions for the North-East (Schedule VI) that were frequently carried forward from colonial times (Baruah, 2020). Asymmetric arrangements have also been in place in relation to Jammu and Kashmir, Goa and Sikkim (given their late admission to the union) and to tribal areas in parts of India other than the North-East (Schedule V).

Table 3 specifies a number of cases that have dealt with the policing of asymmetric arrangements in relation to other constitutional rights (Tillin, 2016 for an extensive overview). In their judgements, the justices also recurrently reflect on their understanding of the Indian federal system as a whole. Overall, the Supreme Court has been relatively permissive of asymmetry, even where some arrangements appeared to contradict fundamental rights (such as equality). There are no discernible differences between the period of one-party dominance under Congress rule and coalition government, suggesting that neither the political supremacy, nor the judicial safeguard thesis hold explanatory

value. However, jurisprudence with regard to Jammu and Kashmir (JK) has been far less supportive of that State's special status (relative to the North-East), well before the centre's decision on 5 August 2019 to bifurcate and demote the State into two Union Territories.

Table 3 About Here

A number of judgments sanction asymmetric constitutional provisions, especially in relation to Schedules V and VI. *Mangal Singh* (1970) endorsed inter as well as intra-State asymmetries so long as they are in conformity with democratic norms and a separation of powers doctrine. Hence, States which are formed or admitted to the union must all have a separable executive, legislature and executive, but beyond that may vary in their internal organization. In *State of Sikkim* (1984), the Supreme Court sanctioned the continuation of laws predating its admission to the Union, even where they could be seen to be in conflict with fundamental rights, notwithstanding article 13 of the constitution (which declares such deviations impermissible; Tillin, 2016: 557).

Relatedly, in *R C Poudyal v Union of India* (1994), the Court argued that legislative reservations for certain groups need not necessarily be proportionate as per article 332 (3) of the Indian Constitution. 'A strict application and enforcement of the principle one person, one vote' is not necessary (Khosla, 2012: 79). So long as the terms and conditions [under which Sikkim joined the Union] do not 'establish a form of government alien to and fundamentally different from those the Constitution envisages […] there is no constitutional imperative that … the new State should, in all respects, be the same as the other States of the Union.' (p.2). In a sense, the Supreme Court endorsed a form of

asymmetric federalism in conformity with Article 2 of the Constitution according to which Parliament can admit new States into the union 'on terms and conditions as it sees fit'. A similar reasoning underpinned the Court's judgement in *Ewalangki-E-Rymbai* (2006) which interpreted Sixth Schedule provisions as a 'self-contained code of governance of the tribal areas of Assam' separate from 'provisions which apply to other constituent States of the Union' (p.5 of judgement, as cited in Tillin 2016: 552). This seemed to contradict the Court's ruling in *Pu Myllai Hlycho* (2005) though, just one year earlier, in which the Court denounced legal pluralism and stressed the need for the Constitution to be considered as a single legal order.

In contrast to the mostly permissive attitude in relation to asymmetries linked to Schedules V and VI, the Court has sanctioned the gradual erosion of JK's special provisions linked to Articles 370/35A (Nair, 2019). This chimes with the political supremacy thesis in that successive central governments, for security or ideological reasons, have sought to scale back the extensive self-rule arrangements that were offered to the formerly princely State of JK when it acceded to the Indian union. The State joined by means of an Instrument of Accession which gave the centre powers in relation to external affairs, defence and communication only. This was accompanied by a declaration by the then Prime Minister, Jawaharlal Nehru to hold a plebiscite to ratify the constitution when possible. The special circumstances under which the State joined the union was reflected in a draft Article 306A during the Indian CA, which eventually became Article 370. Initially only Articles 1 and 370 of the Constitution were applicable to the State. However, Article 370 also specified its 'temporary provision' and contained clauses enabling the President of India, *with the concurrence of the State Government* to extend

the power of Parliament to matters in the union and concurrent list, or, more generally to other provisions of the Constitution; thus, potentially bringing the State in line with the other States. The concurrence of the State government was to be understood as the JK Constituent Assembly (JK CA) for such actions undertaken when it was still in operation, as was the case for a set of Presidential Orders in 1950 and 1954. However, numerous such orders (frequently designated as amendments to the 1954 Order) continued to be issued after the dissolution of the JK CA in November 1956 and were challenged in the Supreme Court.

In *Prem Nath Kaul* (1959), the Court first specified that the 'temporary' nature of Article 370 is confined to those clauses requiring the consent of the JK CA. Furthermore, as the JK CA is the final arbiter for the purpose of those clauses extending Parliamentary powers to the State, further additions to such powers *without* its recommendations (following its dissolution) are invalid (Nair 2019: 261). However, in *Sampath Prakesh* (1970) the Court overturned *Prem Nath Kaul* insofar as it declared the entirety of Article 370 to be in operation, even after the dissolution of the JK CA. Hence, the practice of Presidential Orders post-1956 was not contested. The fact that the Supreme Court declared the article in usage did not necessarily amount to its permanence though (the latter, according to Nair (269), would imply that the Court includes the Article as part of the Basic Structure, a position which the Supreme Court has not defended). In *Mohd Maqbook Damnoo* (1972) the Supreme Court sanctioned the right of the Governor (a central appointee) to substitute for the State Government's concurrence to proposed amendments under Article 370. This led Tillin (2016: 548) to assert that 'the Court has helped to strengthen the role of the President as guardian of the spirit of autonomy, rather than acting

itself to project JK's differential autonomy from political intervention on the basis of its distinctive constitutional settlement.' Furthermore, Khosla (2012: 76) argued that the ability of the President and Governor to act without the concurrent consent of the JK CA or the State's legislative assembly has 'given the Union powers vis-à-vis the State of Jammu and Kashmir that it does not ordinarily have with respect to the States'. Indeed, changing the federal balance of powers between the Centre and the States (as per Schedule VII or other provisions) is subject to constitutional amendment, implying the consent of special majorities in both houses of Parliament and a majority of State legislatures.

The decision in August 2019 by the BJP majority government to honour a long-standing campaign pledge and abrogate key sections of Article 370 as well as bifurcate the State into two Union territories is currently subject to a judicial challenge in the Supreme Court. To this effect the government issued two Presidential Orders, the first of which amended Article 367 as a result of which 'Constituent Assembly' in article 370 was to be read as State legislative assembly. Given that at the time of the decision, JK was placed under President's Rule, Parliament then could act in lieu of the State legislative assembly and agreed to making Article 370 inoperative. Despite the wide-ranging ramifications, the Supreme Court did not consider the matter urgent. A five-judge bench of the Supreme Court is held with the petitions challenging the case, but at the time of writing (December 2020) has not yet pronounced judgement. In March 2020, Attorney General KK Venugopal argued that 'the abrogation of provisions of Article 370 has now become a 'fait accompli' leaving sole option to accept the change' (cited in Mathur, 2020).

The Supreme Court and Shared rule in State Reorganization, Treaty-Making Powers and Senate Nominations

The demotion and bifurcation of JK is a recent case of 'State reorganization'. Yet, India went through State reorganizations in the 1950s and 1960s which made State boundaries more congruent with regionally dominant languages (other than Hindi). This was followed by a remapping of the North-East (principally by carving States out of Assam) and more recently, by the creation of four new States from the Hindi-speaking States of Bihar, Uttar Pradesh and Madhya Pradesh (2000) and the Telugu-speaking state of Andhra Pradesh (2014). Article 3 of the Indian constitution authorizes the Indian Parliament to engage in State reorganisation *unilaterally*, a feature which sets the Indian practice apart from most federations (Tillin, 2015). This raises a wider question about 'shared rule', i.e. the ability of the States to inform or participate in central policymaking on issues affecting their autonomy. Apart from State reorganization, we discuss this issue further in the context of Treaty reform (given that many international treaties touch upon the competencies of the States) and of the Rajya Sabha and its role as a federal second chamber. As Table 4 below clarifies, on each of these issues the Court has largely sided with the centre (5 out of six cases), irrespective of the time period under consideration. Although this may reflect the Court's willingness to accept the prerogative of political forces (Parliament and executive), the period of coalition-government at the centre did not make the Court more supportive of State influence. On the other hand, we should acknowledge that the constitutional text in these matters itself leaves limited room for expanding the role of the States.

Table 4 About Here

On the issue of State reorganization, the Supreme Court has held on to the view that while Article 3 provides for affected State assemblies to *express* their views on a proposed bill on State reorganization, the Parliament must not abide by that view. *In Babulal Parate v State of Bombay (1960*), the Supreme Court did not invalidate Parliament's unilateral amendment of an earlier sanctioned bill by the Bombay State assembly to trifurcate the State in Maharashtra, Gujarat and the Union Territory of Bombay. Instead, the Union Parliament included Bombay within the State of Maharashtra. In justifying this decision, the Supreme Court argued that the States had no constitutional rights in this matter (Krishnaswamy 2015: 365).

The Supreme Court upheld the same view in more recent cases. For instance, *Pradeep Chaudhary v. Union of India* (2009) concerned the Uttar Pradesh Reorganisation Act 2000, which led to the creation of Uttarakhand (then Uttaranchal). The State legislature had proposed including Haridwar city in the new State but not the entire district of Haridwar. However, Parliament subsequently amended the bill to include the entire district. (Krishnaswamy, 2015: 364). The Supreme Court dismissed the view that Parliament should have referred the amended bill back to the State legislature on the grounds that its views on this amendment had not been sought. Instead, the Court argued that 'substantive compliance with the proviso was sufficient and even in a case where substantive amendment is carried out, the amended Parliamentary Bill need not be referred to the State Legislature again for obtaining its fresh views' (ibid.: 364). The ability to set aside the

views of a State more recently became apparent with the formation of Telangana (2014), even though the move was heavily contested in the Andhra Pradesh legislative assembly.

State Reorganization (unless accompanied by up- or downgrading union territories to State levels) does not affect the material competencies which a State controls, but simply the territorial reach (boundaries) of its public policies. However, said competencies may be affected when the centre acts in central policy areas which generate important externalities. A good example of this is Article 73 (according to which executive Power extends to matters on which the Parliament has power to make laws) in relation to foreign policy (entries 10,11,12, 13, 14, 15 and 16 in List I). Furthermore, Article 253 entrusts Parliament (centre) with the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries. Articles 73 and 253 appear to leave the States without any meaningful input in negotiating (executive) or ratifying (legislature) Treaties which touch upon State competencies. Indeed, in *Maganbhai Ishwarbahi v Union of India* (1969), the Supreme Court, speaking through Justice J C Shah, held:

> The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State legislature, the *Parliament alone has*, … 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 (p.784).

This judgement, which was not favourable to the States, became a bone of contention in the era of globalization, through India's involvement in the GATT and the subsequent signing of the World Trade Organization treaty in 1995. Yet, as in *Maganbhai*, the Supreme Court showed little sympathy for the position of the States. In *P B Sarnant v Union of India* (1994) the Supreme Court authorized the Indian federal executive to enter into a final treaty relating to 'Dunkel proposals' without the prior consent of the Parliament and State legislatures (Saxena 2007: 26). These proposals (which pertain to trade in goods, services and intellectual property rights in the context of the –then- GATT Uruguay round) dealt with subjects in the State list, such as trade in agricultural products, irrigation facilities and the procurement, marketing and processing of raw cotton. Srhi Bobde, representing the petitioners, argued that the national executive cannot implement international treaty obligations which encroach upon the State list without concurrent State legislative consent. The court dismissed this view and endorsed its earlier decision in the *Maganbhai Patel* case. Furthermore, the council appearing on behalf of the Central government appealed to the presence of State safeguards during the coalition era in other domains: 'the negotiations at the Uruguay Round have already been circulated to all members of the Parliament and to all Chief Ministers and discussion had already been taken in the Lok Sabha and Rajya Sabha*.'* (p.5). In other words, Chief Ministers and members of the Rajya Sabha who have an institutional link with State legislatures had their say already.

Although *P.B. Sarnant* did not deny that national and State legislatures (insofar as they affect their competencies) may have to issue legislation to implement international Treaties, the Supreme Court, in *Vishaka v. State of Rajasthan* (1997), ruled that international conventions signed by the government of India can be read into fundamental

rights, even if the union and State legislatures have not passed implementing legislation to that effect. Thus, the government of India, by singing up to international conventions binds itself as well as the State governments (Saxena, 2007).

The Court's refusal to extend the input of the States in Treaty negotiations makes their influence in this matter dependent on their political input. The coalition-era is rife with examples in which regional parties used their role as veto-players at the centre to exert influence in international relations, from the Teesta water-sharing treaty with Bangladesh to relations with Sri Lanka during and after the civil war (Sharma, Destradi and Plagemann, 2020). However, absent such conditions, States become reliant on alternative mechanisms. The Rajya Sabha (or 'Council of States') is meant to provide such a forum. Yet, Supreme Court jurisprudence has not done much to further the role of the Rajya Sabha as a voice of the States. In 2006, it assessed an amendment by the former BJP-ruled coalition government to the Representation of the People Act of 1951 which abolished the domiciliary requirement for members of the Rajya Sabha (second chamber) elected from a particular State and also changed the process of voting for second chamber membership from a closed to an open vote. To the extent that Rajya Sabha members can originate from anywhere, the territorial connection so vital to its operation as a 'Council of States' is severely weakened. The changes also strengthened the practice of opening Rajya Sabha membership to well-known personalities or business tycoons, at the expense of politicians rooted in the State of origin. Yet, the Supreme Court threw out the challenge to the legislation. It did so after reviewing the CA debates which led to the constitutional requirements for Rajya Sabha membership. These, so the Court argued

> ‘showed that residence was never the constitutional requirement’ (p. 9). [Acknowledging that] ‘India is not a federal State in the traditional sense of the term,’[it then went on to argue that] ‘it is no part of Federal principle that the representatives of the States must belong to that State. There is no such principle discernible as an essential attribute of Federalism, even in the various examples of upper chambers in other countries’ (ibid)… ‘Our Constitution does not cease to be a federal constitution simply because a Rajya Sabha Member does not ‘ordinarily reside’ in the State from which he is elected.’ (p. 22)

Conclusion: The Supreme Court: judicial safeguard of federalism or facilitator of centralisation?

In this article, we have assessed the role of the Supreme Court in the adjudication of Centre-State issues. Overall, the evidence presented here, based on a sample of 40 cases does not offer convincing support for the political supremacy or judicial safeguard assumptions (1-2). An important exception concerns President’s Rule and the related effort of the Supreme Court to read ‘federalism’ into the Basic Structure of the Indian Constitution. Such a paradigm shift took place when the political opportunity structures (with the rise of regional parties) turned in favour of a more decentralized reading of the Constitution but remained in place with the return of one-party dominance (thus potentially providing a ‘judicial safeguard’ of federalism in times of political centralization).

On disputes relating to legislative competence (the largest sample in our group) there simply is too much variation across time, with State-favourable judgements not

necessarily relating to periods of coalition government, as per the political supremacy assumption, or one-party dominance, as per the judicial safeguard assumption, but scattered across both periods. However, we find considerable support for the judicial doctrine assumption (3) here, drawing on 'pith and substance', 'repugnancy' or 'original intent'. Therefore, endogenous, rather than exogenous factors provide a more compelling rationale for explaining the direction of this set of judgements.

In other aspects we noticed remarkable consistency in the direction of judgements, irrespective of the time period under consideration. This was largely so for cases related to asymmetry, be it in a State-favourable (Schedules VI and V) or centric sense (Jammu and Kashmir). Furthermore, the Court was neither willing to widen the ambit of State input (shared rule) in processes of State reorganization or treaty negotiations, nor to strengthen the State residence requirements of senators. The judgements underpinning these decisions reveal a tendency to rely on original intent (Schedule VI in particular), a rather legalistic interpretation which stays close to the letter of the relevant constitutional articles (Senate composition, Treaty reform and State reorganization) or a willingness to focus on self-rule aspects of federalism (acknowledging the need for States to possess some level of autonomy to meet the idea of 'federal balance' which the Court has read into the basic structure), but much less so on shared rule. In the case of Kashmir, one could argue that the Court, given the political salience and controversy regarding the States' statute, simply followed the prevailing political mood which also remained contentious throughout much of the coalition period (especially for much of the 1990s with a renewed insurgency on the ground).

We identify three avenues for further research. Firstly, scholars could compile a list of all 'federalism-related' disputes to have passed through the Supreme Court and apply statistical analysis to test the validity of the political and judicial safeguard assumptions outlined in this article (see Popelier and Bielen 2018 for such an analysis in relation to the case of Belgium).

Secondly, scholars could examine how the territorial origins or ideological preferences of individual justices influence judicial rulings. A recent study of Indian Supreme Court appointments since 1950 by Chandrachud, (2014) notes that the vast majority of justices have been recruited from State high courts from across India.[vii] Therefore, would justices who served in high courts from more 'peripheral' States (North-East, Jammu and Kashmir, and South India) be more inclined to defend State powers than those who served in State High Courts in the Hindi-Belt, West India or Delhi? The attitudinal or ideological preferences of justices though, unlike their territorial origins, are harder to establish. The Indian Supreme Court has gradually wrested control from the central executive in its own appointment. Appointments are decided by a collegium made up *exclusively* of Supreme Court justices, including the sitting Chief Justice (Pillay, 2017: 286-9). This makes it harder to assign political ideologies to justices, unlike in the US for instance. It would require in-depth engagement with the judgements of individual justices across time, a task made more onerous in the Indian case, because judgements are delivered by benches of varying size. The Court itself is also marked by a frequent turnover in membership (not just linked to its large size, but also to a requirement for justices to retire at age 65).

Finally, our analysis was confined to *positive cases* only, i.e. cases which the Supreme Court has been willing to hear. However, several petitions are thrown out before they are even considered; others are not considered urgent even though the political decisions to which they are linked have far-reaching ramifications for India's federal system (for instance the recent decision affecting the special status of Jammu and Kashmir). An analysis of these 'negative cases' can shed further light on the motives of the Supreme Court, especially with the arrival of a more combative and ideologically-driven Hindu nationalist one-party government in 2014 which has sought to compromise the independence of the Court (Khaitan, 2020).

Acknowledgements: A first draft of this paper was presented at a Leverhulme International Network Workshop, New Delhi, January 2017. We thank participants at the workshop for useful feedback as well as suggestions by the anonymous referees and journal editor. The research benefited from the support of a Leverhulme International Network grant on 'Continuity and Change in Indian Federalism', Grant Number INR-2013-043.

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ENDNOTES

[i] We use state in a generic sense, and State (capitalized) to refer to a unit of the Indian federation; in other federal contexts sometimes referred to as canton, region, province or Land.

[ii] Central acts were at stake in 19 and State acts in 21 of these judgements. The Court sided with the centre for 12 of the centrally contested acts and with the States for the remaining 7. Conversely, it followed the States in 13 of the contested State acts but chose an interpretation more favorable to the Centre in the 9 other cases. This provides some support for the 'consistency hypothesis' according to which the Supreme Court seeks to interpret acts in such a way that they are constitutional. At the same time, the judgements of the Court are not line with the expected direction for about a third of the cases. Based on our sample, the Court is almost as likely to overturn a State act is it is to overturn a central act. We are grateful to an anonymous referee for prompting us to look into the 'consistency hypothesis.'

[iii] (1973) 4 SCC 225

[iv] (1980) 3 SCC 625

[v] (2007) 2 SCC1

[vi] The meaning of this principle is well-explained in *Ujagar Prints (II) v Union of India* (1989) taken from (Bakshi: 2007: 222): '… 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.'

[vii] Chandrachud (2014: 244) finds that no more than two (or in very few cases three) judges originating from same High Court serve as Supreme Court justices at the same time. Regional representation increased with the expanding size of the Supreme Court bench (from 8 seats in 1950 to 31 seats today) The 4 (now 5) Southern States have always had between 22 and 35 percent of bench members, whereas the Northern States (which -until 2019 included - Jammu and Kashmir but not Bihar which is classified as East) usually occupied between 30 and 35 percent of the seats (Saxena and Swenden 2017). This makes the Supreme Court more regionally balanced than the political institutions (central executive and legislature; see Adeney and Swenden, 2019).