Changing Judicial Pronouncements on Impugned Discharge & Dismissal under Industrial Disputes Act, 1947

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From a review of more than 200 court rulings delivered by the Supreme Court and different High Courts in India over six decades since 1950, the author establishes a relationship between India's changing economic and related labor policies and the judicial pronouncements by the courts over a fairly long time. Effect of the changing economic policies on judicial pronouncements on impugned discharge/dismissal made under the Industrial Disputes Act of 1947 was examined and it was found that the statute did not change to the extent as did its interpretations by the courts. It is disputable whether the change in judicial interpretation could be completely attributed to the transforming economic policies.

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Introduction

Indian constitution has tried to insulate the country's judiciary from outside influence, from both the executive and the legislature. At the same time we know that judicial interpretation of statutes is a very important trait of common law system which is what the Indian judicial system follows. Parties under the auspices of legal realism in common law win or lose legal battles because of the interpretation of the statutes by the judges rather than the actual law scribed in the statutes. Law acts in favor of the 'desires and preferences of the society's most powerful members', which include the government as it embodies those in power and those who withstood the electoral challenge. So, when the same government and its organs try to attack the independence of judiciary to achieve its objectives, it is difficult to believe that the judiciary can protect its independence under the auspices of legal realism.

This very government is under pressure to revive the economy particularly in an emerging economy context. The revitalization initiatives are very often

backed by policy reforms, which are supported not by the legislature alone but also get defended by the judiciary. The dominant public opinion affects the legislature's preferred policies, and simultaneously alters the judicial decisions (Bergara, Richman & Spiller, 2003 cited in Iaryczower, Spiller & Tommasi, 2006). Hence, the legislature that is committed to reform policies leaves a lasting impact on the courts. We study the effects of nation's changing economic and related labor policies on India's judiciary and check if policy changes have made government attack the judicial independence. The effort is to see if the judicial rulings that were in favor of labor during immediate post-Independence have changed with majority rulings in the subsequent decades getting in favor of employers on account of the government's neo-liberal economic policy initiatives where the country moved from a so called coordinated economy to a more liberal market economy. So, the important question is whether we will witness the legal discourse getting tainted by the changing policies while comparing the judicial pronouncements delivered in the pre-liberalization era with those delivered in the post-liberalization era.

Literature

Extant literature in relation to the role of diverse factors affecting judiciary suggests that such factors can affect judicial independence. They can range from political and economic factors to even judges' predispositions. Studies that suggest that improved judiciary minimizes the risks that firms face and promote their

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motivation to invest more[1] points towards a justice system that is amicable to the political process where the government strikes a balance between its (economic) policies and judicial doctrines so that the latter do not hinder the smooth implementation of the former. Evidences gathered by La Porta, Lopez-de-Silanes, Shleifer and Vishny (1997; 1998) have proven that a justice system attuned to political process is a strong predictor of economic development. According to La Porta et al (1997; 1998), where the appointment of judges is wholly in the hands of politicians, the government determines the structures, kind of people recruited in those structures, and the norms that govern behaviors. Not only does the scope of government activity affect the litigation rate (Grossman & Sarat, 1971), the behavior of judiciary too gets influenced by the government's policies under such conditions. Iaryczower et al (2006) found that Argentina's Supreme Court has faced threats from the political powers, and has adjusted its behavior accordingly (Helmke, 2002; Iaryczower et al 2002). Per Ashenfelter et al (1995:263) judge's "worldview as revealed by party affiliation….(often) dominates over some competing sources of court rulings" . For instance, the Democratic judges in the US were found to be more tending to

[1] For instance, firms in Brazil, Peru, and Philippines have reported that they would be willing to increase investment if they have more confidence in their nation's courts (World Bank Report, 2004).

vote for labor union compared to the Republican judges (Aliotta, 1988; Songer; 1982; Tate, 1981).

Data

We examined the changes in judicial pronouncements on impugned dismissal and discharge under the Industrial Disputes Act of 1947 in India by using data on the Supreme Court's and high courts' decisions delivered between 1950 and 2010. The case laws were selected from three time frames viz., 1950-70, 1970-90, and 1990-2010 considering the maximum number of times they were cited by other courts while deciding cases. By reviewing the case facts, *ratio decidendi*, and the decisions of the highest office(s) of judiciary in 234 landmark cases, we examined the changes in judicial pronouncements vis-à-vis changes in the state of political economy in India.

Industrial jurisprudence in India

Indian Parliament has brought amendments from time to time to various labor laws including the Industrial Disputes Act such as introducing Sec-11A and amending Sec-2A by offering special protection to workmen who raise disputes against wrongful/illegal discharge/dismissal/retrenchment, but these changes being more perceptible seldom exist. But, it is not necessary for the government to every time bring reforms by amending legislation since it can subtly influence the behavior of judiciary in a way that the same legislation gets interpreted by the court differently over a period of time.

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Indian legislators and courts took a giant step to go along an industrial jurisprudence where a complex distribution of power among the courts exists. The labor courts (LCs) and industrial tribunals (ITs) enjoy special places in industrial jurisprudence. In addition, there exists a complex system of interactions between the SCI (Supreme Court of India) and the lowest courts viz., the LCs where they either compete with each other or cooperate to resolve differences. The SCI prefers to carry out an action that is to provide information for future actions. These rulings set the tone for future role of judiciary where the SCI influences the lower courts to interpret a statute on its line of thinking to avoid conflict between courts. The complexity of interactions between the courts from different hierarchy happens when the upper court has to reverse the order of the lower court causing disjuncture between the courts. Such disconnect according to Mccubbins et al (1995) is a result of instigating events like an electoral change or partisan alignment.

Because LCs hold special expertise, their skills and regularity in interpreting statutes are instrumental in bringing trend setting judicial rulings unless the SCI refuses to cooperate with them. But, major changes in government policies take

place at the union level. So, one may observe the variance in forms of effects of partisan politics on judicial doctrine set by the LCs-ITs vis-à-vis the SCI. It is presumed that the disjuncture between the preferred policies of the SCI and LCs/ ITs could cause reversals that reinforce the policy changes introduced by government or otherwise.

Dismissal & Discharge: Judicial Pronouncements

All the way through 1950-70 there has been no legal provision bestowing power upon the Indian courts to deal with matters concerning employee dismissal and discharge, especially if fair and proper manner of conduct of (domestic) enquiry by employer has been ensured. The SCI too abided by the legislative intent. Concerning fairness and appropriate manner in which a decision to dismiss a workman has been arrived at, the Labor Appellate Tribunal in 1952 in Buckingham and Carnatic Co. Ltd. vs. Workers of the Buckingham held that the decision of an employer in relation to charges against an employee shall not prevail only if certain conditions are attracted viz., 'want of bona fide', case of victimization or unfair labor practice, violation of the principles of natural justice, basic error of facts, or perverse finding on the materials. In a number of cases during these two decades such as Indian Iron and Steel Company Ltd (IISCO) and other vs. Workmen (1958), The Punjab National Bank Ltd. vs. Workmen (1959), and M/s. Bharat Sugar Mills Ltd. vs. Shri Jai Singh and other (1962) the SCI not only upheld five conditions suggested in Buckingham case but emphasized on the fact that tribunal overall has no jurisdiction to question the dismissal order that has been passed by employer after meeting the procedural justice following the statute/standing orders of a company.

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However, between 1970 and 1990 the scope of jurisdiction over impugned dismissal increased phenomenally. The main reason was the insertion of Sec-11A in the Act of 1947 as per which the LC is offered special power to go into the adequacy of decisions concerning dismissal and discharge, examine the merits of the case and pass awards setting aside dismissal, or substituting some other punishment in lieu thereof. Interestingly, the same SCI post insertion of Sec-11A in 1973 in the Workmen of Firestone vs. Management and Others clarifies the changed position of judiciary. Per SCI the LCs, which until then had no power to interfere with the punishment was clothed with such a power. The ratio of Firestone was followed in subsequent cases heard by various HCs (High Courts) post 1973 such as in Management of Binny vs. Additional Labor Court, Madras High Court, 1979 and in RM. Parmar vs. Gujarat Electricity Board, Gujarat High Court, 1983. HCs persistently upheld the decisions of LCs where the courts, regardless of finding the charges leveled against the workman been duly proven, set aside the management's order of dis-

missal and ordered reinstatement of workmen on various grounds.

The LCs 'in principle' continued quashing the dismissal order in a significant number of cases and reduced the punishment too. However, to the surprise of many, the SCI from mid-90s began taking a different stand point. Mid-90s was the dawn of a new era of economic liberalization that India has firmed upon, post which the SCI has come down heavily on LCs. Out of 81 judicial rulings concerning Sec-11A passed between 1990 and 2010 in 77 cases the SCI quashed the decision of the lower courts (including HCs') and asked the courts not to interfere with the employers' decisions made through domestic enquiry. In cases after cases[2], the SCI quashed and set aside the orders of LCs and went on to set new principles for justifying dismissal/ discharge of workman. SCI commented in a number of cases that LC cannot exercise the power of quashing an order of discharge/dismissal, unless it is satisfied on the basis of circumstances of the case that penalty of discharge/dismissal was not justified. It added that tribunal's discretionary jurisdiction to interfere with the quantum of punishment could be exercised only when, inter alia, punishment is found to be grossly disproportionate. SCI cautioned HCs stating that it is important for the HCs that they do not remain a mute spectator after noticing capricious use of said discretion by the LC. SCI even went to the extent of defining the types of cases in which the LC has the power to substitute the punishment. It stated that discretion vested with the LC under Sec-11A is certainly not 'unlimited' where the "labor court can by way of sympathy alone reduce the punishment" and LC had misplaced its sympathy in interfering with the decision reached in domestic enquiry and LC had no justification to interfere with the punishment awarded by the management as creating an atmosphere of threat and security would be sufficiently good reason for dismissal of the employee, so on and so forth.

Discussion

Extant literature suggests that changes in doctrine are often attached with specific political events (Mccubbins et al, 1995). Getting higher on these considerations, we seek to postulate the conditions under which the changes in judicial pronouncements could be attributed to government's shifting economic and labor policies. From the review of relevant case laws, we present here a curious case of equivocation in the role of the SCI.

Indian courts were found to be typically nonaligned during the period immediately post-Independence. They is-

[2] Parikshatbhai Mahavbhai Patel vs. Divisional Controller, G.S.R.T.C, 2000; The Management of Tamil Nadu Civil Supplies Corporation vs. The Presiding Officer LC, 1997; Brihanmumbai Municipal Corporation vs. Arun V. Golatkaer, 2004; Mahindra and Mahindra Ltd vs. N.B. Narawade, 2005; Hombe Gowda Education Trust and another vs. State of Karnataka and Others, 2005; Mohan Sugan Naik and Others vs. National Textile Corporation, 2005; Gujarat State Road Transport Corporation vs. Hansraj M. Chudasama, 2004; Management of Salem Steel Plant vs. Presiding Officer LC, 2002; LIC of India vs Tukaram Ganpat Marathe, 2001;Victor F Parmar vs. Elecon Engineering Co. Ltd, 1999; State of Harayana vs. Sukhbir Singh, 2004.

sued rulings coherent with the statutes resonating judicial independence. In the absence of Sec-11A of the Act of 1947, the SCI laid down guidelines according to which the labor courts (LCs) could go only into the prima facie matter of a case but could not look into the evidences. During the first two decades after independence (1950-70), a clear disjuncture between the choices made by Indian judiciary and the functioning of Indian parliamentarians is noticed. The disjuncture is attributed to India's century old judicial system that has its origin in English common law, where courts have stubbornly remained unmoved in its core values of favoring the haves over the have-nots (e.g., the SCI consistently defended an inequitable property arrangement in favor of the privileged few).

However, the same courts (including the SCI) during the next two decades if not completely on account of the law reform (viz., insertion of Sec-11A) but otherwise took stands in majority rulings that were pro-labor. Workers got protected themselves from unfair dismissal. Post emergency, the country found its highest office of judiciary taking huge pro-labor stances. This started from mid-70s. Courts favored the marginalized to gain justice in a number of important cases. The disputing truth about Indian judiciary that lies in the legal breakdown of emergency rule, sought the SCI to reassert its position by espousing the cause of the disadvantaged. The court that was until then considered to be a conservative protector of the economically better-offs (Rudolph & Rudolph, 1987), became savior of those who suffered the state's oppression. According to Sudarshan (1990: 55f as cited in Dembowski, 2000) the SCI "sought to refurbish its image with a new activism, which championed the rights of those who are prevented from the privileges of full citizenship because of social and economic disability". By early 80s there has been a sea change in the judiciary's appeal to common man exemplifying a rise in judicial activism. Capital and market forces trailed in the court rooms. Rulings were no longer the tool of oppression by the capitalist to control the proletariat in class struggle. The saga continued for more than a decade in which the provenance of judicial activism amongst the honorable judges of the SCI triumphed over the dictums held by the lower courts.

While in the first four decades since Independence the courts exhibited stances that though were opposite to each other, the most provoking time began with the initiation of economic reforms in early 90s by the then government. LCs and HCs continued offering pro-labor rulings, but the SCI began to change from its earlier position. The apex court was no longer non-interfering. The same SCI that cooperated with the lower courts in resolving policy decisions until a year ago began to set distinctive judicial doctrines. It quashed bulk of orders where the LCs interfered with the findings of the domestic enquiry. SCI reduced the power of the LCs and its jurisdiction instigated limitations to the implementation of Sec-11A by LCs.

But how SCI's actions could be remotely connected to the government's reforms? An important trait of India's reform program is that it has accentuated gradualism and evolutionary transition in place of a rapid restructuring. However, the subsequent reform in the trade policies though traversed some of the important milestones such as reduction in import duties, opening up sectors to foreign investors, and divestment of the PSUs, yet there were no major reforms in labor laws owing to labor unions and the left parties who vehemently opposed labor law reforms of any kind. So, the government's hope lied with the judiciary. It considered for a shifting legal discourse (judicial pronouncements) tainted by the changing economic conditions – the judiciary that oscillated from pro-capital to pro-labor position, if can retreat back!

Consequently, major changes in the economic policies molded the dominant views of judiciary. During 1990-2010 the tone of judiciary on matters pertaining to right of employer to dismiss workman was quite opposite to what it used to be between 1970 and 1990. The government's new policies awaited relaxations in labor laws so as to reduce workers' bargaining power. It created special economic zones (SEZs), which are practically insulated from the applicability of protective labor legislations. Majority of labor laws including the Act of 1947 were kept away from the establishments set up in growing number of SEZs. There was rapid expansion in the country's emerging service sector that catered to the global needs in ITeS domain. However, the sector tried to keep the unions at bay (Sarkar & Charlwood, 2014; Sarkar, 2009; 2008). Measures were taken to curb the interference of government in resolving disputes between labor and management. It guarded firms from alleged interference of protective legislations by allowing rapid contractualization of workforce. However, to promote these measures, a significant patronage of judiciary was crucial. So, government considered for a shifting legal discourse. The old laws protecting privileges were actively enforced (Baxi, 1994). So, while the legislature extended support to the growing needs of market forces, the judiciary has done its own part fairly well. If this is the level of influence political members has devoid of the sanction of a written law then necessarily as it gets penned down the impact will be even greater. That judicial independence having got repeatedly under threat by the parliamentarians was proven in two subsequent eras, no matter whether it is the new form of imperialism since mid-90s or it is the older years of socialistic governance when the judicial independence was 'under threat' of parliamentarians. Consequently the higher courts have been swinging sides from being in favor of proletariat to aligning with capital. So the statute need not necessarily change but the interpretation of the statute by the courts has indeed changed over time in India.

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References

Ashenfelter, O., Eisenberg, T. & Schwab, S. J. (1995), "Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes", *The Journal of Legal Studies*, 24: 257-81.

Baxi, U. (1994), Inhuman Wrongs and Human Rights. Unconventional Essays, New Delhi: Haranand Publications.

Bergara, Mario, Barak D. Richman & Pablo T. Spiller (2003), "Modeling Supreme Court Strategic Decision Making: The Congressional Constraint", *Legislative Studies Quarterly,* 28 (May): 247–80.

Dembowski, H. (2001), Taking the State to Court - Public Interest Litigation and the Public Sphere in Metropolitan India. Asia House, http://www.asienhaus.de/public/archiv/taking_the_state_to_court.pdf (accessed on 01 January 2017).

Grossman, Joel B. & Sarat, Austin (1971), Political Culture and Judicial Research, Wash. U. L. Q. 177 http://openscholarship.wustl.edu/law_lawreview/vol1971/iss2/2 (accessed on 24 January 2017)

Iaryczower, M., Spiller, P. T. & Tommasi, M. (2006), "Judicial Lobbying: The Politics of Labor Law Constitutional Interpretation", *American Political Science Review*, 100(1): 85-97.

La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny (1997), "Legal Determinants of External Finance", *Journal of Finance*, 52(3): 1131-50.

La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny (1998), "Law and Finance", *Journal of Political Economy*, 106(6): 1113-55.

Labor Law Journal Editorial Committee, 57 Years Consolidated Index to *Labor Law Journal* (1949-2005).

Mccubbins, Mathew D., Noll, Roger G. & Weingast, Barry R. (1995), "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law", *Southern California Law Review*, 68: 1631-83.

Plato (1941), The Republic of Plato, Translated by Francis MacDonald Cornford, New York: Oxford Univ. Press.

Rudolph, L. I. & Rudolph, S. H. (1987), In Pursuit of Lakshmi: The Political Economy of the Indian State, The University of Chicago Press.

Sarkar, S. (2008), "Trade Unionism in Indian BPO-ITeS Industry-Insights from Literature", *Indian Journal of Industrial Relations,* 44: 72-88

Sarkar, S. (2009), "Individualism- collectivism as Predictors of BPO Employee Attitudes toward Union Membership in India", *Asia Pacific Journal of Management,* 26: 93-118.

Sarkar, S. & Charlwood, A. (2014), "Do Cultural Differences Explain Differences in Attitudes Towards Unions? Culture and Attitudes Towards Unions among Call Centre Workers in Britain and India", *Industrial Relations Journal*, 45(1): 56–76.

Sudarshan, R. (1990), "In Quest of the State: Politics and Judiciary in India", *Journal of Commonwealth and Comparative Politics*, 28 (1) (Mar.): 44-69.