

**BURNISHED LAW JOURNAL***Aditi Jain***“Economic Impact of Judicial Decisions”****INDEX**

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## THE FORMATIVE YEARS ( INDIA )

The framers of the Constitution were in favor of granting power to the judiciary but wished to take precautionary measures in order to avoid usurpation of power by the court, which could come in their way of implementing policies of socio-economic justice. What the constituent assembly expected was neutrality of the judiciary or at best consent of the judiciary to the consensus of the society as reflected through the legislative and executive decisions. This traditional role portrayal of the judiciary was severely narrow. It had problems with regard to execution as there was a mismatch between the text of the Constitution and the intention of the framers. The courts were thus faced with the daunting task of protecting people's fundamental right besides upholding the acts of the other two organs, without however sounding activist in their interpretative skills. This was a jurisprudential conundrum for the judges. On the one hand they were expected to merely declare the law by restricting themselves to the body of the text; on the other they had to accommodate legislative and executive decisions, which were in apparent

Conflict with the constitutional provisions.<sup>1</sup> An alternative of reconciling the socio economic policy within the Constitutional set up was to give primacy to directive principle of state policy over the fundamental rights .The court had to look beyond the text of the Constitution and resort to extra constitutional factors such as the social and economic reality to make it a part of the grand revolution that was taking place.<sup>2</sup> Therefore, they were bound to design some innovative methods of constitutional interpretation, which can transcend the limitations of written text and Capture the spirit of the Constitution and meet the demands of the time. This was a difficult task and courts were thereby destined to indulge in law making. Thus irrespective of various limitations the court had enough scope for the use of discretionary power to interpret the Constitution, especially in economic matters.<sup>3</sup>

## THE ROLE OF CONSTITUTION

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<sup>1</sup> *The Supreme Court of India and Economic Policies Perspectives : peeping through the rear window Chapter 3* ,available at [shodhganga.inflibnet.ac.in/bitstream/10603/29989/11/11\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/11/11_chapter%203.pdf)

<sup>2</sup> Sudarshna,R.1985."Judges state and society in India" *Judges and the Judicial Power :Essays in Honour on Justice Krishna Iyer. Rajeev Dhavan, R Sudarshan and Salman Khurshid eds. Bombay.*

<sup>3</sup> *Ibid.*

With the limited role as envisaged by the constituent assembly, the Supreme Court embarked upon the path of Constitutional adjudication. Once it started working, it was flooded with number of petitions. This move of the parliament can be placed in the background of the fact that, when India achieved independence one of the most important challenges before the country was to feed the starving people, who were suffering under staggering poverty.<sup>4</sup> The country decided to follow a path of planned economic development, which were primarily inspired by the lofty ambitions as enshrined in the directive principles of state policy. These directive principles mentioned amongst others about regulation of the ownership and control of the material resource of the nation, avoidance of the concentration of wealth and means of production and providing an adequate means of livelihood. The Planning Commission was set up barely within two months of the inauguration of the Constitution. The challenge before the commission was to redirect the economic and social development in such a way that they will give full expression to the basic rights and directive principles enunciated in the Constitution. It is in this larger perspective that the task of planning had to be envisaged. The judgments of the court were seen as potential hurdles in attaining social and economic justice in India. The decision of the Supreme Court in invalidating the Bihar enactment proved the apprehensions of the parliament that judicial review may prove disastrous for its policies of social and economic reform. In that case the object of the legislation in question was to do away with concentration of big blocks of land, which were concentrated in few hands and to distribute the ownership and control of the material resources which come in the hands of the State so as to sub-serve the common good as best as possible. Besides agricultural development, industrial development of India was given equal importance in the plan documents. The role of the state was particularly emphasized in the industrial development of the country. The intervention of the state was twofold in nature. First, the state had to regulate industries and market and secondly, it has to be a direct participant in the development process. By the second five year plan, wind of change was felt already. Continuing the earlier trend, this decade also began with a low GDP growth. Both internal as well as external factors were responsible for the dismal performance of the economy. These include war with Pakistan in 1971 which led to creation of Bangladesh and mass influx of refugees to India, two consecutive droughts in 1971-72 and 1972-73 besides the oil price shock which came in 1973. The inflation rose to 30%. In order to control the economy and ensure equal and just distribution of wealth and eradication of poverty the government of the day devised various measures in both industrial as well as agricultural front. While on the agricultural front the government successfully carried on the green revolution, its impact was observed only towards the end of this decade. Emphasis was laid on land reforms.<sup>5</sup> Urban land was also put to scrutiny under the

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<sup>4</sup> [http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/10/10\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/10/10_chapter%202.pdf)

<sup>5</sup> *The Supreme court, the Constitution and economic Policies: Survey of issues ,chapter 2 , available at*  
[shodhganga.inflibnet.ac.in/bitstream/10603/63964/13/13\\_chapter%206.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/63964/13/13_chapter%206.pdf)

Urban Land Ceiling and Regulation Act, 1976 whereby the ownership and disposition of land in the urban areas could be regulated, and concentration of urban land in the hands of a few could be checked. Many enactments relating to business and industry were also inserted in the Ninth Schedule, which includes, The Mines and Minerals (Regulation and Development) Act, 1957, The Monopolies and Restrictive Trade Practices Act, 1969, the Coking Coal Mines (Emergency Provisions) Act, 1971, the General Insurance Business (Nationalization) Act, 1972, The Sick Textile Undertakings (Takeover of Management) Act, 1972, The Coal Mines (Taking over of Management) Act, 1973, The Coal Mines (Nationalization) Act, 1973.

**Nationalization of coal mines, banks and oil companies were just some of the measures to ensure a strong grip over a vast section of the economy.** The year 1980 began with a parliamentary election which brought Indira Gandhi back to power with two third majority. She brought changes in the national economy in a surreptitious manner, meaning thereby bringing change without apparently doing any. However in 1984 Indira Gandhi's death led to another election in which Rajeev Gandhi came to power with three fourth majority. He initiated various measures of economic reforms.<sup>6</sup>

The government did take various measures of economic reform in the beginning of its tenure. These include de-licensing of industries, broadening of licensing to include manufacturing of similar products, liberalization of the import policy, increasing the investment limit for big business houses, increasing the asset limit to come under the MRTP Act, waiving regulations regarding MRTP clearance for 27 industries, de-reservation of industries exclusively reserved for the small scale industries and increasing the asset size in plant. There was an urge to move beyond the path of socialism and take up the path of market economy. This also entailed reconsidering the methods of attaining economic growth irrespective of the ideological differences. Thus there was a clear divergence of ideology and economic policy making. Another significant development during this era was the concern for the popular voice. Both Indira and Rajeev Gandhi paid heed to the popular perceptions of economic development and played to the gallery.<sup>7</sup>

Thus at the judicial front this decade was marked by three significant developments, first, in economic matters the judiciary conceded to the will of the legislature and to some extent trailed behind the legislature as it could not cope with the changing economic policies, second, at the institutional level the judiciary conceded to executive supremacy and third, the court searched for greener pasture beyond the traditional boundaries of adjudication and thus discovered the plight

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<sup>6</sup> *Ibid*

<sup>7</sup> [http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/11/11\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/11/11_chapter%203.pdf)

of the poor and invented the Public Interest Litigation. All these developments indicate that the court was not in confrontational mode with the other two organs but wished to concentrate on remedying the plight of the poor and find a separate identity for itself. The Constitution has always been a source of guidance while interpreting economic policy matters. More often it is the location where the economic policies have been placed. <sup>8</sup>Thus it is the sight of contestation. Second, fundamental rights are not absolute, those are not only subject to specific limitations but are also vulnerable to directive principles of state policy. Supreme Court plays an important role in the implementation of economic policy measures. Third, state has carved out a greater role for itself in the economic system of the country and the judiciary has facilitated that by accommodating the role of state within the constitutional framework. We may conclude that with the introduction of the Constitution the court had embarked upon a difficult task of playing a limited role as conceived by the constituent assembly, nevertheless while protecting people's right as envisaged by the Constitution the court had to play a much larger role. The court did that by largely accepting the policy of the government and providing checks when necessary. The Court has been able to do so by adopting a confrontationist approach as well as by cooperating with the other organs. While confrontation has led to supersession and curtailment of judicial review, a lesser assertive role has ensured the continued relevance of the court in economic matters. In both the approaches the court has relied upon the Constitution as the primary ground for the justification of economic policies.<sup>9</sup>



## INTERPLAY BETWEEN LAW AND ECONOMICS

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It has been recognized for quite some time now that law is an interdisciplinary subject where interface between law and other social Sciences (social sciences as well as natural /physical sciences) come into play and the impact of other disciplines on law is to be necessarily kept in mind while taking a decision (of course, within the parameters of legal provisions ). Interface between law and economics is much more relevant in today's time when the country has ushered into the era of economic liberalization , which is also termed as “globalization” of economy. India is on the road of economic growth. It has been a developing economy for number of decades and all efforts are made ,at all levels , to ensure that it becomes a fully developed economy. Various measures are taken in this behalf by the policy makers. The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role

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<sup>8</sup> *Ibid.*

<sup>9</sup> *The Supreme Court of India and the Economic policy perspectives, Chapter 2, para 3.7 ,Available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/13/13\\_chapter%205.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/13/13_chapter%205.pdf)*

in this direction. It calls for economic analysis of law approach, most commonly known as “law and economics”.<sup>10</sup>

Although law and economics trace back to the period of Jeremy Bentham i.e. the 18<sup>th</sup> century, in the last few decades, interplay between law and economics has gained momentum throughout the world. Indian judiciary has resorted to economic analysis on ad hoc basis. Time has come to consider the inter-discipline between law and economics as a profound movement on a sustainable basis. These are the additional relevant considerations which have weighed in our mind in adopting a particular course of action in this case.<sup>11</sup> The same considerations must weigh when interim orders are passed in such petitions. The court observed in *CCE v. Dunlop India Ltd.*<sup>12</sup> That an interim order should not be granted without considering the balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in *Ramniklal N. Bhutta v. State of Maharashtra*<sup>13</sup> the court observed that while granting a stay, the court should arrive at a proper balancing of competing interests and grant a stay only when there is an overwhelming public interest in it, as against the public detriment which may be caused by granting a stay. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost. Even in those cases where economic interest competes with the rights of other persons, need is to strike a balance between the two competing interests and have a balanced approach.<sup>14</sup>

## SEPERATION OF POWERS

The separation of powers is not rigid but flexible allowing as it does in many ways, for a functional overlap of powers in the three limbs of the Government. For example, apart from legislating during a national emergency or when Presidential Rule is declared in respect of a state, the executive has the power when the parliament is not in session, to promulgate ordinances, which have the same force and effect as an act of parliament and are theoretically, to be in force for 6 months.<sup>15</sup> It is empowered to make administrative rules relating to the functioning not only of the executive but also relating to the legislative bodies<sup>16</sup> and because its field is coterminous with that of legislature, if there are no statutory rules in force, it is competent

<sup>10</sup> *Shivshakti Sugars Ltd. v. Shree Renuka Sugar Ltd.* (2017) 7 SCC 729, para 43, Available at <http://www.sconline.com/Print/iu3ysAGK>

<sup>11</sup> *Shivshakti Sugars Ltd. v. Shree Renuka Sugar Ltd.* (2017) 7 SCC 729, para 46, Available at <http://www.sconline.com/Print/iu3ysAGK>

<sup>12</sup> *CCE v. Dunlop India*, (1985) 15 SCC 260; 1985 SCC (Tax) 75; (1985) 2 SCR 190

<sup>13</sup> *Ramniklal N. Bhutta v. State of Maharashtra* (1997) 1 SCC 134

<sup>14</sup> *Shivshakti Sugars Ltd. v. Shree Renuka Sugar Ltd.* (2017) 7 SCC 729, para 43, Available at <http://www.sconline.com/Print/iu3ysAGK>

<sup>15</sup> Article 123 and 213. An ordinance does not require any involvement of other legislative members. It was held in *D.C. Wadhwa V. State of Bihar*, 1987 that “the executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session take over the law-making function of the legislature.”

<sup>16</sup> Article 118(3)

to make appropriate rules and to formulate policies on any matter in respect of which the legislature is competent to enact laws<sup>17</sup>. The executive also exercises quasi-judicial powers under several provisions. Similarly, legislatures exercise quasi-judicial powers under the constitution for example in the case of impeachment of judges<sup>18</sup> and contempt of legislatures. The constitutional framework is supported by various national institutions e.g. the defence forces, and civil services, primary amongst which is the judiciary and the judicial system. The Indian Constitution expressly confers the power of judicial review on the Supreme Court and high courts under Articles 32 and 226. Referring to fundamental rights, the constitution says that “the state shall not make any law which takes away or abridges the rights conferred and any law made in contravention of this clause shall, to the extent of the contravention be void. All legislative powers whether of Parliament or State legislatures are also expressly made subject to other provisions of the Constitution. The powers of judicial review have been held to be part of basic structure of constitution and cannot be abridged by the constitution. What judicial powers could be more widely and expressly constitutionally conferred? It is therefore acknowledged even by the diehard critics of judicial activism that “the power of judicial review is an exception to the principle of separation of powers.<sup>19</sup>” In fact, with so much constitutional overlap in the functioning of three organs of the government, the Indian constitution itself does not indicate a separation of powers as is commonly understood. Where there is inaction even by the executive for whatever reason, the judiciary can step in and in exercise of its obligation to implement the constitution provide a solution till such time as the legislature or the executive act to perform their roles either by enacting appropriate legislation or issuing executive orders to cover the field. Similarly while the legislature and executive may reject a judicial decision by amending the law, the judiciary may in turn test that law against the touchstone of the constitution. The only curb on the exercise of powers by the three limbs of government is the constitution, and because the judiciary protects, interprets and enforces the constitution, the judiciary. That does not make the judiciary supreme although that is probably what the strongest and most vocal critic of judicial activism, the executive, fears. This fear has led to an amendment of the constitution in 1976 to drastically curb the powers of judicial review, amendments which were subsequently undone partly by another constitutional amendment and partly by the judiciary itself by holding the first amendment to be unconstitutional.<sup>20</sup>

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<sup>17</sup> Article 73 and 162; *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

<sup>18</sup> Article 124(5), Article 217

<sup>19</sup> *Judicial oversight or overreach: The role of Judiciary in contemporary India* by Justice Ruma Pal, Available at

<http://www.sconline.com/Print/6wW6U2mj>

<sup>20</sup> The constitution act, 1976 amended by the Constitution act, 1977.

## IMPORTANT JUDICIAL DECISIONS

**The court was examining the contention that the 12-digit Unique Identification number given out to 1.2 billion Indians violates the Right to Privacy, which was named a fundamental right by the top court last year.**

The government had made Aadhaar compulsory for a host of services and welfare measures, including bank accounts, PAN cards, cell phone services, passport and even driving licenses. It was made the over-arching proof of identity and residence, over-riding all other prior identity proofs. The petitioners argued that Aadhaar -- built on a mammoth biometric database comprising fingerprints and iris scans -- cannot be made mandatory. They also contended that this huge database was open to compromise, citing a number of instances of data breach that had triggered a huge debate. Arguing that the Aadhaar law impacts human life, the petitioners demanded that it be scrapped. The Centre had defended Aadhaar on multiple grounds - the biggest being that it ensured proper distribution of benefits to millions and prevented siphoning of funds. Aadhaar data, government and Aadhaar authority UIADI contended, is safe and cannot be breached.<sup>21</sup>

The UIADI had argued that petitions that Aadhaar be scrapped in favor of smart cards were a ploy. "They want smart card because institutions like Google don't want Aadhaar to succeed," the Aadhaar authority said. In its initial hearings, that court had pushed back the deadline for Aadhaar linkage to bank accounts, passports and mobile phones by three months, and eventually announced an indefinite extension. It also expressed concern over data leakage amid the huge controversy over the illegal use of Facebook data in the US elections. "The real apprehension is the data available can influence the electoral outcome of a country... whether democracy can survive if Aadhaar data is used to influence the electoral outcome," said Justice DY Chandrachud, who was part of a five-judge bench. For the same reasons, it was argued, a laudatory act like the Aadhaar Act, designed for enabling better delivery of public welfare and social services to the masses, could not be defeated on privacy claims. Several recent Supreme Court judgments were given in this. The SC states that the privacy is not an elitist feature and should be available to all. The Bench cited the example of forced sterilization of slum dwellers for population control, a state act which could be controlled perhaps only through a claim of privacy. Further, the bench noted that if privacy was not a fundamental right, then there would be a blanket sanction on anything the state can do. Data given for passports, voter cards, is in the public domain? On being questioned by the bench on which aspects of privacy deserved protection, it was stated that informational privacy, for example, is not a constitutional guarantee. It was argued that there can be no right to privacy for information already in the public domain. Examples cited were the data disclosed by citizens for voter registration, biometrics for passports, and for property registration. This is a troubling argument, which seems to consider data given to the government as being in the public domain. For example, people provide their addresses for acquiring a voter card, but this does not thereby mean that the address is in the public domain and can be published on, say the internet. Similarly, looking at the property registrar, the registrar is open to the public. However, if a data broker preparing a file on an

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<sup>21</sup> Justice K.S.Puttaswamy(Retd)& ... vs Union Of India & Ors on 11 August, 2015



individual for commercial purposes accesses and includes data from such a registrar, it will be a violation of privacy. These are issues which need to be looked into.<sup>22</sup>

Kharak Singh and MP Sharma cases On these cases, the main argument made was that they had specifically denied the right to privacy. Moreover, Constituent Assembly while framing the Constitution had denied privacy as a fundamental right. To this, the bench observed that much had changed since the times the Constituent Assembly debated and rejected the right to privacy. Will privacy be held to be an independent fundamental right? On the whole, the apex Court appears to be reluctant to completely reject privacy as a fundamental right. If upheld, the main question that will remain will be its recognition as an independent fundamental right or as a right restricted to the protected facets under existing fundamental rights.<sup>23</sup>

“The court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy, or the revenue of the state,” Supreme Court Justices A.K. Sikri and A.M. Sapre said in a ruling, overturning a high court decision that shut down a sugar factory because it was too close to another.<sup>24</sup>

Shivashakti Sugars Ltd. Case<sup>25</sup>

Even in cases where economic interest competes with the rights of people, the courts need to take a balanced approach, the top court said. The “first duty of the court is to decide the case by applying the statutory provisions,” the court said. “However, on the application of law and while interpreting a particular provision, economic impact/effect of a decision, wherever warranted, has to be kept in mind.” In the judgment, the Supreme Court overturned a high court ruling which shut down Shivashakti Sugars Ltd.’s factory in the southern state of Karnataka, after a challenge from Shree Renuka Sugars Ltd. under a government mandate that stipulated there must be at least 15 kilometers (9.3 miles) between two sugar factories. The top court noted that the Shivashakti Sugars had spent 3 billion rupees (\$47 million) on setting up the unit, which employed 377 people directly and 7000 indirectly. “Public purpose demands that the appellant’s factory remain in operation and continue to function,” the ruling said. India is ranked 130 out of 190 in ease of doing business by the World Bank and 172 in enforcing contracts. The top court’s judgment sets a precedent as projects worth billions of rupees remain stuck for years in a judicial system that has more than 24 million pending cases, including commercial and criminal. India’s judiciary must consider the interests of the economy and examine the impact of its verdicts on jobs, the country’s top court said in a judgment that could help reduce stalled projects in Asia’s

<sup>22</sup> *Ibid.*

<sup>23</sup> <https://indiankanoon.org/search/?formInput=aadhaar>

<sup>24</sup> <https://www.thehindubusinessline.com/opinion/columns/justice-cannot-be-blind-to-the-economy/article23365650.ece>

<sup>25</sup> *Shivshakti Sugars Ltd. v. Shree Renuka Sugar Ltd. (2017) 7 SCC 729*, Available at <http://www.sconline.com/Print/iu3ysAGK>

third-largest economy. The observations of the Supreme Court will usher in an era where the interplay “between law and economics would be considered by the courts on more a sustainable basis” especially where technical irregularities withhold economic development, Sandeep Chilana, a partner at Shardul Amarchand Mangaldas & Co, said in an email. More than half of the 24 million cases in India are pending for at least two years and more than 9 percent have been unresolved for more than 10 years, according to government data. A spokesman from the office of Prime Minister Narendra Modi did not respond to phone calls or text messages. The loss of productivity while attending court hearings amounts to 0.5 percent of Indian GDP, according to a report on the judiciary in 2016 by DAKSH, a Bengaluru-based organization that seeks to promote better governance and accountability in India.<sup>26</sup>

### **‘Huge Impediment to economic progress’**

The economic implications of India’s judicial backlog are hard to miss, a study on delays in the Indian Supreme Court by Simi Rose George of Harvard University’s John F. Kennedy School of Government found. “A growing pool of empirical studies suggests that slow court systems discourage the growth of new businesses,” according to the study. Speedy disposal of civil suits reduced breaches of contract, encouraged investment, and facilitated access to finance and foreign direct investment, it found, citing research papers.

“The judicial process has now become a huge impediment in the implementation of very many large projects,” said Mohan Guruswamy, who heads the Centre for Policy Alternatives, a New Delhi-based research group.

Not only are judicial processes “extremely slow,” the courts increasingly had a tendency to pass comments and orders that require technical expertise. “Our courts are increasingly encroaching on the domain of the executive often giving the constitution a go-by.” Guruswamy said.

In a significant verdict last year in the Shivshakti Sugar Mills case, Supreme Court Justices Sikri and Sapre said that, “The court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy, or the revenue of the state.”

The court has realized that its decisions on the legality of several licenses granted by the government *qua* industrial operations do have wide ranging economic impact. Investments made by private and public industrial units, combined with job security of thousands of employees, and financial security, via peripheral business opportunities, to all those linked with these industrial units are at stake.

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<sup>26</sup> <https://www.thehindubusinessline.com/opinion/columns/justice-cannot-be-blind-to-the-economy/article23365650.ece>

Justice Sikri stated, “India is on the road of economic growth. In such an environment it becomes the bounden duty of the Court to have the economic analysis and economic impacts of its decisions.”<sup>27</sup>

In the COAL BLOCKS Case<sup>28</sup>, Chief Justice Lodha opened his opinion by observing that, “Coal can help significant economic growth. India’s energy future and prosperity are integrally dependent upon mining and using its most abundant, affordable and dependent energy supply — which is coal.” The Chief Justice’s first two sentences of his opinion are, “Coal is king and paramount Lord of industry is an old saying in the industrial world. Industrial greatness has been built up on coal by many countries.” The opening of a mine has several economic, environmental and social consequences at the national, state or provincial and local levels. Mines not only create direct and indirect employment opportunities, but also generate foreign exchange earnings and tax revenues. New mining projects provide, in addition to business activities, basic facilities like roads, schools and health clinics to remote areas. Mining has also a range of indirect impacts, positive and/or negative, on the local communities and their livelihoods: It displaces them from their own land, they could lose their homes, agricultural land and forest based livelihoods; their natural environment degrades day by day, creating air and water pollution; skilled labour migrates to work in mines, creating tension between the local people and the outsiders. Sometimes, the benefits may be unevenly shared, or they may not compensate for the loss of existing livelihoods and damage to environment and culture (MMSD 2002). Coal mining in the Ib valley coalfield in Orissa has affected the community in many ways: it has provided employment to the people, it has provided basic facilities like roads, schools and clubs; it has however caused air, water and noise pollution. The people have been displaced from their own land. Coal mining influences all activities; the effects of these activities on the assets, in the form of five types of capital are studied. These assets influence policies and institutions and also get influenced by them. Finally, they adopt different livelihood strategies, which result in diverse livelihood outcomes. In this study it is observed that mining has a positive impact on financial capital. Shows the difference between mean household income and mean per capita income in both mining and control villages. Mean household incomes of the mining villages are high in comparison to the control villages. In the mining villages, half of the sample households have a job in the mines, giving them a higher level of income. In the control villages, people work as farmers or labourers. In the mining villages, the casual labour in mines are paid Rs 50 per day, hence, the same wage rate has been fixed for all other activities. This situation is the same in one control village, Saletikra, as it is closer to the town. The mean household income of villages near underground mines is the highest because most of the households of this village have a job in the mines. Villages near opencast mines have lower mean household income. In these villages, the mine workers relatively fewer in number. Some villagers, who have a job in the mines, are now staying in MCL quarters, and hence, do not contribute to the income of this village. The number of people depending on agriculture is more in this village, and this income does not significantly contribute to the mean household income. The same is true in the case of villages,

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Common Cause & ors. Union of India & ors on 14<sup>th</sup> may, 2015*, by M B Lokur, available at <https://indiankanoon.org/doc/26883388/>

which are in the vicinity of both the opencast and underground mines. On the other hand, there is a big difference in mean household income in the control villages. Here, the wage rate is Rs 40 per day. The availability of employment opportunities is less in these villages. A comparison of the control villages with the mining villages shows the extent to which mining has a positive impact on the financial capital. The sources of income considered here for determining the Herfindahl index include mining, agriculture, wage labour, business, government service and others. Diversification is defined as the deduction of Herfindahl index.<sup>29</sup> The control villages have more diversified sources of income than the mining villages. A village near underground mines is the least diversified, as most of the households have a job in the mines, and so the people do not need to look for other sources of income. The other two mining villages have comparatively more diversified income sources than the village near underground mines. Corruption or *mala fides* during the licensing process, proved beyond doubt, cannot be tolerated. But when the Supreme Court cancels licenses (as it did in the coal blocks case) going back decades based on an apprehension of some wrongdoing without actually being legally required to examine proof beyond reasonable doubt, and without any Judicio-Economic Impact Assessment, the economy and people suffer.<sup>30</sup>

The words of Justice Sikri in Shivshakti Sugar Mills, are almost prophetic, “(...) in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favor of a particular view which sub serves the economic interest of the nation.”

When we read these two sentences from two significant Supreme Court decisions together, it becomes abundantly clear that a wholesale cancellation of coal block licenses was not in the economic interest of the nation. **If coal is such an integral part of industrial growth, then ignoring the economic impact of the cancellation of 214 out of 218 coal block licenses was undesirable and unacceptable.**

### Liquor case

Here are the directions issued by the three Judge bench headed by Chief Justice Thakur in State of Tamil Nadu Vs K.Balu;<sup>31</sup> (i) All states and union territories shall forthwith cease and desist from granting licences for the sale of liquor along national and state highways; (ii) The prohibition contained in (i) above shall extend to and include stretches of such highways which fall within the limits of a municipal corporation, city, town or local authority;(iii) The existing licenses which have already been renewed prior to the date of this order shall continue until the term of the license expires but no later than 1 April 2017; (iv) All signage and advertisements of

<sup>29</sup> <http://re.indiaenvironmentportal.org.in/files/Coal%20Mining%20and%20Rural%20Livelihoods.pdf>

<sup>30</sup> *Ibid.*

<sup>31</sup> *State of Tamil Nadu Vs K. Balu anr. On 15 December, 2016 Author: D Y Chandrachud (Bench: T.S. Thakur, D.Y. Chandrachud, L. Nageswara Rao)*

the availability of liquor shall be prohibited and existing ones removed forthwith both on national and state highways;

(v) No shop for the sale of liquor shall be (i) visible from a national or state highway; (ii) directly accessible from a national or state highway and (iii) situated within a distance of 500 meters of the outer edge of the national or state highway of a service lane along the highway....

All States and Union territories are mandated to strictly enforce the above directions. The Chief Secretaries and Directors General of Police shall within one month chalk out a plan for enforcement in consultation with the state revenue and home departments. Responsibility shall be assigned inter alia to District Collectors and Superintendents of Police and other competent authorities. Compliance shall be strictly monitored by calling for fortnightly reports on action taken....

They were issued under article 142 of COI. The Supreme Court's purported cure for drunken driving along highways is proving to be a bitter pill for India's liquor and hospitality industries. The worst affected are the microbreweries, bars and hotels, which are located within 500 metres of national highways. About half the establishments of the country's fledgling microbrewery industry have been rendered defunct by the ban, and about 27% of premium hotels in 12 Indian cities are going to lose 30% of their revenue. Indicators are that the industry's hopes of recovering from the adversity of prohibition in Bihar and demonetization have been dashed by the ban. Let's look at some very important official statistics. In 2015, accidents caused 5, 01,423 deaths in India. Of these deaths, 16,298 or 3.3% happened due to drunken driving.

Another set of statistics tells us that the ban on liquor sale/consumption within 500 metres of Indian highways from April 1st following a Supreme Court order will deprive the Indian economy of a revenue equivalent to ₹75,000 crore. Plus, about one million jobs associated with highway liquor sale/consumption will simply vanish into thin air.

Needless to say, the above two sets of statistics are linked because the Supreme Court passed the liquor ban order apparently to free India's 250,000 km of national/state highways of deaths caused by drunken driving.

Shockingly, the country's top three distillers – United Spirits, Pernod Ricard and Allied Blenders – reported zero growth by volume in the April-December period. Together the trio accounts for 60% of total liquor sales in India. Now, in view of the Supreme Court ban, there are slim chances of the industry regaining its volumes because one-third of the 65,000 licensed branded liquor outlets need to be relocated or shut. This apprehension got further strengthened when stocks of United Spirits, United Breweries and Radico Khaitan fell following the Supreme Court's reaffirmation of its liquor ban order on March 31st. Brokerages have also downgraded the ratings of some liquor companies.

Apart from the liquor industry, the hospitality sector also finds itself in troubled waters because of the liquor ban. The Federation of Hotel and Restaurant Associations of India (FHRAI) has warned of a decline in foreign tourist arrivals because a substantial room inventory of FHRAI member-hotels is located on national/state highways, where foreigners may not like to stay due to the non-availability of liquor. The FHRAI member hotels currently contribute 6.3% to India's GDP, which is likely to decline with reduced tourist arrivals.<sup>32</sup>

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<sup>32</sup> <https://economictimes.indiatimes.com/industry/cons-products/liquor/highway-liquor-ban-half-the-outlets-remain-shut-industry-feels-the-pinch/articleshow/60110711.cms>

The nascent microbrewery business, which has been growing impressively in metros and IT hubs like Gurgaon and Bangalore, has also taken a beating from the ban. Almost half of the country's 100 microbreweries are facing closure, rendering scores of people jobless and wasting an investment worth over ₹200 crores.

India's highway liquor ban has forced some of the most prominent hotel chains in the country such as the Taj, Oberoi, Hyatt and Accor groups to stop serving alcohol to guests at key locations from April 1, threatening an estimated toll of Rs 65,000 crore in revenue foregone by state governments and the hospitality industry.

The move could lead to states losing overall tax revenue of Rs 50,000 crore, restaurants and pubs taking a hit of Rs 10,000-15,000 crore and 100,000 people going out of work, said Riyaz Amlani, president of the National Restaurant Association of India (NRAI).<sup>33</sup>

Apart from the trade having to dispose of stocks, states will lose heavily. "State revenue losses are estimated at Rs 50,000 crore, besides job losses of over a lakh. We are in the process of putting together exact numbers but these are initial projections," he said. NRAI is a lobby group that represents restaurants and pubs around the country.

## ECONOMIC POLICIES AND THE ROLE OF JUDICIAL 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. 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. The factors on the basis of which judges may exercise limited judicial review in matters of policy adjudication can be broadly categorized as procedural limitations, substantive limitations and institutional limitations. These limitations not only constrain the scope of judicial review but the court has used as a tool to justify judicial restraint. 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. 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. There are a significant number of cases where the Indian judiciary has enforced socio-economic rights by couching them with the fundamental rights guaranteed under Article 21 of the

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<sup>33</sup> *Ibid.*

Constitution. The *Olga Tellis* case<sup>34</sup> is a classic example in this regard. The Supreme Court has established the significance of judicial review in India time and again in the judgements of various cases. In *Keshavananda Bharati* case<sup>35</sup>, Justice Khanna was of the opinion that the power of judicial review has to be exercised as long as the fundamental rights exist in India. Besides this, in *Minerva Mills Ltd.* case<sup>36</sup>, the minority judgement delivered by Justice Bhagwati clearly presented the picture that it is the duty of the judiciary to uphold the constitutional values and also enforce the constitutional limitations. According to J. Bhagwati, the power of judicial review unquestionably forms a part of the basic structure of the constitution. It is however important to note that the judges, in these cases upheld judicial review as a safety valve against the protection of fundamental rights guaranteed by the constitution though Chapters XLI and XLII of the Parliamentary debate on the Constitution (Forty-Forth) Amendment Bill shows that allegation has been brought against the judiciary for retarding the socio-economic development of the country through the exercise of the power of judicial review.

In the case of *T.N. Godavarnam* 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. 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.<sup>37</sup> For instance the Supreme Court in *M. C. Mehta v. Union of India* <sup>38</sup> 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. 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. 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

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<sup>34</sup> *Olga tellis and ors. V. Bombay Municipal Corporation, 1985 SCC (3) 545*

<sup>35</sup> *Keshavananda Bharati and ors. V. State of kerela and anr. , (1973) 4 SCC 225*

<sup>36</sup> *Minerva Mills Ltd. and Ors. v. Union Of India and Ors. AIR 1980 SC 1789)*

<sup>37</sup> [http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/11/11\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/11/11_chapter%203.pdf)

<sup>38</sup> *M. C. Mehta v. Union of India : 1987 SCR (1) 819*

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 as well as Constitution making addresses these issues in greater detail. 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. 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, because the constitutional text and context is expansive and hospitable enough for pursuit of liberal as well as socialist constitutional interpretation. 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. 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. The case of *Commissioner of Income Tax, Udaipur v. Hindustan Zinc Limited*<sup>39</sup> discussed the jurisdiction of Court to interfere in economic matters under Articles 226 and 14 of the Constitution of India.

In the present case, the petitioners are exporters, registered with respondent's No. 2, M/s. Apparel Export Promotion Council, (n short "AEPC") and are engaged in the manufacture and export of garments and claim to have turnover of Rs. 300 Crores. They are grieved with the notification dated 20.8.2002, notifying that the Government vide its letter No. 1/1/2002-Exports-I dated 19.8.2002, has decided that respondent No. 2/AEPC may immediately release 10 per cent additional quantities in the categories 338/339-USA under the FCFS, i.e. first cum first served quota, after giving usual notice to the trade. Further, it was notified that transfers of quota in the above categories would be permitted only up to 30.8.2002.

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<sup>39</sup> *Commissioner of Income Tax, Udaipur v. Hindustan Zinc Limited*, AIR 2000 SC 3625, 2000 243 ITR 867 SC, (1999)



Petitioners had impugned the above notice, as not being in public interest. The notice is also assailed as imposing unreasonable restriction on the right to carry on business of exports which is an infringement of Article 19(1) (g) of the Constitution of India.

It was adjudged that when in economic matters, convincing explanation for the exercise of administrative discretion is available, then the Court cannot replace it by its own decision, unless the same was shown to be arbitrary.

The concept of welfare economics as given by Amartya Sen is applicable in this case. Welfare economics refers to a term used for general framework of normative analysis that is for evaluating different choices that society may make. Considerations regarding equity in distribution of income can be expressed in the measure of welfare economics. Distribution of income affects distribution of utilities which in turn affects social welfare.

The above case talks about the power of the courts to interfere in the economic matters of the country. It was observed that the courts can pass judgements in economic matters in relation to only the legislation or the law but the court cannot govern the matters that fall under the purview of the legislations or the policies enacted by the Central Government.

There is a presumption that the law is constitutional in its origin and provides for only when the exercise of power by the state results in infringement of right of the citizens by the state.

Similar presumption is available to subordinate legislation as also to the exercise of the executive power of the State. However, there is a difference in the weight or the degrees of these presumptions. The presumption attached to a legislative enactment ought to be weightier than the presumption attached to the subordinate legislation or of the exercise of an executive power. Legislative enactment is preceded by debates in the legislature and the representatives of the public have a direct say while enacting a law. That is not the case with a subordinate legislation or an executive order. Even in the case of a Statute to the fact that it was enacted by a competent legislature does not mean that the restrictions imposed by it reasonable and in the interest of public.<sup>40</sup>

## CONCLUSION

The reforms of the last two decades have gone a long way in freeing the domestic economy from the control regime. Economic liberalization and respect for human rights are both highly topical issues. In theory, more trade should increase economic welfare and protection of human rights should ensure individual dignity. Both fields of law protect certain freedoms: economic development should lead to higher human rights standards, and should be used to secure

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<sup>40</sup> *Ibid.*

compliance with human rights agreements. However the interaction between trade liberalization and human rights protection is complex.<sup>41</sup>

Human rights and liberal trade rules are based on the same values: individual freedom and responsibility (e.g. to adjust to competition); non-discrimination; rule of law; access to courts and adjudication to disputes; promotion of social welfare through peaceful cooperation among free citizens; parliamentary approval of national and international rules. Therefore, it is up to the state to recognize the intersection point of the two and come up with such an economic policy that the public as well as the trade of the country is benefitted and there is no infringement of any legal right during this period.

The Indian judiciary has in its judgments consistently preserved as unassailable the economic and industrial policy of the Government of India. It is evident from an analysis of these decisions that in the event of any *mala fides*, arbitrariness or gross illegality in any decision or order concerning FDI policy issued by the Government, investors have resorted to filing appropriate legal proceedings, including writ petitions in the High Courts and appropriate legal relief has been sought. It is hoped that some of the legal conundrums that do arise in the interpretation of the FDI policy and FEMA can and are resolved by a proper, just and fair interpretation and adjudication by the Indian Courts.

Judges need to understand the complex linkages between various areas of governance and economic and legal activity today. The higher judiciary is increasingly dealing with issues which have large-scale economic and commercial impact. These include allocation of natural resources such as spectrum, coal blocks, allowing mining of sand and sandstone, use of the Aadhaar card to access essential services, data privacy and security and waiver of farm loans.

A lack of economic analysis while passing judgement has the potential to create an adverse impact on employment, growth of infrastructure, hospitality, tourism, real estate and other economically relevant sectors, revenue of state and Central governments, and balance sheets of banks and financial institutions, without having the desired positive impact on social behaviour.

Perhaps the neglect of economic considerations is baggage from the past. Historically, the Indian judiciary has dealt with socially significant issues such as health, education, reservations in education and employment, priority sector lending, bank nationalization, bank branch licensing in remote locations, etc. While such issues have direct and indirect economic impact, the need for conducting economic analysis of judicial decisions was not felt, perhaps owing to our limited understanding of the linkages between judicial decisions and economic governance.

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<sup>41</sup> [http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/13/13\\_chapter%205.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/29989/13/13_chapter%205.pdf)

branch licensing in remote locations, etc. While such issues have direct and indirect economic impact, the need for conducting economic analysis of judicial decisions was not felt, perhaps owing to our limited understanding of the linkages between judicial decisions and economic governance. Efforts in the past to undertake economic analysis of judicial decisions have remained half-baked.

For instance, in *M.L. Sharma v. Principal Secretary And Ors*, the Supreme Court heard parties on the potential economic impact of cancellation of coal blocks, but was persuaded by Central government submissions that it was fully prepared to deal with the impact of cancellation and levy of additional penalty on coal block allottees. It did not provide any rationale for accepting the Central government's contentions; nor did it take into account the economic impact of cancellation and levy of penalty on several stakeholders.

Thus, while the economic impact of decisions may often be recognized, the depth of economic analysis and the significance given to it while decision making seem to be inadequate. A comprehensive economic analysis not only aids in sound decision making, but also promotes transparency and improves the quality of decision making.

It needs to be recognized that the economic impact of judicial orders could be direct, indirect, patent or latent, and different stakeholder groups could be differently affected. Accordingly, capacity building within the judiciary to balance different competing interests will be needed. With the arrival of commercial courts and benches, this becomes more necessary than ever.

The economic impact assessment of judicial decisions will aid in upholding the credibility of the judiciary and the quality of judicial decision making, which is increasingly coming under scrutiny. Judges need to understand the complex linkages between various areas of governance and economic and legal activity today to ensure delivery of economically responsible justice.

Efficiency in judicial dispute resolution might be likened to a current in the ocean: it can work without being seen or heard. Just as sailors overcome the currents of the ocean, judges may overcome the pull of efficiency when they have somewhere else to go. Efficiency may determine the outcome of a case as rarely as a current controls the movement of a ship at sea. And, most of the time, we may predict the motions of courts and ships better by listening to judges and captains than by charting the currents. But their lack of ultimate control does not make the currents unimportant. Judges are not always as sure of their direction as are captains, and currents of efficiency may carry the law when the judges row in opposite directions. Economic hypotheses may explain the drift of cases when other sources of understanding fail. The distinction between status and incentive effects may help us to understand the currents flowing deep in judicial decision making process.

