# Defensive Federalism

## Protecting Territorial Minorities from the "Tyranny of the Majority"

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# 8 The Role of Constitutional Judges in Protecting Territorial Self-Government

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## 1 Introduction

"You will only get a partial picture of 'who does what' if you read the Canadian Constitution Act of 1867" (Simeon 2005, 12ff, at 12). Similar to this statement it has been remarked concerning Spain that "the competence provisions, have been developed and fleshed out by hundreds of decisions" so that it is impossible "to understand the functioning of the state of the autonomies without taking the Court's case law into consideration" (Casanas Adam 2017, 387). These observations beg the question, which this chapter aims to answer, to what degree judges have not only played a crucial role regarding the distribution of powers but also used it to protect the territorial self-government of subnational entities in federal systems, especially if they are characterised by the presence of national minorities.

Traditionally, much scholarly attention has been dedicated to "judge-made federalism" (Schneider et al. 2008). The complementary question "to what extent judges actually often *un*make federalism" seems rather neglected but equally important because courts may not only "play a key role in terms of animating federalism, they may also stifle it" (Kössler and Fessha 2020, 1–14). From this dual perspective of judges as potentially making and unmaking federalism, the above-mentioned question of whether they protect territorial self-government gains particular salience. To explore this question, this chapter starts with a clarification of key concepts and a justification of the selection of federal systems that it draws evidence from (Section 2). This selection is based on two criteria: firstly, the existence of a constitutional court entrusted with the ultimate interpretation of the country's constitution and, secondly, the employment of federalism as a tool to ensure the territorial self-government of one or more national minorities. The chapter then goes on to analyse from a comparative perspective to what degree judges have protected territorial self-government in four countries, that is, Canada, India, Belgium and Spain (Section 3). I have argued elsewhere that federalism jurisprudence is actually much broader than only rulings concerning the distribution of powers so that case law dealing with other issues concerning the combination of self-rule and shared rule, as well as fundamental rights, is also relevant for

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the judicial configuration of a federal system.[1] Yet, the focus of this edited volume on territorial self-government and the need to conduct a sufficiently deep comparative analysis of several federal countries in a single chapter entails that I concentrate on the distribution of powers. More concretely, this chapter's comparison covers jurisprudence on three dimensions, that is, exclusive and concurrent subnational powers, as well as the suspension of such powers under provisions of emergency rule, as litmus test for the judicial protection of self-government. Section 4 concludes.

## 2 Constitutional Courts and Territorial Self-Government

The first criterion for confining the comparators is the existence in a federal country of a constitutional court that functions as ultimate interpreter of the constitution and arbiter between the national and subnational governments. Theorists agree with few exceptions[2] that such a role of judges is an essential characteristic of federalism. The classical and most-cited expression of this view is Dicey's, who famously declared that federalism "means legalism – the predominance of the judiciary in the constitution" (Dicey 1915, 170). From an organisational perspective, the interpreter and arbiter function may be entrusted to a Constitutional Court in the often-used strict sense of the term or to a Supreme Court. As specialist court, the former is concentrated exclusively on constitutional jurisdiction, while the latter is a generalist court entrusted also with ordinary jurisdiction as the highest appeal court. As one observer aptly put it, a Constitutional Courts is – unlike a Supreme Courts – "outside of" the regular court system rather than "on top of" it (Favoreu 1990, 105–120).

The second criterion for the selection of the countries which this chapter draws evidence from is the presence of a specific reasoning behind the introduction of the federal system. While there are, historically, many different rationales (Burgess 2006, 76–101), one has come to dominate the academic and political discourse in the late 20th century, that is, that of the federal system as a tool to ensure the territorial self-government of one or more national minorities (Palermo and Kössler 2017, 97–111). This presupposes, first, to clarify the meaning of the latter notion as the intended beneficiaries of this institutional arrangement. For the purpose of this chapter, the term "national minority" does not refer to its strict specific meaning within the area of minority rights. Even if documents binding under international law have failed to this day to provide a widely recognised definition of "national minority" (Marko and Constantin 2019, 84–85), the expression has acquired a specific meaning in the context of the Council of Europe Framework Convention for the Protection of National Minorities and the OSCE High Commissioner on National Minorities. At the same time, the term "minority" has been regarded especially by groups mobilising in Western European countries against the dominant majority as pejorative so that other notions like "stateless nations" (Keating 2001) have come into use. In this chapter,

national minority is used in a purely numerical sense for a group within an ethno-culturally diverse country whose territorial self-government is to be protected through the federal system. After all, if there is a majority, against which protection is needed, there must also be a minority in this same numerical sense. The idea that ethno-cultural diversity should form the basis of the federal territorial structure has become popular around the world especially since the 1990s when the end of the Cold War caused the "nationality question" to resurface in many places. Of course, this question has not been tackled in all instances with the recipe of territorial self-government. In fact, many countries of Central and Eastern Europe have employed arrangements of non-territorial autonomy as, given fears of secession, harmless surrogates of territorial arrangements (Kössler 2015, 245–246). There is no doubt, however, that political and academic discourse has come to be dominated in most cases by those regarding territorial self-government more or less exclusively as a tool for minority protection (Ghai 2005, 38)[3] and advocates of concepts such as ethnic, multinational or plurinational federalism.[4] What these have in common is the prescription, which is not without problems (Kössler 2018, 21–41), that *national minorities*, at least the larger ones with relatively compact settlement areas, are transformed into *regional majorities* within "nationality-based units" (Kymlicka 1998, 125).[5]

Applying these two criteria reduces the number of federal systems that this chapter focuses on. As for the first requirement of constitutional court judges as ultimate interpreters and arbiters, most countries clearly follow the above-mentioned Diceyan view. Yet, there are a few outliers which are thus excluded from our comparative study. One such case is Switzerland, where Federal Supreme Court judges are only authorised to review cantonal law (Article 189(1) of the Constitution)[6] but obliged to apply federal law (and international law), even if they regard it as unconstitutional (Article 190). Evidently, this asymmetrical power of judicial review makes it impossible to assess the role of judges regarding the protection of territorial self-government (against intrusion of federal legislation). This holds even more true in the case of Ethiopia with its unique "non-judicial review" (Vibhute 2014, 12). In fact, Article 83(1) of the 1995 Constitution stipulates that "[a]ll constitutional disputes shall be decided by the House of the Federation", that is, the second chamber of Parliament. Its members act on the basis of recommendations by a Constitutional Inquiry Council which is composed of legal experts and – again – politicians (Article 84(2)).

The first criterion and the second one, that is, the federal system's rationale, exclusively or among others, to ensure the territorial self-government of one or more national minorities, are clearly met by countries such as Canada, Belgium and Spain. In other cases of possible relevance for our comparative study this is not so straightforward. South Africa, for example, is without doubt a country that boasts immense ethno-cultural diversity, but its subnational entities, that is, the nine provinces, are not "nationality-based units" in the above-mentioned sense. In fact, they are derived from the nine

development regions of the 1980s and when adjustments were made from 1993 by the territorial demarcation commission, the primary objective was to diminish territorial disparities regarding social and economic development (Egan and Taylor 2003, 105f). Similar to South Africa, India's federal structure was initially in 1949 not diversity-based, primarily due to fear for national unity and territorial integrity (King 1997, 138). Soon, however, the country changed course as a result of political pressure from various parts of the country. In 1956, the federal government followed the recommendation of the States Reorganization Commission by restructuring the then 27 states into 14 new states along linguistic lines and further territorial changes (some language-based, others not) have been implemented since then. In contrast to South Africa, India therefore fulfils the second criterion for the selection of federal countries considered in this chapter.

## 3 Constitutional Judges Protecting Territorial Self-Government? The Distribution of Powers as Litmus Test

When allocating competences, not every single detail and contingency can be foreseen and regulated by national constitutions, either alone or in combination with other written law such as the statutes of autonomy in Spain (enacted as organic laws of the national parliament) and special acts in Belgium. As a result of this inherent incompleteness of the distribution of powers, judges are called on to fill the gaps. These are of course particularly large when the framers of the constitution, as it often occurs in ethno-culturally diverse countries due to a lack of political consensus, "decide not to decide" (Dixon and Ginsburg 2011, 636ff) and deliberately defer certain matters to future resolution. In these cases, and when framers resort to a large extent to vague compromise language following a strategy of (more or less) "constructive" ambiguity, judges are likely to play an outsized role.

Thereby, it is important to bear in mind that they act while interpreting the distribution of powers – in Kelsenian terms – not only as negative but also positive legislators (Kelsen 1942, 187). This is because a "polity cannot access the benefits of review without activating the court's prospective lawmaking capacity" (Stone 2012, 827) so that the invalidation of an act of either government level as *ultra vires* in a single case also determines the boundaries of competences to be observed in the future. Thus, jurisprudence regarding the relative scope of powers of the national and subnational governments is crucial for the extent of territorial self-government in any federal system.

### *3.1 Exclusive Subnational Powers*

Exclusive competences usually mean those attributed to only one level of government without the possibility for others to intervene. As federal practice over the last decades demonstrates, however, such powers of subnational entities have been rendered in many federal countries de facto concurrent

because of the national government operating in the same policy field. Even if the latter is limited to different aspects of this field, this has entailed encroachment on purpose or unintended overlaps of powers. Such cases have been aptly characterised as "a weak form of concurrency, as the listed powers of each order are proclaimed as exclusive" (Steytler 2017a, 9).

In Canada, exclusive responsibilities traditionally played a key role with early jurisprudence of the Judicial Committee of the Privy Council (JCPC) interpreting the competences of each government level rather strictly as "watertight compartments".[7] Moreover, the committee held specifically regarding provincial powers that they must be construed as being "plenary and ample",[8] which turned the, on paper, very centralised distribution of powers on its head. Unsurprisingly, therefore, members of the JCPC came to be called by some sceptics "the lawmakers" (Saywell 2002) or even the "wicked stepfathers of confederation".[9] From the perspective of the provinces, however, this interpretation was an effective safeguard against centralisation efforts, even during the economic crisis of the 1930s. Together with a restrictive interpretation of the general federal power to legislate in order to guarantee "peace, order and good governance" (the POGG Clause), this met with fierce opposition:

> The federal 'general power' is gone with the wind. It can be relied upon at best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their water-tight compartments.[10]

Similarly, the allocation of powers in Belgium, which is contained in the constitution and the Special Act of 8 August 1980 on Institutional Reform,[11] was based on the idea of ensuring as much exclusivity as possible. This was prompted by the inherent complexity of a system that features two types of subnational entities with different sets of competences and overlapping territorial jurisdictions, that is, three regions and three communities. The assumption was that with a tripolar distribution of powers, there would be an even greater potential for disputes over competences and for an erosion of subnational authority. For the purpose of this chapter, it is important to note that the judges of the Constitutional Court later reinforced the penchant for exclusive powers. For one, jurisdiction of one legislature in their view strictly excludes jurisdiction of another one.[12] If a subject matter is claimed by more than one legislature, they decide where the centre of gravity lies based on the doctrine of "pith and substance".[13] Moreover, the exclusivity principle inspired the court in several cases to interpret subnational competences extensively by granting them plenary powers ("la plénitude de competence").[14] Conversely, in order not to deprive the subnational entities' broadly construed powers, federal competences should be interpreted narrowly.[15] Moreover, Article 10 of the above-mentioned Special Act of 1980 grants the communities and regions

implied powers "necessary" for the exercise of their enumerated competences. Although the court subjected the subnational entities' exercise of implied powers to certain conditions, it acts with restraint and only invalidates law if the justification of the necessity is "manifestly erroneous".[16] Exclusivity was reinforced even further by the alignment, in 1988 for the communities and 1993 for the regions, of internal and external powers through the *in foro interno, in foro externo* principle. Thus, the competences of subnational governments regarding subject matters assigned to them do not only cover the legislative and executive dimensions but also the external one, including treaty-making power and policymaking within the EU (Bursens and Massard-Piérard 2009, 97f). Overall, the scope of subnational exclusive powers has thus been extended by judicial interpretation (Peeters and Mosselmans 2017, 69ff, 98 and 102), even if an early ruling stated that the economic and monetary union upon which Belgium's federalisation was built entailed certain limitations to these powers, especially concerning the mobility of persons and goods throughout the country.[17]

For territorial self-government to be protected, it is obviously key that exclusive competences are not watered down so that the above-mentioned risk of de facto concurrency is avoided. In this regard, Canada and Belgium have indeed undergone quite different developments and judges have thereby played a significant role. The Supreme Court's emphasis on an understanding of the 1867 Constitution Act as having "planted in Canada a living tree capable of growth and expansion within its natural limits"[18] entailed a penchant for dynamic interpretation. Such interpretation has prevailed, in particular, since the 1982 Canadian Charter of Rights and Freedoms, interestingly regarding disputes not only on fundamental rights but also on the allocation of powers (Hogg 2007, 87). The dynamism at the heart of the "living tree" metaphor has led in combination with the "double aspect" doctrine to a dilution of exclusivity. The latter doctrine says that in certain cases one aspect of a subject matter may fall within (exclusive) federal powers and another one within (exclusive) provincial powers.[19] In short, this doctrine recognises the de facto concurrency of national and subnational rules, which refer to different aspects but regulate the same subject matter. The key follow-up question is then how to solve the problem of these rules contradicting each other and the Supreme Court foresees for such cases of antinomies the paramountcy of federal law, thus opening the gates for (federal) intervention in formerly "watertight compartments". It seems undeniable, in particular given the broad wording of federal and provincial powers, that there is a certain "risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation".[20] While older jurisprudence was rather generous (to the national government) in identifying cases of antinomies, it has more recently limited them to scenarios of operational incompatibility in which the observance of one rule would entail the violation of the other[21] so that the

scope of federal paramountcy and thus of intrusion into exclusive provincial jurisdictions has been somewhat reduced.

In the Belgian case, exclusivity has clearly been preserved more efficiently and this has a lot to do with judicial interpretation (Popelier and Lemmens 2015, 93). To be sure, also the Constitutional Court recognised that the complexity of the allocation of competences makes de facto concurrency in certain cases unavoidable.[22] However, it read a proportionality principle into the distribution of powers which obliges the national parliament to enter into intergovernmental cooperation when regulating certain issues and to refrain from anything that makes the exercise of subnational competences excessively difficult.[23] Moreover, while the judges have allowed the federal government to legislate on single aspects in competences of the communities such as education, the introduction of a Canadian-style "double aspect" doctrine (Peters and Mosselmans 2017, 69ff, 97)[24] has also benefitted the subnational governments. For instance, in recent decisions concerning a complementary Flemish care insurance the court stated that the issue can come under the community power regarding aid to persons and under the federal competence for social security.[25] That this de facto concurrency does not inevitably entail a threat to territorial self-government is owed to a different approach than the Canadian one of federal paramountcy. If national and subnational laws on the same issue cannot be applied cumulatively, the judges determine whose exclusive competence has the closest link with the matter concerned and these determinations have rather reinforced self-government of communities and regions (Peters and Mosselmans 2017, 69ff, 97 and 102).

Compared to the Canadian and Belgian cases, exclusivity has played from the outset a less central role in India and Spain, albeit for different reasons. In India, Article 246(1–3) of the Constitution introduces exclusive powers of the federal government and the states, as well as concurrent powers and the Seventh Schedule then assigns subject matters to these categories in three long lists ("Union List", "Concurrent List" and "State List"). On this basis, the Supreme Court has sometimes protected exclusive subnational powers by declaring that the entries in the State List must be given a "broad and plentiful interpretation" because doing otherwise would "whittle down the power of the State and might jeopardize the federal principles".[26] On the other hand, however, its doctrine of "pith and substance", which is used in Canada, has allowed interventions into each other's jurisdictions, if they are merely incidental to an act's primary objective (Bakshi 2013, 246f). This has mostly benefitted the national government.[27] While in theory exclusive powers of both the states and national government may benefit equally from such an interpretation, the latter are in reality extended much more because of the higher number of subject matters assigned to them. Besides judicial interpretation, political action has also reduced the scope of exclusive state powers. After the centralisation of most subject matters requiring major investments or scientific expertise already in 1949, subsequent constitutional amendments

have continued this trend. Invoking again the need for central socio-economic planning, it was especially during the predominance of the Congress Party until 1989 that items from the State Lists were shifted to one of the other two lists with the transfer of education and forestry to the Concurrent List being cases in point (Tewari and Saxena 2017, 233f).

Whereas exclusivity has not played such a key role in India due to the existence of a quite comprehensive list of concurrent powers, a superficial reading of the Spanish Constitution might suggest the opposite in this case. After all, Article 149 states explicitly that the national government "holds exclusive competence" over as many as 32 subject matters, complemented by a list of powers that the autonomous communities may assume (Article 148). However, such a reading would disregard two important facts. First, "exclusive competence" in Article 149 only means a real legislative monopoly of the national government for some of the listed subject matters (e.g. labour law) (Argullol and Bernadí 2006, 238ff, at 248). Concerning other enumerated issues its power to basic legislation (e.g. environmental protection)[28] or the regulation of single aspects of broader policy fields (e.g. air traffic regarding infrastructure). The latter of course risks to come into conflict with legislation of the autonomous communities. Whereas some early rulings held that extra-territorial effects of the latter do not exclude regional competence,[29] other rulings soon negated such a competence even in case of rather minimal effects beyond a region.[30] Secondly, such a superficial reading would disregard that the actual distribution of powers is not deduced directly and exclusively from constitutional provisions but is "inductive" (Moreno 1999, 149ff, at 168). As such it involves bilateral processes of demarcating competences by means of the statutes of autonomy, that is, negotiated organic laws approved by both the respective regional parliament and the national parliament (Article 147(3) of Constitution). The statutes reformed between 2006 and 2011 did this demarcation exercise with the aim of making regional powers as exclusive as possible. Their definition in great detail in the 2006 Statute of Catalonia and others, a strategy known as *blindaje* (armour plating), was intended to protect self-government against national encroachment (Balaguer Castejón 2006, 37ff, at 42). However, this technique was countered by the Constitutional Court, which asserted its interpretive authority. While the statutes may describe based on Article 147(2d) the content of these competences, they could not determine the precise scope of the latter in relation to national powers. It would only be for the judges of the Constitutional Court to carry out a "genuine and unchallengeable interpretation of the principles and categories in the Constitution".[31]

### *3.2 Concurrent Subnational Powers*

This chapter follows a broad definition of concurrency as a category "in contradistinction to exclusive powers" (Steytler 2017b, 301). Such an understanding encompasses not only explicit concurrent powers in a narrow

sense, which can be exercised by either government level regarding the same subject matter, at the same time and in the same territorial jurisdiction. The broader understanding also includes conditional and complementary concurrency (Steytler 2017a, 9). The latter refers to cases in which legislative authority concerns the same subject matter but is divided in functional terms between national framework legislation and more detailed subnational rules on its basis. Conditional concurrent powers are those that depend on a certain requirement being met such as, for example, a national interest in a country-wide regulation or "a variant of this open-Sesame concept" (Steytler 2017a, 9). Such a broad understanding covering these three varieties is in line with the diverse meanings of "concurrency" in different languages, that is, doing something at the same time and place, doing so in agreement or in competition (Dziedzic and Saunders 2017, 16–17; Steytler 2017b, 300).

As for *explicit* concurrent powers, the countries covered in this chapter rely on them to very different degrees. In fact, The Belgian emphasis on exclusivity entails that such concurrency does not play a role. More surprisingly, the same holds true for the Spanish case. But explicit concurrent competences are not among the five classical types of competences that originated from the early jurisprudence of the Constitutional Court.[32]

By contrast, Canada was the first of all federal systems to introduce this category of competences. However, understandably in view of the above-mentioned focus on exclusive powers, this only concerned few issues: immigration and agriculture in 1867 (Section 95) with old-age pensions and supplementary benefits added after World War II (Section 94a). As the constitutional text contains only few exceptional cases of explicit concurrency and clear written rules on whose legislation takes precedence (federal under the first provision and provincial under the latter), judicial interpretation has not played a significant role.

This is quite different in the Indian case. The above-mentioned Concurrent List enumerates as many as 47 subject matters with the rationale for concurrency "to promote the diversity of laws, social traditions, and federal experimentation" (Mathew 2006, 165). Article 254 of the Constitution establishes for cases of inconsistency between state and federal legislation the precedence of the latter unless legislation of a state has received prior assent from the President of India. In this case, state law applies but of course only in the state concerned and it can be overridden by federal legislation at any time. The judges of the Supreme Court has provided further clarifications regarding cases and modalities of such presidential assent[33] and they also declared explicitly that state occupancy of these fields is valid until the federal government occupies them.[34]

As far as *complementary* concurrency is concerned, this does not exist in India's distribution of powers based on the three above-mentioned lists of exclusive and explicitly concurrent competences. It is equally unsurprising in view these countries' penchant for exclusivity that such powers play no role in Canada and only a minor one in Belgium. In the latter case, however, it

was exactly the Constitutional Court which allowed the subnational entities to adopt detailed rules based on federal basic legislation in some areas (e.g. safety in certain facilities) sometimes even in the absence of an explicit authorisation in written law provided that they do not "weaken" the federal basic rules.[35] Thus, jurisprudence has actually extended the degree of self-government in the face of the (legal) unity rationale that is usually invoked in favour of national legislation applying throughout the country (Peeters and Mosselmans 2017, 69ff, 96).

This contrasts starkly with the situation in the Spanish case where encroachment through national basic laws has been pervasive and facilitated considerably by the Constitutional Court. In fact, the above-mentioned armour plating concerning regional competences in the statutes of autonomy was not least an attempt to reduce such encroachment. To be sure, the early case law established that the content regarded as "basic" must be set out explicitly in ordinary legislation enacted by the national parliament.[36] The judges also stated that this content may only amount to a minimum common denominator of goals and principles which is sufficiently basic to leave each autonomous community a margin for its own policies.[37] Judicial interpretation, however, has later partially backtracked from both these positions (Ferreres Comella 2013, 173f). As to the first point, basic rules have been deemed in several cases lawful even if they featured in other sources than ordinary laws such as administrative acts.[38] In some cases, the national government was even allowed to execute laws in order to ensure basic conditions.[39] As for the second point, observers have regarded basic legislation upheld by the Constitutional Court in several cases as excessively detailed and exhaustive, especially in the areas of environmental protection and economic policy (Aja 2005, 135ff, at 144; Maiz et al. 2010, 63ff., at 72). Moreover, concerning the regulation of the economy, the solidarity principle of Article 2 of the Constitution is reflected in the duty of the national government to establish a just and adequate economic balance between the different areas of the Spanish territory (Article 138(1)), which together with the guarantee of free movement of persons and goods (Article 139(2)) entails certain limitations for regional economic powers. According to the court, the "equality in the basic conditions for exercising economic activities"[40] is constitutionally mandated. Moreover, in this critical area the judicial interpretation of what is known as "horizontal clauses" has mattered considerably. The national government's competence regarding "basic rules and coordination of the general planning of economic activity" (Article 149(1)(13)) had initially been limited to measures with direct and significant impact on general economic activity[41] but then benefitted from a broader interpretation.[42] Similarly, the clause authorising the central regulation of "basic conditions guaranteeing the equality of all Spanish citizens" (Article 149(1)(1)) has undergone a process from a more narrow reading to a rather extensive interpretation.[43] This appears to have been a trend regarding both basic legislation and the "horizontal" clauses (Casanas Adam 2017, 392).

It is in the very nature of complementary concurrent powers that an extensive interpretation of national basic legislation must lead to a diminishment of the leeway for self-government of subnational entities.

As for *conditional* concurrency where (national) legislative competence depends on certain requirements, Spain is again an example of judicial interpretation playing a key role. Unlike regarding complementary concurrency above, it has in this case benefitted the autonomous communities. It should be noted that there has only been one single court case, but a crucial one, regarding Article 150(3) of the Constitution, which enables the national parliament to "enact laws establishing the principles necessary for harmonizing legal provisions of the autonomous communities, even in the case of matters over which jurisdiction has been conferred upon the latter, when this is necessary in the general interest". As the same clause goes on to say that it is up to the national parliament "by an absolute majority of the members of each House, to evaluate this necessity", its potential to diminish self-government is evident. The single occasion on which parliament relied on this article was at a moment of political instability to which Spain's major national parties[44] responded in 1981 with a series of agreements (*acuerdos autonómicos*). Competences of the autonomous communities should be limited and the exercise of the remaining powers should be obstructed by subjecting regional laws to national government approval. The Constitutional Court's review of the law to give effect to the envisaged changes, that is, the 1982 Organic Law on the Harmonisation of the Autonomy Process (LOAPA – *Ley Orgánica de Armonización del Proceso Autonómico*), became crucial and the judges in fact invalidated significant parts.[45] They ruled that that the national government is not permitted to unilaterally redefine the allocation of powers via Article 150(3). According to the court, the latter is an extraordinary provision to be used very restrictively and it is normally possible to preserve the "general interest" that the clause mentions through ordinary means such as basic legislation. Moreover, it recognised the balance between homogeneity and heterogeneity and thus a certain degree of asymmetry as a hallmark of the state of the autonomies. At the same time, the judges did not invalidate LOAPA entirely and some of the parts that they upheld were decisive for the distribution of powers becoming not as asymmetrical as some had feared and others had wished for (Agranoff 1999, 108).

A similar provision in India allowing for central legislative intervention in the name of the "national interest" has also been the subject of judicial interpretation. According to Article 249 of the Constitution, a resolution of the Council of States, that is, the second chamber of the Indian Parliament, which is "supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that parliament should make laws with respect to any matter enumerated in the state list" grants a power "for parliament to make laws for the whole or any part of the territory of India". But even if this provision appears to give the national

government broad leeway in defining what constitutes "national interest", a series of Supreme Court rulings have established certain requirements for the invocation of such an interest to be lawful. Under Article 249, encroachment of federal legislation upon exclusive state jurisdictions is typically permitted concerning India's national security, communications networks of nationwide importance, the implementation of obligations under international law and subject matters of such a size and specialisation that increased managerial and financial resources are needed (e.g. industry and mines) (Mathew 2006, 170).

### *3.3 Suspension of Subnational Powers*

Essentially, territorial self-government may be suspended in two different ways: negatively, by "only" invalidating subnational law, and positively, by also imposing national law in its stead.

An early example of a power of suspension in the negative sense is Section 90 of the 1867 Constitution Act, which declares the right of the imperial government to annual Canadian legislation (Section 56) to be also applicable to relations between the national government and the provinces. Indeed, during its predominance in the early period, the federal government made frequent use of this power and disallowed provincial legislation in a total of 112 cases from 1867 to 1943 (Hurley 2001, 142 and 149). Soon thereafter, however, such annulment has lost its importance with the last invocations of this provision being considered "almost wholly frivolous and acutely embarrassing to the federal government" (Mallory 1984, 371). Even the Supreme Court weighed in and stated that the powers of disallowance "although in law still open, have, to all intents and purposes, fallen into disuse".[46] This is because today national government allegations that subnational legislation is *ultra vires* should be decided upon in the courts and claims that it is unwise should be left to the discretion of the provincial electorate. Thus "the modern development of ideas of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance" (Hogg 2000, 5–19).

While in the Canadian case the judges of the Supreme Court thus rather confirmed an existing political practice not to use the power of disallowance anymore, their Indian counterparts had a chance to play a more confrontational role vis-à-vis politics. Article 201 of the Constitution authorises the President of India, acting upon advice of the Council of Ministers which they shall act in accordance with in the exercise of their functions (Article 74), to give or withhold their assent a state bill. This only requires the governor of the state concerned, a presidential appointee, to have reserved the bill for presidential consideration. The Sarkaria Commission on centre-state relations included a clear recommendation for this invasive power to be exercised only on "grounds of patent unconstitutionality" of a state bill.[47] But it was not merely this advisory commission that weighed in on this power of federal assent, as the Supreme Court repeatedly opposed claims of an extensive interpretation of this power. The judges held, for instance, that the right to give

or withhold assent may only concern those provisions of state legislation that were specifically brought to the President's attention.[48]

Another clause of the Indian Constitution enables the suspension of self-government in the above-mentioned positive sense. The seminal Article 356 empowers the Indian President to impose emergency rule in case of a "failure of the constitutional machinery in a state", something that, according to Ambedkar, allowed the country to "be both unitary as well as federal according to the requirements of time and circumstances".[49] According to this provision, the President may issue, again upon advice of the Council of Ministers (Article 74), an emergency rule proclamation, if they are convinced that "the Government of the State cannot be carried on in accordance with the provisions of this Constitution". With this proclamation, the President may, firstly, assume any power from any state authority except for the legislature, secondly, subject the powers of the state legislature to their exercise by or under the authority of the national parliament or, thirdly,

> make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution.

In the 1970s, however, these extremely incisive powers started to be abused to remove state governments under the control of opposition parties and it was eventually for the Supreme Court to protect self-government. While in 1977 the judges still characterised questions surrounding Article 356 as a "political thicket"[50] left by the Constitution to determination by the federal government, a paradigm shift occurred with another ruling in 1994.[51] The latter regarded the emergency rule proclamation as justiciable regarding the relevance of the reasons behind the proclamation and the absence of *mala fide*. Moreover, the judges introduced several procedural principles for invoking the emergency provision, among them the involvement of the legislature of the relevant state, and held that no irreversible measures shall be taken before the approval of President's rule by the national parliament after two months (Article 356(3)). Finally, the Supreme Court claimed for itself the power to provide effective remedy in case of an unconstitutional proclamation, for example, by re-establishing a state legislature or restoring a state government to office. Together with other changes like the advent in 1989 of coalition governments including state-based parties and the opposition controlling the second chamber, the strong stance of the judges in this ruling, later reinforced in others,[52] is widely credited with having reduced central interventionism based on Article 356 (Mitra and Pehl 2010, 51; Tewari and Saxena 2017, 249). It is difficult to predict how that will evolve in the long run after several instances of President's rule under renewed one-party dominance since 2014, but much will certainly depend on whether judges are ready to protect self-government.

A provision allowing for its suspension has recently made in Spain even more headlines well beyond specialists in constitutional law and politics. Article 155(1) of the Constitution states that

> [i]f an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

To ensure the implementation of these measures, the national government may, pursuant to Article 155(2), "issue instructions to all the authorities of the Autonomous Communities". Before the events in Catalonia in autumn of 2017, it could still be said that "[a]s a matter of fact, the State has never resorted to this clause" (Ferreres Comella 2013, 176). Some had even criticised the fact that, in dealing with the independence movement, the national government had placed, despite Article 155 at its disposal, "further responsibility on the Court" and "effectively converted it into the Spanish government's enforcer" (Casanas Adam 2017, 387). Several reasons have been mentioned for the hesitance of the national government in invoking Article 155. For some, it was the aim to avoid a further escalation of unrest and the publicity of the obligatory debate on the issue in the Senate,[53] while others referred to the historical baggage of the suspension of Catalan self-government during the Second Republic (1931–1936) so that "the social and political meaning of using article 155 counsels against its use".[54] Anyway, the Spanish government continued for a long time to push other institutions, especially the Constitutional Court, to the forefront. This is epitomised by a law adopted in 2015 that enhanced the capacity of the court to secure compliance with its rulings such as the power to temporarily dissolve public authorities in breach of the law and other means to increase pressure towards abidance by its judgments. According to the Council of Europe's Venice Commission,[55] but also a minority of Constitutional Court members in dissenting opinions,[56] the court having and using these executive powers would politicise it and compromise its neutrality. The judges used them, for example, to suspend the electoral authorities appointed by the Catalan government[57] and to enforce the closure of the webpage on the independence vote.[58] The judicial-political interplay changed, however, when the Declaration of Independence ratified by the Catalan parliament on 27 October 2017 eventually prompted the national government to invoke Article 155 on the same day. On this basis, the latter dismissed Catalonia's executive, dissolved its parliament and called regional elections on 21 December with the formation of a new government ultimately ending the extraordinary measures. In two decisions, the judges confirmed

the lawfulness of the invocation of Article 155, citing not least Catalonia's reluctance over years to comply with their rulings. They emphasised that the provision only allows the temporary alteration and no "indefinite suspension of autonomy" and that its use is limited to "cases in which it is evident that only this way is it possible to restore the constitutional order"[59]

## 4 Conclusion

"[I]f the law lords had not leaned in that [provincial] direction, Québec separation might not be a threat today; it might be an accomplished fact" (Trudeau 1968, 198). Indeed, many observers claim that the country's relative success in accommodating Quebec *within* Canada has much to do with its trademark of a "flexible federalism" (Linden 2006, 18), which involves a constant re-balancing of national-subnational power relations through judicial interpretation. Where exactly the right balance lies in these power relations and whether judges do enough to protect self-government is often not only a subject of political controversy. Especially in federal countries featuring national minorities and a difficult context of real or perceived separatism, these interrelated questions frequently also divide academic communities. In fact in Canada, a scholarly debate has been ongoing for long on whether constitutional judges have struck a federal-provincial balance or demonstrated a centralist bias.[60] Similarly, in Spain, some argue that the Constitutional Court has maintained a balanced approach and others see this approach as abandoned since at least two contentious rulings on the autonomy statutes of Valencia and Catalonia.[61] While the Indian Supreme Court's historically rather centralising jurisprudence has been cast in doubt in the post-1989 era of coalition governments by several more state-friendly decisions (Tewari and Saxena 2017, 224 and 252). Belgium seems to be the only case for which assessments do not oscillate between "centralizing" and "balanced". Some regard its constitutional judges as striking a middle ground (Popelier 2017, 32) and others even see them as "a safeguard of the autonomy of the communities and regions" (Peeters and Mosselmans 2017, 102).

Given this lack of consensus and the high level of abstraction of overall assessments on judges as protectors of self-government, this chapter looked more in depth into their role regarding three concrete key dimensions of the distribution of powers whose evolution is a litmus test in any federal system. This promised to provide a more detailed and nuanced picture.

As for the first dimension, that is, the exclusivity of powers, it is striking that Canada and Belgium started from a similar emphasis on "watertight compartments" but then embarked on quite different trajectories with constitutional judges in the former case being complicit in diluting exclusive subnational powers and in the latter case largely preserving them. As for the Indian Supreme Court, its broad interpretation of exclusive state powers is substantially thwarted by federal interventions based on the "pith and substance" doctrine so that its own affirmation that "[w]ithin the sphere allotted to them,

States are supreme"[62] seems only partly true. Likewise in the Spanish case, the only weak emphasis on exclusive powers has certainly not been strengthened by the Constitutional Court, as illustrated by the judicial limitations on the armour plating concerning regional powers in the autonomy statutes.

Secondly, regarding concurrent powers, this chapter analysed the three varieties of explicit, complementary and conditional concurrency. What all of them have in common is, compared to exclusive competences, a presumed advantage of flexibility by enabling legislative cooperation between government levels and the adaptation of responsibility for a subject matter to specific circumstances. However, this comes with certain risks and costs for self-government which are sometimes increased by constitutional judges rather than diminished. Admittedly, this is not the case regarding *explicit* concurrent powers. While these are of no relevance in Belgium and Spain and of quite marginal significance in Canada, the states of India have actually benefitted in this area from judicial interpretation. The Supreme Court strengthened them by further clarifying the modalities of subnational legislation remaining in force based on prior assent of the Indian president. Much more problematic for self-government has been the role played by constitutional judges in Spain regarding *complementary* concurrent powers, which are of no or merely minor importance in the other three countries analysed. First, they deemed it sometimes sufficient to set out basic national rules in mere administrative acts and not explicitly in ordinary legislation, a non-formal approach that is highly unusual compared to other countries with basic legislation (Palermo and Kössler 2017, 147f). Secondly, and that is a problem shared with other countries, judges have often upheld national rules that go well beyond merely basic goals and principles. By contrast, jurisprudence regarding *conditional* concurrent powers has protected self-government in the two of the countries compared where these exist. India's "national interest" clause has been judicially tamed through a specification of the purposes for which the federal government may invoke it, while judges in Spain prevented in their only ruling on national harmonisation legislation a massive unilateral redefinition of the distribution of powers.

Thirdly, concerning the suspension of subnational powers in a negative manner, the Canadian Supreme Court has merely confirmed the political neglect over time of the federal disallowance power, whereas its Indian counterpart has played a more significant role by repeatedly opposing an extensive interpretation of the presidential power to withhold assent to state bills. Suspending subnational powers positively is of course even more incisive because it does not only nullify acts of self-government but replaces them with national government acts. It is thus remarkable that constitutional judges in India have resorted to "creative interpretations" (Thiruvengadam 2017, 86) to protect self-government against the political abuse of President's rule. Concerning Spanish opposition to the independence of Catalonia, the Constitutional Court was, on the one hand, long pushed to the forefront by a national government trying to avoid the political costs of invoking emergency

rule, and then, on the other hand, in charge of reviewing the compliance of such rule with the constitution.

This evidence from the chapter's comparison illustrates that judges in each of the four countries have strongly protected territorial self-government in some of the three analysed dimensions of the distribution of powers and less so in others, thus confirming the importance of a differentiated and in-depth approach. An overarching key question concerning all three dimensions, that is, the exclusivity, concurrency and suspension of subnational powers, has been in recent years how courts position themselves in view of a trend towards more complex governance problems entailing increased intergovernmental cooperation.[63] In fact, the view that "[t]he ideal distribution of powers between governments in a federation is the one in which each government is able to act independently" (Wheare 1963, 14), which guided the ambition of early federal systems, is today anachronistic. The erosion of exclusive competences, in constitutional texts and – apart from Belgium – in constitutional jurisprudence also has to be interpreted in light of this underlying trend. On the one hand, this trend carries the risk for subnational governments to lose with "watertight compartments" a key safeguard for self-government. It is not a coincidence that especially federal countries with national minorities have typically placed much more emphasis on exclusive powers (Watts 2007, 225ff, at 234). On the other hand, it is difficult for them to resist this trend, as also repeatedly underlined by courts in recent judgments. A seminal Canadian ruling referred to a growing international practice "of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts".[64] Even if Belgian jurisprudence regards exclusive powers as the rule, the latter can only be applied insofar as the issue is actually suited for them. Thus, despite its undisputed exclusive competence regarding air pollution, the Flemish Region's unilateral regulation of aircraft emissions was deemed unconstitutional. With other regions and Belgian sea areas under federal control being equally affected by these emissions, any regulation would have necessitated intergovernmental cooperation.[65]

How may constitutional judges then position themselves vis-à-vis this trend towards complexity and cooperation? A recent attempt to redefine their role argued that there are, traditionally, two ways for them to act as federal arbiters enforcing the constitution, either as restrained "umpires" or activist "guardians" (Schertzer 2017, 116–119). However, both these roles would fail to recognise that in diverse federal countries conflicts over the distribution of powers inevitably mix with conflicts over national identity. As the argument goes, therefore, in such countries "all federalism jurisprudence is inherently political" (Schertzer 2017, 130) so that judges should embrace the political nature of a new third role as "facilitators". Judicial facilitation of conflict management would then involve either pushing conflict parties back into political negotiations or, when this is unfeasible, accounting in a judgment for competing visions of national identity and thus rejecting a zero-sum outcome

(Schertzer 2017, 127). In Canada, the Supreme Court has arguably assumed such a facilitator role since the mid-1990s (Schertzer 2017, 133–135) with the Secession Reference being an obvious example.[66] Whether such a role of judges being deferential to political cooperation would work in the other countries analysed in this chapter, and would help to protect territorial self-government, is an intriguing question. First, however, cooperation is often dominated by the better-resourced national government and it is such a "spirit of 'cooperative' federalism" (Tewari and Saxena 2017, 244), rather based on coercion, which actually often prevents in India that courts get involved at all. Secondly, it will be virtually impossible for constitutional judges to assume a facilitator role if one party sees them as biased and casts their legitimacy in doubt like in the case of the standoff between Catalonia and Spain. This and the general tendency of judges to minimise conflict with their political environment (Epstein and Knight 2018, 272–289), especially the more powerful national government, for the sake of ensuring institutional legitimacy suggest their limits in protecting territorial self-government, whatever role they opt for. Thus, they may make an important contribution, as numerous examples cited in this chapter illustrate, but not all hopes should be only placed upon them.

## Notes

1 As I argued, federalism jurisprudence includes beyond the focus on the allocation of powers case law on other dimensions of self-rule (subnational constitutional autonomy, financial autonomy, emergency mechanisms to suspend autonomy) and several dimensions of shared rule (subnational participation in constitutional amendment procedures, participation in national lawmaking, (executive) intergovernmental relations). Moreover, fundamental rights are relevant too because the judicial interpretation of national bills of rights are a main driver for uniformity across jurisdictions and therefore significantly alter national-subnational power relations (see Karl Kössler, "Federalism and Constitutional Interpretation", in Choudhry, O'Regan and Bernal [forthcoming]).
2 See, for example, Livingston (1956).
3 According to Yash Ghai's classical definition, for example, "autonomy is a device to allow minorities claiming a distinct identity to exercise control over affairs of special concern to them".
4 For an overview, see McGarry and O'Leary (2007).
5 Kymlicka contrasts them with "regional-based unity".
6 In practice, this power is used with restraint, since invalidation only happens if an interpretation in conformity with the national constitution is impossible, see Lienhard et al. (2017, 417).
7 *Canada (AG) v Ontario (AG)* [1937] AC 326 (JCPC), 354.
8 *Hodge v The Queen* (Ont) [1883] 9 AC 117 (JCPC).
9 Eugene Forsey, quoted in Hogg (2000).
10 Gilbert Kennedy, quoted in Linden (2006, 29).
11 A special act has to be adopted under the rules of Article 4(3) of the Constitution as

> a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present

and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast.

The Belgian parliament features a Dutch- and a French-speaking language group with relevance under some procedures.

12 Constitutional Court No. 146/2001.
13 Constitutional Court No. 184/2002.
14 See also Delpérée (1993, 136). For example, Constitutional Court No. 25, 26 June 1986.
15 Constitutional Court No. 172/2006.
16 Constitutional Court No. 189/2002.
17 Constitutional Court No. 47/1988.
18 *Edwards v Canada (AG)* [1930] AC 124, 136.
19 *Hodge v The Queen* (Ont) [1883] 9 AC 117 (JCPC).
20 Dissenting Opinion of Puisne Justice Jean Beetz in *Bell Canada v Quebec* [1988] 1 SCR 749, 766.
21 A good example for such incompatibility is a provincial law society act banning people without legal training from appearing as counsels in court, but the federal immigration law allowing exactly that for immigration cases. See *Law Society of British Columbia v Mangat* [2001] 3 SCR 113.
22 Constitutional Court No. 166/2003.
23 Constitutional Court No. 132/2004.
24 See Constitutional Court No. 168/2011, 10 November 2011.
25 Constitutional Court Nos. 33/2001 and 51/2006.
26 *International Tourist Corporation v State of Haryana*, 1981 AIR 774.
27 For example, *State of Bombay and Ors v F.N. Balsara*, 1951 AIR 318.
28 See Section 3.2.
29 STC 37/1981.
30 STC 48/1982, 85/1982 and 12/1984.
31 STC 31/2010.
32 These are national and regional exclusive powers, national powers only of legislation, basic legislation or legislation regarding single aspects of certain policy fields. See Aja (2005).
33 *M. Karunanidhi v Union of India*, 1979 AIR 898.
34 *Western Coalfields v Special Area Development*, 1982 AIR 697.
35 Constitutional Court No. 79/92.
36 STC 69/1988.
37 STC 32/1981.
38 STC 49/1988, 50/1999 and 109/1988.
39 For example, STC 86/1989.
40 STC 88/1986.
41 STC 125/1984.
42 For example, STC 95/1986.
43 For example, STC 61/1997.
44 Partido Socialista Obrero Español (PSOE) and Unión del Centro Democrático y Social (UCD).
45 STC 76/1983. See also Solazábal (1996).
46 *Reference Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 SCR 793.

47 Commission on Centre-State Relations, Report, Part I (Nasik: Government of India Press, 1988), 5.10.06.
48 *Kaiser-I-Hind (P) Ltd v National Textile Corporation Maharashtra North Ltd* (2002), 8 SCC 182.
49 B.R. Ambedkar, one of the chief architects of the Constitution, quoted in Shiva Rao (1968).
50 *State* of *Rajasthan v. Union* of *India*, 1977 AIR 1361.
51 *SR Bommai v Union of India*, 1994 AIR 1918.
52 *Rameshwar Prasad v Union of India*, 2006 AIR 980.
53 See Boix Palop (2017).
54 Ferreres Comella, Victor: *The Catalan Secessionist Movement and Europe – Remarks on the Venice Commission's Opinion 827/2015, Verfassungsblog*, 22 March 2017.
55 European Commission for Democracy through Law (Venice Commission), "Spain: Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court", CDL-AD(2017)003.
56 STC 185/2016.
57 ATC 126/2017.
58 ATC 127/2017.
59 STC 89/2019 and 90/2019.
60 For an overview, see Schertzer (2017).
61 STC 247/2007 and STC 31/2010. See Casanas Adam (2017).
62 *SR Bommai v Union of India*, 1994 AIR 1918, 276.
63 A number of factors have contributed to this trend such as the rise of the modern welfare state and regulatory state, globalisation and – in Europe – supranationalisation, as well as the multitude of (non-)governmental actors involved in processes of political decision-making. See Palermo and Kössler (2017).
64 *Reference Re Securities Act* [2011] 3 SCR 837, 132.
65 Constitutional Court No. 67/2014.
66 *Reference Re Secession of Québec* [1998] 2 SCR 217, 55–60 and 88–90.

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