Chapter-V

Economic Policies and Role of the Supreme Court: An Analysis of Judicial Review
Economic Policies and Role of the Supreme Court: An Analysis of Judicial Review

5.1 Introduction

In this chapter we shall examine the approach of the court in exercising the power of judicial review and shall also explore the factors influencing the exercise of such power by the court. While assessing the actual exercise of judicial review it shall be tested on the touchstone of the two most important grounds on which the power is based upon. In a democracy, judicial review is based upon the ground that, it is a counter majoritarian check on the excesses committed by the other two branches of government and that it protects people’s right. Thus, in a system of checks and balances the importance of judicial review can be best understood by analyzing its capacity to invalidate executive and legislative actions, on these two grounds. In India, this holds special significance as the power of judicial review has been specifically granted by the Constitution.

Broadly speaking the trend that has emerged from the cases discussed in chapter-4 suggests that in majority of cases the court has refrained from upsetting the policy decisions of the government. A number of factors have been attributed to that. The explanations of the court for the limited exercise of judicial review can be broadly categorized into institutional, procedural and substantive factors. Notwithstanding the emphasis laid upon the limited reviewability of policy issues, the court has been equally emphatic about its obligation to protect the Constitution, especially the fundamental rights of people. Therefore the court has carved out the exception to limited judicial review in policy issues and has consistently held that it shall not hesitate to intervene in flagrant violation of Constitution. Nevertheless, the detailed analysis of cases in the previous chapter was evident of the fact that, policy decisions and improprieties in the implementation thereof, has hardly been struck down by the court, even when violation of rights have been alleged. In these issues, the response of the court can be categorized into two kinds, first, the court has exercised judicial
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restraint, and has refused to intervene in the matter and second the court has expressed reluctance to intervene and has not applied strict standards of review.

The impact of the judicial intervention has been two fold. First, court has been able to reinterpret and bring changes in the rights of people through active intervention and adjudication, and second, the court has been able to attain similar results by refusing to intervene in policy decisions. For instance, in Balco\(^1\) disinvestment case or the ITDC workers union\(^2\) case the court refused to stall the policy on the grounds of rights of the labour. The court held that policy decisions cannot be judicially intervened and the consequent violation of fundamental rights of employees is an incidence of service. Notwithstanding the method of judicial decision making, the conclusion has been in favour of the new economic policy in cases on labour dispute adjudication where the court has taken proactive steps in bringing gradual changes in law (See Annexure for a detailed analysis of the gradual changes in labour laws). There seems to be a collaborative effort amongst all the three branches of the government to bring policy changes. This collaborative attempt of the judiciary with the other two organs of the government can be said to have institutional roots, where depending upon the necessity and suitability any organ of the government reacts. This argument finds support from the fact that the court has preferred adjudicating upon that aspect of reforms where the legislature has been able to bring limited policy changes.

Besides the institutional factors that may have influenced the decision making behavior of the judges, there may be other factors as well which may impact upon or provide incentive to the judges to decide in a particular manner. An analysis of the approaches of the court can throw better light upon that issue.

5.2 Approaches to Judicial Review

In Chapter II we have discussed the factors on the basis of which judges may exercise limited judicial review in matters of policy adjudication. These factors can be broadly categorized as procedural limitations, substantive limitations and institutional limitations. These limitations not only constrain the scope of judicial review but the

\(^1\) BALCO Employees Union v. Union of India (AIR 2002 SC 350)
\(^2\) All India ITDC Workers Union v. ITDC, 2006 Indlaw SC 887
court has used as a tool to justify judicial restraint. In another sense these limitations inform the approach of the court towards economic policy issues.

On the procedural front it is believed that court is passive, as it needs to be moved by the contending parties, where as policy making involves active initiative. It is also often argued that policy making involves complex issues, which requires expert knowledge on the subject, whereas judges are generally experts of law only. Policy is meant to address issues that may arise in future whereas adjudication is about an issue that has already arisen and is seeking resolution before a court. In adjudication the issue generally involves two contending parties, therefore hearing their arguments and processing their written submission may be sufficient to come to the conclusion. This may not be the case in policy decisions, where a large number of view points may emerge and need to be heard prior to taking a decision.

The factors mentioned here portray a picture of judicial decision making which is different from the process of taking policies decisions. The other two branches of the government seem to be better equipped to fulfill the above mentioned criteria. While the legislature provides the platform for detailed deliberation, the executive provides the necessary skill and expertise to carry out policy decisions. Therefore it is often argued that the courts should not intervene in policy matters and rather provide the necessary flexibility to the other two branches to experiment with different policies.

However doubts have been raised on the procedural difference and the inability of court to process necessary information for policy formulation. In the case of T.N. Godavarnam v. Union of India, the Supreme Court without adhering to the procedural limitations has taken over the implementation of the Forest (Conservation) Act, 1980.

In this case as well as many other public interest cases, the court has appointed expert committees to fill the lacunae with regard to technical expertise. The court has also taken suo-motto cognizance of matters involving governance failure and has required the relevant authority to act. Thus procedural limitations have been overcome by the Supreme Court in many instances. Moreover it may be mentioned that the court is

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3 T.N. Godavarnam v. Union of India, WP 202/1995
primarily resorted to resolve legal tangles and not to pass laws or formulate policies. From that perspective testing the procedural and substantive legality of the policy in question falls within the realm of judicial activity. Accordingly the court has acknowledged that it can intervene in policy issues if substantive injustice is committed. However actual discussion of cases in the previous chapter provides evidence to the contrary. Thus there is a persisting dichotomy between the judicial reiterations and the solutions that are reached by the court.

Another limitation, which hinders the exercise of judicial review of policy decision, is about substantive limitations, wherein policy issues are considered to be not amenable to judicial review. In other words policy issues are non-justiciable. However it is apparent from the cases that justiciability is a flexible concept which is subject to exercise of discretion by the judiciary. Both these limitations conceive a limited role of the judiciary.

Here non-amenability is premised on the fact that policy issues require exercise of discretion and a choice amongst alternatives. Since due to the procedural limitation, the court has limited exposure to alternatives, the court cannot be a part of policy formulation. However this limitation has also been overcome in a limited sense by the invocation of the epistolary jurisdiction of the Supreme Court, which calls for focusing attention on doing justice. For instance the Supreme Court in *M.C. Mehta v. Union of India*\(^4\) has held that CNG is a better option as a vehicular fuel in Delhi and ordered for the conversion of all public transport from diesel to CNG. This was a matter of policy which the court took and ensured the implementation thereof. Similarly in cases on economic reforms we find that the court in general has held that policies are not justiciable and has therefore relied upon the decision of the government, especially if it is based upon recommendations of expert committees. However there are also instances where the court has gone into the facts of the case and has upheld the policy. For instance in *Reliance Energy*\(^5\) case the court has analyzed the accounting principles to determine the interpretational propriety of the terms of tender. Likewise in *Delhi Science Forum*\(^6\) the court looked into the

\(^4\) Writ Petition (Civil) No. 13029 of 1985  
\(^5\) Civil Appeal No. 3526 of 2007  
\(^6\) (1996) 2 SCC 405
development that has taken place around the world and held that the decision to privatize the telecom sector is valid. So far as choosing amongst alternatives is concerned we have seen that the court has clearly struck down the policy of e-auction in determining coal prices in one case and refused to intervene in purchase preference in coal in another case. While in the first case, the court held that profit motive cannot be the sole criteria for a government undertaking, in the later case, the court held that the policy of the government can be based upon profit motives alone. Therefore there does not seem to be any definite principle as to when should the court intervene and what is a justiciable matter. Therefore substantive limitations have been overcome in many of the cases that have been discussed, even when the court has reiterated that policy issues are non-justiciable in nature.

The third limitation upon the exercise of judicial review is the institutional limitation. It hinders expansive use of judicial review. Under this theme we have two major arguments; first, judicial review is undemocratic in nature and therefore should not be exercised to reach policy decision and in a democracy, the elected representative of people should take policy decisions. Thus majority rule should be allowed to prevail in policy matters. The second argument is on protection of fundamental rights of people against the excesses committed by state. Since judiciary is unelected and unrepresentative, it is often argued that judicial review is undemocratic. However the opposite has also been argued and it is observed that, courts are counter-majoritarian checks in democracy. So far as they exercise judicial review to protect peoples fundamental rights and also check the excesses committed by the other two branches of the government, judicial review is a necessary component of democracy, and rule of law. Thus judges can exercise judicial review in order to fulfill their obligation as a counter majoritarian check even if the matter before the court pertains to a policy decision of the government. However we find that the doctrine of separation of power and deference to the will of the majority has been most frequently resorted to defend limited reviewability of economic policies.

From the above discussion on factors that hinder the exercise of judicial review in policy matters, we find that the Supreme Court has followed two major approaches.

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7 Appeal (civil) 5302 of 2006
8 Transfer Case (civil) 4 of 2004
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The first approach is the court has deferred to the will of the majority, and has justified that on multiple grounds discussed above. Deference to legislature is premised upon the doctrine of separation of power as well as the majority rule. The roots of adherence to majority rule can be traced to consensus prevailing in society, wherein one of the prominent methods to ascertain consensus in the society is relying on the majority rule. The second approach that has emerged is, that the court has acknowledged that judicial deference can only be limited in nature and not absolute, and whenever there is violation of the constitutional rules and principles, the court has to intervene in policy matters in exercise of its power of judicial review. However as we have discussed in chapter IV as well as in the present chapter, there is a gap between principles that have been reiterated by the Supreme Court and the decisions that have been reached. An analysis of cases on economic reforms indicates that the court has reiterated both the approaches while adjudicating contested claims.

It is evident from the cases discussed in the previous chapter that the court has preferred to exercise judicial restraint. Whether or not it has been able to refrain from such exercise of power is a different issue altogether, because the court not only exerts influence on a policy measure by active participation in the validation of a policy but also by maintaining strategic silences. It is apparent from the cases that the court wishes to give due deference to the prevailing consensus in the society as reflected through the policy decisions of the legislature. Therefore in majority of cases it has held that the legislature should have the freedom to do trial and error in economic policy matters. The court has also emphasized upon the importance of a deliberative process of decision making in a democracy and has held that, divergent viewpoints could be expressed in the parliament, which provides the opportunity to the legislature to become aware of varied interpretations and it is for a vigilant parliament to take policy decisions keeping in mind the interest of the general public. Thus, the court should refrain from intervening in policy issues.

In order to defer to the consensus of the society, the court may have to distinguish between consensus as it is prevailing in the society (popular consensus at a given point of time) and the consensus as it is emerging from the representatives of the people. When the judges uphold the decision of the government, they uphold the
decision of the representatives, and do not ascertain the consensus prevailing in the
society. Hence amongst the numerous approaches to understanding consensus the
court places reliance upon institutionalized consensus or representative consensus. By
equating the consensus in legislature to that of the consensus in society, the court may
negate the obvious gap between these two distinct viewpoints and in that sense the
court facilitates maintaining the status quo as envisaged by the legislature and
legitimizes the policy decision taken by it.

It is the duty of the court to ascertain the legality of consensus, not merely by looking
at the agency which is voicing the consensus but also by looking at the content
thereof. The essence of content is value which has to prevail over mandate since
mandate is relevant at a given time whereas value is eternal. Constitution is one of the
important expressions of the commitment of society to certain values, but does not
encompass all that expresses the values of the society as a whole. Therefore to the
extent judicial intervention is called for to analyze the policy decisions of the
government vis-a-vis the Constitution and the values enshrined therein it cannot be
said to be curtailing the sphere of legislative and executive decision making.

Since judges have refrained from intervening in policy matters and have observed that
the legislature has complete freedom in experimenting with policy issues one may
argue that the judges are justified in giving effect to the decision of the legislature as
in a democratic system the legislature is legally authorized to create law on a subject
even if no apparent consensus exist. This is because, legislation as an activity is
directed towards the future. In contrast to the legislature the judiciary is not legally
authorized to represent the people. In other words it does not understand the interest
of people as the legislature does. This conclusion is derived from the non-elected
characteristics of the judiciary. Thus it should not in its activist spree make or unmake
laws which have not cleared the democratically defined processes and procedures.
Thus advocates of this approach observe that judges have limited freedom so far as
exercises of judicial review on policy issues are concerned. In view thereof the
authority to go beyond the consensus remains contentious.

In the analysis of cases on economic reform we find that the court has invariably
relied upon the decision of the government on the ground that, policy decisions are
directed towards attaining public interest. However the concept of public interest is not subject to a straightjacket formulation. Moreover there are studies, which show that adherence to majority rule need not necessarily imply attainment of public interest. Particularly the interest group approach to the understanding of political decision making\(^9\) as well as Constitution making\(^10\) addresses these issues in greater detail.

The difficulty with regard to the concept of public interest lies in defining and capturing the variety of values which can be said to be capturing public interest. Broadly speaking it conveys two meanings.\(^11\) First, in its logical sense it means to "explicate the meaning of the established basic values of the community." According to this meaning it is in the interest of public to pursue a certain goal as that would be consistent with the meaning of a basic community value. Second public interest means "a policy is in the interest of public if its consequences would implement one or more of the established values of the community." In other words, the value is such that it would be in the interest of public not to destroy the value in question.

According to the above stated meaning of public interest, it is essential to determine, the target group for which the policy is being determined, because, depending upon the social and economic existence, people are differently placed so far as their interest is concerned and they are subject to different set of legal rules and principles. In such circumstances, the desired as well as legitimate goal and procedures to attain such goal shall differ from community to community and group to group. In another sense, plurality of interest may exist in society, and therefore unless the target beneficiary is determined, what amounts to public interest shall remain debatable. Even within a given group there might be divergent views as to the values, and the procedure of attaining that. Many a times the basic values, which are held to be in the interest of public, does not emerge from diffused groups within a community, rather from an articulate and influential group within it. Accordingly the consensus that seemingly

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emerges with regard to a value the perusal of which is important for the interest of the society as a whole may be a product of acquiescence of its members, which has emerged either overtly, implicitly, reluctantly or by default. To a certain extent clarity with regard to the value can emerge and be articulated depending upon the nature of expressing acquiescence. For instance in India when the commitment to socialism was articulated at a constitutional plane and also at the level of governmental policy documents, the judiciary could resort to this value as a ground for justifying violation of fundamental rights and upholding the validity of a number of nationalization statutes. In other words socialism was the anchor for constitutional adjudication of certain matters. However due to the limited or scattered expression of acquiescence to the new economic policies, either at a constitutional plane or at a statutory plane, the Supreme Court does not have an anchor in a broader sense. Therefore the court has been presuming the validity of a policy per se rather than being able to relate that to a value to which the process of economic reforms could be anchored to. It has led to an intellectually uncomfortable position for the judiciary, which has found expression occasionally.\textsuperscript{12} The difficulties lie in the fact that, there is a gap between the judicial strategy to deal with the shifting ideas of public interest and the acknowledgement of that shift. Therefore as a first and an essential step towards bridging that gap, Baxi invites the justices to make their “fighting faiths” both legible and intelligible,\textsuperscript{13}because the constitutional text and context is expansive and hospitable enough for pursuit of liberal as well as socialist constitutional interpretation.

In light of the above discussion we find that there has not been adequate consideration of the concept of public interest in the cases pertaining to the new economic policy. There has hardly been any analysis on what public interest is and which interests of public shall be served if a particular decision of the government is implemented. The presumption of validity has been very strong in favour of policy decisions, equally strong and heavy is the burden of proof that has been imposed upon the person challenging such policy decisions. Although the court has appealed to the rightness of decision, it has not discussed in detail, the scope of fundamental rights and the limitations thereto. In the absence of any such discussion the protection of

fundamental rights remains susceptible to judicial discretion. The argument that has been advanced for the inadequate analysis as to the interest of public is based upon the foundations of limited material that the judges can refer as well as the non-representative character of the judges, which keeps them aloof from societal developments. This can be amended to certain extent by bringing changes in the process of appointment of judges. However more than these technical changes, the issues needs to be addressed through the constitutional text and the values inherent therein.

The judiciary has expressed the limited reviewability of the policy issues also because, intervention of court in policy issues may be perceived as a transgression of jurisdiction by the court, in which case the independence of the court may get adversely affected. In another sense, this justification is premised upon the fear that if the judges deviate from the prevailing consensus (as expressed through the legislature) their impartiality, neutrality and independence shall be sacrificed and shall adversely affect the reputation of the court. This fear is not without any foundation. In India, judges have in the past faced supersession, virtual invalidation of their decision by amendment of the law including the Constitution, curtailment of the power of judicial review etc. Further deviating from consensus also render the role of the judge to scrutiny, which can no more be shielded within the folds of institutional neutrality. It will also require giving a new direction to the issue at hand thus requiring taking a path other than the consensus. Thus the Supreme Court has adopted the consensus approach in justifying limited reviewability of policy issues.

In the cases that we have discussed, we found that, the court has relied upon the decision of the expert committees to uphold the validity of a given policy. However it is not known how far these reports give expression to the prevailing consensus in the society, if that is what the court apparently gives effect to through limited exercise of judicial review. Further we find that many of the policy measures are being implemented through executive actions, in which case the scope of deliberation by the representative of people is less. In such circumstances, the court cannot be said to be giving effect to the consensus in the society unless it makes these decision pass through the constitutionality test. Moreover the court is constrained by the absence of
freedom in seeking the enactment of a law on a given matter. Thus creating safeguards and relaxing the burden of proof on cases where policies are challenged, can be one of the ways of balancing expert views with that of the popular consensus.

The court has often justified its non-intervention in policy issues on the ground that judicial intervention might delay the implementation of the policy, escalate cost and upset the finely crafted plans. This is an extraneous consideration in comparison to legal rules and principles. The reliance placed upon this ground cannot also be derived from the consensus approach, unless it is shown that some public interest shall be served if a project is completed or a policy is implemented.

The only evidence that the judges have given effect to the consensus is that there is a reiteration in all the cases that we discussed regarding limited reviewability of policy issues, and the judicial intervention in cases of violation of the Constitution. However these reiterations have not given rise to the emergence of a definite judicial strategy. This is clearly visible from the approach of the Supreme Court, which is less often resorting to constitutional arguments while adjudicating upon policy issues. The court is more often relying upon the policy per se to justify the pattern of judicial review. This evidences fitting period demands into adjudication without ascertaining the period values as such. This also reflects that courts more often rely upon consensus not to ascertain and give effect to consensus in society but because, they do not prefer deviating too much. Thus in a broad sense the court has followed the consensus approach.

The second approach that has emerged from the trend of judicial review in the post economic reform era is that although the court has accepted limited reviewability of economic policy issues it has carved out certain exceptions, which includes, protection of constitutional and statutory provisions and protection of fundamental rights of people. Fundamental rights are considered to be sacrosanct and needs to be protected against infringements. However these rights are not absolute in nature. Specific limitations have been built into these freedoms and these cannot be taken away in an arbitrary manner. Over a long period of constitutional adjudication the court had provided safeguards against arbitrary violation of fundamental rights. However from the analysis of cases in the previous chapter we found that, the court
has presumed the validity of all governmental actions. It has also held in a number of cases, that a policy decision cannot be challenged on the ground of violation of fundamental rights, especially in cases where rights have emanated as a consequence of judicial interpretation, rather than from the text of the Constitution itself. This approach has opened debates as to the nature, scope and importance of fundamental rights.

In view of this approach it appears that the Supreme Court has drawn distinction between rights guaranteed by the Constitution and the rights recognized by the Supreme Court. The distinction is based upon the 'source' from where the fundamental right has emanated. Having emphasized upon the source of rights, the decision has raised two issues, first pertaining to the meaning and scope of fundamental rights and second regarding the scope of judicial review in economic policy matters.

The source of fundamental rights are important to the extent, they provide a trump to the individual possessing such a right against any violation thereof. However in the Indian context due to the inbuilt limitations, fundamental rights are not trumps in an absolute sense. Nevertheless, Article 32 provides that a person can approach the court for protection of fundamental rights. Moreover the doctrine of basic structure has established that the values underlying these freedoms are beyond the power of the parliament to curtail, even through the amendment to the Constitution. Thus, it is accepted that fundamental rights as contained in different provisions of the Constitution are merely an expression of the rights or the constitutional recognition thereof but the values underlying those stated rights are inherent to the constitutional scheme. This view has been taken forward by the Supreme Court in *I.R. Coelho v. State of Tamilnadu*\(^{14}\) where emphasis has been placed on the values that underlie the fundamental rights. Thus non recognition of fundamental rights for the purposes of giving effect to policy decisions defies the fundamentals of a constitutional democracy and the concept of judicial review.

In our analysis we found that the court has made gradual changes in the standard of review of legislative and executive actions, pertaining to economic policy changes.

\(^{14}\) Appeal (Civil) 1344-45 Of 1976
which are alleged to be violating the Constitution. While interpreting constitutional provisions especially provisions guaranteeing fundamental right, it has been argued that a strict standard of review should be resorted to.\textsuperscript{15} However there has been gradual change in the standard of review. For instance in the previous chapter we find that in cases pertaining to Article 14 court has used the argument of fundamental rights more as magniloquence rather than as a tool for judicial intervention seeking remedial actions. The court has constrained the limits of judicial review to an extent where “public interest” has been given precedence over individual right. Even the invocation of the doctrine of level playing field has not furthered the cause of protection of equality. Instead of providing substantive protection against executive and legislative action this doctrine has advocated a facilitative role of the judiciary. As a result the standard of review has weakened.

The court has also not adequately been able to check the excesses of the other two branches as; it has put a heavy burden upon the person challenging the decision of the government. Although presumption of bonafide has to be there for effective administration, nevertheless in cases where there are evidences to support that the exercise of discretion by the executive authority has failed the tests of Wednesbury principles, the court could have struck down such action instead of justifying non-intervention on the grounds of economic efficiency.

From the above discussion it is evident that though the trend of judicial review suggests that the court has followed the rights approach and the consensus approach; a deeper analysis into these approaches and the decisions of the court provides evidence that there are trappings of these approaches rather than completely reliance thereupon. Thus the approach of the court towards the applicability of judicial review does not clearly emerge. While on the one hand the court has been observing that it shall not intervene in the policy matter, and it shall do so only when constitutional provisions are violated, however it is apparent from the above discussion that even in cases of violation of fundamental rights, the court has adopted different approaches. It has led to confusion as to the proper place of judicial review in the matter of economic policy. The confusion has been compounded by the fact that, while on the one hand, the court

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has asserted that the Supreme Court is the final interpreter of the Constitution, on the other it has admitted the vulnerabilities of judicial interpretations which have to evolve according to the changing demands of time and adjust to the institutional placing. While changing interpretation is emerging in the context of constitutional adjudication of policy issues, which also is evident of the exercise of judicial discretion, what material can be relied upon by the court to decide such cases, what principles to be followed do not clearly emerge from the decided cases. There also seems to be a gap between the reiteration of constitutional principles and the actual application thereof.

5.3 Factors Influencing the Decision Making Process

Broadly speaking there are two approaches to explore the factors that may influence the decision making behavior of the judges, first an individual centric or actor centric approach and second the institution specific approach.

5.3.1 Actor Centric Approach

One of the important approaches to the study of judicial behavior is the actor specific approach. Here, it is assumed that, judicial decision making mirrors the personality of the judge, as Justice Cardozo of the American Supreme Court has rightly observed “We may try to see things as objectively as we please nonetheless we can never see them with any eye except our own”.16

It was the realist school, which exploded the myth of declaratory role of the judges and asserted that judges make law. For realists, judicial law making is coloured by a judge’s notion of life and his own experiences. Therefore understanding the background of the judges can explain the voting pattern in the Supreme Court. Number of studies have been carried out to explain the relationship between social background of the judges, judicial attitudes and the decision making process.17

These studies have analyzed the attitude, occupational experience, educational background, party affiliation, ideological leanings, social and economic status, tenure of service, future prospects of promotion and post retirement benefits etc. In countries where the entire court do not sit but judges are paired together to form benches the impact of other judges on the bench or the collegial factors have also been studied in the past to find out the relevance thereof on the decision making process. Another component of this kind of study is to analyze the factors that give incentive to the judges to decide cases in a particular manner. These incentives could be pecuniary as well as non-pecuniary.

In India not many studies have been conducted to analyze these issues, even though judges wield enormous power. In India in addition to the power provided by the Constitution, much of the court’s power is self-acquired, it is all the more important to know what influences the judges. While the Constitution specifically provides that the law declared by the Supreme Court is the law of the land, the courts have further expanded the scope of judicial review by enunciating the doctrine of basic structure whereby even the powers of the parliament to amend the Constitution has been made subject to the exercise of judicial review. In such circumstances, where the decision of the Supreme Court on legal and constitutional interpretation is of much authority and regard, it is essential to look behind the institutional structure of the Supreme Court and analyze the composition thereof.

A close look at the composition of the Supreme Court will open the window for better understanding of judicial pronouncements. The question to be addressed here is who becomes a judge and what factors influence his decision making. The constitutionally mandated qualification includes that he/she should be a citizen of India, has been at least five years a judge of a High Court or two or more such courts in succession or has been for at least ten years an advocate of a High Court or two or more such courts in succession or is in the opinion of the President a distinguished jurist. Other qualifications that have crept into the selection process include, age, gender, regional considerations etc. While these considerations have crept in as additional criteria, one of the constitutionally prescribed categories of people are yet to be appointed as judge

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18 Article 124 (3) of the Constitution
of the Supreme Court, viz., distinguished jurists. Even amongst the first two categories it is the first category that has dominated since independence. After the introduction of economic reforms there are only two direct recruits from the bar to the Supreme Court of India.\textsuperscript{19} Besides these technical qualifications, a judge of the Indian Supreme Court is expected to be a man of high calibre. Much emphasis is placed upon the impartiality, neutrality and independence of the judiciary. Thus a person to be suitable to become a judge should have the calibre and character to uphold these values. Judges also have their self role perceptions. In matters of appointment of judges the Chief Justice of India, who along with other senior judges of the Supreme Court constitute collegiums for the purposes of consultation with the executive. Except in the case of the appointment of the Chief Justice in all other cases he/she shall always be consulted.

In the previous studies conducted by Gadbois\textsuperscript{20}, Rajeev Dhavan\textsuperscript{21}, V.K. Gupta\textsuperscript{22} and others\textsuperscript{23} they have examined the background of the judges of the Indian Supreme Court judges. George H. Gadbois, Rajeev Dhavan and V.K. Gupta have reached the conclusion that by and large a judge in the Supreme Court has a socially and economically advantageous family background, belong to the majority community, although other religions also get represented in the court.\textsuperscript{24} The judges either have received their education in foreign universities or have studied in better universities in the country. One significant finding of these studies is that all the judges that they

\textsuperscript{19} Kuldeep Singh, N. Santosh Hegde, JJ.
\textsuperscript{21} Rajeev Dhavan, The Supreme Court of India A Socio-Legal Critique of its Juristic Techniques, N.M. Tripathi, Bombay, 1977.
\textsuperscript{24} Gadbois came to these conclusions while studying thirty-six judges who had served on the Supreme Court of India between 1950 and 1967. Rajeev Dhavan had come to these conclusions while analyzing background information of fifty-five judges who had served the Court between 1950 and 1975. V.K. Jain has come to similar conclusions while studying judges appointed during 1973-1981. Malia Redick has analyzed the voting pattern of the judges serving in the Supreme Court from 1954-1982.
have studied, do not have political affiliation. According to Gadbois judges had not participated even in the freedom struggle of India.

The trend of appointing practicing advocates as judges is not new as all these studies confirm that Supreme Court judges had long practice career in high courts and were first appointed as a judge in the court before which they had practiced. In view of these observations it is obvious that the age by which anyone gets appointed as a judge in the Supreme Court he is in his mid fifties. Dhavan finds additional information on appointments of judges and states that although judges from all the high courts had been elevated to the Supreme Court, a significant number of them are from the Calcutta, Delhi (including Punjab) and Bombay High Courts. He also finds that many of them had served in commissions of enquiry before getting appointed as judge in the Supreme Court, however that is not an essential requirement.”

Even though there could be exceptions to this prototype, the striking homogeneity and similar socialization experiences shared by the judges of the Supreme Court and large number of unanimous decisions pronounced by them has made it difficult for some to establish any correlation between a particular personal characteristics and the decision that is reached by the judge.

Previous studies have also examined the relation between social backgrounds of the judge’s and the voting pattern, in terms of participation of judges in court, their confirmations with the majority, leadership in deciding cases, the number of times they have dissented from the majority or the number of times they have preferred writing a separate opinion. However Reddick finds that unlike the U.S. and the Canadian justices, a social background model of the voting behavior of Indian justices has little explanatory value. The difficulty gets compounded in case of the Indian judges, because irrespective of the background, Indian judges prefer to give unanimous decisions. Therefore the influence of any particular factor could not be established by her.

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Notwithstanding the conclusion reached by Reddick in the present study we shall attempt to explore the relationship between social background factors and the decision reached by the court. The reason being, in Reddick’s study she examined the causality between background factors of individual judges and the relation that these factors have with the decisions pronounced by them, whereas in the present study we are not doing a causality test, rather we are focusing on exploring the pattern of judicial review in matters of economic reforms.

The present analysis is different from the previous studies in several respects. First, unlike other studies the present analysis is not about the judges who have served in the court during a particular period. It is not examining the background information of all the judges who were appointed since 1991. Here while we are aware that more than 90 judges have already served or are in the service of the Supreme Court since the introduction of economic reforms in 1991, however all of them have not featured in the decisions discussed by us. Thus instead of focusing on judges who have served the court since 1991, we have focused on cases where the constitutionality of a policy or the implementation thereof has been challenged before the court and the judges who have participated in such cases. Therefore the present analysis is limited to the cases where the relevant issues have arisen and the judges who have participated in deciding those cases. In the previous chapter we have discussed 28 such cases. In these cases total numbers of 39 judges have participated in the decision making process. Thus we have focused on these 39 judges rather than on all the judges who have served since 1991.

Second, all the previous studies have focused on dissenting and concurring opinions, it is argued that the decision making behavior of a judge can be best analyzed by examining the contribution of the judge in the ultimate decisional output. It is the dissenting and concurring opinions, which makes a person stand separate and independent of the ‘majority’ of judges, and pronounce a different view from the ‘decision of the court’. Thus this is evidence of a stronger conviction on the part of the judge with regard to the view that he expresses. Any expression of individualistic behavior requires on the part of such a judge to stand apart from other judges amounting to breach of the consensus norms. Therefore that is a better indication of
Chapter V

the judicial behavior and social background information. However in the present study, we all the decisions have been taken by consensus. Most of the cases that we have discussed have been decided by the entire court, and rarely concurring opinions have been written. There is unanimity so far as the decision the issue of policy reform is concerned. There is also unanimity amongst judges while deciding cases. Thus the unanimity is two fold, first with regard to subject matter and second with regard to the judges. Hence the nature of data is different from the previous studies. The uniqueness of this data can be explained by the fact that there is no exercise of discretion in choosing the kind of opinions that will be studied. Since the focus of the discussion is subject specific decision making, cases decided on economic policies have only been discussed even if dissenting voices do not feature in such judgments.

Third, the previous studies have analyzed the pre-appointment experience, more particularly their duration of private practice; however we have taken two more factors into consideration. First, we have analyzed both pre and post appointment government assignments that the judges are engaged in. In the pre appointment stage, we have looked into various government appointments that the judges have accepted. For instance we have analyzed how many of the judges have been government advocates, standing counsels, advocate general, attorney general or solicitor general. This data is evidence of the fact that the number of judges who have been advisors to government and have also defended the government before courts of law. We have also looked into the post-retirement benefits that judges have received from the government, in terms of appointment into commissions and regulatory bodies.

Fourth, in the present analysis labeling techniques have not been adopted, whereby a judge can be labeled as conservative or liberal, unlike other studies, because all the cases have unanimous decisions. Therefore there may be difference of degree rather than of category amongst the judges and labeling per se may not explain much. Lastly the previous studies have not focused on the factors that act as incentives for the judges to decide in a particular manner. In the present analysis we shall focus on the incentives that may influence judges to decide in a particular manner.
A. Pattern of Decisions

In chapter IV we find that judges usually defer to the legislative and executive action in matters of economic policies. They have hardly struck down policy decision of the government.

Table 5.1: Judgment Patterns in Select Policy-Related Cases

<table>
<thead>
<tr>
<th></th>
<th>Cases</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upheld</td>
<td>26</td>
<td>92.9</td>
</tr>
<tr>
<td>Rejected</td>
<td>2</td>
<td>7.1</td>
</tr>
<tr>
<td>Total Number of Cases</td>
<td>28</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 5.1 shows that in majority of cases (93 percent), the decision of the government has been upheld by the Supreme Court. Out of 28 cases, only in 2 cases judges have rejected the decision of the government to give effect to a policy. Thus the decision to uphold policy decisions of the government is near unanimous. Even in those two cases where the court has struck down the government action, judges have taken unanimous decision. There are no dissenting opinions in any of these cases, which could have provided an alternative approach to the issue. Moreover those two decisions where the state action was struck down, the judges have upheld the validity of the policy. They only have reservations about the method of implementation. Therefore we find a large consensus amongst the judges to uphold the decision of the government. Large number of unanimous decision were also found by Gadbois, where he found that only 7 percent of decisions produced in the first decade of independent India had dissenting opinions. The rest 93 percent of decisions produced during that period were unanimous decisions.

The unanimous decisions could be explained by the commonality in the social background of judges. This view finds support from many studies as discussed earlier. It is advocated that similar background leads to similar upbringing and experiences in life and ultimately leads to similar decision making processes as well.

This has also been the conclusion of a study conducted on the background information of the Law Lords in United Kingdom, where Griffith found that judicial
understanding of public interest is influenced by the social background of judges.\(^{27}\) He concludes that similar background of judges in England has led to similar perception amongst judges as to what serves public interest. Therefore it cannot be said that unanimous decisions and similar background information are disjointed facts.

In the present analysis we find that judges share certain common features. We shall now proceed to analyze the commonalities and differences amongst judges and explore whether their background information can assist in understanding the pattern of decision making. Before we proceed with the analysis of background information of judges it may be mentioned social background information of some of the judges have made their policy preferences quite apparent. In this category we may include, Justice Krishna Iyer,\(^{28}\) Justice P.N. Bhagwati,\(^{29}\) Justice, D.A. Desai\(^{30}\) and Justice O. Chinnappa Reddy.\(^{31}\) These justices may be taken as points of reference for appreciating the importance of this method. In view of these past evidences on the relation between policy preferences of judges and the decisions that they arrive at, we shall proceed further to analyze the social background information of 39 judges who are part of the 28 cases that have been discussed in chapter IV.

B. Political Affiliation

One of the relevant information for the purposes of the present analysis is the data on political affiliations. However the data on political affiliation of the 39 judges that we are studying is not available, which could have indicated their political or ideological leanings. Instances of the political affiliation of judges are very few. For example, Justice Krishna Iyer was a minister in the communist government in Kerala. His political ideas have influenced his decision making as well, similar is the influence on


Justice O. Chinnappa Reddy in whose decisions there is a clear tilt towards socialism. Amongst the judges who have been appointed after the economic reforms was introduced we find that two judges had political affiliations prior to the appointment as a judge of the Supreme Court.

Justice P.B. Sawant was the office bearer and legal advisor of several trade unions; Justice A.S. Anand has been a student leader at the Lucknow University and had affiliation with the Praja Socialist Party. However none of judges appointed after 1991 were member of any legislative body. The only exception is Justice Ranganath Mishra. He was nominated to Rajya Sabha by Congress support, after his retirement as the Chief Justice of India. In the absence of detailed data on this account no meaningful analysis can be carried on. Although one may argue that traces of political affiliations and ideological leanings can be found in the judgments pronounced by the court that is not a sufficient criterion in the given circumstances, since the cases we have analyzed reflects unanimous decisions.

However the lack of data could be explained by the fact that the process and qualification for appointment as a judge in India, emphasizes upon professional expertise. Further there is emphasis upon the concept of independence of judiciary. In pursuance of the English common law tradition, the position of a judge is held high, and the doctrine of separation of power, independence of judiciary and rule of law were embedded to the Indian legal system. Thus a deliberate distance was created between known political affiliation and the role that plays in the process of appointment of judges. However considerations of political affiliation do not stand outside the realm of necessary considerations. Because, “the plain fact is that only certain kinds of human beings can become justices- those with the ‘right’ socialization, ‘right’ professional standing, ‘right’ kind of reputation. The criteria transforming human being into justices cannot transcend dominant ideologies and the need to maintain and expand organization of force’. Thus political affiliations and ideological leanings contain important information about the making of a person as a distinct human being notwithstanding similar socio-economic background of the

judges. Thus in the present analysis due to the absence of any known affiliation, it cannot be conclusively held that, non-affiliation to political parties is positively related to the pattern of judicial review that has emerged in the present analysis or vice versa.

C. Educational Background

In the present analysis out of 39 judges 31 judges have bachelors’ degree in law. Seven judges have masters’ degree out of which two judges have obtained their masters degree from foreign universities, while one of the judges has obtained professional degree in chartered accountancy.

Table 5.2 Educational Qualification of Select Supreme Court Judges

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>LL.B*</td>
<td>31</td>
<td>79.5</td>
</tr>
<tr>
<td>Master Degree*</td>
<td>7</td>
<td>17.9</td>
</tr>
<tr>
<td>Other Professional Degree</td>
<td>1</td>
<td>2.6</td>
</tr>
</tbody>
</table>

* Two Foreign Educated in Each Category

The result obtained by us is in contrast to the previous studies conducted by Gadbois and Dhavan where they had found that forty to fifty percent of the judges had received their complete or partial education from abroad whereas we find that the judges whom we have focused on have mostly received their degrees from Indian Universities.

When we explore the impact of educational qualification upon the decisions pronounced by the judges we find that the impact of professional qualification on is apparent to some extent. In Reliance Energy Pvt. Ltd. v. MSRDC\textsuperscript{34} the issue before the court was regarding the interpretation of a particular term in the tender document, which pertained to principles of accountancy. Although the Supreme Court has been observing that it cannot intervene in policy matters, in this case a bench consisting of Justice Arijit Pasayat and Justice S.H. Kapadia went into the terms of the tender documents, interpreted relevant terms on accountancy and held that those terms if

\textsuperscript{34} Appeal (civil) 3526 of 2007
interpreted in the manner suggested by the judges would allow the petitioner to be eligible to be considered for the tender. Thus knowledge of accountancy comes handy for the justices as one of them is professionally qualified on the subject. This observation also supports the consistent pattern of justification advanced by the judges that they should not intervene in policy matters as they lack technical expertise on the subject. Thus, when they have the required knowledge they may not hesitate to intervene in a policy matter. However this observation cannot be generalized since, it is based on only one observation. Multiple observations could have provided strength to this argument.

D. Pre-Appointment Work Profile

Information on pre appointment professional experience of the judges are relevant as that can throw light upon the response of those judges in a given policy matter. We find that all the judges except two have been first appointed to the High Court where they were practicing and have been gradually elevated to the Supreme Court. The two judges, who have been directly appointed to the Supreme Court, are Justice Kuldeep Singh and Justice N. Santosh Hegde. Remaining judges (37) have had practice experience as well as judgesship experience in different High Courts. The Constitution of India in Article 124(3) (ii) provides that to be a judge a person should have been in practice for at least ten years in any High Court or in two or more High Courts in succession. Therefore we find that all the judges had more than ten years of practice experience prior to their appointment as judges in the High Court or the Supreme Court.

The two judges who have been directly appointed to the Supreme Court have fairly long practice career as well. Prior to being appointed to the Supreme Court, Justice Santosh Hegde had served as the advocate general of Karnataka, additional solicitor general of India and solicitor general of India. Prior to his appointment to the Supreme Court Judge Kuldeep Singh had served as the senior standing counsel for the central government in Punjab & Haryana High Court, advocate general of Punjab and additional solicitor general of India. While Santosh Hegde had a practice career spanning a period of more than three decades, Justice Kuldip Singh had a practice career spanning twenty-nine years. Thus practice experience is given precedence
while appointing judges in India. This is also evident from the fact no appointment has yet been made from the third category of persons who can be appointed as a judge of the Supreme Court, viz., distinguished jurist.

In addition to the practice experience, the judgeship experience is generally emphasized upon. The reason behind very less number of direct recruits can be explained by the attitude of the judiciary as it is reflected in the Law commission report, which observes that in view of the appointing authorities "it will be somewhat hazardous to appoint to the bench a person straight from the bar without previous judicial experience."\textsuperscript{35} Thus along with practice experience judicial experience is also considered essential for appointment to the Supreme Court.

While it can be argued that direct appointments to the Supreme Court may have impact upon the decision making behaviour of the judges, as is evident from the environmental activism displayed by Justice Kuldip Singh, but generalizing this arguments which is primarily based upon one observation would be stretching the argument too far. However the emphasis upon the professional legal experience of invariably all the judges is indicative of the fact that the experiences gained during professional career is considered useful to carry out the functions of a judge at the level of the Supreme Court. Thus the questions here is what kind of experience could have had impacted upon the decisions reached by the 39 judges who were part of the 28 cases that we have analyzed in the previous chapter.

Table 5.3 Pre-Appointment Government Assignments

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>8</td>
<td>20.51</td>
</tr>
<tr>
<td>Yes</td>
<td>31</td>
<td>79.49</td>
</tr>
<tr>
<td>Total</td>
<td>39</td>
<td>100</td>
</tr>
</tbody>
</table>

\textsuperscript{35} 14\textsuperscript{th} Law Commission Report, P.39
Economic Policies and Role of the Supreme Court

Table 5.4 Pre-SC Judgeship Work Profile

<table>
<thead>
<tr>
<th>Job Category</th>
<th>Number of Judges</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>5.1</td>
</tr>
<tr>
<td>2</td>
<td>18</td>
<td>46.2</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>6</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>7</td>
<td>4</td>
<td>10.3</td>
</tr>
<tr>
<td>1&amp;3</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>1&amp;4&amp;3</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>2&amp;3</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td>2&amp;4</td>
<td>5</td>
<td>12.8</td>
</tr>
<tr>
<td>5&amp;2</td>
<td>3</td>
<td>7.7</td>
</tr>
</tbody>
</table>

N.B: Subordinate Judiciary: 1, Standing Counsels/Govt. Advocate: 2, PSU/Govt. Service: 3, Academics: 4, Advocate General/Solicitor General/Attorney General: 5, Private practice: 6, Only High Court Judge: 7; Multiple job category are shown by the combination of numbers - For ex., if one has served in category 1 and category 4, it is shown as 1&4.

In the present analysis we find that out of the 39 judges, 31 judges or about 80 percent of judges have had backward linkages with the government. Backward linkages are found in terms of being appointed as government pleader, standing counsels, advocate general and solicitor general. Out of 39 judges more than 46 percent judges have been appointed as government advocates and standing counsels for various governmental departments and bodies. Another aspect of the backward linkages includes the experience of being a lawyer for public sector undertakings and other government departments. Therefore the practice years of these judges have been predominantly spent at the service of the government. These judges have spent most of their professional career in advising, representing and defending the position of the government. Although some of the judges were part of the subordinate judiciary as well, those judges have not been included in calculating the number of judges having backward linkages with the government, because, serving in the subordinate judiciary is different from defending the government in ones personal capacity. Appointment to judiciary cannot per se be equated with defending the government; otherwise, the need for further analysis does not arise, as appointment to Supreme Court would
automatically amount to defending the policy of the government. In contrast to that the judges who have served as government advocates, have been advisors and defenders of government policies before the court for a long period of time. From the present data a case can be made that judges having strong backward linkages may more inclined to uphold the decision of the government as they are used to doing so and their past experiences leaves definite imprints on them.

**E. Tenure of Service and Collegial Factors**

In addition to the pre appointment experience of dealing with government assignments, the tenure of service at the Supreme Court could have impacted upon the decision making behavior of the judges, because, besides the impact of subject matter and the approach of the judge which is rooted in the past experience, the sheer number of years to be spent in court could impact upon the judicial behavior. Further, depending upon the number of years, a judge may have to be a part of numerous collegiums, where he can influence the decision making behaviors as well be influenced by those collegiums.

Previous studies have found that an average Indian Supreme Court judge is generally in his mid fifties when he is first appointed to the court, in which case he/she gets the opportunity to serve the court for ten years or less.

**Table 5.5: Number of Years in the Supreme Court**

<table>
<thead>
<tr>
<th>No. of Yrs in Court</th>
<th>Number of Judges</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>5</td>
<td>12.8</td>
</tr>
<tr>
<td>4</td>
<td>9</td>
<td>23.1</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
<td>12.8</td>
</tr>
<tr>
<td>6</td>
<td>2</td>
<td>5.1</td>
</tr>
<tr>
<td>7</td>
<td>8</td>
<td>20.5</td>
</tr>
<tr>
<td>8</td>
<td>5</td>
<td>12.8</td>
</tr>
<tr>
<td>9</td>
<td>2</td>
<td>5.1</td>
</tr>
<tr>
<td>10</td>
<td>2</td>
<td>5.1</td>
</tr>
<tr>
<td>13</td>
<td>1</td>
<td>2.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>39</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

N.B: Minimum years of Serving: 3 yrs, Average Tenure: 6 yrs, Half of the judges served more than 6 years
Table 5.5 depicts that out of 39 judges that we have focused our attention on were also appointed in their mid-fifties and served in the court ranging from 3 years to maximum of 13 years. The average number of years that these judge shave served in the Supreme Court is approximately 6 years. The above presented data on tenure of service when juxtaposed with the data on the combination of judges forming benches, we see the emergence of a pattern.

Table 5.6: Bench Composition in Cases On Economic Reforms

<table>
<thead>
<tr>
<th>Case No./Citation</th>
<th>Year of Disposal</th>
<th>Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>AIR 2000 SC 2047</td>
<td>2000</td>
<td>M.B. Shah, B.N. Kirpal</td>
</tr>
<tr>
<td>2001 Indlaw SC 2406</td>
<td>2001</td>
<td>Ashok Bhan, B.N. Kirpal</td>
</tr>
<tr>
<td>Appeal (Civil) 4679 Of 1995</td>
<td>2002</td>
<td>B.N. Kirpal, Y.K. Sabharwal, K.G. Balakrishnan</td>
</tr>
<tr>
<td>Manu/SC/0804/2003</td>
<td>2003</td>
<td>V.N. Khare, Ashok Bhan, S.B. Sinha</td>
</tr>
<tr>
<td>2004 Indlaw SC 40</td>
<td>2004</td>
<td>Ashok Bhan, S.B. Sinha</td>
</tr>
<tr>
<td>Transfer Case (Civil) 92-95 Of 2002</td>
<td>2004</td>
<td>V.N. Khare, Brijesh Kumar, Arun Kumar</td>
</tr>
<tr>
<td>2006 Indlaw SC 887</td>
<td>2006</td>
<td>A.R. Lakshmanan, A.K. Mathur</td>
</tr>
<tr>
<td>Appeal (Civil) 773 Of 2001</td>
<td>2006</td>
<td>Ashok Bhan, G.P. Mathur</td>
</tr>
<tr>
<td>2006 Indlaw SC 913</td>
<td>2006</td>
<td>Arijit Pasayat, S.H. Kapadia</td>
</tr>
<tr>
<td>Appeal (Civil) 3302 Of 2006</td>
<td>2006</td>
<td>S.B. Sinha, P.P. Naolekar</td>
</tr>
<tr>
<td>Transfer Case (Civil) 4 Of 2004</td>
<td>2007</td>
<td>Arijit Pasayat, S.H. Kapadia</td>
</tr>
<tr>
<td>Appeal (Civil) 3526 Of 2007</td>
<td>2007</td>
<td>Arijit Pasayat, S.H. Kapadia</td>
</tr>
<tr>
<td>Appeal (Civil) 1730 Of 2007</td>
<td>2007</td>
<td>Arijit Pasayat, S.H. Kapadia</td>
</tr>
<tr>
<td>Appeal (Civil) 3067 Of 2004</td>
<td>2007</td>
<td>K.G. Balakrishnan, D.K. Jain, V.S. Sirpurkar</td>
</tr>
<tr>
<td>Appeal (Civil) 678 Of 2006</td>
<td>2007</td>
<td>Tarun Chatterjee, P. Sathasivam</td>
</tr>
<tr>
<td>Civil Appeal Nos. 4113-4115 Of 2008</td>
<td>2008</td>
<td>S.B. Sinha, V.S. Sirpurkar</td>
</tr>
</tbody>
</table>

In India, judges sit in benches. Therefore there is a possibility that they do get influenced by the views of others, especially because our data shows that all the cases were decided unanimously. Only two judges have preferred writing concurring
opinions. In view of the similar pattern of decisional behavior the possibility of a judge influencing another judge in the bench cannot be ruled out.\textsuperscript{36}

A number of studies have been conducted in the past to analyze the impact of collegial factor in understanding the pattern of judicial decision making. This factor is important because, individual specific analysis of judicial behavior is premised on the belief that, judge have specific policy preferences, and they decide cases in a manner which shall further their policy preferences, and the whole exercise of exploring factors influencing judicial behavior is to ascertain whether they have any policy preferences at all.

Collegial factor are useful when the judges decide unanimously and they have a shared policy preference or when there are dissenting opinions and different policy preferences or shared policy preferences with a divergent view on attaining or implementing the policy of ones choice. The role of common agenda amongst judges and its impact on the decision making behavior of judges sitting together has been studied by Levin and Plott.\textsuperscript{37} They have studied the judges of the appellate courts. In the Indian context the bench consisting of like minded judges such as Justice Krishna Iyer and Justice Bhagwati, Justice O. Chinnappa Reddy and Justice D.A. Desai had an impact upon the ultimate decision that were reached. For instance, all these judges believed in the renaissance of the judicial power at the service of the poor and downtrodden, and they received exemplary support from each other.\textsuperscript{38}

The collegial factor can also be relevant to analyze whether judges share common agenda or not as they can still influence each other in terms of reaching the outcome that they have ultimately reached. For instance, inspite of minor differences judges may prefer ignoring such differences and being with the majority. For instance in a matter pertaining to granting state largesse in Reliance Energy Ltd., Justice Kapadia

\textsuperscript{36} Baxi argues that though judges have their solitudes where they trade their own path of reaching a decision, nevertheless the quest for judicial companionship still stands relevant notwithstanding the vicissitudes of judicial bench formation where the Chief Justice exercises the sovereign power of forming benches and assigning cases. Forward by Upendra Baxi, in Forward to, O. Chinnappa Reddy, The Court and the Constitution of India Summits and Shallows, OUP, New Delhi, 2008, p. xvi.


\textsuperscript{38} Baxi observes that Justice Krishna Iyer and P.N. Bhagwati had the capacity to carry colleagues on the bench with them, in Forward by Upendra Baxi, in O. Chinnappa Reddy, The Court and the Constitution of India Summits and Shallows, OUP, New Delhi, 2008, p. xxi.
preferred writing a concurring opinion, where he fundamentally differed with one of the observation of the majority opinion and that point constituted the heart of the matter. However the judge concluded that except that point which he has raised, he agrees with rest of the decision of the majority and therefore he becomes a part of the majority.

Judges may also prefer joining the majority as they will be saved from writing another opinion, explaining the points on which they agree or deviate from the decision of the majority. Further, a decision is known as the decision of the entire court, therefore there is less individual accountability, in which case a judge need not explain his/ her exact understanding of an issue. Therefore it is strategically convenient to be with the majority. This kind of concurring opinion has been termed as disguised dissent\(^3\) as it reflects the difference in outlook and perception of a judge. It is also evidence to the fact that, though there are divergences of opinion and outlook nevertheless the judge has decided to concur by abstaining from casting a negative vote. A judge may also decide to write a concurring opinion when the matter is so important that, the judge has felt the necessity of putting his views on record. These views find support from Tager who finds that judges prefer being on the side of the majority in comparison to giving dissenting opinion and they do not prefer writing separate opinions. This preference affects the ultimate decision reached by the court.\(^4\)

In another study Allan Paterson\(^5\) finds that interaction amongst judges influences their decision. These interaction make them chose between the particular sides on which they wish to stay. Therefore collegial factors do influence judges. When all the judges agree on the decisional outcome, they may prefer being a part of the 'opinion of the court'. Amongst the options available to the judges so far as the method of expressing their view is concerned include, being a part of the opinion of the court, being with the majority where there is an acknowledged minority, or else being a part of the majority or minority and preferring to write a concurring opinion or being a part of the minority and write a dissenting note. While in opinion of the court, no

judge is particularly accountable, in case a judge prefers writing a separate opinion, he is accountable for his written expressions. Writing opinion need not always be the duty of the senior most judges in the bench, as he can assign the task of writing to another judge, or it can be by rotation as well. There is no clarity as to which method has been adopted by the Supreme Court of India, in writing opinions. In the absence of clarity, the judges can decide to be with the majority and be spared from expressing their exact views on a matter. However this creates hindrances in analyzing the influence of one judge over the other.

In the pattern of decisions reached in post 1991 cases on economic policy as given in Table 5.1 depicts that there is complete unanimity across the benches. However that does not necessarily mean that there is an agreement at the institutional level about the reforms process and the manner of implementation thereof. That could have clearly been case if all the judges would have sat together and decide a matter. When judges sit in benches, they decide cases within the institutional framework and many of their differences at the policy preference level and attitudinal level may require to be accommodated within such institutional structures leading to an outcome which has appearances of unanimity. The nature of the decision making is dependent upon a number of factors including individual as well as institutional. It is a complex issue and no straight jacket formula can be applied to come to the conclusion as to why judges decide the way that they do.

In all the 28 cases, judges have preferred simple vote, which only expresses their silent agreement with the opinion written by another judge. One of the reasons for expressing silent concurrences could be that, the benches deciding all these issues were small and in a small bench one need not strive to get a separate identity, unlike a case decided by a large bench where one may strive to stand apart from the rest of the judges.

Our analysis shows that in two cases the manner in which a policy decision of the government was carried on was struck down by the court. Even in those two cases, there was unanimity as to the conclusion reached. In those two cases, four judges have participated namely Justice Naolekar, Justice S.B. Sinha, Justice Rajendra Babu and Justice G.P. Mathur. Amongst those four judges, Justice Naolekar has participated in
only one case where he has invalidated the decision of the government. Here he has distinguished between a monopoly concern and a private business entity and observed that profit motive cannot be the sole purpose of a public sector enterprise. The rest three judges, who have participated in invalidation of the decision of the government in these cases, have also participated in other cases where they have upheld the policy of the government. Therefore no general conclusion can be drawn so far as their policy preferences are concerned.

There is unanimity amongst these three judges regarding the validity of the policy of economic reform in general and they also share the view that policy decisions of the government should be least interfered with. However on facts of a given case, they have invalidated the method of implementation thereof.

Out of 28 cases that we have discussed, Justice Sinha has participated in six cases and out of that in five cases he has been a part of the majority in upholding the validity of the method of implementing a given policy. Justice G.P. Mathur has participated in two decisions, while in one he has upheld in another he has invalidated the policy. Similarly Justice Rajendra Babu has participated in two decisions, while in one case he has accepted the contention of the government in another he has not. Even in the case where he did not uphold the decision of the government he did mention that, the policy of disinvestment which is part of the government’s economic reforms formulations is not subject to review, except when there are constitutional or statutory bar to do so. Since in the given case, the government could not have proceeded with disinvestment without getting prior approval of the government, as required under the Constitution and the government was also required to amend the Act, under which the public sector undertaking was created, the court in exercise of its power of judicial review required the government to follow the constitutional and statutory norms. Thus there is no outright dismissal or difference of opinion so far as the validity of the policy of economic reform is concerned.

We not only find near complete unanimity on the validity of the reform process and the policy making power of the government, we also find that there are combinations of judges, who if sit together have definitely upheld the decision of the government. Further there are such combinations of judges (see, Table 5.6) who have been a part
of a bench more often than others and have constituted a large part of the total decision making by the Supreme Court.

These combinations of judges have always upheld the policy measure of the government. These judges belong to the middle category of judges, who have served in the Supreme Court for around 7-8 years. These are not the judges who were either there in the court for a short period of time or for a very long period of time they were surely available in the court more than the average number of years that judges serve. Therefore it can not be argued that they wished to leave their mark because their tenure of service was too short or these judges were for so long that they preferred judicial deference to legislative and executive policy measures.

The prominence of some of judges and benches can also be attributed to their participation in more number of cases. The data shows that twenty-five judges have participated in only a single case out of the twenty-eight cases that we have discussed. The rest fourteen judges have participated in multiple decisions. In maximum five times a judge has participated in matters pertaining to economic policy issues.

Since bench allocation is not a matter of personal prerogative of the judges, it cannot be argued that these judges have specific preferences for the kind of cases that they participate and pronounce judgment according to their choice. Bench allocation is traditionally done by the Chief Justice and now it is said to be done by the computer, thereby introducing objectivity in the process of case assignment. Notwithstanding this apparent objectivity certain fixed alignment patterns that have emerged is evident though not conclusive enough to suggest that the differences amongst judges over choice of cases, the outcome they reach may affect in the assignment of cases. The Chief Justice may take differences in personalities, preferences and the decisions that they would generally reach into consideration while allocating benches and may put together like minded people in a bench. Thus similar personality and policy preferences amongst judges, who are sitting together to decide case will result in a unanimous decisions. However this argument cannot be stretched too far because the available data does not provide conclusive proof pertaining to the fact that bench allocation is the sole cause for judicial deference to governmental policy decisions. It is observed that irrespective of the composition of benches, all the judges have uphold
the policy decisions of the government and held that they would not like to intervene in such policy decisions. Thus consensus on economic policy matters cannot solely be attributed to the bench allocations in economic matters. It requires an in-depth analysis on the decision making process which will take into consideration on the bench as well as off the bench remarks of the judges.

F. Incentives and Judicial Decision Making

A number of studies have been conducted to explore and analyze the factors that act as incentives to judicial decision making. These studies are outcome oriented in contrast to the process oriented information that we have discussed in the previous sections. This strand of judicial behavior analysis is influenced by the basic tenets of economics, which amongst others include the notions of rationality. In this perspective, it is presumed that judges shall be motivated to decide cases in a manner which will facilitate the attainment of a goal that they wish to attain. The goal that the judges may wish to attain could be pecuniary as well as non pecuniary. For instance, the increase in salary, pension, other retirement benefits, the possibility of post retirement job assignments with lucrative remuneration, etc. form part of the pecuniary benefits which may act as incentive for judges.

Keeping in view the importance of pecuniary benefits as an incentive, the Indian Constitution provides that financial independence is one of the important components of judicial independence and that is one of the basic features of the Indian Constitution, which cannot be violated. Thus the court has built its argument on financial autonomy around this logic. The Constitution provides that the salary of Supreme Court judges cannot be altered to their disadvantage. In order to avoid vote on the matter at the floor of the parliament, it is made deductible from the Consolidated Fund of India [vide Article 112 (3)]. Since the salary is provided in the Constitution (vide Article 125), it cannot be altered or reduced by the Parliament. In that sense, it is ensured that the financial independence of the judiciary is maintained vis-à-vis the legislative and the executive. However during financial emergency the salary of judges can be reduced [vide Article 360 (4) (b)]. The financial freedom of the Indian Supreme Court is not absolute in nature and the executive does retain the power of determining pension, allowances and leave of absence of judges; however
that cannot be determined to the disadvantage of a serving judge. Thus the judges are
dependent upon the executive for periodic review of their salary.\textsuperscript{42} The judges cannot
in exercise of judicial review require the legislature to enact a law including the
annual budget in a particular matter.\textsuperscript{43} Therefore they have to depend upon the
executive to approve the revision in their salary.

Table 5.7 Chronology of Salary Revision of Supreme Court Judges (Rupees)

<table>
<thead>
<tr>
<th>Year</th>
<th>Salary of Chief Justice</th>
<th>Pusine Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>5,000.00</td>
<td>4,000.00</td>
</tr>
<tr>
<td>1986a</td>
<td>10,000.00</td>
<td>9,000.00</td>
</tr>
<tr>
<td>1998b</td>
<td>33,000.00</td>
<td>30,000.00</td>
</tr>
<tr>
<td>2008c</td>
<td>1,00,000.00</td>
<td>90,000.00</td>
</tr>
</tbody>
</table>

N.B. a. Constitution 54th Amendment Act 1986 with effect from 1.4.1986;b.High Court and Supreme
Court Judges (Condition of service) Amendment Act 1998 with effect from 1.1.1996;c. 2008 with
effect from 2006

This table shows the phenomenal increase in the salary of the judges in the recent
times. However reliance upon government for periodic increases in remuneration
entails an obvious potential for impairment of judicial independence, because those
who control the purse will always have some capacity to influence the actions of those
who are dependent upon the contents of the purse. Thus constitutional safeguards as
mentioned above have been provided to insulate the judges from the influences of the
executive.

Independence of judiciary can be visualized from two perspectives, while in a narrow
sense this encapsulates independence and impartiality of individual judges in relation
to the appointment, tenure, payment of salaries and procedures for removal from the
office, in a broader sense it is about institutional independence of the judiciary, which
also includes fiscal autonomy. Separate budget has been advocated by a number of
international instruments emphasizing upon independence of judiciary.\textsuperscript{44} In India,
judges have also urged for transferring the budget on administration of justice to be transferred from non-plan to plan budget, whereby more budget could be allocated for the judiciary. In First Judges case the Supreme Court had observed that, efficiency in judiciary can be sought by investing the required finance, therefore the nation has to pay a price to get an efficient, strong and enlightened judiciary. This view has received support from the 125\textsuperscript{th} Report of the Law Commission of India, where fiscal autonomy has been advocated. This idea has been taken forward in the Second Judges Case. Though the court in the second judges’ case observes that the government of India has accepted that administration of justice falls under planned expenditure, but we find from the available data, the entire administration of justice is yet to be completely accounted in the planned expenditure.

5.1 Total Expenditure (Justice): Pre-1990 (in Rs. Crores)

![Graph showing total expenditure (Justice): Pre-1990 (in Rs. Crores)]

Source: Finance Accounts, Govt. of India (Various Issues)
Note: Over the years total expenditure on Judiciary has gone up. But, the jump in 1980’s is quite remarkable. However, the absolute number (Rs. 5.12 crores) looks very dismal.

45 S.P. Gupta v. Union of India, AIR 1982 SC 149
46 Law Commission of India Report, the Supreme Court – A Fresh Look (1988)
47 Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441
48 For instance in 2004 -05, the total expenditure of the judiciary including planned and non-planned as well as revenue as well as capital expenditure is , Rs. 1,00,91,87000 in which plan expenditure is Rs., 4,9912000, and non-plan expenditure is Rs., 50,24,96,000. Finance Accounts, Government of India, Ministry of Finance, 2006, page 121.
5.2 Total Expenditure (Justice): Post-1990 (in Rs. Crores)

Source: Finance Accounts, Govt. of India (Various Issues)
Note: In between 1990-91 to 2007-08, the annual compound growth rate of total expenditure (justice) is 19 percent, which is way above the national output growth rate. In the past three years, the growth is really stupendous as is evident in the graph. There is 100 percent increase in 2005-06 over the previous year and 68% increase in 2006-07 over 2005-06.

The budgetary pattern shows that there is marked increase in the overall budgetary allocation for the administration of justice in India (Fig 5.1 and Fig 5.2). This data along with the data on salary is evident of the fact that in recent times, the expenditure on justice administration has received much financial strength. However as mentioned above, it is insufficient to make a case against the court by saying the Court validates measures of economic policy in response to the increased incentives. The reason being, the changes are in its early stages to come to any such definite conclusion. Moreover if a relation could be established between the period during which the salary of the judges have remained stagnant and the response of the court to various governmental policy, then a better understanding of the issue can be gathered. However in the absence of any such analysis in the present study, no definite conclusion can be reached. Unless clear trends are available it will be inappropriate to hold that, the judges of the supreme court are guided by pecuniary benefits that they are getting or are expected to get in the future.

Another aspect of pecuniary benefit which could act as an incentive for the judges is the probability of post retirement benefits and government assignments. If there are more chances of getting post retirement governmental appointments and assignments
then it may be argued that, a judge would not prefer deviating too much from the policy preferences of the government. Similarly if there is hardly any chance of any post retirement governmental appointments, the judge may not have any incentive to prefer deferring to the policy decisions of the government.

In view of the low salary that the judges were receiving until recently the post retirement benefits that can be offered by the government in the form of appointments to statutory and non-statutory committees and commission hold good financial benefit for the judges. These post retirement appointments also form the part of the forward linkages with the government. Thus along with the backward linkages that we have discussed earlier, these forward linkages indicate a strong tie between a judge and the government in terms of professional engagement. We find that more than ninety-six percent of judges who have served in the Supreme Court have benefited from the post retirement assignments from government.

Table 5.8 Post-Retirement Govt. Engagement

<table>
<thead>
<tr>
<th>Post-retirement Engagement</th>
<th>Observation</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>1</td>
<td>3.70</td>
</tr>
<tr>
<td>Yes</td>
<td>26</td>
<td>96.30</td>
</tr>
<tr>
<td>Total</td>
<td>27</td>
<td>100.00</td>
</tr>
</tbody>
</table>

If we juxtapose the forward as well as backward linkages with the government we find that more than eighty-five percent of judges have always received professional assignment from the government, whether before their appointment to the Supreme Court or after their retirement from the court.

Table 5.9 Pre and Post Govt. Engagement

<table>
<thead>
<tr>
<th>Post-retirement Govt. Assignment</th>
<th>Pre-appointment Govt. Assignment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NO</td>
</tr>
<tr>
<td>No</td>
<td>0</td>
</tr>
<tr>
<td>Yes</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>3</td>
</tr>
</tbody>
</table>
The judges have not only benefited from such post retirement engagements in terms of pecuniary benefits but also in terms of being able to head important committee and commissions. While some of these appointments have statutory basis, not all of them have such support. For instance, retired judges have served in various capacities, which include statutory commissions such as the National Human Rights Commission, the National Armed Forces Tribunal etc., as well as non-statutory commissions, such as the Godhra Train carnage matter. Judges have also served in regulatory bodies. Many judges have also been assigned arbitration matters from court.\textsuperscript{49}

These are rewarding offers in comparison to the salary that the judges receive during their tenure as the judges of the apex court.\textsuperscript{50} Many a times judges have expressed the urgent need to increase their salary and other perks and benefits given to them. For instance the judges have mooted in the past to exempt their salary from income tax.\textsuperscript{51} They have also sought parity in pension amongst all the judges of the Supreme Court, whether they are directly appointed to the Supreme Court or they have been elevated to the Supreme Court from various high courts.\textsuperscript{52}

Notwithstanding the impact of pecuniary benefits on the decision making behavior of judges, it is argued that judges should desist from taking post retirement assignments, especially if those appointments have political overtones.\textsuperscript{53} However if the nature of the appointment is of such public importance that a judge must make himself available even after retirement then there is no harm in accepting such offers by the government, which includes appointment to the Law Commission or the National Human Rights Commission.

In a case\textsuperscript{54} discussed in the previous chapter we find the Supreme Court has observed that the relevant provision in the Competition Commission of India (Selection of

\textsuperscript{49} For instance the Supreme Court had appointed Retd. Justice Sujata Manohar and Retd. Chief Justice V.N. Khare as arbitrators in a matter between a public sector enterprise and a foreign firm.

\textsuperscript{50} In December 2008 the salary of the judges were hiked to Rs. 100000 for the Chief Justice of India, and Rs. 90,000 for other judges of the Supreme Court. There is 113 percent CAGR growth in salary of CJI and other judges in 2008 which is by far the largest since 1950.


\textsuperscript{52} Ex-SC judge seeks pension parity, The Hindu, October 18, 2001


\textsuperscript{54} Brahmkumar v. Union of India, Writ Petition (civil) 490 of 2003
Chairperson and Other Members of the Commission) Rules, 2003 needs to be amended as only a retired high court or a supreme court judge can be a chairperson of the Competition Commission, or else the court suggested that two bodies should be created wherein one body should be assigned regulatory tasks and the other body should be assigned with adjudicatory task. The court was of the view that if a non-judicial person is allowed to head the commission then the independence of judiciary will be jeopardized.

This case is evident of the fact that the Supreme Court has paved the way for creating more post retirement assignments for retired judges of the high court and Supreme Court, on the ground that independence of judiciary cannot be allowed to be violated, even if the decision of the court is in contrast to the developments taking place in rest of the world as well as the nature of the body, which is primarily regulatory in nature. Thus from the analysis of available data we find that the Supreme Court judges in India have pre and post retirement linkages with the government. The incentives of better remuneration in the post retirement assignments along with low salary structure of the judiciary (which has recently changed) can be said to explain the pattern of judicial review in the cases on economic policy reform. We find that more than 85 percent of judges have taken up post retirement assignments as well as benefited from the government prior to their appointment as judges. Therefore this may be said to be one of reasons for the judges preferring to decide in favor of the decision of the government. However this conclusion needs further corroboration which will strengthen this observation.

G. Limitations of this Approach

This approach is straddled with many limitations. One of the important limitations is the bench system in India. Unlike the American Supreme Court where the entire court sits together to listens to a matter, in India, judges hear matter in different benches, which could be a bench of two, three, five, or more. The only time that maximum numbers of judges have sat together was in the fundamental rights case. The Chief Justice of India allocates judges to different benches and can influence the decision making process in an indirect manner. Thus bench allocation can distort a close scrutiny of behaviors of individual judges. Further, bench allocation also ensures that
a judge is not able to hear all or many matters whereby it can be said that a pattern has been consciously developed. With limited knowledge of a judge’s behavior on bench, analysis of this kind remains incomplete.

The second important limitation with the actor specific approach is that it stresses too much on the background of the individual judges. However it has got limited application in two kinds of circumstances, first where the judges are from similar socio-economic background and second where the decisions of the court are mostly unanimous in nature. Unless there is variety either in the background information of the judges or in the decisions reached, difference in approach of judges belonging to different background cannot be ascertained. In India on both these counts there is disappointing information. Till date studies analyzing the Indian judges have found that Indian judges belong to the same category of people. There is hardly any variation so far as their social and economic background is concerned.

Article 124 (3) emphasizes upon the technical legal expertise. This is very different from the American way of selecting judges where emphasis is placed on the political affiliation of judges as well. In contrast to that in India, a judge should be a person who is apolitical in nature; otherwise it amounts to compromising the independence and impartiality of the judiciary. It is in policy matters that these ideological differences would have been apparent and established a correlation between political affiliation, economic background and the decision arrived at.

The third limitation of this approach is, since this approach adopts statistical technique to quantify the decisions of the court, for the purposes of this approach ‘vote’ counts rather than opinions. Thus this approach only reflects the decision of the court in quantified terms and does not explain the rationale for voting in a particular manner. Decisions expressed in strict quantifiable terms sans finer nuances of an opinion shall provide an incomplete picture of the decision arrived at. Votes also cannot differentiate between concurring but different opinions, where it is not the vote per se but the finer details of the concurring but different opinion matters to understand a judge’s personality. This only provides a limited perspective to the entire decision making process, which also take into consideration the institutional location
Economic Policies and Role of the Supreme Court

and capacities, legal rules and principles, pressures of consensus, incentive structures, interpretative techniques etc. matter to understanding the decision making process.

The fourth limitation of this approach, in the preset context is the absence of relevant data. In India, the number of biographies or autobiographies of judges of the Supreme Court has been less, and is almost absent when it comes to the judges who have served and are currently serving in the Supreme Court since the introduction of economic reforms. In the absence of relevant personal details, one has to rely on very little data that is available in the public domain, which is limited in nature and fails to provide details regarding upbringing, detailed professional experience, expertise, political affiliations if any etc. The limited availability of data constraints to explain as to how with the similar set of background information, different personalities have emerged.

Thus, the individual centric approach has limited utility and the attitude of judges cannot be ascertained with complete certainty from the available data. It is pertinent to mention here that economic philosophy of a judge and the upbringing of a judge can be a relevant indicator of the policy choices made by the court only when there is adequate data on the matter. In the present analysis we found that the professional expertise, pre and post appointment experiences and assignments are correlated to the decision that is reached by the judges. We also find that, no single judge has been predominant in all these decisions, even though a number of combinations of judges are apparent. However these combinations do not have any additional value as most of the cases are decided unanimously, no dissenting opinion has been given and even the number of concurring opinions is few. In such circumstances, the collegial effect gets reduced to the extent, every judge, decides in favour of the policy irrespective of the composition of the bench. Those judges who have invalidated the process of implementation of a given policy have also upheld the policy of economic reform in other cases and they have taken a different position only when there is blatant violation of the statutory and constitutional provisions. Thus there is no difference of opinion so far as limited reviewability of policy or the general validity of a given policy is concerned.
Chapter V

We shall now proceed to the institutional approach to see whether the special institutional location of the Supreme Court could explain the decisions reached by the court post economic reforms introduced since 1991.

5.3.2 Institutional Approach

In this section we shall focus on the institutional approach to explain judicial decision making. In this regard the institutional location and interaction of the Supreme Court with the other two branches of the government shall be looked into. While examining the approaches of the judiciary to policy adjudication we observed that the court has by and large deferred to the policy decisions of the legislature and has also upheld the validity of executive actions in this regard. The court has relied upon the consensus approach and the rights approach to justify judicial deference. From an institutional perspective deference can be justified on many grounds, which can broadly include an expansive view of what is reviewable and justiciable and which is tuned according to the contextual justifications. Moreover deference can also be justified on the ground that judges should assign significant weight to the views of the other decision makers, especially the legislature and the executive. However it may be clarified that deference is not about surrender of ones capacity to decide.

According to Kavanagh deference can be justified as a matter of assigning due weight to the judgment of another either where it is at variance with one's own assessment, or where one is uncertain of what the correct assessment should be.\textsuperscript{55} In the Indian context this poses a dilemma for the Supreme Court, because, while on the one hand it has established itself as the chief interpreter of the Constitution, and its decisions are the law of the land on the other deference to the other two organs on issues of policy is an acknowledgement of the limitations of the judiciary (in its capacity, expertise and democratic legitimacy) which may also include judicial fallibility. Issues pertaining to various limitations have already been discussed in the earlier sections. Therefore we shall look for alternative explanation for judicial deference.

Another explanation could be based upon the argument of institutional bargaining, which can effectively take place when all the three organs are sufficiently independent of each other, and shall mutually benefit from a bargaining, in which case they can either collaborate as to the goals or means of attaining policy changes. We find that in matters of policy adjudication, even though the court has transcended the gap between judicial restraint and judicial deference, it has insisted upon maintaining judicial independence. This can provide clue as to the institutional explanation of the policy adjudication from the perspective of the judiciary.

The Supreme Court is expected to exercise the power of judicial review in economic issues in a manner which will do least harm to its institutional independence and prestige. However the other two organs of state shall respond positively if they also gain out of limited reviewability of policy issues and by the independence of the judiciary. Thus it is a bargaining that is likely to be struck as all the organs of the state stand benefited. However how can that bargaining be reached? This has been depicted by a model by Brian Marks\textsuperscript{56} which is presented here.

\textbf{Figure 5.3: The Neo-Markist Model}

In a bargaining framework of the separation of powers models, it is strikingly evident that the Court would defer to legislative action when there is credible threat of being overturned. Marks has depicted it in a two dimensional policy space where there are

three actors – the Court (C), the House (H) and the Senate (S) with their ideal points of positioning at C, H and S respectively. The line HS represents the unalterable decisions because the point close to either of the edge improves the welfare of one at the cost of other. Hence, any point on the line represents a pareto-optimal situation for both the actors. But, any decision off the line HS can be overturned either by House or by Senate as there would be at least a point on HS which would be more acceptable to House and Senate. Since IS and IH represents the indifference curves of senate and House, both the actors would prefer any decisions inside the arc. If court chooses its ideal position at C, then congress may overturn it and may position it anywhere in the intersection which may prove to be a far worse decision from the court’s point of view. Hence, the court would try to locate itself in a point which is closer to its optimal position and would lie on the irreversible line. In this case, point X* is close to court’s ideal position. Therefore, the lesson is that the court instead of choosing point C and ending up anywhere between S(C) and H(C), it would rule at X*.

The above framework could be extended to the Indian contexts as well. When we apply this to the present analysis we find that under the constitutional scheme both the legislature and the executive do retain some power to adversely affect the judiciary. For instance, the last word on impeachment can come from parliament, whereas on appointment as well as on matters of salary revision and pension etc. of judges the executive can exert influence upon the judiciary. These two organs also have the power to ignore any judicial pronouncement or amend the law and the Constitution to do away with the effect of a decision. At the worst they can also curtail the power of judicial review itself. Thus while deciding policy issues the court has to be aware of the institutional constraints within which it operates.

When we apply this model to the 28 cases that we have discussed in detail, we find that in 26 cases the court has upheld the legislative and executive action on economic policy, even in the two cases where the court has struck down the decision of the government, the judges do not disagree on the issue of validity of the economic policy. Thus there is unanimity so far as the policy decision of the government is concerned. The court has expressed its inability on intervening on these cases on several grounds. As derived from the above given model, it could be assumed that the
court may have done so on the ground that it was apprehensive that if its decision would not be either on the line of irreversible or as close to that as possible, the legislature and executive shall make the decision in fructuous. Therefore it would align its decision according to the ideal points of other organs and also try to minimize the distance between its ideal position from that of the line of irreversible. The Supreme Court seems to have followed this path because; the past experience of judiciary with that of the economic policy issues has not been smooth, and it had to face the wrath of the other two organs as well as loose popular support on some occasions.

Moreover if the judiciary intervenes in policy matters there are concerns that the neutrality and impartiality of the judiciary may get adversely affected. Neutrality and impartiality are important ingredients for maintaining the position that judges only declare law and do not make any law and they rely only on principles of law to reach decisions rather than take policy considerations into account.

Impartiality and neutrality are also necessary for the judiciary to establish its popular legitimacy. While democratic legitimacy of judicial review has been built into the Indian Constitution, the popular legitimacy is found in the respect that people have for the judiciary. This justifies the intervention of judiciary in policy issues and create an aura of objectivity around the decision making process. The justification of the court clad in legal language further establishes its popular legitimacy. Thus the apparent objectivity that is woven into judicial decision making, are largely possible due to these ingredients of neutrality and impartiality. Popular legitimacy of judicial decisions may require the court to defer to the legislative and executive action when the issue under considerations apparently falls outside the realm of judicial intervention. The court can also maintain this objectivity by following precedents, which shall depict a picture of adherence to principles rather than to policy. Most importantly the court can exercise restraint in policy issues and remain unaccountable for a vast number of cases dealing with economic policy issues. It not only saves the court from being seen as partial but also does not create a constituency of aggrieved and agitated people as it would have been the case if the decision was based on apparent bias or partiality.
Chapter V

Legitimacy in its popular sense means the vast reservoir of respect, popular support and public acceptance that the Indian Supreme Court enjoys. Thus it is about commanding support for the decisions that is pronounced by the court. The popular support is visible in various contexts. For instance the invocation of the epistolary jurisdiction along with the introduction of the public interest litigation has received popular reception, whereas the decision of the court with regard to the nationalization of banks had received popular opposition. Thus unlike the belief that the judiciary does not have constituencies, it can be observed that the Supreme Court has its own constituencies. However this popular support has been largely possible because, the court is widely perceived as a non political institution. Thus it is important for the court to maintain an apparent neutrality and impartiality.

Since policy making involves choosing amongst alternatives, the judges may not expressly indulge in policy issues lest at the cost of loosing the popular legitimacy that they enjoy. Thus the court benefits by deferring to the legislative and executive acts, at least by apparently doing so. However the court is often seen as asserting judicial independence, even if it prefers deferring to the will of other organs on certain issues. The reason being, independence not only provides the necessary legitimacy as discussed above but also because, the court uses this as a trump against the other organs. This has been possible largely due to judicial decisions where it is held that independence of judiciary is a part of the basic structure of the Constitution, thus even the amendment to the Constitution cannot take it away. In another sense, judicial independence allows on maintaining a kind of uncertainty about the nature and scope of exercise judicial review and thus helps in maintaining the relevance of the judiciary as a necessary institution in matters of economic policy.

Although it is apparent that the judiciary may derive a number of benefits by generally deferring in economic policy matters, the questions that arises is what benefit does the legislature derive in a scheme of institutional bargaining, where the

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court insists on retaining the independence of judiciary. Richard Posner and William Lands have provided an explanation in this regard. 58

According to Richard Posner and William Landes, observe that a degree of independence of judiciary is consistent with and integral to the interest group theory of government. According to this theory, an independent judiciary plays an important part in the market of wealth transfers. Judiciary provides stability to the bargains struck by the legislature. If legislations are taken as instruments of wealth transfer then by providing stability and continuity in the interpretation of these laws, the court ensures that a law does not lose its utility once the original legislature is out of office.

The presence of independent judiciary enhances the durability of these legislations and thus helps in ensuring the stability of means of wealth transfer. This is because; an independent judiciary shall not get affected by the changing hands of power. According to them independent judiciary is one which does not make decisions on the basis of the sorts of political factors that would influence and in most cases control the decision were it made by a legislative body. Such judiciary would be functionally independent and insulated from day to day political pressures exerted by the shifting coalitions of the organized interest group. As a result of this the past legislative contracts are protected from being easily abrogated.

Since the independence of judiciary attains the much desired stability to the contracts made by the legislature, it is presumed that the legislature may be incentivized to promote the independence of judiciary. One of the best tests to determine the independence of judiciary is to see whether the court enjoys the power of judicial review where by it can struck down the acts of the legislature and executive if that is in violation of the Constitution and more importantly, whether the judges are willing to use this power when the need arises. However an unchecked exercise of judicial review by a completely independent judiciary may jeopardize the production of further contracts of wealth transfer. Therefore from the perspective of the legislature an optimal degree of independence enhances the durability of wealth transfer laws and

is therefore should be encouraged. However why will the judiciary do so? What incentive does it have to maintain the durability of these instruments of wealth transfer? The answer could be found in a rational actor model.

The judiciary shall uphold legislation as enacted by the original framers of the law, when it is motivated to do so. In which case, one may ask what motivates the judiciary? It is generally argued that judges are motivated by an abstract concept of justice and welfare of society.\(^59\) However the application of principles of neoclassical model that every person is a rational actor impliedly states that judges are also rational actors. Therefore they would be motivated to maximize benefits for self. However what are the benefits that they would like to maximize? This differs from person to person. While some may argue that judges would be motivated by pecuniary benefits, some other may argue that judges may get motivated to maximize non pecuniary benefits. For instance a judge may get motivated to propagate his ideology through judicial pronouncements and impose his policy preferences on society\(^60\) or a judge might be motivated to enhance the prestige of the institution of the judiciary of which he is a part.

When we apply this model to the present context we find that this model explains the judicial deference on the one hand and judicial assertion of independence and the non-curtailment of such assertion by the legislature and the executive on the other. Thus the approach of the Supreme Court in economic policy issues can be examined from the standpoint of a bargaining wherein both the parties gain and mutually benefit. This bargain not only helps the judiciary enhance its prestige and legitimacy in society it has also provided durability and stability to the policy decisions of the government.

Thus the institutional approach provides insights into the decision making process in policy issues, where the location of the Supreme Court vis-à-vis the other organs are important. This approach is based upon pragmatic considerations and recognition of the judicial limitations and fallibility.\(^61\) Both the factors prompt the judges to defer to

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another organ. In the present context the Indian Supreme Court has relied upon the expert knowledge of other organs and has recognized the limitations within which it functions. We have observed that the scheme of bargaining as discussed above provides one of the ways to overcome the dual problem of incapacity and fallibility.

5.4 Concluding Observations

In the present chapter we set out on the task of analyzing the approach of the Supreme Court to adjudicating economic policy issues and explore the factors that may have impacted upon the judicial decision making. We observed that the trend of policy adjudication in chapter IV suggested that the Supreme Court has deferred to the will of the other two branches of the government and has upheld the validity of a number of policy measures. The arguments advanced by the court to justify the decisions that it has reached is seemingly based upon the consensus approach and rights based approach. The consensus approach suggests that the judiciary should defer to the majority will, as it is an institutionalized representation of the public interest. However, the analysis of the cases on economic policy show that, the courts have presumed the validity of the actions of these organs of the government and have also not clearly ascertained the particular public interest that will be served by a policy decision. In the absence of any such analysis along with the availability of various interest group theory of the democratic decision making, it could not be conclusively established that, the Supreme Court has indeed deferred to the will of the majority because public interest required it to do so. Thus more than ascertaining the public interest, judicial intervention or the absence of that is used as a strategy to create a zone of unaccountability. It was also suggested by the adjudication of cases on economic policy that, the court should intervene in policy issues, only in cases where there is violation of rights of people. Here again we find that, the court has either refrained from the exercise of judicial power or has applied lesser standards of review to ascertain the violation of fundamental rights. Thus, though there are apparent adherences to the two approaches to judicial intervention on policy issues, our observation evidences to the contrary.

In this chapter we have also explored the factors that may have impacted upon the decision making behavior of judges. We have adopted two approaches to analyze the
factors that influenced the judges, first the actor centric approach and second the institution centric approach. In the actor centric approach we observe that any factor could have two fold relations with the behavior of the judges, it could impact upon the judge or it could provide incentives to the judge to decide a case in a particular manner. Since the previous studies have suggested that the social background information of Indian judges is by and large similar, we focused our attention on the political affiliation, educational background and on pre appointment and post retirement government assignments, the tenure of the judges, salary of the judges, budgetary allocation for the judiciary and collegial factors. We observed that amongst these factors the pre appointment and post retirement experience in dealing with government assignment opens a window to understand the judicial decision making in better light. Some of the other factors can also be expanded in future to build arguments to explain judicial behavior. However in the absence of sufficient data and evidence broad generalization cannot be made from few observations.

The second approach that we have followed to explain the judicial decisions making in policy issues is the institutional approach. In this approach we have based our analysis on the separation of power, independence of judiciary, judicial deference and judicial legitimacy. In this regard we have analyzed the conceptual framework that has emerged in the present context in the perspective of the trend of policy adjudication. We have analyzed the need for and importance of judicial independence, judicial review and institutional propriety and legitimacy of the judiciary in deciding policy issues. In this analysis it is observed that, the Supreme Court while deciding policy issues not only decides according to legal principles but also recognizes the judicial fallibility and lack of expertise. These shortcomings prompt the judiciary to either take an incremental approach or a doctrinaire approach. While incremental approach may leave the scope of judicial review uncertain, the doctrinaire approach has the possibility of creating zones of unaccountability and diverging, labeling and categorizing issues. Thus the Supreme Court is faced with the dilemma with regard to its authority in interpreting the Constitution and at the same time being fallible or being unaccountable.
In this context the institutional approach provides some relief, in the way of recognizing the institutional limitations and advantages and carving out a space for itself where it can legitimately decide an issue, and collaborate with the other organs of the government. Here it will not be surrendering the independence of judiciary, instead will be able to maintain its independence. There may be two explanations for this, first, the court would prefer deciding a case at a point in the line of irreversible, whereby it will ensure that its decision is given effect to and its decisions and its authority is not being curtailed by the other two organs, and second, even the legislature wishes to have an independent judiciary, which can provide stability to the legislations passed by a legislature even if the original makers of law are out of office. In return the legislature may be incentivized to enhance independence of the judiciary. In the process the judiciary benefits so far as it is able to gain prestige and is able to maintain the institutional relevance of the judiciary in the realm of economic activities. From this analysis we observe that even the cases discussed by us in chapter IV suggest that the judges have deferred to the actions of the other two branches of the government, and they have also recognized the fallibility of judicial intervention in policy issues. Judges of the Supreme Court have also aspired to maintain independence of judiciary whereby its relevance in policy adjudication shall remain intact. Certain amount of uncertainty has further added to the institutional relevance of the judiciary. By deferring to the policy measures, the court has also been able to provide legitimacy and constitutional validity to these measures. Thus the approach of the Indian Supreme Court in economic policy matters can be explained through the institutional approach to understanding judicial intervention.
Appendix 5.1

Labor Rights and Post Reform Judicial Dicta in India

Labour reform holds a pivotal place in the discourse of second generation economic reforms. It is widely believed that open market economy and labour market rigidities cannot go hand in hand since labor market policies and institutions have an impact on the effectiveness of economic reform programs.¹

Indian Labour laws are considered to be highly protective of labour rights. These laws apply only to the organized sector. This has presumably resulted in restricting labour mobility, creating relatively inflexible labour market, leading to capital-intensive methods in the organized sector and adversely affecting the sector's long-run demand for labour.² Keeping in view the above mentioned rigidities some corrective measures of labour law seems desirable which would rationalize the labour mobility, allow sub-contracting, regulate the recognition of labour union, facilitate easy and efficient solutions to labour disputes and revamp the existing exit policy.

There are number of arguments put forth to support the labour reform policy. It is argued that flexible labour law regime shall attract more foreign investment and ensure competition in the job market. Currently not only the rights of workers are protected but also are the jobs which they are occupying. In other words, laws that are meant to protect the workers in reality are hurting them by creating rigidities in labour market.³ Lack of labour reform has been held responsible for less growth in the


³ Besley, Timothy and Rob Burgess. 2002. Can Labour Regulation Hinder Economic Performance? Evidence from India. London: London School of Economic: Development Economics Discussion Paper Series, No. 33 conclude that "...States which amended the Industrial Disputes Act in a pro-worker direction experienced lowered output, employment and investment in registered formal manufacturing. In contrast, output in unregistered or informal manufacturing increased. Legislating in a pro-worker direction was also associated with increase in urban poverty. This suggests that attempts to redress the balance of power between capital and labour can end up hurting the poor" On the other hand, trade unions and certain economists claim that labour cannot be treated like any other commodity, and measures like minimum wages, job security, separation benefits, social security, trade union rights, etc, are socially and politically necessary even for sustaining the process of globalisation, as they increase labour productivity. The government is facing an acute dilemma over this issue and labour and managements are at loggerheads with each other, forcing the government to be circumspect in reforming the labour market. This dilemma is rooted in the philosophy of social and labour policy in the country. Since independence and in the planning era labour has been understood to be a contributing partner in the industry. This view is reflected in the opinion of Justice Krishna Iyer in Bangalore Water Supply and Sewerage Board v. A. Rajappa (1978) 2 SCC 213, where it is acknowledged that if the employer is employing capital the employee also employs sweat and blood. Industry cannot exist without co-operative endeavor between employer and employee. However that view is gradually changing and the worker has transformed from a subject of law to an object of law. Further the rationale behind all these protective laws is based on the realization that the worker is a weaker partner in comparison to the employer.
industrial sector during 1990s. Notwithstanding the above view there are evidences to suggest that Indian labour market is flexible. Business Climate Survey of 2005 indicates that less than 17 per cent of firm managers in India cited labour regulations to be a major constraint. Another study carried out by S. Dutta Roy (2004) found the impact of rigid labour law to be statistically insignificant for most industries over the period of 1960-61 to 1994-95. He also finds similar results for the period before the introduction of stringent job security clauses in the law (the 1976 and 1982 amendments to the Industrial Disputes Act). Another study conducted by L. Deshpande and associates (2004) over 1991-98 suggest that the Indian labour market is not as inflexible as it is made out to be. He found that many firms were able to change employment as they wanted to increase the share of non-permanent (casual and temporary) workers. Thus labour laws are not that rigid; rather what ails the system is the sheer number of laws that are operating in the field. In spite of the divergent views that have been expressed above, undoubtedly labour laws need some rationalization in order to reduce disputes and bring in efficiency in labour adjudication. More importantly labour law needs reform in order to bring simplification and uniformity of regulation all over the country.

One of the main reasons for the enactment of so many labour legislations is the unique placement of “Labour” in the Constitution of India. Entries relating to labour relations are found in all the three lists, though the most important ones are in the concurrent list such as trade unions, industrial and labour disputes (entry 22), welfare of labour including conditions of work, provident funds, employers’ liability,  

4 Arvind Panagariya, India in the 1980’s and 1990’s: A Triumph of Reforms, IMF Working Paper, WP/04/43 writes, “The most disappointing aspect of the 1990s’ experience, however, has been a lack of acceleration of growth in the industrial sector. The average annual rate of growth in this sector was 6.8 percent during 1981-91 and 6.4 percent during 1991-2001. Given that many of the reforms were particularly aimed at this sector, this outcome is somewhat disappointing. There are at least three complementary reasons. First, due to draconian labor laws, industry in India is increasingly outsourcing its activities so that growth in industry is actually being counted in growth in services. Second, due to some key binding constraints in areas of labor laws, small-scale industries reservation, and power, large-scale firm are still unwilling to enter the market. Finally, large fiscal deficits continue to crowd out private investment.”

5 Sharma, Alakh N. 2006. "Flexibility, Employment and Labour Market Reforms in India." Economic and Political Weekly May 27, pp. 2078-85 observes that inspite of inflexible labour laws, the labour market has been able to retain its flexibility by adjusting to the growing demands. Various methods have been adopted, prime amongst them is by employing flexibility with respect to wages. He states, “While real wages of workers in the latter half of 1990s stagnated, the emoluments of supervisors increased significantly. This happened along with reduction in the workforce and significant growth in output. All these took place without much resistance from trade unions. This is because of the dominant ideology of liberalisation and globalisation in which increasingly the state and its various organs, including the executive and the judiciary, have either retreated from the collective bargaining process or have taken an implicitly or explicitly anti-worker stance. Several states have relaxed the provision of enforcement of labour laws leading to flexible practices at the ground level.”

6 Changes in the Industrial Disputes Act, 1976 made it necessary for enterprises employing 300 or more workers to seek government permission to effect lay-offs, retrenchments and closures, and later in 1982, these provisions were made applicable to establishments employing 100 or more workers. It has been argued that due to these rigid provisions, the employers were highly reluctant to increase the number of employees, because they were unable to reduce their workforce. The industries either opted for more capital intensive technologies or contracted out increasingly larger volumes of work to smaller enterprises wherein the provision of government permission did not apply.

workmen’s compensation, invalidity and old age pensions and maternity benefits (entry 23), vocational and technical training of labour (entry 25), factories (entry 36) and boilers (entry 37). This placing in the seventh schedule has in one hand created a clutter of laws on the other has also facilitated labour reform. Being in concurrent list it is a subject of legislation both for the state as well as the central legislature. There are certain other important areas which are reserved exclusively for the central government. Currently more than 45 central legislations are regulating labour market besides the large crowd of state level legislations. Thus different parts of India are faced with different regulatory climates. As mentioned above besides the overcrowding of laws the unique placing has also helped various state governments to take initiatives to make labour law flexible, which otherwise might have been difficult to achieve at the national level. For instance the government of Maharashtra has amended the Industrial Disputes Act, whereby it increased the number of employees a firm could have and still be exempt from the provisions of the relevant exit regulations. This provision has given relief to number of entrepreneurs from taking permission from state government to retrench workers or close down an enterprise, which otherwise is difficult to get.

The flexibility that the state government has shown in reforming labour laws is lacking in the case of the central government. The reasons could be many. It is always very difficult to carry on labor reforms especially in a developing country having a large segment of unemployed population. The labour force of India consists of 46.8 crores people. Approximately 1.05 crores people are engaged in the public sector undertakings and are protected by a number of welfare legislations. This segment perceives reforms as a threat to their life and livelihood. There are organized trade unions to voice the grievance of these labourers. In the unorganized sector, though the legal and regulatory regime falls short in comparison to its organized counterpart, but it has still not been possible to carry on labour reform in India; on the legislative front only few changes were made. The government also resorted to such other indirect

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8 Entry 55, 61, 65 provides items on which only the parliament can legislate, this includes regulation and safety in mines and oil fields, industrial disputes concerning and union agencies and institutions of vocational training. Entry 22, 23 and 24 in the concurrent list provides items on which both central and the state legislatures can legislate. These include, trade unions, industrial and labour disputes, social security and insurance, employment and unemployment, welfare of labour including condition of work, provident funds, employers invalidity and old age pension and maternity benefits.


10 The concept of a national floor level minimum wages was mooted by the central government in 1996. This rate was revised in 2004, however this rate is not mandatory in nature. The Payment of Wages (Amendment) Act 2005 and then 2007 was passed and relevant notification was issued to increase the wage ceiling. The Child Labour (Prohibition & Regulation) Act 1986 was passed with effect from 10 October 2006 prohibiting employment of children as domestic servants and in tea shops and dhabas etc. The trade Union Act was amended in 2002, which now provides that, no trade union shall be registered unless at least 10% or 100 whichever is less of workmen engaged or employed in the establishment or industry with which it is connected are the members of such trade union on the date of making or application for registration. In no case, the union shall be registered without a minimum strength of 7 members, a registered trade union of workmen shall at all times continue to have not less than 10% or 100 of the workmen whichever is less subject to a minimum of 7 persons engaged for employed in the establishment or industry with which it is connected are the members of such trade union on the date of making or application for registration. In no case, the union shall be registered without a minimum strength of 7 members, a registered trade union of workmen shall at all times continue to have not less than 10% or 100 of the workmen whichever is less subject to a minimum of 7 persons engaged for employed in the establishment or industry with which it is connected, as its members, a provision for filing an appeal before the Industrial tribunal/ labour court in case of non-registration/ restoration of registration has been provided, all office bearers of a registered trade union except not more than one third of the total number of office bearers or five whichever is less shall be persons actually engaged or
means by which these organized voices could be subdued. For instance in 1990s, workforce was reduced by resorting to voluntary retirement schemes. Though it led to retrenchment, the immediate financial benefit lured workers to opt for this. Due to the willingness of employees themselves trade unions could not oppose these schemes. In view of the fragile nature of the coalition governments at the centre, where the communists are also an ally it becomes all the more difficult to carry on radical labour reforms.  

Multiple stake holders with varying interest have made the reform process difficult. Furthermore having ingredients of "mass politics" labour reform has been nudged to a corner in the overall reform process. In the mean time the government has resorted to piecemeal approach and has brought in amendments in various legislations pertaining to labour. This is done in such a manner in order to avoid the potential hurdles that may be created by the losers of reform process. Therefore to avoid any untoward incident half-hearted steps are taken and no radical change has happened thus far. However failure on the part of the government to introduce massive labour reform has not led to stagnation in the labour jurisprudence. The Supreme Court has stepped in to interpret the existing statutes in ways that will facilitate present needs of the time. How far those interpretations are in consonance with the past precedents and complement the constitution is a matter to be analyzed here.

Development of labour jurisprudence has been closely connected with the constitutional development in India. The constitution of India envisages a number of directive principles pertaining to labor rights to be prioritized in the governance of the employed in the establishment or industry with which the trade union is connected. Minimum of rate of subscription to trade unions has also been revised. Wage limit under the Employees State Insurance Act, 1948 was revised vide 18.10. 2006. The employees' pension scheme came into effect in November 1995. Under the scheme the employees' family pension scheme 1971 ceased to operate and its existing members compulsorily became the members of the new scheme. These are some of the legislative changes happened since 1991. Further there is no consensus on the Participation of Workers in Management Bill (pending since 1990), the Industrial Disputes Amendment Bill, 2007 (which permits lay-offs and retrenchment of units and the compensation that should be paid to workers), amendment to the Factories Act (allowing the employers flexibility in labour legislation implementation) and the issue of women working in the night shift. The Standing Committee of Parliament is likely to clear the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Certain Establishments) Amendment Bill, 2007, first introduced in Parliament in 2005. This will reduce labour force-related paperwork significantly for units employing up to 40 people. The Unorganized Sector Workers Social Security Bill, 2007, was presented in the monsoon session of Parliament. When the Bill is passed, 93% of the workforce in India which is unorganized will be covered by social security schemes like health and life insurance.


12 Varshney, Ashutosh. 1998. "Mass Politics or Elite Politics?: India’s Economic Reforms in Comparative Perspective." Journal of Policy Reform, December. He defines issues of mass politics as having three ingredients, (i) number of people getting affected by the policy (ii) how organized they are and (iii) whether the effect is direct, obvious and short run or indirect, subtle and long run.

13 The sheer number of people, who are well organized through trade unions and shall be directly affected in the short run, is enough for political class get distracted from initiating labour reforms. The NSSO 61 Round Survey on employment and unemployment, 2004-05 records that total Labour Force in both rural and urban area combined are 468625952, total work force in India in both rural and urban area combined is 457464940 and Employees in Public limited companies alone are 10502601.
country. Labour rights reached its pinnacle in 1970s when the word “socialist” was inserted in the preamble to the constitution. Soon that became a potent tool for constitutional interpretation. However in the wake of the recent economic developments the word “socialist” has more of an ornamental value than any real worth for the purposes of interpreting labour rights within the broader constitutional framework. The Supreme Court in State of Punjab v. Devans Modern Breweries Ltd.,\(^{14}\) observes that, “socialism might have been a catchword from our history. It may be present in the preamble of our constitution. However due to liberalization policy adopted by the central government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away.” The court also expresses the judicial conundrum of interpreting the socialist constitution at a time of globalizing capitalist economy and writes, “although the United States is guided by a capitalists philosophy unlike the socialist policy laid down in the Indian Constitution the very fact that changes in society have to be reflected in the interpretation of the constitution, while still preserving the core constitutional intent of the constitution makers, is a factor to be reckoned with. This has never been more important than in the age of globalization when vast changes are taking place both at the social and political level.” It is interesting to note that since the introduction of economic reforms besides the constitution, labour law is the only other area of law which has mostly grown and adapted to the changing circumstances through judicial interpretation than by legislative fiat.

A cursory look at the changes in labour law is evident of the fact that in the following issues there has been a perceptible change in the labour jurisprudence and in majority of such cases it is to the disadvantage of the worker. There has been a demonstrable bias in favour of the employer. Matters such as subsistence allowance, back wages, relation back, regularisation, workmen’s compensation, misconduct etc. have received a retreat. An example is the case of Divisional Controller KSRTC v. A.T. Man\(^{15}\) where the Supreme Court held that punishment is irrelevant in a case where the employer has lost confidence in the employee. Similar is the opinion of the court in APSRTC v. Raghuda Shiva Sahankar Prasad\(^{16}\) and UPSRTC v. Ram Kishor Arora\(^{17}\). In Regional Manager, Rajasthan Road Corporation v. Sohan La\(^{18}\) the Supreme Court declined to look into the past conduct of the employee for determining the quantum of punishment.

These judgments not only water down the concept of ‘misconduct’ but also create a strong bias in favour of the whims and caprice of the employer. The court justifies dismissal of the employee if he has already lost faith of the employer. The court observes that such decisions of the employer should not be interfered with. Misconduct is lightly construed and dismissal is not taken seriously by the court anymore. For instance in Mahindra and Mahindra\(^{19}\) the action of the employer was conceded to and dismissal was upheld by the court where the worker had used abusing language. This decision is in contrast to earlier decisions such as Ved

\(^{14}\) (2004) 11 SCC 26
\(^{15}\) (2005 (3) SCC 254)
\(^{16}\) (2007 (1) SCC 222)
\(^{17}\) (2007 (4) SCC 627)
\(^{18}\) (2004 (8) SCC 218)
\(^{19}\) (2005 (3) SCC 134)
Appendix

Prakash²⁰ where the court had held that the employee cannot possibly be dismissed for using abusive language against another co-worker because one should take into account the strata of society he comes from.

Similarly the court has started to come heavily on workers if they overstay their leave period. Now termination of service without holding a proper enquiry is also not considered illegal vide Bank Staff Association²¹ and Punjab and Sind Bank v. Sakattar Singh²². Earlier termination effectuated in violation of section 25G and 25H of Industrial Disputes Act were held to be illegal leading to reinstatement. However recent judgment in Jaipur Development Authority v. Ram Sahai²³ and State of Rajasthan v. Sarjeet Singh²⁴ strike a different note to the effect that reinstatement is not automatic in such cases. The entire law relating to section 11A of the Industrial Dispute Act which gave added power to the Labour Court to interfere with misconduct and punishment has recently been judicially repealed in the latest decision of the Supreme Court in J.K. Synthetics²⁵. In this case the court held that the power under section 11A cannot be invoked unless the punishment is shockingly disproportionate. This was the position of law prior to the insertion of section 11 A.

Further the court is of the opinion that in cases of misconduct back wages are not be granted automatically. The court held that back wages can be given only when the worker is completely absolved of the charges or the dismissal is for frivolous charges.

Thus the court is giving a free hand to the employer to dismiss the employee without any fear of paying back wages. In this case the court admitted that having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, no precise formula could be laid down as to under what circumstances payment of entire back wages should be allowed. The court calls for application of mind on the part of the industrial court and observes that payment of full back wages should not be taken as a natural consequence.

Similar attitude is also evident from several other decisions of the court. While on the one hand the court has expanded the civil and political rights of people on the other the court has curtailed the right to collective bargaining and the right to go on strike. Although taking recourse to international treaties and conventions to shape the content of fundamental rights is the latest judicial trend such legal instruments (ILO conventions) are not relied upon to promote workmen’s rights. While principles of natural justice has been taken to be a part of article 14 right, in Divisional Manager Plantation, Andaman and Nicobar v. Munna Bareck (2005 (2) SCC 237) and A. Sudhakar v. Post Master General, Hyderabad (2006 (4) SCC 348) the court has held that, failure to comply with the principles of natural justice by the appellate authority while enhancing the penalty would be of no consequence in view of gravity of main allegation. This judgment of the court is atavistic in nature, especially in view of the

²⁰(1984 (2) SCC 569)
²¹(2000) 5 SCC 65
²²(2001) 1 SCC 214
²³JT (2006) 9 SC 520
²⁴(2006) 8 SCC 508
²⁵(2007 (2) SCC 433)
Appendix

The evolution of principles of natural justice over a period of time, beginning since the decision of the Supreme Court in A.K. Kraipak v. Union of India\(^{26}\).

Hindustan Lever Employees Union v. Hindustan Lever Limited\(^{27}\) and others was the beginning of apprehension by the workers that in a globalized world their rights may not get protected. In this case merger was carried on between Hindustan Lever Limited and Tata Oil Mills. Though arrangements were made between the companies for the protection of workers, they were still apprehensive that their rights may get violated if after the merger the new company finds surplus labour and remove them from the job. In this case the court recognized the rights of the worker, however did not entertain the plea on the ground that there is no chance of their rights getting adversely affected. However in the years to come, the court itself confirms the apprehension of the workers. Violation of labour rights is a reality in all ages and times, however what is new post 1991 is that workers are losing their right to approach the court for protection of their rights, whether constitutional or statutory.

In another significant decision the court has held that there is no legal or moral right to strike. Strike is the most potent weapon in the hands of a worker to press for their demand before the employer. It is an important instrument to put economic coercion on the employer. Strike is defined in section 2 (q) of the Industrial Disputes Act, 1947, as cessation of work for any length of time under a common understanding to put pressure on an employer to accept their demand. The legal sanctity of right to strike can be traced to chapter V of the Industrial Disputes Act. Chapter V generally prohibits strikes under certain conditions. Accordingly strikes can be classified as illegal strike, legal strike, justified strike and unjustified strike.

Though right to strike is a legal right, the Act distinguishes between public utility services and non-public utility services. In public utility services strike requires a notice of not less than two weeks and not more than six. In All India Bank Employees Association v. National Industrial Tribunal the Supreme Court has held that right to strike is not a fundamental right. It is a well settled position of law that this is at the least a legal right. However in T.R. Rangarajan v. Government of Tamil Nadu\(^{28}\) a two judge bench of the Supreme Court held that a government servant does not have any legal, statutory or moral right to go on strike. In para 18 of the judgment the Supreme Court observed that there is no statutory provision empowering the employees to go on strike.

The court observes “government servants cannot claim that they can take the society at ransom by going on strike. Even if there is injustice to some extent as presumed by such employees in a democratic welfare state they have to resort to the machinery provided under different statutory provisions for redressal of their grievances. Strikes as a weapon is mostly misused which results in chaos and total insubordination....” The court ignores the fact that even civil servants are workmen under the Industrial Disputes Act\(^{29}\), and right to strike is available to workmen as an essential ingredient of collective bargaining. In this case the government had invoked the Tamil Nadu

\(^{26}\) (1969 (2) SCC 262)
\(^{27}\) AIR 1995 SC 470
\(^{28}\) AIR 2003 SC 3032
\(^{29}\) Jois, Rama. 2007. Services under the State. Delhi: Indian Law Institute., See p. 711

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Essential Services Maintenance Act 2002 along with an Ordinance to summarily dismiss employees en masse who had gone on strike. Under these kinds of Acts, the government enjoys enormous power to declare any business as essential service and this imposes bans on strikes. Though in this particular case the court did not pronounce upon the legality of either the Act or the Ordinance, it is well established that these laws are lethal weapons in the hands of the government to ban strikes. The decision of the court raises several questions whether the court can refuse to decide on the legality of these legislations, especially because, still there were people who were dismissed for carrying out the strike and were adversely affected by these laws. The rationale that majority of employees are reinstated cannot be a sound reason for refusal to pronounce upon the legality of the statute when that is specifically contested.

The above mentioned decision is evident of the fact that the Supreme Court has denied right to strike to the public servants. Similarly lawyers have also been reprimanded by the court to not to resort to strike. Doctors are also not allowed to go on strike to express their demand. While pronouncing such a decision the court is oblivious of the fact that government servants are also workmen as per the Industrial Dispute Act. Therefore they cannot be denied their statutory right. It is the service rules that prohibit them to go on strike. The bench of two judges has failed to take note of the fact that Industrial Disputes Act recognizes strike even in public utility services provided prior notice is given. Further the court has far exceeded its limit by holding that they do not even have moral right to go on strike. This approach is not only in contrast to the decision of the court in 1970s or 80s but is different from the decision pronounced as late as 1990.

In 1990 in B.R. Singh v. Union of India, the court held that right to strike is a part of industrial relation. The court indirectly traces the origin of the right to article 19 (1) (c). Therefore the decision of Rangarajan is bad in law for having ignored past precedents as well as statutory law. It ignores the workers welfare aspect of labour laws. In contrast to the present approach Justice Krishna Iyer in Statesmen Ltd. v. Their Workmen had emphasized that since between illegal strike and lockout lies a grey area to ascertain that the whole cause of development should be examined otherwise that might negative workers their due. This is important in view of the fact that when workers go on strike their wages are determined based upon the nature of the strike. However the present developments are strikingly different from the labour jurisprudence developed in the past.

Reversal of trend has also been observed in the issue of regularization. Prior to the judgment of the Supreme Court in Secretary, State of Karnataka v. Uma Devi there were several decisions where regularization of services of employees in state and its instrumentalities as daily rated, casual, temporary and on ad-hoc worker on permanent and perennial nature of work, have been upheld. These judgments were based on various constitutional provisions such as articles 14, 16, 21, 32 and 39 etc. The importance attached to the directive principles of state policy and the spirits of

30 Ex-Capt Harish Uppal v. Union of India (2002)
31 AIR 1990 SC 1
32 (1976) 2 SCC 223
33 ((2006) 4 SCC 1)
Appendix

Protection of worker emerging from those provisions are evident in all prior decisions of the court.

In a series of cases since independence the Supreme Court has held that contract laborers are an integral part of the industrial process and they share a master-servant relationship with the employer. The court has been able to reach such a conclusion by relying on the test adopted from the old English cases distinguishing between contracts of service and contracts for service. The Supreme Court has relied on the integral nature of the work, and the choking off effect of employment to determine whether the contract laborers have a master servant relationship or not. These tests were created irrespective of the fact that the laborers were working from home, and were also taking up work from other sources as well.\(^{34}\) Such an interpretation was inspired by the socialist principles ingrained in the constitution of India. However in the wake of the new economic policy this interpretation has received a set back. In \textit{Denanath v. National Fertilizers Limited}\(^{35}\) and \textit{Gujarat Electricity Board Ukai v. Hind Mazdoor Sabha}\(^{36}\) the Supreme Court held that section 10 of the Contract Labour Act does not expressly lay down any right of contract workers to absorption as permanent employees in case of abolition of the system. In other words contract workers do not have any such right. However after a notification is issued under section 10 abolishing the contract labour system workers can raise a separate demand before the industrial tribunal. It was also emphasized that as there is a penal clause in the Act, in case of non compliance of any of the provisions of the Act, the consequences that will ensue would only be penal in nature and shall not affect the substantial employment rights and status of the workmen. Thus it overrules a line of judgments of various high courts where it was held that if the contractor or principal employer did not take a valid license or registration certificate under the Act, then the workmen would become the direct and permanent employees of the principal employer. A deviation from this trend occurred in 1997 in the \textit{Air India Statutory Corporation v. United Labour Union}\(^{37}\). However that was short-lived and was reversed in \textit{Steel Authority of India Ltd. v. National Union Water Front Workers}\(^{38}\).

In \textit{Air India} case, the court had relied upon the preamble of the constitution as well as the directive principles of state policy (article 38) to come to the conclusion that the constitution envisages ensuring meaningful and dignified life. The court explained, “in other words the aim of social justice is to attain substantial degree of social, economic and political equality which is the legitimate expectation and constitutional goal. Social security, just and humane conditions of work and leisure to workmen are part of his meaningful right to life and to achieve self expression of his personality and to enjoy the life with dignity...” Further the court held that, “the contract laborers who were earlier having regulatory protections would be rendered persona non grata and would be thrown out from the establishment and told off the gates. Then in such a

\(^{35}\) (1992 (1) SCC 695)
\(^{36}\) (1995 AIR SC 1893)
\(^{37}\) (1997 (1) CLR 292)
\(^{38}\) (2001 (2) CLR 349)
case the remedy of abolition of contract labour would be worse than the disease and it has to held that the legislature whilst trying to improve the lot of erstwhile contract laborers... had really left them in the lurch by making them loose all facilities available to contract labour on the establishment as per chapter V and desired them to wash their hands off the establishment and get out and face starvation... if on abolition of contract labour system, contract labour itself is to be abolished, it would cause economic ruin and economic death to contract laborer and his dependents for amelioration of whose lot order under section 10 is to be passed).

However this decision was reversed by a larger bench of Supreme Court in Steel Authority of India case. The constitution of this bench was prompted by the fact that, the Air India case was opposed especially by the public sector enterprises. The standing committee of public sector enterprises had issued statements requesting the Supreme Court to review the decision in Air India case. Finally the issue of automatic absorption of contract labour was referred to a five judge bench of the Supreme Court. This constitution bench held that, the contract workers have no automatic right to absorption when such a system is abolished. Moreover once the notification for abolition is issued contract laborers shall cease to function. The court observed that in the absence of any express provision in that regard in the Act it cannot be presumed that absorption is automatic. According to the court such an interpretation will be putting extra financial burden on the management to employ permanent staff for all kinds of works, which is unnecessary. The court also felt that, if absorption has to take effect from the date of the notification it may unduly harm the worker who was in service for a longer period of time but on the fateful day was replaced by another worker who has hardly worked in the establishment. Therefore the Act does not seem to have provided for automatic absorption. The bench held that these workers can continue to work in those establishments for which no notification has been issued and can demand absorption under the Industrial Disputes Act. However that is subject to the intention of the employer to absorb these workers in his establishment and is also subject to the workers fulfilling required qualifications and any other requirement set by the employer.

The court also invalidated a 1976 notification issued by the Central government banning employment of contract labour in central government enterprises. In this case the validity of 1976 notification was not agitated at all. This notification was issued by the central government under section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970. Without going into the rationale behind such notification the bench held that “a glance through the notification shows that it does not comply with the conditions laid down in section 10 of the Contract Labour Act.” Thus the court affected the right to life and livelihood of lakhs of workers without going into the details of the matter. This was opposed to the decision of the three judge bench in Air India case, where the court had gone into the background papers of the 1976 notifications and held the notification valid.

The culmination of anti labour decisions of the court in this regard has been Uma devi’s case. In this case all most all past precedents have been emphatically sidelined. This case reverses the past trend of regularizing causal and daily labourers. In its judgment the court held that whatever may be the length of the services of casual, daily rated, temporary employees, such employment being illegal have no right for
Appendix

regularization. More than the past precedents this decision is in contrast to the constitutional principles envisaged in the directive principles of state policy. Instead of laying emphasis on article 14 and 16, the court emphasizes on the pressures of a globalized world where governments should have the flexibility to make temporary appointments for engaging workers on daily wages. The bench observes, "A sovereign government considering the economic situation in the country and work to be done is not precluded from making temporary appointments or engaging workers on daily wages..." The 1976 notification was already held to be invalid in the SAIL case. Thus both the judgments facilitate in untying the hands of the government to freely hire and fire contract laborers. By holding that these temporary workers need not be regularized the court is giving an upper-hand to the employers who can perpetuate contract, casual and forced labour in the country. This is in contrast to the systematic effort in developing the rights of contract labour in India.

In expressing its deepest concern for the plight of the contract laborers in Standard Vacuum Company the Supreme Court had conceded to the demand of the workers to abolish contract labour system in the company. The court accepted the contentions of the workmen and laid down measures to do so. The legislature also responded to ameliorate the condition of the contract laborers by enacting the Contract Labour Regulation Act 1970. The constitutional validity of the Act was challenged and upheld in Gammon India Ltd. V. Union of India. Since the enactment of this law the task of regulating and abolishing contract labour has shifted from judicial to legislative hand. All these initiatives have been watered down in Uma Devi's decision. These developments in labour law could be said to be not in consonance with the principles laid down in the constitution which envisages a just and equitable society and provides for protection of labour from all kinds of exploitation.

In Uma Devi's case the court adopts two prong strategies to avoid the use of constitutional provisions. While on the one hand, it recognizes that the right of a sovereign government to employ casual laborers, and holds that there is no constitutional prohibition for doing so, on the other the court observes that regularizing those workers will be like perpetuating illegalities and jettisoning the scheme of employment. Further the court observes, "accepting the arguments of this nature would mean that the state would be promoted to perpetuate illegality in the matter of public employment and that would be negation in the constitutional scheme by us".

This decision is important in the context of the present day employment scenario. Labour law rigidities on exit issue have led to deceleration in employment growth, which has been accompanied by increasing informalisation of the workforce. Over the years, organized sector employment has grown more slowly than total employment. Organized sector employment grew at 1.20 per cent per annum during 1983-94 but this rate fell to 0.53 per cent between 1994 and 2000. Consequently, the proportion of unorganized sector employment has considerably increased in construction, transport, storage and communications, and financial services. Apart from new jobs largely being created in the unorganized sector, a large number of retrenched workers have

39 (AIR 1960 SC 948)
40 (1974) 1 LLJ 489
found refuge in the unorganized sector. While rigid and protective laws along with equally rigid interpretation of these laws has led to the current anomalies in the labour market, leaving the hapless labour to fend for himself as it is done in the present case leads to equally disastrous consequences. It leads to an anomaly for the trade unions. Earlier in view of the difficulties faced by contract laborers trade unions used to demand abolition of such a system. Such a demand was considered labour friendly as the court used to automatically absorb those workers in the concerned undertaking. In view of the changed circumstance, where abolition of contract labour does not necessarily lead to absorption, the trade unions hesitate to demand abolition of the system; otherwise these contract laborers will be completely left without any job.

There have been a growing number of cases where the court has almost equated people working on the basis of a contract with contractual workers as understood in the traditional sense. A time has come when a person employed under specific contract delimited either by time or by the nature is now referred to as a contract worker. Retrenchment of such worker has been removed from the definition of retrenchment by clause (bb) of sub section (00) of section 2 of the ID Act in 1984. Irrespective of these legislative changes through judicial interpretation rights of workers were protected where the job or post or work in which the concerned workman was employed continues to exist even after his termination on account of non renewal of contract and in cases where contractual appointments are resorted to subvert the protections afforded to the concerned workman by law.

The above said view has been reversed by various supreme court decisions such as, Birla VXL Ltd. v. State of Punjab Managing Director, Karnataka Handloom Development Corporation Ltd., v. Sri Mahadeva Laxman Raval, and Batala Cooperative Sugar Mills Ltd., v. Sowaran Singh, Municipal Council Samrala v. Sukhwinder Kaur and Punjab State Electricity Board v. Sudesh Kumar Puri. These cases have clearly held that such contract workers cannot complain of illegal retrenchment if they are removed from service even though they may have completed 240 days of “continuous service” or even if the establishment employs over 100 workers and comes within the purview of chapter VB of the ID Act. Sections 25 F, 25G, 25 H, 25 M and 25 N have been enacted to protect workers from being hired and fired.

Even various safeguards that were built in the previous decisions of the court have been taken away. For instance vide ONGC Ltd. v. Syamal Chandra Bhowmik the Supreme Court held that in cases concerning the claims of regularization the burden is always on the employee to establish that the employee was in continuous service in the preceding calendar year. Earlier deposition made by the workers that he has worked for more than 240 days was enough to shift the burden on the management to

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42 (LLJ 1999 (1) 220)
43 JT 2006 (10) SC 383
44 (2005) 8 SCC 481
45 (2006) 6 SCC 516
46 (2007) 2 SCC 428
47 (2006 (1) SCC 337)
prove from the records maintained by them that the workmen had actually worked for 240 days and non-production of the relevant registers, statutorily required to be maintained by the employer, which is the best evidence in their custody, was leading the court to draw an adverse inference against the employer.

However recent Supreme Court decisions have made it harsher for the workmen, by shifting the burden of proof onto them. Further being in continuous service for 240 days or more in itself would not entitle the workmen for permanency in job as held in Manager RBI, Bangalore v. S. Mani\(^{48}\). Keeping in view the existing realities where records are in exclusive custody of the employer and the employee hardly has any proof of employment shifting the burden on to the employee is impractical.

In Municipal Corporation Faridabad v. Siri Nivas\(^ {49} \) the Supreme Court set aside the order of the high court where it was held that even if the burden of proof is not on the management however in case of non production of documents adverse inference could be drawn against the management. The Supreme Court was of the view that presumption as to adverse inference for non-production of document is always optional. One of the factors that is required to be taken into consideration is the background of facts involved in the lis. Again in Range Forest Officer\(^ {50} \) and in Rajasthan State Ganganagar S. Mills Ltd.\(^ {51} \) it was reiterated that self serving affidavit by the workman is not sufficient and non production of muster roll for the period by the management did not give any adverse inference against the employer when the workman himself has not discharged the initial burden of proving that he has worked for 240 days. Similarly in M.P. Electricity Board\(^ {52} \) the court refused to reinstate the workman on the failure of the management to produce relevant documents even when the workman had obtained an order to that effect from the high court. The Supreme Court held, since the workman has not discharged his initial burden he cannot be reinstated. Some relief was granted by the court when realizing the practical difficulties on shifting the burden of proof on the workman the court in R. M. Yellatti v. Assistant Executive Engineer\(^ {53} \) observed that daily wage earners are not regular workers and are not given letters of appointment, letters of termination or any other documents by which they can produce as proof or receipt of wages. Their muster rolls are maintained in loose sheets and thus the government should issue certificate to mitigate this problem. Though this judgment does not reverse the judicial trend but at least cases the plight of the workers and seeks a solution for their problem.

In a number of cases the Supreme Court has observed that suspended workers are not entitled to subsistence allowance. In no less words the Supreme Court had held in Captain M. Paul Anthony v. Bharat Gold Mines Ltd.\(^ {54} \) that, the fundamental right including the right to life under article 21 of the constitution or the basic human rights are not surrendered by the employee. Provision for payment of subsistence allowance made in service rule only ensures non-violation of right to life of employee.”

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\(^{48}\) (2005 (5) SCC 100)
\(^{49}\) (2004) 8 SCC 195
\(^{50}\) (2002) 3 SCC 25
\(^{51}\) (2004) 8 SCC 161
\(^{52}\) (2004) 8 SCC 246
\(^{53}\) (2006) 1 SCC 106
\(^{54}\) (1999) 3 SCC 679
However in *Indira Bhanu Gaur's*\(^{55}\) case the apex court considered the effect of non-payment of subsistence allowance and held that, since no claim has been made, non-payment of subsistence allowance has no way affected the enquiry or has caused any prejudices in effectively defending. The enquiry does not stand vitiated. This decision has been followed in the case of *UP State Textile Corporation Ltd*\(^{56}\).

This approach of the court can be contrasted with its view with regard to providing free legal aid. In *Suk Das*\(^ {57}\) the court held that, “the exercise of this fundamental right is not conditional upon the accused applying for free legal aid and hence cannot be denied if the accused failed to apply for it.” In the present context payment of subsistence allowance is essential for protecting right to life of the workman therefore even if no claim is being made, the same should have been provided.

The court also dismantles the constitutional jurisprudence on payment of minimum wages, and denies the fact that non payment of minimum wage amounts to forced labour which is prohibited under article 23 of the constitution. The concept of minimum wages was considered “revolutionary” by the first National Commission on Labour (1969)\(^ {58}\) as the wages are thereby not left to be entirely determined by the market forces. It is important because workers those who are not well organized may not be in a position to bargain and negotiate for their wages. In the absence of a concept like that it will be impossible to prevent exploitation of labour through payment of unduly low wages.\(^ {59}\)

The minimum wages act specifically provides that any contract or agreement whether made before or after the commencement of the Act whereby the employee relinquishes his rights or reduces his right to minimum wages under the Act shall be void so far as it violates the provisions of the Act. Even the Supreme Court has upheld the constitutional validity of this statute.\(^ {60}\)

In the bonded laborers case the court held that, in a country like India, where poverty is rampant and unemployment rate is huge, people will be available to work bellow the minimum wages. Even if they have joined the job with their consent, it is apparent from their socio-economic standing that they were not in a position to bargain for their wages. Therefore it is for the court to protect such people from being exploited.

Forced labour and exploitation has been broadly defined in the past, which also included non-payment of minimum wages. Payment of minimum wages has been considered important for sustenance of human life. In *PUDR v. Union of India*\(^ {61}\), the apex court equated the non-payment of minimum wages for work done with the concept of forced labour which is prohibited under article 23 of the constitution of

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\(^{55}\) (2004 (1) SCC 281)  
\(^{56}\) (2005) 8 SCC 211  
\(^{57}\) (1986) 2 SCC 401  
\(^{59}\) Ibid, page 429.  
\(^{61}\) (1982) 3 SCC 233
India. The decision of the court raised the need to pay minimum wages to the level of fundamental rights.

The court was also of the view that if an industry cannot pay minimum wages the industry should close down. This was the decision of the court in *Bandhua Mukti Morcha v. Union of India*\(^2\). Once it is considered as a fundamental right the Supreme Court and the high courts can entertain writ petitions under article 32 and article 226 respectively.

However in *Uma Devi*’s case there is a complete reversal of that position. The court no more feels obligated to protect people’s fundamental right or speaks up for the disadvantaged. The court in page 279 para 36 writes, “It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain – not at arms length – since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets…. In other words, even while accepting the employment the person concerned knows the nature of his employment...” The court goes on to hold that article 23 is not violated in the present case. In page 281 the court states, “The argument that article 23 of the constitution is breached because the employment on daily wages amounts to forced labour cannot be accepted. After all the employees accepted the employment at their own volition and with eyes open as to the nature of employment.” These observations have ignored the fact that in India, labour laws might have drawn their inspiration from the English common law of contract; it has long been given a go by in favour of a protective regime of labour laws. In India, labour laws are recognition of the wider responsibilities which the state undertakes to protect the economically weaker sections of society.

The decision of the court is not in consonance with the observation made by the court in the previous paragraph. The court is aware that workers are not in a position to strike a bargain for their wages; rather they are forced to accept whatever they get, in such circumstances not coming to the rescue of the poor worker is difficult to understand, more so because there are a number of precedents to support the view. In the *Central Inland Water Transport Corporation v. Broja Nath Ganguly*\(^3\) the Supreme Court had declared that there was no mutuality between the employer and employee and if such mutuality were to be there it would be that between a lion and the lamb. The Supreme Court declared a service rule which empowered the employer to terminate the service of a permanent employee by just giving one months notice as arbitrary and opposed to public policy in terms of section 23 of the Indian Contract Act, 1872.

However in view of the judgment of the court in *Uma Devi*’s case there is very less hope left for the daily wage and casual laborers. More importantly, this case is evident of the fact that gradually the relation between fundamental rights and directive principles is loosening grounds in labour adjudication in the country.

\(^2\) AIR 1984 SC 802  
\(^3\) AIR 1986 SC 1571
From the above discussion it is also evident that the Uma Devi’s judgment draws inspiration from the current socio-economic scenario of the country and gives a free hand to the employers to hire and fire at their will without being bothered about the constitution of the country. The decision of the court also shows sheer disregard to the past precedents and labour jurisprudence developed over a long period of time.

Similarly in Lingegowda Detective & Security Chamber v. Mysore Kirloskar Ltd.\(^6\) the court further dismantles the minimum wages jurisprudence. In this case the court held that security guards working in the premises of the company were not entitled to the statutory minimum wage prescribed for the engineering industry in which the Mysore Kirloskar company falls. The rationale for holding so was, the security guards were supplied by a detective agency and since that does not fall under the category of industries covered under Minimum Wages Act, statutory minimum wages cannot be imposed upon them. This decision encourages creation of various other agencies which shall provide escape routes for non application of labour legislation.

Judicial intervention has not been very different in matters relating to equal pay for equal work. Contrary to its earlier position the court observes, “the employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those are working on daily wages formed a class by themselves. They cannot claim that they are discriminated against those who have been regularly recruited on the basis of relevant rules”. This is in complete contrast to a series of earlier decisions of the court where it was held that equal pay shall be made for equal work, irrespective of the mode and method of employment. (examples are many, such as AIR 1988 SC 519, AIR 1987 SC 2342, AIR 1990 SC 883).

Not only that the Supreme Court has failed to ease the burden of the contract and temporary workers, it has also turned a deaf ear to the plights of workmen who are in continuous employment and get injured during the course of employment. As per the Workmen’s Compensation Act 1923 a workmen is entitled to compensation in the event of an accident arising out of employment and during the course of employment. The rationale behind passing such legislation has been two fold; first, due to industrialization the workers are gradually exposed to large and heavy machinery and may as a result face the danger of accidents and second the comparative poverty of the workmen to deal with a situation when he suffers from work related injury. In order to mitigate the problems that may ensue upon the workmen this beneficial legislation was passed. The judiciary had devised the concept of “notional extension” to extending benefits under the Act, even when the workmen is not exactly within the premises of the industry and not doing his designated work. Accordingly compensation was decided. Thus liberal interpretation was adopted by the court which will benefit more and more workmen. However there seems to be reversal of trend so far as this principle is concerned. In Regional Director ESI Corporation v. Francis De Costa\(^6\) and Shakuntala Chandrakanta Shreshti v. Prabhakar Maruti Garval\(^6\) the Supreme Court observed that the employment of the workman does not commence until he reaches the place of employment and does not continue when he leaves the

\(^6\) (2006) 2 CLR 392
\(^6\) AIR 1997 SC 432
\(^6\) AIR 2007 SC 248
place of employment. Therefore in these judgments the concept of "notional extension" has been done away with and the journey to and from the place of employment is excluded for the purposes of awarding compensation.

Once considered to be a natural consequence of reinstatement, back wages have undergone radical changes in the hands of the Supreme Court of India. In General Manager Haryana Roadways v. Rudhan Singh, it was held that it is not a thumb rule that in every case of termination of service being illegal entire back wages should be awarded. It was also held that length of service is a relevant criterion to determine back wages. Similar views were also expressed in Surinder Kumar's case. It is strange that a workman who has been illegally prevented by the employer from working should be denied back wages on the reasoning of no works no pay. The length of service should not be a relevant criterion because, if the suspension is illegal, it is deemed that the workman was in continuous service and he has never ceased to be in work. Further the court wishes to consider the nature of employment, viz., whether the workmen is in permanent post, daily wager or casual to determine whether back wages should be given or not. However the nature of employment hardly matters, since the fact of the matter is the workman was in service and was illegally terminated from service and that order of termination was found to be illegal by court consequent upon which he should be compensated and reinstated in the service.

In UP State Brassware Corporation Ltd. v. Udaya Narain Pandey the Supreme Court followed its earlier decisions in Allahabad Jal Sanstahn v. Daya Shankar Ra and Kendriya Vidyalaya Sangathan v. S.C. Sharma and held that "a person is not entitled to get something only because it would be lawful to do so. This view is in contrast to the common understanding that law should be obeyed. Instead of relying on any lawful reason for the denial of back wages and reinstatement the court has resorted to exercise of inordinate discretion. In this case the supreme court shifted the burden of proof from the employers to the employee to determine whether the workmen is gainfully employed during the period in which the worker is under suspension or not.

The influence of the new economic policy on the decision of the court is obvious. In U.P. Brassware the court observes that, "the changes brought about by the subsequent decisions of this court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident." Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now with the passage of time, a pragmatic view is being taken by the court. The court hesitates to compel industries to make payment for the period during which the workmen apparently contributed little or nothing at all.

Besides the above mentioned judicial endeavors to interpret labour law in consonance with the changing demands of time, there have been attempts by the legislature and the executive to do away with protective legislations. Special Economic zones are one of such creations. Special Economic zones have been created so as to expedite the

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67 (2005 (5) SCC 591)
68 Appeal (civil) 7304 of 2005
69 Appeal (civil) 8924 of 2003
process of economic development. Various procedural formalities have been relaxed in order to facilitate business activities in these zones. Chapter 2 Clause 5 (g) of the SEZ rules hands over the power to the Development Commissioner to declare the SEZ as a “Public Utility Service”. Since these are public utility services strike cannot be carried on in these areas. Though formation of trade union is not prohibited, but restrictions are placed on joining trade unions and entering into collective bargaining. Clause 5 (f) delegates power on the Development Commissioner to handle employer-employee relation. Functions of the labour commissioner are also handed over to the Development Commissioner; meaning thereby even the power of the central government to refer disputes for adjudication, abolition of contract labour and other issues related to labour welfare can be so delegated to the development commissioner. Due to such transfer of power, labour rights gets jeopardized, since the main purpose of the development commissioner is not to protect the rights of the labour but to develop the special economic zone. Further these zones are exempted from the Contract Labour (Regulation and Abolition) Act, 1970, meaning thereby casualization of labour shall be rampant. Most importantly barring emergency situations, governmental agencies are not permitted to enter these zones without prior permission. In these circumstances, these zones shall pose serious threat to protection of labour rights.

Exception to the Current Judicial Discourse:

At a time when economic efficiency has an overriding effect on the constitutional adjudication there have been exceptions, very few though. One of such case is G. B. Pant University of Agriculture & Technology v. State of U.P.\(^70\). In this case a bench comprising Justice S. B. Majumdar and Justice Umech C. Banerjee held that staff serving at University Cafeteria should be regularized and the University has to accept the burden. The Court held that in view of the socio-economic commitment of the constitution in Part III and Part IV to attain democratic socialism these workers should be regularized. They were also of the view that, socialism conveys end of poverty, ignorance, disease and inequality of opportunity, because social justice is the order of the day and economic justice is the rule of the day. Similarly in Haryana State Electricity Board v. Suresh\(^71\), the court observed that raw societal realities not fine spun legal niceties, not competitive market economics but complex protective principles shape the law when the weaker, working class sector needs succor for livelihood through labour. It is interesting to note that the Supreme Court which by and large is dismantling labour rights in India, infrequently resorts to directive principles of state policy and upholds the duty of the state to protect labour rights.

There have been cases in the past where workmen were given important position in the governance of the industry they are associated with. The trend began in N.R. Kamani v. R.R. Kam\(^72\), which is a landmark case for the sheer reason that in this case workers of a sick company had taken up the responsibility of managing the company and making it profitable upon them. Workers scheme of running the company was accepted by the court and all the workers were given shares in the

\(^{70}\) AIR 2000 SC 2695  
\(^{71}\) (1999) 3 SCC 601  
\(^{72}\) AIR 1989 SC 9
company to incentivise their further participation. Likewise in *Ashok Paper Mills Kamgar Union v. Union of India*\(^{73}\), the Supreme Court has accepted the rehabilitation scheme proposed by the workers union. The court asked the finance secretary to ensure that all legal conditions are fulfilled and the mill is rehabilitated. Further issues concerning arrears of wages of the workmen were directed to be taken up during the process of implementation. These cases stand in contrast to the decision of the Supreme Court in the *BALCO* case where even hearing the worker was not considered to be essential while disinvesting the company and changing the very nature of the company. This not only jeopardizes labour rights in this particular context but dismantles the very understanding of “industry” as enunciated by the court in *Bangalore Water Supply and Sewerage* Case where the Supreme Court observed that both the employer and the employee contribute to the enterprise called “industry”. Thus the meaning of industry should not be devoid of the employee’s perspective. However in the changed circumstance it is only natural that doubts have been raised on such an expansive definition of “industry” and in *State of U.P. v. Jai Bir Singh*\(^{74}\) a larger bench has been called upon to reconsider the matter and legislative initiatives (section 2 (j) as amended by the Industrial Disputes (Amendment) Act, 1982) is yet to be enforced.

Thus post economic reforms the rights of the workers stands threatened. There are attempts to diminish the two pillars of workers’ rights, the Industrial Disputes Act and the Contract Labour Regulation Act, besides de-constitutionalizing the labour adjudication.

\(^{73}\) (1997) 10 SCC 113
\(^{74}\) (2005 (5) SCC 1)
## Annexure:

### 5.1 Select Post Retirement Assignments

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<th>Sl.No.</th>
<th>Judge</th>
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<td>A.M. Ahmadi</td>
<td>Chancellor Aligarh Muslim University, Advisory Committee of National Human Rights Commission, Arbitration</td>
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<td>A.R. Lakshmanan</td>
<td>Chairman, Law Commission of India</td>
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<td>3</td>
<td>Ashok Bhan</td>
<td>Member of Indian delegation, during the 2008 parliamentary hearing at the United Nations, Chairman National Consumer Dispute Redressal Forum, Three member committee on salary hikes for judges</td>
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<td>B.N. Kirpal</td>
<td>Chairman first National Forest Commission,</td>
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<td>5</td>
<td>K. Venkataswamy</td>
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<td>G.B. Patnaik</td>
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<td>G.T. Nanavati</td>
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<td>Kuldeep Singh</td>
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<td>M.B. Shah</td>
<td>President, National Consumer Dispute Redressal Forum</td>
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<td>13</td>
<td>M.N. Venkatatchalliah</td>
<td>Chairman, National commission to Review the Working of the Commission, Lokayukta, Karnataka, Chairman National Human Rights Commission</td>
</tr>
<tr>
<td>14</td>
<td>S. Rajendra Babu</td>
<td>Chairman, National Human Rights Commission, Rajendra Babu Commission, which inquired into the lock-up deaths, ICICI, Chair Professor in National Law School of India University, President of International Nursing Services Association</td>
</tr>
<tr>
<td>15</td>
<td>V.N. Khare</td>
<td>Head Search Committee for UGC Chairman, Arbitrator appointed in a matter between ONGC and SFID, Panama</td>
</tr>
<tr>
<td>16</td>
<td>Y.K. Sabharwal</td>
<td>Nil</td>
</tr>
<tr>
<td>17</td>
<td>N.P. Singh</td>
<td>Chairman, Cauvery Water Disputes Tribunal</td>
</tr>
<tr>
<td>18</td>
<td>A.K. Mathur</td>
<td>Chairperson, Armed Forces tribunal, General Council, Member National Law University</td>
</tr>
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<td>19</td>
<td>G.P. Mathur</td>
<td>Member National Human Rights Commission</td>
</tr>
<tr>
<td>20</td>
<td>Shivraj V. Patil</td>
<td>Member National Human Rights Commission, Member, National Advisory Committee of the Institute of Human Rights Education</td>
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<tr>
<td>21</td>
<td>S.N. Phukan</td>
<td>Phukan Commission on Tehelka Scandal, Chairman Assam Human Right Commission</td>
</tr>
<tr>
<td>22</td>
<td>K. Ramaswamy</td>
<td>Member, National Human Rights Commission, Chairman Advisory Panel on &quot;Pace of Socio-Economic change and development under the Constitution&quot;, under the National Commission to Review the Working of the Constitution, Arbitrator</td>
</tr>
<tr>
<td>23</td>
<td>S.P. Bharucha</td>
<td>Chairman, National Legal Services Authority, Advisor, Indian Legal Information Institute, Ambassador, Citizens Forum on Human Rights</td>
</tr>
</tbody>
</table>
Annexure

<table>
<thead>
<tr>
<th>SL.No.</th>
<th>Judge</th>
<th>Post Retirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
<td>M.M. Punchi</td>
<td>Chairman, Commission on Centre-State Relation</td>
</tr>
<tr>
<td>25</td>
<td>S. P. Kurdukar</td>
<td>One Member Commission on Dabhol Enron Deal, Chairman</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Panel to probe on Dow Chemical's research and development facility in Maharashtra, Chairman Grievance Redressal Authority for rehabilitation of Sardar Sarovar Project (SSP) oustees in Maharashtra</td>
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<tr>
<td>26</td>
<td>Sujata Manohar</td>
<td>Member, National Human Rights Commission of India,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Arbitrator between ONGC and SFID, Panama, Arbitrator</td>
</tr>
<tr>
<td></td>
<td></td>
<td>between Citi Bank and TCL, Arbitrator between Montblanc Investments and Wallace Flour Mills</td>
</tr>
<tr>
<td>27</td>
<td>Brijesh Kumar</td>
<td>Chairman, second Krishna Water Disputes Tribunal</td>
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</table>

5.2 List of Disinvestment Cases

<table>
<thead>
<tr>
<th>Court</th>
<th>Total</th>
<th>Dismissed / Disposed (%)</th>
<th>Pending (%)</th>
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<tbody>
<tr>
<td>Supreme Court</td>
<td>15</td>
<td>86.70%</td>
<td>13.30%</td>
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<tr>
<td>Karnataka High Court</td>
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<td>80.00%</td>
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<tr>
<td>Delhi High Court</td>
<td>19</td>
<td>68.40%</td>
<td>10.50%</td>
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<tr>
<td>Chhattisgarh High Court*</td>
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<td>0.00%</td>
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<tr>
<td>Madras High Court</td>
<td>7</td>
<td>28.60%</td>
<td>42.90%</td>
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<tr>
<td>Allahabad High Court</td>
<td>3</td>
<td>0.00%</td>
<td>33.30%</td>
</tr>
<tr>
<td>Patna High Court</td>
<td>2</td>
<td>100.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>J&amp;K High Court*</td>
<td>1</td>
<td>0.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>Calcutta High Court*</td>
<td>10</td>
<td>40.00%</td>
<td>50.00%</td>
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<tr>
<td>Rajasthan High Court*</td>
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<td>50.00%</td>
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<tr>
<td>Kerala High Court</td>
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<td>100.00%</td>
<td>0.00%</td>
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<tr>
<td>Orissa High Court</td>
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<td>60.00%</td>
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<td>Bombay High Court*</td>
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<td>High Court Of Mp</td>
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<tr>
<td>Punjab &amp; Haryana High</td>
<td>1</td>
<td>100.00%</td>
<td>0.00%</td>
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</table>

* There are 95 privatization/disinvestment cases, inclusive of transfer petitions, are filed between December, 1999 and 30th June, 2007. Out of which, 16 writ petitions were transferred to the Supreme Court from High Courts. By July, 2007, twenty-four matters were pending before different high courts and two matters before Supreme Court. The disposal ratio of cases related to disinvestment or privatization is very high in the higher judiciary if weighted by the cases registered in the court.
5.3 Distribution of Cases Related to Policy Matters as per Time Taken to be Decided/Disposed off

![Bar Chart]

Note: Approximately 55 percent of the cases are decided within a year.
5.4 Frequency of Participation of Judges in Select Cases

<table>
<thead>
<tr>
<th>Judge</th>
<th>Frequency</th>
<th>Percent</th>
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<tr>
<td>Arijit Pasayat</td>
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<tr>
<td>S.B. Sinha</td>
<td>5</td>
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<tr>
<td>Ashok Bhan</td>
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<td>B.N. Kirpal</td>
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<td>S.H. Kapadia</td>
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<td>4.48</td>
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<tr>
<td>K.G. Balakrishnan</td>
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<tr>
<td>G.T. Nanavati</td>
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<tr>
<td>S. C. Agrawal</td>
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<td>S. Rajendra Babu</td>
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<td>S.N. Phukan</td>
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<td>V.S. Sirpurkar</td>
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<td>A.R. Lakshmanan</td>
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<td>Arun Kumar</td>
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<td>Brijesh Kumar</td>
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<td>M.B.Shah</td>
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<td>Tarun Chatterjee</td>
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