# THE JUDICIALISATION OF POLITICS IN INDIA

## ORIGINS AND CONSEQUENCES OF THE POWER OF THE INDIAN SUPREME COURT

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# CHAPTER ONE

## *Introduction: India's Droit Politique and the Politics of Judging*

***Abstract*** A single question suffices to structure this thesis — why has the Indian Supreme Court become so powerful? Embedded within this question lie three contextual dimensions which consequently come to frame our analysis of judicial power: relational, temporal, and institutional contexts. Firstly, Chapter One introduces judicial power as relational; most forms of power are and especially for a court — with 'no influence over either the sword or the purse' (Hamilton, *Federalist*, No. 78) — our search for answers thus must begin with a search for those powerful actors who can make the Supreme Court do something it does not want to do; vice versa, to what extent can the Indian Supreme Court impose its will on those other actors, especially through persuasion and influence as key indicators of judicialisation? Secondly, Chapter One maps the temporal contexts of this thesis, illustrating that judicial power — like all good dependent variables — varies over time. Thirdly, the Supreme Court is not just an idea, but also an institution: a building, with a budget, and surrounded by a fence, where judges, clerks and lawyers struggle with enormous workloads together. Chapter One argues that their power is embedded in political reality, calculation and strategy, and to understand the nature and origins of the power of the Court we must, above all, study the diffusion of power through elections. Last but not least, as the English legal language does not distinguish easily between *droit* and *loi*, between *Recht* and *Gesetz*, Chapter One also brings in that great paradox of constitutional theory, the relationship between *pouvoir constitué* and *pouvoir constituant*, to analyse the fall of parliamentary supremacy and India's new basic structure constitutionalism.

## [1.1] From Parliamentary to Judicial Supremacy

Is the Indian Supreme Court the most powerful court in the world? This was not always a question posed by those who study Indian politics. When Indian Independence was young, the Westminster model was at the forefront of constitutional thought and the supremacy of parliament quickly became the central paradigm for understanding Indian politics, polity and policies. With Nehru at its head, the Congress party was not content with gaining office and majorities, but aimed for nothing less than boundless legislative freedom to rebuild Indian society from above. What is more, with the inauguration of a republican constitution in 1950, the ascendancy of universal suffrage, and the consolidation of a unitary legislative power, any type of reform politics and any agenda for social change not only implied changes in the contents of laws but above all a revolution of law's institutional premise in terms of popular sovereignty. For the first time, modern institutions of mass democracy would claim a pivotal role in the administration of justice and as India held her first general election in 1951, the idea of law itself inevitably became captive to the ultimate primacy of the legislature and the mobilising power of democratic competition. Speaking in Parliament on March 14, 1955, on the fourth constitutional amendment, Nehru elaborated:

> You may say, you must accept the Supreme Court's interpretation of the Constitution. They are wiser than we are in interpreting things. But, I say, then if that is correct, there is an inherent contradiction in the Constitution between the

> fundamental rights and the Directive Principles of State Policy. Therefore, again, it is up to this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of state policy.
>
> […]
>
> The Ultimate authority to lay down what political or social or economic law we should have is Parliament and Parliament alone; it is not the function of the judiciary to do that. […] We accept the interpretation by the judiciary of the Constitution. Having accepted that, we feel it is not in consonance with the social or economic policy that we think the country should pursue. Therefore, we do not by-pass the Supreme Court; we come for a change in the Constitution, accepting their interpretation of it. (LSD, March 14, 1955; columns 1949, 1957)

In a nutshell, at the beginning of the 1950s Nehru and India's political elites had no doubt that 'if the Constitution itself comes in our way, then surely it is time to change that Constitution' (Nehru 1989 [1951], 325).[1]

Enter Chief Justice Sikri and the famous judicial opinions in the Kesavananda case,[2] known throughout the world as an epoch making affirmation of the power of judges, and asserting the ultimate supremacy of the Indian Supreme Court over the ballot box. This drumming vindication of judicial power, though partly a strategic retreat from the unsophisticated doctrines set out by the Golak Nath case,[3] has become

[1] The following two paragraphs are from Fischer (2007). The mere project of an entrenched written constitution already had been a step out of Dicey's shadow and parliamentary supremacy in its most radical sense — as India makes a clear legal distinction between constitutional and other laws and introduces 'a judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional' (1939, 91); at the same time, the immediate introduction of the Ninth Schedule before the first election restores the idea of parliamentary omnipotence to some extent, especially when combined with the explicit claim to a right to legislate on any topic as Parliament pleases through constitutional amendments.

[2] (1973) 4 SCC 225.

[3] Golak Nath vs. State of Punjab AIR 1967 SC 1643.

the icon of India's new constitutionalism, as unelected judges have effectively substituted the notion of the parliamentary sovereignty with an unambiguous declaration of formal judicial supremacy. The story of judicial power then continues with the emergence of public interest litigation, India's rights revolution and an unparalleled transformation of judicial behaviour in terms of social activism. Today, there 'is no area where the judgments of Supreme Court have not played a significant contribution in the governance — good governance — whether it be environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution.'[4] As well as this, the Indian Supreme Court[5] has come to provide the single most important avenue for political activists, organised groups of every stripe and opposition parties to challenge the government of the day. Above all, it is not only astonishing to note the exceptionally bold and copious rulings of the court after the emergency, but, what is more, since the end of the 1980s the judges have repeatedly claimed the power of 'the last word' and successfully imposed their will on the executive and legislative. For India's judges, the supreme act of popular sovereignty was the ratification of the Constitution of 1950, not the electoral process, and it is the Court's job to put elected politicians in their place. This was no easy victory for the Indian Supreme Court, and it is worthwhile remembering that the Court's frontal assault on the supremacy of the Indian Parliament

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[4] Speech of the Chief Justice of India, Y. K. Sabharwal, *Role of Judiciary in Good Governance* (2006, 11); <http://www.supremecourtofindia.nic.in/new_links/Good%20Governance.pdf>, last accessed, September 12, 2015.

[5] Throughout this thesis we speak of "the Court," when of course there is no single Supreme Court, but rather sets of many Indian justices. The question of how judges reach consensus and how individual judicial preferences are aggregated is a related but different topic, and chapters two and three address such theoretical problems in detail.

was at first unsuccessful and politically costly because of retaliation by the other branches of government.

> It has been not today's policy, but the old policy of the National Congress laid down years ago that the zamindari institution in India, that is the big estate system must be abolished. So far as we are concerned, we, who are connected with the Congress, shall give effect to that pledge naturally completely, one hundred per cent. And no legal subtlety and no change is going to come in our way. That is quite clear. […] Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament. But we must respect the judiciary, the Supreme Court and the other High Courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function.[6]

This Nehruvian understanding of parliamentary supremacy — for Dicey parliament can make or unmake any law, for Nehru, Parliament can make or unmake any part of the constitution — may have been the constitutive principle of Indian politics after

[6] Jawaharlal Nehru, Constituent Assembly Debates, Volume IX, pp. 1195-96 [10th December 1949].

Independence, but it has lost first its vitality and then its relevance. After a nostalgic, courteous nod to Indira Gandhi's institutional dance with the judges in the 1970s, we can declare parliament's supremacy as dead as the electoral hegemony of the Congress system. At the end of almost three decades of grim institutional struggle between the governing Congress party, whose mandate was backed by the people, and the Court, whose mandate was backed by a piece of paper, there was nothing to stop the judges after the breakdown of the Congress system. Today, the working of Indian governance is structured by an ever-expanding web of constitutional and legal constraints. In a word, Indian politics has been judicialised as the Supreme Court routinely intervenes in legislative processes, establishes limits on law-making behaviour, reconfigures policy-making environments, sets new policy agendas and even drafts the precise terms of legislation.

## [1.2] The Political Origins of Supreme Court Power

Alexis de Tocqueville's observation that 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question'[7] holds true for India too, particularly since the early 1980s, as India's Supreme Court judges began to reinvent themselves in the course of the emergence of public interest litigation as judicial activists of the "most active" sort. Today, authors like Upendra Baxi and S.P.

[7] Quoted in Langer (2002, 1).

Sathe simply as well as unequivocally refer to India's Supreme Court as the most powerful court in the world: 'The Court's specific political role lies in its functioning as a parallel legislature and quite often as a parallel constituent body' (Baxi 1980, xii).

Such extraordinary powers of the Supreme Court of India derive from a history of contestation. Broadly speaking, plans for fresh federal constitutional designs and all the other big constitutional questions before partition reinforced the idea of judicial review and strong non-representative institutions to govern federal structures, to guarantee minorities' rights and to institutionalise veto-players powerful enough to oppose "crude" majoritarianism. As the constitutional debate then was shaped by conditions of political deadlock and diffused parties, we can expect to find elements of strong, accessible judicial review. These consociational functions of courts have echoed until today: whenever religious or ethnic cleavages threaten the polity, unelected judges reinforce constitutional commitments to minority rights facilitating productive discussion rather than debilitating conflict. By putting some subjects beyond the boundaries of democratic intervention, Indian courts and constitutionalism thus divert 'resources from unresolvable problems to soluble ones' (Sunstein 1988, 399). However, by 1950 we are also coming face-to-face with a dominant political party setting itself up to control India's political system, and thus we should also expect a weak, low-access form of judicial review. It is thus not a surprise to find a Congress party that strips the Indian Supreme Court of parts of its jurisdiction already before the first general elections, continuing year by year, eventually culminating in a constitutional emergency crisis during which the complete abolition of judicial review becomes likely. Hence, both

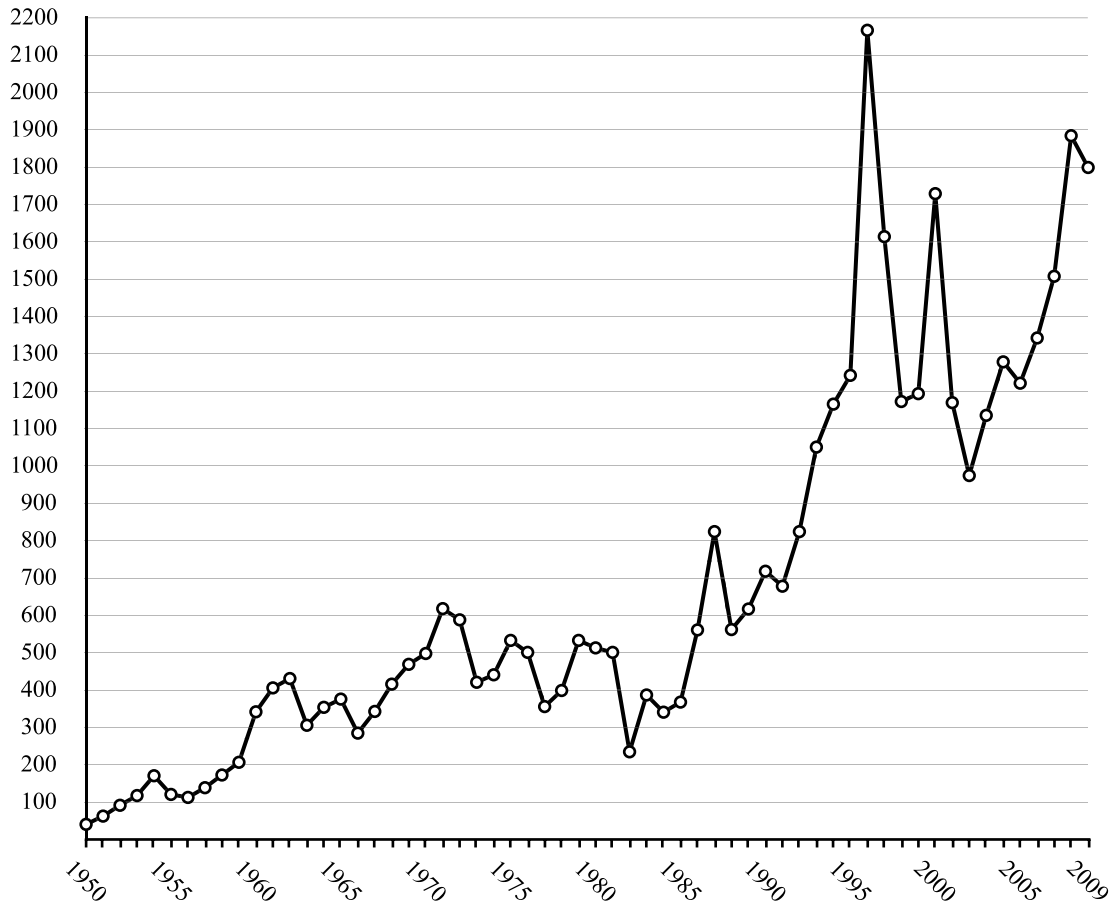
predictions have come true at different points of time and such contradictions and histories of contestation will be examined in more depth in the case studies that follow.

Many narratives describing the Supreme Court before the 1980s provide us with examples of a court that overreaches, loses in separation-of-power-games, and exposes itself to retaliation by the other branches. The origins of judicial power after 1980 are thus political in the sense that new actors begin to dominate Indian politics and either want to benefit from the existence of powerful judges (e.g. as an "insurance" while being out of power, for blame avoidance or dispute resolution within complex coalition systems) or simply are politically so divided that they no longer can create the consensus necessary to defy or retaliate against court decisions they regard as undesirable (see Cooter and Ginsburg 1996; Ginsburg 2003). As long as the dominant Congress party is able to predict its continued success in elections it prefers strong majoritarian institutions. However, as political forces deadlocked, or scattered across coalitions, no party can any longer confidently predict that it will be able to win the next elections; and since there are no clear prospective winners in Indian democracy anymore, all political parties prefer to have bounded majoritarian institutions and value non-representative institutions such as judicial review (insurance model). The key factor in explaining variation in the extent of judicialisation in India's constitutional systems is therefore the structure of the party system and the diffusion of political forces. As the probability of electoral loss increases the benefits provided by access to judicial review for politicians out of power seem all the more attractive: namely the entrenchment of their policy-decisions, the protection of individual interests and the ability to oppose and re-direct government policy via constitutional litigation. As a general hypothesis,

judicial power, the importance of constitutional rights, and access to judicial review will be greater where other political forces are diffused.

The best indicator to begin our analysis of the growing political spaces for judicialisation, is the growth of judicial activity at the Supreme Court, measured simply by the most important output of apex courts: published cases (Figure 1.1).

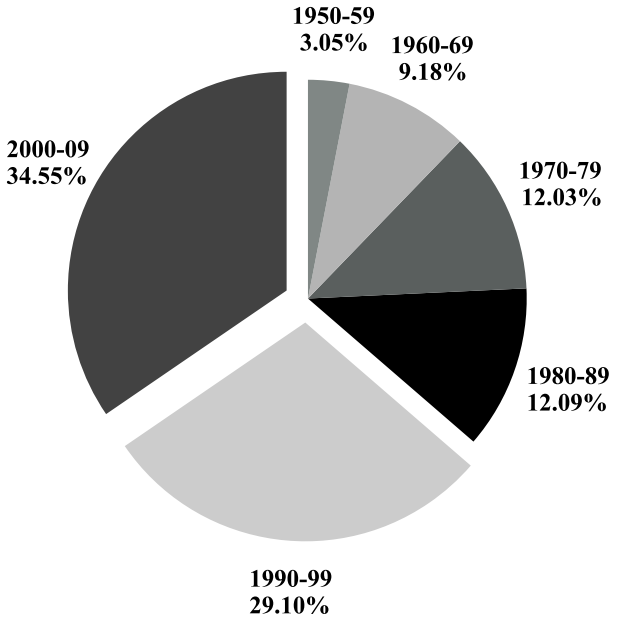
**FIGURE 1.1 Public Agenda of the Supreme Court: Total Number of Cases Reported per Year, 1950-2009**




*Source:* Compiled by author from SCC;
n = 40,618 (total number of all reported cases in SCC database).

Between 1990 and 2009, the time period covered by our analysis, the SCC reported 40,618 cases – a large sample size for our analysis[8] and revealing interesting temporal patterns of accelerating, increasing judicial activity, in particular after 1990 (Figure 1.2).

**FIGURE 1.2 Public Agenda of the Supreme Court: Distribution of Cases Reported per Decade (%), 1950-2009**

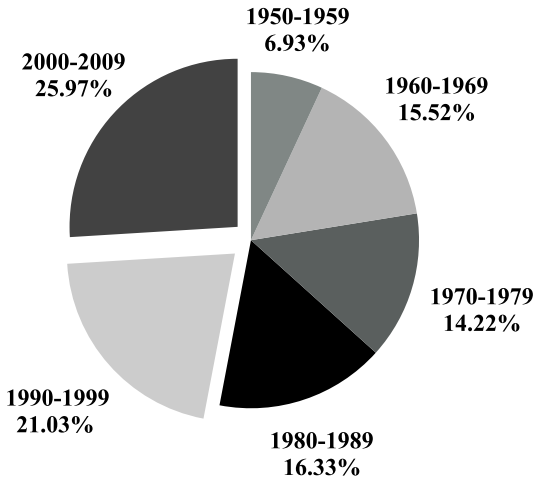



*Source:* Compiled by author from SCC;
n = 40,618 (total number of all reported cases in SCC database).

[8] Chapters Two and Seven will illustrate that reported cases are only a fraction of the total of decisions and workload of the Court and explore the methodological problems of working with reported cases. Thanks to an enquiry under Freedom of Information Act, by Shankar and Mehta (reported in Gauri 2008) we know that from 1950 to 2006, the Supreme Court alone disposed of 1,158,303 cases and as a rough average we can estimate that only about 3% of all the decisions of the Supreme Court have been published.

Our indicators get more precise (Figure 1.3) if we filter all the reported decisions for cases that involve the Government of India either as plaintiff or as defendant, and then only select cases that address questions of unconstitutionality — the power to declare executive and legislative actions unconstitutional and void as a particularly significant manifestation of judicial power.

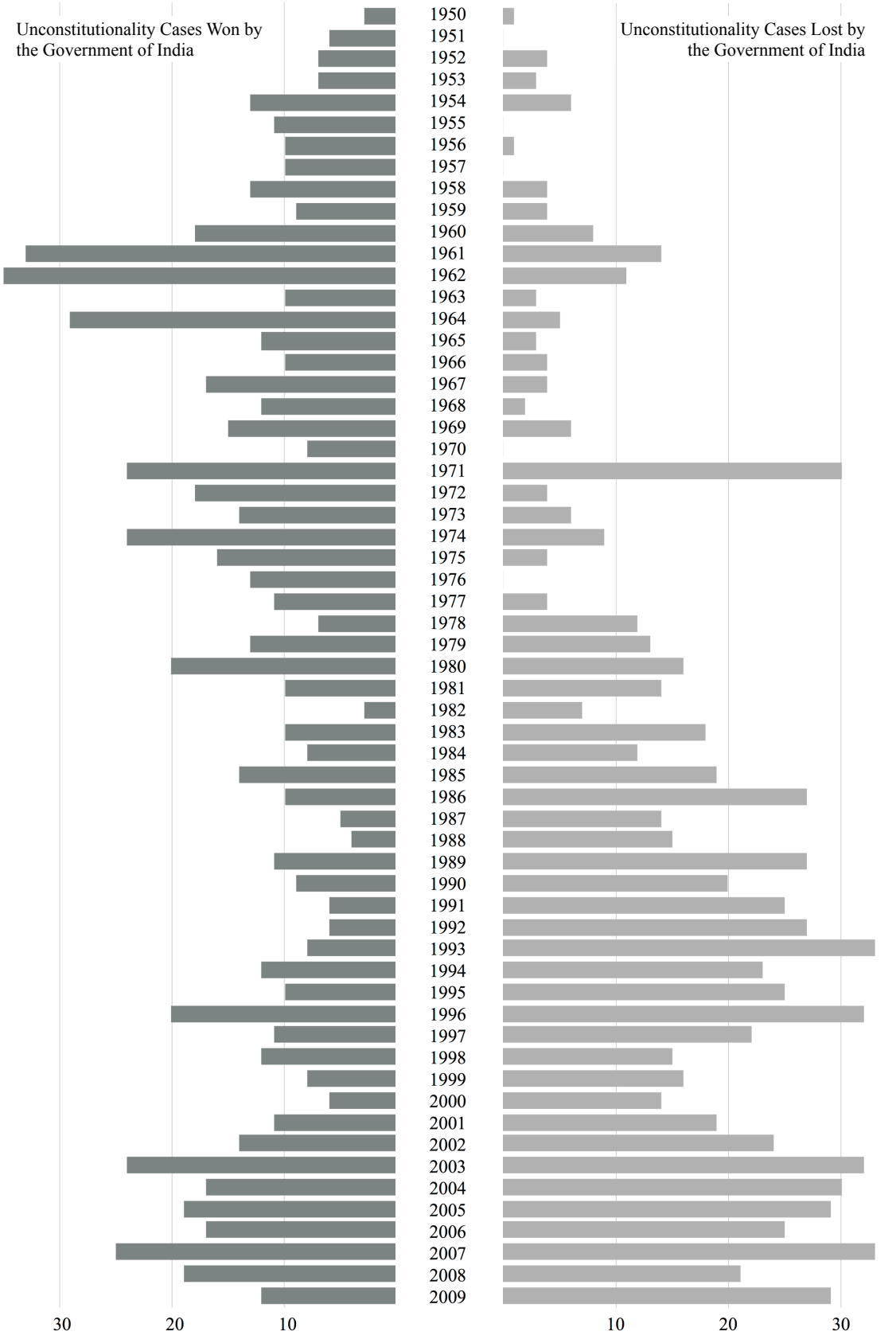
**FIGURE 1.3 Unconstitutionality Cases with Government of India as Litigant: Distribution of Cases Reported per Decade (%), 1950-2009**




*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 1,617 (total number of reported unconstitutionality cases in SCC database).

Again we observe acceleration and a sharp increase of unconstitutionality litigation activity post 1990. This is not only to say that the Government of India has to spend a lot more time and resources on litigation today but read in conjunction with the case coding results (government wins or loses) presented in Figure 1.4 also illustrates that

**FIGURE 1.4 Unconstitutionality Cases: Claims and Declarations of Unconstitutionality against the Government of India, 1950-2009**




*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 1,617 (total number of reported unconstitutionality cases in SCC database).

the Supreme Court builds up its ability to assert itself through anti-government decisions. Figure 1.4 thus adds an important dimension to our study judicial power, the distinction between assertion, i.e. judicial decisions not in line with the preferences of the government, and deference, i.e. decisions that support the government.[9]

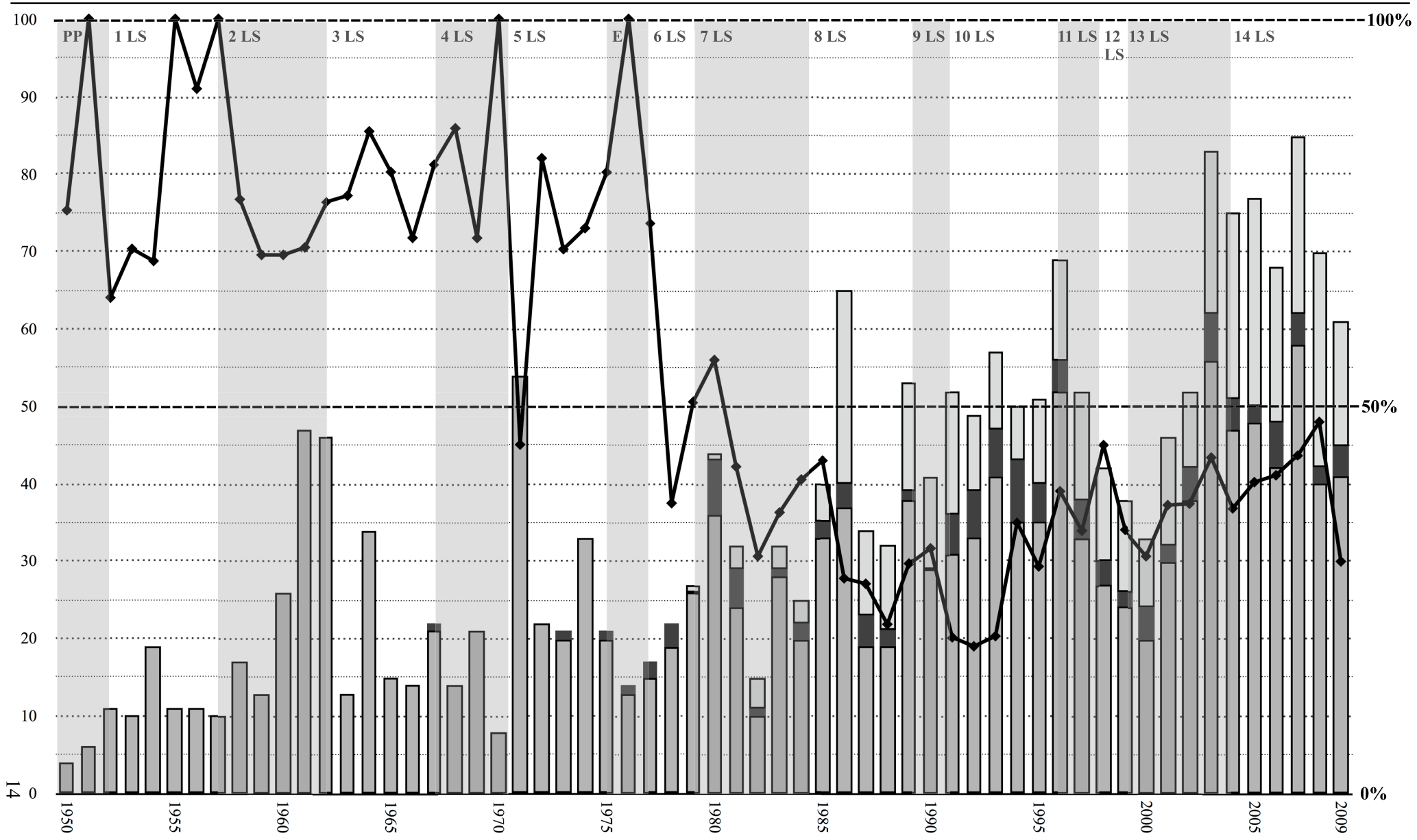
The relationship between assertion and deference can be observed in Figure 1.5 again, where the black line shows how the Indian Supreme Court outgrows any regime support roles and emerges as an assertive, powerful court that decides against the government in more than half of increasing numbers of cases. In addition, from the bar chart elements of Figure 1.5 it is apparent that more and more important cases are brought in front of the Indian Supreme Court, framed as unconstitutionality challenges or even as basic structure questions;[10] Figure 1.5 also points towards a steady and growing flow of public interest litigation cases, a special form of litigation and Supreme Court activism with particularly strong governance implications. All elements of Figure 1.5 therefore point towards our dependent variable: judicial power expansion.

Simultaneously, across time, judicial power is also question of path dependency, positive feedback loops and self-reinforcement. The strategies that the Supreme Court utilise — such as the judicial innovations of public interest litigation or the basic structure — have a significant effect on the judges ability to exercise power in future encounters with the other branches. It may be apparent from this discussion that we confront an endogeneity problem (King et al. 1994) in trying to explain the development of judicial power: Constitutional courts are constrained by the

[9] For Dahl (1957) the key function of judicial review, especially in new democracies, actually is regime support.

[10] Chapter Four will explain basic structure review as a special type constitutional litigation, based on the idea of the unconstitutional constitutional amendment.

**FIGURE 1.5** **Judicial Power across Time: Rise of Unconstitutionality, Basic Structure and Public Interest Litigation Cases**



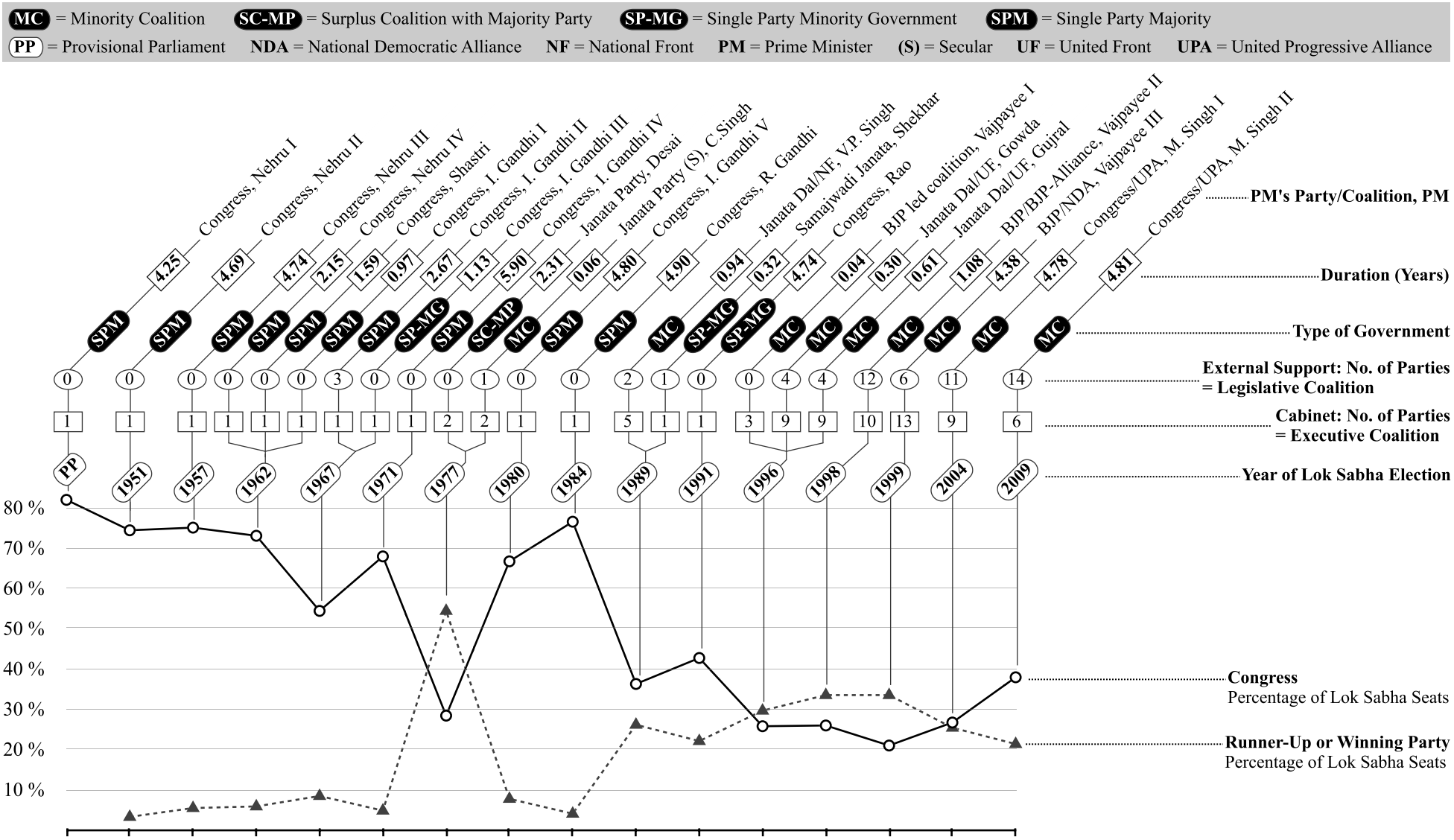

**E** = Emergency, **LS** = Lok Sabha, **PP** = Provisional Parliament. Unconstitutionality Cases Reported, per Year; n = 1617. Basic Structure Cases Reported, per Year; n = 119. Public Interest Litigation Cases Reported, per Year; n = 390. Unconstitutionality cases won by the GoI (%, per Year). *Source:* Compiled by author from MANU and SCC databases; n = 40,618 (total number of reported cases).

constitutional order, but they are themselves central actors in the articulation of rules that constitute constitutional order. Perhaps, more than other political institutions, constitutional courts can shape their own institutional operating environment. Either way, our arguments are always based on a law and politics approach, taking for granted that central forces constraining the judges of the Indian Supreme Court are not legal but political, and primarily the countervailing power of other institutions. Nevertheless, our study of judicial power has to be careful in attributing outcomes to the institutional framework, since that framework is in part a result of judicial power. While we treat the power of the Supreme Court of India as dependent variable, we cannot neglect the fact that Court itself simultaneously shapes the independent variables that constrain or empower the judges. In other words, it is difficult to balance the study of our dependent variable — judicial power — with the path dependency of judicial power , while at the same time taking into account that the exercise of judicial power has the potential reinvent the Supreme Court itself and thus disrupt path dependent flows (Chapter Four, for instance, argues that a heresthetic manoeuvre broke the trend of judicial power contraction after Independence).

Simultaneously, this view of India's constitutional order as dynamic helps to explain why judicial power has grown as democracy deepened. The Supreme Court became an important site of political contestation, and frequently called upon to resolve disputes. Losers in the political arenas are likely to take their disputes to the Court, which means that political questions themselves are increasingly framed within the context of a constitutional-legal discourse. Judicial review thus enhances participation

**FIGURE 1.6 Distribution of Government Types in Relation to Lok Sabha Election Results**

*Notes:* Indira Gandhi III is not a new government per se but only a new type of government relying on the official declaration of external support by three other parties after the Congress split. The Rao government survived various votes of no-confidence building various alliances - but always remained without any official declaration of external support; December 1993 the Rao government turned into a single party majority government after a faction of the Janata Dal had merged with the ruling party and its majority had grown considerably before that too due to by-elections and Congress' success in the delayed Punjab Lok Sabha elections. The figure does not include G. L. Nanda's and Rajiv Gandhi's de facto caretaker governments after the death of a prime minister. The Internal Emergency, 25.06.1975 until 31.03.1977, and external emergency periods could be classified as different government types but are not included here to maintain the figure's focus on election results.




*Source:* Compiled by author from Election Commission Reports, Sridharan (2012) and Ziegfeld (2012).

and empowerment, but also judicialises political discourse.[11] Such processes contribute to the search for empirical linkages between increasing political competition and fractionalisation (Figure 1.6 and Figure 1.7) and rising litigation rates (Figure 1.5) due to the politicisation of the judicial process and the judicialisation of politics.

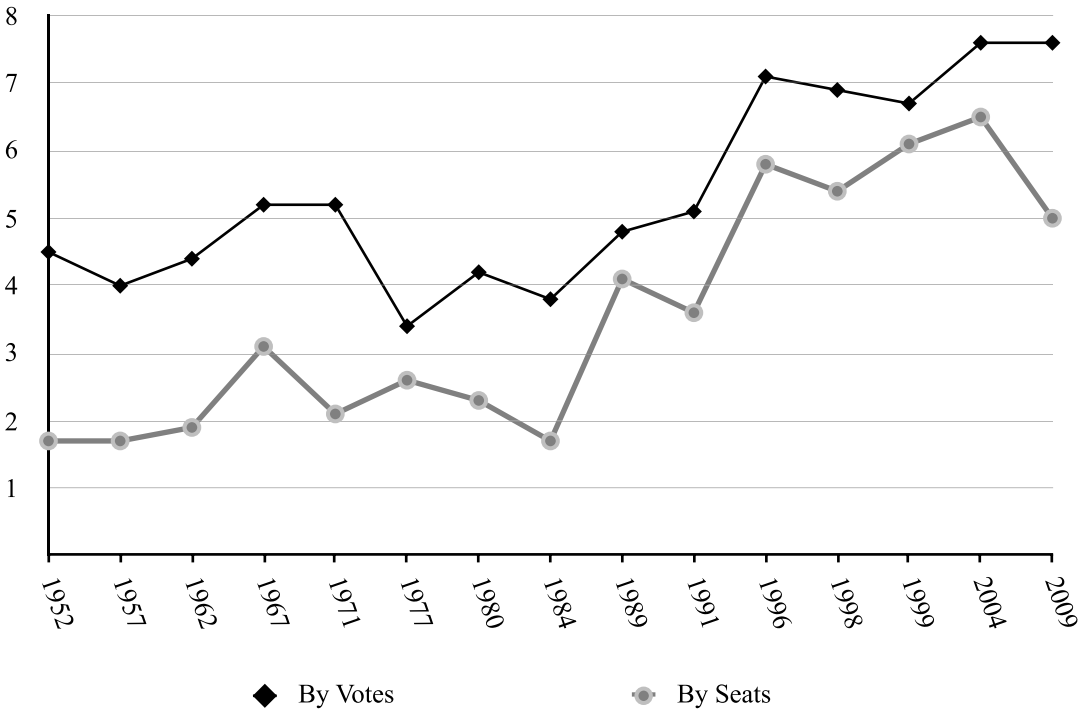
> The politicisation of constitutional review processes, by litigants, comprises the essential first step, the trigger mechanism, that enables judicialisation; and judicialisation processes serve to legitimise constitutional review, by establishing and continuously reinforcing the centrality of constitutional case law within legislative and judicial processes. Underlying this argument, indeed underlying the account of constitutional politics in this book, is a theory of action. This theory of action integrates strategic behaviour and normative reasoning. (Stone Sweet 2000, 139)

As there was a single, dominant party in 1950 that had rightly believed that it was likely to hold onto political power, Congress had little incentive to set up a strong, neutral umpire to resolve disputes about constitutional meaning. It would rather retain the flexibility to dictate outcomes without constitutional constraint. The flexibility of constitutional change and the power of Nehruvian supermajorities allowed for easy policy changes and maximum exercise of parliamentary power by overruling the Supreme Court frequently. The absence of a successful and assertive judicial review institution under Nehru reflects the desire of strong politicians to maintain their exclusive role of constitutional interpretation — in a nutshell, if the Constitution is what somebody says it is, then who has the last word? By contrast, if we move down the time

[11] Critical legal studies scholars argue that a juridified or judicialised political discourse constrains politics and is structurally conservative, embedding the status quo, and encouraging a type of politics that is unambitious, almost blindfolded by legal categories.

dimension of Figure 1.6, after the downfall of the Congress system, no party can have confidence that it is likely to continue to win future elections. A constitutional design allowing unlimited flexibility for electoral winners, such as in the Westminster model of parliamentary sovereignty, is much less attractive in the post 1977 setting of political diffusions. While each prospective governing party would like flexibility while in power, each prospective opposition parties would value limited government and the option to change, stall or somehow undermine government policies via judicial review.

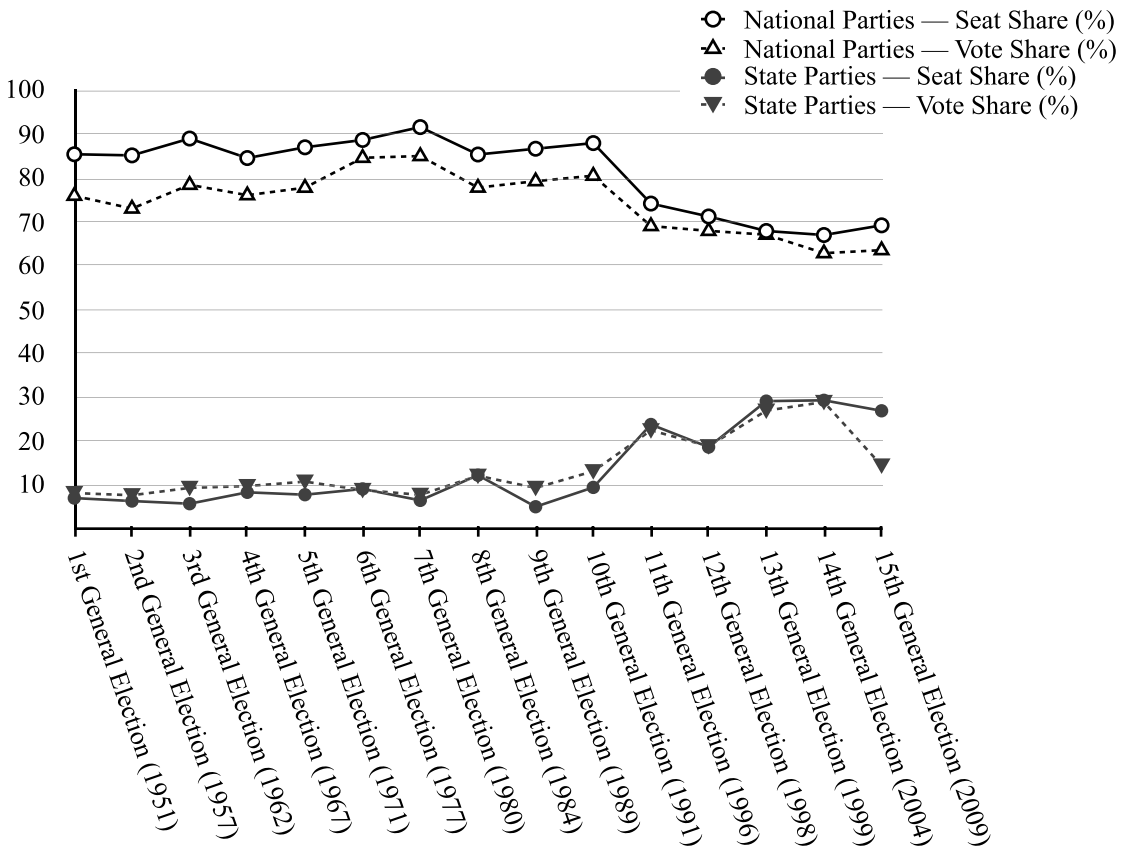
**FIGURE 1.7 Distribution of Votes and Seats across Time: Fractionalization of the Party System**




*Source:* Compiled by author from Sridharan (2012).

Politicians who have learnt that they can also lose elections (e.g. Indira Gandhi) learn to value an alternative forum, such as a powerful court with neutral judges, in which to protect their individual interests and to challenge the policies of the majority when out of power, and since no Indian politician can any longer expect to win in elections, let alone in the legislature, all the time. The key purpose of Figure 1.6, Figure 1.7 and Figure 1.8 is thus to pay more attention to the structural, political ingredients that

**FIGURE 1.8 Seat-Share and Vote-Share of National and State Parties: Federalization of the Party System**




*Source:* Compiled by author from Election Commission Reports.

underlie manifestations of judicial power, in particular the tectonic shifts in India's party system at Union and State levels. Throughout this thesis we will use the simple idea — that elections diffuse power at increasing rates, thus opening up new spaces for judicial power expansion — to analyse and contextualise judicial activism of India's post-emergency democracy and the various judicial *coups d'état* during the period of governmental instability of the 1990s. There are two features of these contexts which contrast sharply with Nehru's democratic regimes. First, future political outcomes are more uncertain. The presence of increased electoral competition means that even the most dominant and popular parties face a relatively high chance of losing power. Information on future outcomes is more difficult to assess — in this new context, a powerful Supreme Court creates more "winners" by looking after the increasing numbers of losers. Support for the power of the Court is therefore nothing more, and nothing less, than a question of political interest. We can call this the insurance model of judicial review (Ginsburg 2003). By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers. Judicialisation thus helps to ensure a level of institutional stability of India's political system that may otherwise not be, by accommodating those who lose. It is therefore worthwhile to remember that many of the defining features of judicialisation go beyond the judges' activist and 'imperialist' impulses, as the expansion of judicial power has been taking place in the context of weak, decentralised, or a chronically deadlocked coalition governments. It seems plausible to speculate that changes in the party system are the key independent variable, opening up those new

political spaces for judicial power expansion. Political deference to the judiciary is not only tacit approval of judicialisation but also an effective way of overcoming systemic 'ungovernability.' It seems clear that hung parliaments, minority governments and weak coalitions provided courts with a structural window of opportunity to change the balance of power in their favour. As the decline of the Congress-system corroded the authority of the legislative and executive branches of government, the Supreme Court emerged as a dominant, seemingly apolitical decision maker.

The Figures of Chapter One and Table 5.2 illustrate how the transformation of the Indian party system has taken vulnerability elements of political competition — an incumbents' safety of tenure — to new levels.[12] Any professional politician has to live with the almost certainty that he will be out of power during some time during his career. What will he do when not in power? Litigation is a shield, and a tool for access. Moreover, Ginsburg's idea of diffusion of power is not just limited to the party system. Global debates about a differentiated polity or disaggregated state hint at the ways in which power flows across India's complex webs of commissions and watchdog bodies, media, civil society. Structural changes, such as *panchayati raj* reform or differentiation through increasing specialisation of governance (e.g. the SC/ST commissioner becomes a permanent commission, then two different permanent commissions) further decentralise and diffuse power across new institutions and actors with competing,

[12] What matters for judicialization is not just the fragmentation as measured today, but also the political uncertainty that politicians can expect tomorrow. Table 5.2 provides further variables of power diffusion: Anti-incumbency trends, more candidates contesting, more deposits lost, new technologies of campaigning with massive impact and swing elections, narrower margins of victory, comparatively low numbers of re-elected and simultaneously first-time Members of Parliament. In India, we first see a fragmented opposition in 1950, and then fragmentation all around.

conflicting preferences for governance. Even if we imagine the re-emergence of a dominant political party, the polity itself has diffused and fragmented, as the meaning of separation of powers has changed, bringing in new actors that create new spaces for political competition; for our model of judicialisation, this means that the court has many layers of allies and a multitude of support constituencies (Chapter Six, for instance, shows how an Election Commission and Supreme Court alliance rewrote electoral laws, against strong opposition from Parliament and the executive).

Thus, as the risk of electoral loss increases, the incentives for politicians to support a powerful Indian Supreme Court increase as well. Similarly, an increase in perceived legitimacy benefits or greater possibilities of policy-making through litigation will expand judicialisation, holding electoral risks and agency costs constant. Given the institutional structuration of incentives within India's political system, the judicialisation of politics is therefore systemic and the rise of the judges is unstoppable as long as elections continue to diffuse political power. Other things being equal, an increase in the diffusion of political power leads to an increase in uncertainty, followed by increased demand for the types of political insurance that judicial review provides. Under such conditions it is especially useful for Indian politicians to support the judicialisation of politics to entrench existing political bargains, and to protect them from the possibility of extreme reversal after the next election. Because rational Indian politicians have learnt that they will remain in power for five out of ten years, they choose to defer a certain amount of political power to independent judges to protect their bargains from repeal and to oppose and influence government when out of power.

Behind the Figures of Chapter One we find another pattern: Judges have increasingly asserted their own authority in the governance of the India whenever legislative politics, operating on the basis of majority rule, fails in finding efficient solutions. As soon as the executive or legislature become incapable of action, they will lose control of their political authority and the Court — as an agency capable of focused, autonomous action — will act where the government and legislative is too divided to react. This dimension of judicialisation is the key reason why Figure 1.5 goes beyond election results and expands our analysis into the realms of governmental types and instability; Chapters Five, Six and Eight in particular will discuss sequences of "raw" judicial power expansion — which scholars have come to call *judicial coups d'état* — that fall into the 1990s and "rob" the prime minister of control over judicial appointments, the Central Bureau of Investigation, and more. Figure 1.5 thus describes the types of circumstances in which policymaking and lawmaking will tend to be judicialised and migrate towards the sphere of the Indian Supreme Court as the only body that is capable of decisive action. These are the conditions of a political system in which we see the development of a divided legislative, a "runaway" bureaucracy and the emergence of a powerful, activist court (Ferejohn 2002). The contributions of this thesis are such strategic accounts of judicial power, rooted in metaphors of positive political theories. It is neither judicial behaviour nor normative political philosophies that account for the stunning rise of judicial power in India: Above all, the continuous presence of elections, the sine qua non of Indian democracy, has continuously increased the complexity of and uncertainty within the polity — hence, the demand for judicial review, the political

origins of judicial power. The power of Indian the Indian Supreme Court thus reflects the political diffusion characteristic of Indian democracy and the process of the judicialisation of Indian politics has not only begun, it is systemic as well as irreversible as long as elections continue to open up new spaces for judicial power expansion.

# CHAPTER TWO

## *Mapping the Supreme Court Across Time and Jurisdictional Spaces*

***Abstract*** Chapter Two explores the deep historical and quintessentially colonial roots of the judicial review process. The Supreme Court is a modern, Indian, English-language court in a sub-continental, linguistically diverse and multinational state. Like few other bodies of the modern Indian polity, the Supreme Court is linked ideologically, institutionally and aesthetically — by history as well as imagination — with the pillars of the Empire and that most English of creations, the common law. In contrast, as with all legal transplants, indigenisation has driven the Court's institutional development from the start as Indian judges had to come to terms with specific local social phenomena, such as widespread poverty and specific patterns of marginalisation, as well as India's sheer size and its mega-pluralism of groups and cultures. This chapter portrays the history of the Indian Supreme Court as a judicial struggle for jurisdictional spaces against an unsupportive and often hostile political environment; the chapter then draws attention to specific historical events and structural political changes that opened up new political spaces for jurisdiction expansion after the Emergency. At the same time, judicial power expansion emerges as a double-edged sword as each of the Court's successes kept adding further to enormous workloads, and the resulting challenges of institutional organisation have important consequences in relation to the resources and judicial 'time-budgets' that can flow into the policy-making roles of the Court.

## [2.1] Judicial Review in Time: Legal Transplants and the Migration of Ideas

It was not new. It was bound by tradition. August 1947, at the 'stroke of the midnight hour,' the age of the Federal Court of India did not end, and two-and-a-half years later its successor, the Supreme Court, would not 'step out from the old to the new' either. On the contrary, colonial laws stayed in place, the decisions of the colonial courts remained valid, judges stayed in office[1] and lawyers continued to be licensed to practice. India's Supreme Court did not move into a new building until 1958, and the law libraries of courts and lawyers remained prized possessions throughout the country, full of English law books and reported case law. Probably nothing symbolises continuity more than the Supreme Court's insistence on English language proceedings, which stands in marked contrast to the increased use of Hindi in the Lok Sabha and the affective role of regional languages in parliamentary debates in general (Spary 2010). Even if we take full account of the nativisation of English (Annamalai 2004), it seems that the Supreme Court deliberately set itself apart from established governmental language practices by refusing to make any efforts to publish its judgments in Hindi. Similarly, Supreme Court reports and the court news are published in English only, and the Court maintains probably the only website of the central government that does not have a Hindi version.

From a contemporary, comparative perspective, these observations reveal continuity across regime change as a distinctive, if not a unique, characteristic of the Indian Supreme Court. South Africa, for example, displaced Afrikaans from the legal

[1] The First Amendment Act, 1950, even changed the Constitution to allow non-citizens to stay on as High Court judges.

system, created a new constitutional court, removed judges associated with the apartheid regime, appointed new judges, moved the entire court into a renovated prison and changed the colour of the robes to green. With respect to the latter, and given the role of cloth in South Asia as a symbol of 'community and right conduct […] not merely in fixing and symbolising social and political statuses, but in transmitting holiness, purity, and pollution' (Bayly 1986, 285), we would at least expect to find a debate about changing the design of judicial robes. Yet, in India in 1950, not even such dress codes changed, judges and lawyers continued to put on the same gowns as the judges who had applied colonial law. While homespun cloth had become a central symbol of the entire freedom struggle (Trivedi 2007), the judges still came to court in what was quintessentially foreign dress.

Paraphrasing Morris-Jones (1971, 17-19), it is thus in more than one sense that the new India inherited a 'Westminster-model' constitution (Harding 2004), and it is not fanciful to see English constitutional sentiments underlying both the Supreme Court and the Congress Party — the former, viewing itself as the successor of an assertive Federal Court; the latter devoted to an omnipotent parliament at the time of independence. India's judges and political leaders had not only received the tangible fabric of the British Raj's machinery of government, but also inherited an 'accumulated sum of psychological capital' (Morris-Jones 1971, 19) that accustomed the Indian legal mind to an English outlook on constitutional issues.

> Wealthy Indian families, like the Gandhis, Jinnahs, and Nehrus, were eager to send their brightest young men to dine in London's Inns of Court set amid lovely garden grounds north of the Thames Embankment. There they breathed the sweet air of

> liberty, imbibing such revolutionary concepts of the Common Law as the presumption of innocence and the freedom to express one's ideas and opinions in speech or writing, whatever one's colour, creed, or caste might be. Those London Inns (the Inner Temple for Gandhi and Nehru; Lincoln's Inn for Jinnah) proved inadvertent cradles to the nationalist leadership of India and Pakistan, educating those brilliant barristers to voice English demands for justice and teaching them most effectively to speak, petition, and act in rallying millions of their followers to demand freedom. (Wolpert 2001, 24)

While there is no need to embrace Wolpert's eulogy of and enthusiasm for the 'sweet air of liberty' of 19th century common law constitutionalism,[2] it is easy to see how English legal education and legal practice shaped first the 'empire's governing classes' (Rudolph and Rudolph 2006, 22) and later the independence movement. In point of fact, the first political formations of Indian nationalism were dominated by Indian lawyers. For instance, no less than 68 per cent of members of the Indian National Association, founded by Surendra Nath Bannerjea and Anand Mohan Bose in 1876, were lawyers (Seal 1971, 216). Likewise, it is difficult to overestimate the ascendancy of the legal profession within the Indian National Congress. Not only were half of the delegates at the first Congress session (1885) lawyers, but also the first President of the Indian National Congress, Womesh Chandra Bonnerjee, was a successful Middle Temple barrister and doyen of the Calcutta Bar (Bonnerjee 1944). Of a total of 2361 delegates who attended the first four Congress sessions between 1885 and 1888, 866 were

[2] The relationship between race, common law and the colonial state is discussed further below. The common law also never stood in the way of the enforcement of caste and untouchability. For instance, in *Sankaralinga Nadan v. Raja Rajeswara Dorai* ILR 1908 (31) Madras 236, the Privy Council in London ordered low-caste Nadars to pay damages as their entry into the temple had polluted the idol and the damages paid were calculated on the basis of the costs for purification rituals.

lawyers, and 'for decades to come more than a third of the delegates at every Congress belonged to that profession' (Ghosh 1960; Seal 1971, 278). Even after Gandhi had transformed the Congress 'from a club of Anglicised lawyers into a mass political organisation' (Markovits 2004, 93), lawyers remained at the helm of the Indian independence movement. For illustration purposes, we can look at a random list, in alphabetical order, of political leaders who had practised law: Ambedkar, Jyoti Basu, Sarat Chandra Bose, Gandhi, Syama Prasad Mookerjee, Motilal Nehru, his son, Jawaharlal Nehru, Vallabhbhai Patel, Rajendra Prasad, Chakravarthi Rajagopalachari. Irrespective of region, caste, religion or ideological orientation, it is clear that the most important decision-makers had been intimately acquainted with British constitutional law and its strong aversion towards formal legal checks on the power of government.

It should not come as a surprise, then, that A.V. Dicey's classic work, *Introduction to the Study of the Law of the Constitution*, first published in 1885, became one of the most often-quoted law books in the Indian Constituent Assembly debates and dominated the constitutional imagination of many Assembly members. At the same time, the freedom movement also learnt to use the courts and, more importantly, the discursive power of fundamental rights and equality discourses as tools for direct and ideological resistance against the colonial state. The interplay between law, ideologies, colonial domination and anti-colonial resistance is thus much more complex than Wolpert's 'sweet air of liberty' simplification. We can rather see Wolpert's writing as a mere continuation of the colonial ideology of rule, that the 'foundation of our empire in India rests on the principle of justice' (Sunderland 1929, 105). Probably the most important judicial intervention in the formation and challenging of such ideological frameworks

was the impeachment trial of Warren Hastings. It was not only the first time, but also an exceptionally significant assemblage of important figures; the British public engaged with the trial received the first major public discursive event of its kind in England, in which the 'colonial ambitions and practices of European powers in the East stood exposed to a close and comprehensive critique, and the legal and moral legitimacy of colonialism itself as a phenomenon was thrown into question before the highest judicial body in Britain, the House of Lords. The fact that the prosecution was led by Edmund Burke only added to the trial's enduring significance as a moment of critical reflection on colonial practices' (Mukherjee 2005, 591). Side by side with the idea of justice as a governance discourse (Mukherjee 2010) — *the promise of justice* — such critical reflection quickly brings to light the day-to-day reality of the colonial administration of justice — *the experience of injustice*. Shifting from the law in the books to the law in action, a much more accurate description than Wolpert's thus derives from Bal Gangadhar Tilak: 'The goddess of British Justice, though blind, is able to distinguish unmistakably black from white' (Kesari, November 12, 1907, quoted in Kolsky 2010, 4). Kolsky's work (2010) on colonial law is not just a specific reminder of how the weight of race 'imbalanced the scales of colonial justice', but also of how the inability of the colonial state to prosecute white violence resulted in constant de-legitimisation of the colonial state and reforms.

> If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to

> be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just. (Thompson 1975, 264)

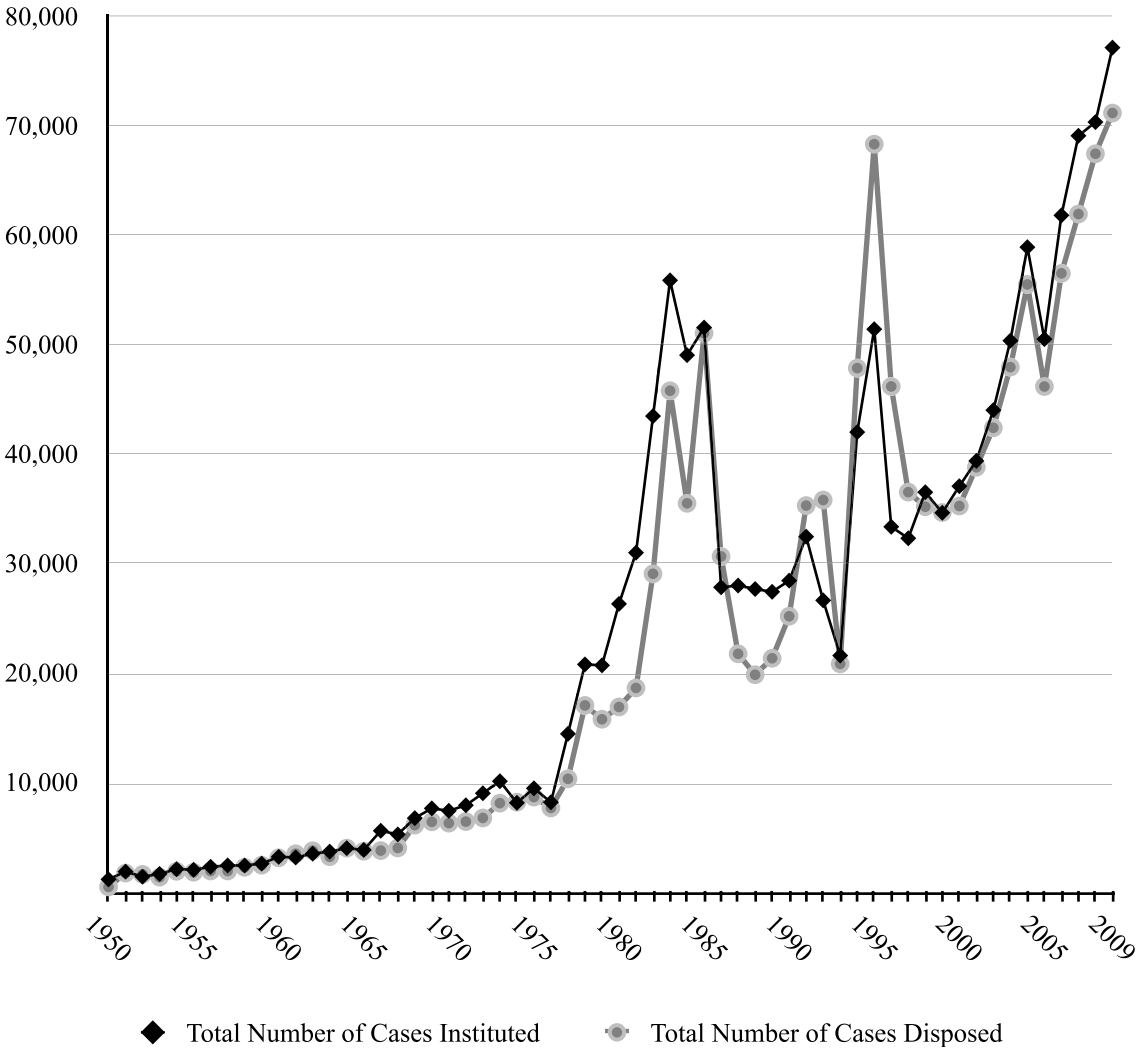
Thompson and Kolsky embody the type of scholarship — in contrast to Wolpert — that enables us to move beyond the 'increasingly sterile debate between "celebratory" and "accusatory" histories of the Empire' (Wiener 2009, ii). Instead of abstract claims about 'the rule of law' and modern courts, we find complexities, contradictions and changing meanings. As legal ideas migrate and legal institutions are transplanted, we simply observe processes by which more Indians come in touch with the rule of law — described by E.P. Thompson as a specific, peculiar type of legitimating ideology, both 'humbug' as well as an 'an unique alified human good' (1975, 266). Many actors and groups managed to gain ground — from the bottom up — by making use of the new legal system, strategically using the colonial state and its courts; other actors and groups were crushed and their defeats embedded deeper by the new legal structure. Both types of stories stand side by side, and as for other places and other times, it is in this case best to think of law as Janus faced. What matters most for our understanding of judicial power are large-scale structural and discursive changes: the institutionalisation of colonial legal services is linked to educational institutions and professionalisation, driving the emergence of a powerful indigenous legal profession. As outlined above, Indian lawyers became exceptionally influential in shaping anti-colonial discourses, even if it was mostly in the language of modern constitutionalism and through rule-of-law discourses. To better understand these complexities, hybrid developments and paradoxes, we can turn to James Tully's work on the history of modern constitutionalism and distinguish three waves of constitutionalism: firstly, the imperial

dimension and the role of constitutional design in the construction of colonial rule; secondly, the anti-imperial dimension and the role of constitutions in state building after decolonisation; thirdly, the politics of cultural recognition and the reinvention of constitutionalism as a challenge to the inherited forms of modern constitutional uniformity in a 'genuinely post-imperial age' (Tully 1995, 17). Indian courts have played important role in all these phases, and despite its foreign origins, the Supreme Court has shed its foreignness a long time ago. Today the Court's 'Indianness' derives not only from its geographic location and jurisdiction, but also from its personnel and undisputed position at the top of Indian legal system because it is run by Indians and run for Indians, which sets it apart from other English language courts in the history of the subcontinent. The following section further explores how the deep embeddedness of the historical structures of judicial review in combination with a powerful legal profession and popular rights discourses continuously push in the direction of jurisdiction expansion, establishing a sense of path dependency from the rule of law to the rule of judges.

## [2.2] Jurisdictional Spaces: Contraction, Expansion, and Hyper-Expansion

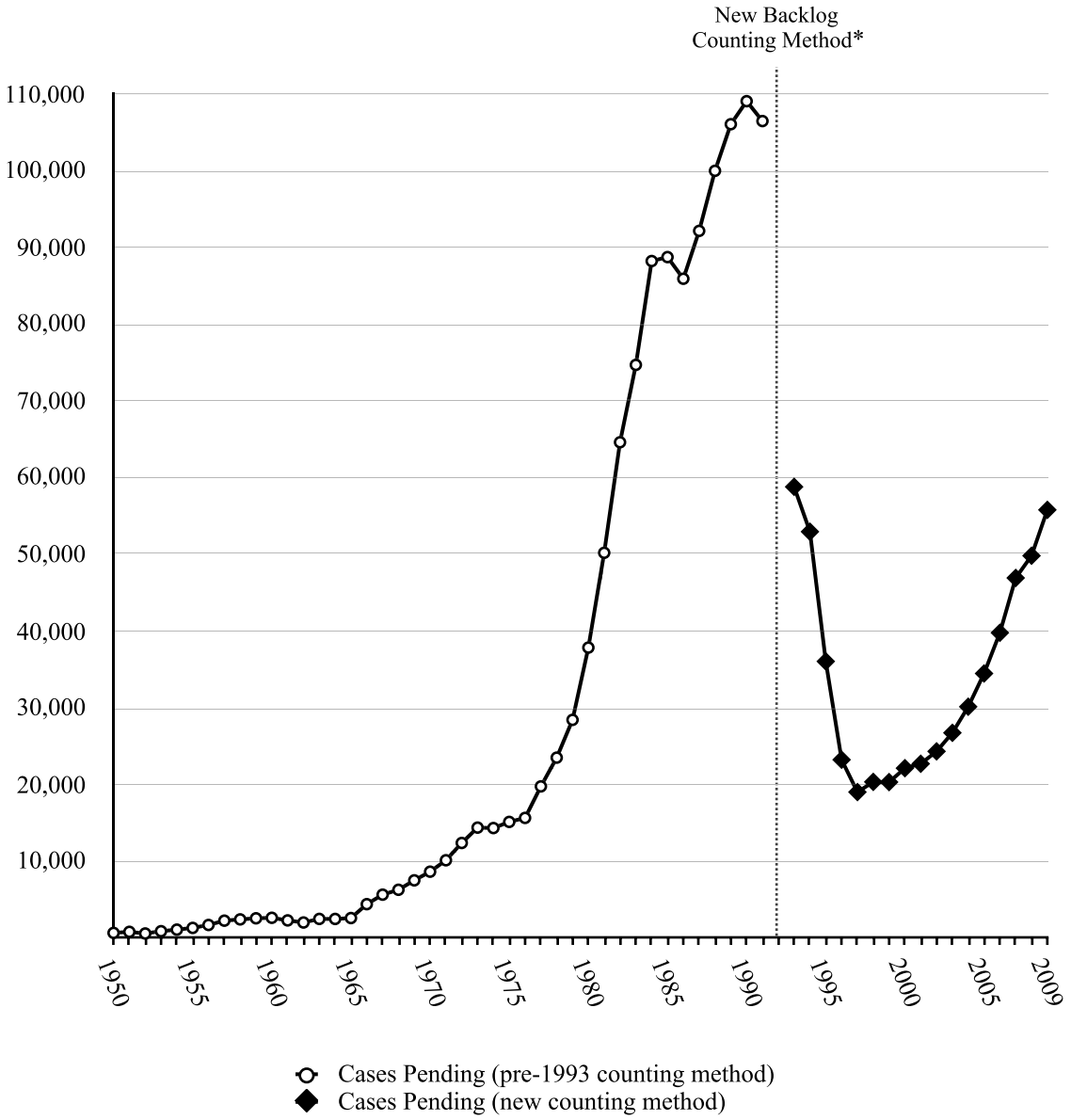
Despite epochal and bold innovations of the Indian Constitution — such as the abolition of untouchability in Article 17 — continuity emerged as a key theme when it came to organising the judiciary. The Supreme Court was not at the centre of the Constituent Assembly Debates as too many other pressing issues had to be given priority, and while we see little innovation in terms of institutional design by the constitution-making body, the Supreme Court evolved into an institution that could not be more different from the Federal Court. Throughout its existence, the Federal Court heard only 250 cases (Pylee 1966, vii) and decided all of them as full bench (all judges sitting). Moreover, each case resulted in a written judgment. The Supreme Court of India heard close to 80,000 new cases in 2009. Even ignoring court and public holidays, roughly speaking more cases are filed per day than the Federal Court heard throughout its ten-year existence (Figure 2.1). In addition the institutional structure is further burdened by a backlog (Figure 2.2) of well above 50,000 pending cases adding to the workload pressure.

**FIGURE 2.1 Supreme Court Workload: Total Number of Cases Instituted and Disposed, 1950-2009**




*Source:* Compiled by author from the *Annual Report of the Supreme Court of India 2008/9* and *Court News* (2009, vol. IV, issues 1-4).

**FIGURE 2.2 Supreme Court Backlog: Pending Cases, 1950-2009**




*Source:* Compiled by author from the *Annual Report of the Supreme Court of India 2008/9* and *Court News* (2009, vol. IV, issues 1-4).

*Between 1992 and 1993 the Registry of the Supreme Court implemented a new counting method for pending cases. Before 1993, matters that had been clubbed together as a single file still each counted as individual cases; during the following years those files then were recounted, with an entire file of clubbed matters counting as a single case only. In addition, and extraordinarily, district court judges and judicial officers were recruited during this period too, overseeing the new accounting practice and helping to organise the disposal of clubbed matters more effectively, leading to a spike in disposals and a sharp drop in pending cases — but both with quickly evaporating impact (see, Robinson 2013).

The institutional design of the judicial review mechanism in India is no longer just a product of the written constitution itself. As such, it reflects more than the choices of the constitutional designers, and the expansion of the Court's jurisdiction is often driven by the judges. This qualification is necessary both because a number of patterns of judicial review are not derived from India's constitutional text (for instance, public interest litigation) but also because non-constitutional norms may be important in shaping the judicial review environment. Robinson (2013) has shown how judicial attitudes towards special leave petitions have remained unchanged since the 1980s, and thus actually encourage higher workloads. Even more surprising is his conclusion that the Supreme Court accepts an increasing number of appeals from the High Courts,[3] thus adding to its ability to control lower courts, although at the cost of further increases in its own workload. In a nutshell, we follow two interrelated historical narratives, institutional design and jurisdiction control through legislative and executive interventions, as opposed to jurisdiction expansion through judge-made law.

The demand for a supreme court of appeal was considered seriously by the colonial powers only during the round table conferences when the princely states agreed to form

[3] Under Articles 132, 133 and 134, the Court can, but does not have to, review appeals from the High Court if a certificate is issued by the concerned High Court in both civil and criminal cases. In this regard, the Supreme Court website states: 'Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies: (a) that the case involves a substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court.' (The Supreme Court of India website: http://supremecourtofindia.nic.in/jurisdiction.htm; last accessed 10 September 2015)

a federal structure with the British provinces. Therefore, a Federal Court that would resolve the disputes within such a structure was considered a requirement. This hints at an important dimension of judicialisation — federalism and the resolution of disputes between federal units, both vertically as well as hierarchically — which is part of the key hypothesis of this thesis in terms of regional parties and their role in political diffusion. The origins of the debate for an all-India court of appeals (and not just provincial apex courts) thus reach back to a tumultuous period of pre-independence India, and the constantly evolving times meant that people kept changing sides on the debate. Those who had opposed the first demand, such as Motilal Nehru and Tej Bahadur Sapru, prominent leaders of the freedom movement, later became supporters of the cause and vice versa. The prime reason for the argument for a 'local' court of appeal (which would still be subject to Privy Council appeal) was the almost universal disapproval of the decisions meted out by a court that was physically very distant from the country and not well versed in the intricacies of personal laws in India. As M.A. Jinnah commented while arguing in support of such a court: 'I have no hesitation saying that the Privy Council have on several occasions have absolutely murdered Hindu law, and slaughtered Muhammadan law' (Legislative Assembly Debates, 17 February 1925, p. 1175). He was in the midst of a heated debate against the stand of Motilal Nehru and others and in support of Hari Kishan Gour who was proposing the establishment of such a court.

Even though the argument seems legitimate, the opposition to a local court of appeal was widespread, cutting across party and community lines. The main issue was the scepticism surrounding the ability to bring adequate skilled and talented judges to

India and the lack of a clear and unbiased atmosphere in which to function even if they were to make the journey. The issue of expense was also an issue, but for parties on both sides of the debate. Newspapers of the time record the astonishment of Gandhi to the opposition against a court of appeal. For Gandhi, the want of support for such a court was due to a lack of confidence 'in ourselves' (Gadbois 1964, 26) since he felt that the judges of the Privy Council were no more immune to prejudice or ignorance than local judges would be.

Within these groups, even the supporters for a local Supreme Court of Appeal or a Federal Court wanted varying levels of relations with the Privy Council; not all of them wanted a complete severance of the chance to appeal to the Privy Council, even with a local court of appeal set up (e.g. Sapru or Sankaran Nair, a former Advocate General of the Madras presidency, was one of the supporters of a local court of appeal because the Privy Council usually did not hear appeals in cases involving criminal offences). The turning point in this debate came in the two round table conferences in 1930 and 1932, where the agreement of the states to enter into a federal structure with British provinces highlighted the requirement for a Federal Court. The new court was to have both appellate and original jurisdiction (Gadbois 1964, 31).[4]

The Federal Court, designed to safeguard the federal structure and resolve disputes between federal units, '… tried to function as the bulwark of individual freedom against state interference' (Pylee 1966, vi-vii). Yet it was constrained by the fact that it could

[4] See also the Indian Round Table Conference (First Session) Proceedings-Cmd. 3778, 1931 XII, p. 417 and Third Report of the Federal Structure Committee submitted to the Second Session of the Indian Round Table Conference Cmd. 3997, 1932, p. 27. It is worthwhile keeping in mind that the Federal Court always remained subordinate to the Privy Council. The Government of India Act 1935 brought the Federal Court into existence and though this court was restricted to disputes between provinces and had no provisions for criminal appeals, it had a structure that would be reflected in the Court to follow.

only pronounce a 'declaratory judgment' (Gadbois 1965, 40) and depended on the provinces for the enforcement of its orders. The Federal Court struggled to maintain and uphold citizens rights in the 'federal vacuum' (Pylee 1966, 2) that it was working in, surrounded as it was by a colonial government that had suspended many freedoms in making its last stand against the freedom movement. 'Indeed, one had to be reminded that, during the period in which the Federal Court was boldly attempting to maintain a balance between individual freedom and the security of the State, the Federal Court itself was a part of the colonial administration' (Gadbois 1965, 115). The Federal Court struck down many of the sedition, preventive detention and criminal courts orders and enactments passed by the colonial government. 'Although each of these decisions was overridden by the alien rulers, the boldness of the Federal Court in handing down decisions embarrassing to the British won the acclaim of the Indian public, and served to increase the prestige of the Federal Court' (Gadbois 1965, iv). Its legacy and influence were the most enduring of the institutions that came into being under the Act of 1935 (Pylee 1966, 1). These episodes of judicial assertion, even if unsuccessful, added prestige to the judges involved and are important for understanding the bold and assertive decisions of the Indian Supreme Court during the first years of its existence. This sentiment is reflected in the statement of Mrs Durgabai Deshmukh, a member of the Constituent Assembly, who stated:

> When the Constitution is passed our Federal Court will be designated as the Supreme Court. It will be the highest court of appeal for all high courts and also the judicial authority for the interpretation of the Constitution. We wish and we hope that the Supreme Court which is going to be the guardian of the Constitution and of

> the fundamental rights guaranteed therein, will do its function very well and every citizen in India will have the occasion to say that it has protected his rights as a true guardian of this Constitution. (CAD Vol IX, 17th September 1949)

It was against this background and with a relatively prestigious legacy that the Supreme Court was born, on 26 January 1950, under the new Indian Constitution. The Federal Court had continued to function in the interim under the Federal Court (Enlargement of Jurisdiction) Act, 1947. During this period, a committee was constituted by the CAD to advise on the structure and jurisdiction of the new court. This committee's report suggested that the new court should have original, appellate and advisory powers (Gadbois 1965, 126)

It also wanted flexibility to be given to the Parliament to increase the ambit of this jurisdiction if Parliament so decided. The appointment of judges was a problematic area then as now, and the Constituent Assembly debates attest to this. There were to be 10 judges, but the number could be increased. The report was accepted and included in the Union Constitution Committee Report chaired by Nehru, but the two modes of appointment of judges suggested in the Supreme Court committee's report were rejected. This Union Committee proposed that the chief justice should recommend the name to the President after consulting fellow judges and other such High Court judges (CAD Vol IV, July 21 1947, pp. 716-31, quoted in Gadbois 1965, 126). Most of the recommendations of these committees were followed by the Constituent Assembly.

The Constitution had kept the structure of the Federal Court under the 1935 act. The new Constitution expressly gave jurisdiction to the Supreme Court in all matters in which the Federal Court had jurisdiction and which were not covered by provisions of

the new Constitution under Article 135. Article 32 of the Constitution defines the scope of the Supreme Courts jurisdiction with regard to writs, 'perhaps the widest that any Court in any part of the world can be said to exercise' (Pylee 1966, ix). The article confers jurisdiction on the Supreme Court for writs that include habeas corpus, mandamus, quo warranto and certiorari for the protection of fundamental rights. For Ambedkar, it was the most important article — the soul of the Constitution (CAD Vol VII, December 9, 1948, p. 953). Article 32 as a device to approach the Supreme Court has been well used. It began as a plea to apply the writ of habeas corpus but soon expanded exponentially to use the means of writ to circumvent the procedural progression to the Supreme Court. Recourse to it was influenced to a large extent by the horrendous backlog and delay faced at all levels of the judicial system. It was also the route used by a lot of public interest litigation to get results and avoid the appeals process. The review and appeal powers in criminal matters are narrower on paper than the Courts civil appellate powers. However, the Article 32 and Article 136 provisions have been used to circumvent this technical narrowing of the court's jurisdiction. In addition, with regard to writ jurisdiction, Parliament has the power under Article 139 to increase the scope of the writ jurisdiction under Article 32. This basically means the Parliament can increase the power of the Court so that it can issue writs for purposes other than the enforcement of fundamental rights. However, since the Court itself has increased the scope of fundamental rights, especially under Article 21, this provision did not have to be used. As the court says of its own powers under Article 136: 'It possesses a special appellate power to permit appeal from any Tribunal, Court or High Court. In

the years that have followed after its establishment, this special jurisdiction has dwarfed all others.'[5]

As per Article 131, the Supreme Court has original jurisdiction in disputes between the central government and the states as well as disputes between states. The exclusion to this article are treaties and covenants signed before the coming into force of the Constitution, as the members of the Constituent Assembly were quite clear they did not want the Court to hear about issues over which they had no control and could provide no relief, such as an 'act of state', including articles of accession. The other exclusions from the court's jurisdiction are water disputes. If Parliament makes a law to this effect under Article 262, Parliament can also exclude the jurisdiction of the Court in matters of finance under Article 280, under Article 290, for pensions and adjustment of pensions, and under Article 363, with regard to certain specific treaties.

The Court also has the power to transfer proceedings from one high court to another, or to itself if the same or substantially the same questions of law are pending in courts around the country under Article 139A. It is a court of record under Article 129, and this article gives it the power to hear contempt of court proceedings. This power of hearing contempt was an explicit addition by the Constituent Assembly. Ambedkar said in this regard:

> As a matter of fact, once you make a court a court of record by statute, the power to punish or contempt necessarily follows from that position. But, it was felt that in view of the fact that in England this power is largely derived from Common Law

[5] The Supreme Court of India, *Annual Report 2007-2008*.

> and as we have no such thing as Common Law in this Country, we felt it better to state the whole position in the statute itself.

That is why Article 108 has been introduced (see CAD Vol VIII, 27 May, 1949), and it stood the court in good stead when it needed to enforce its order in the public interest proceedings beginning two decades later.

Under Article 137, the Court also has the power to review its own decisions. As per the rules regulating these review decisions, the Supreme Court website clarifies that the:

> Supreme Court may review its judgment or order but no application for review is to be entertained in a civil proceeding except on the grounds mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding except on the ground of an error apparent on the face of the record. (From the website of the Supreme Court of India)

International commercial arbitrations can also be initiated in the Supreme Court under the Arbitration and Conciliation Act, 1996. One of the important roles of the Supreme Court lies in its advisory capacity. In this role, the president may refer a question of law or fact to the Supreme Court under Article 143. These cases are then known as special references. Cases involving the elections of the president or the vice- president will

directly come to the Supreme Court, and various other acts specifically allow for an appeal to the court.[6]

The Parliament may increase the jurisdiction to the Court under Article 138, and under Article 140, it may increase the ancillary powers of the Court to enable it to function more effectively. With regard to Article 138, the idea was that the Court, which was at the apex of a unitary judiciary, would be given jurisdiction over the Union list (the three lists consisting of state issues, central issues and the concurrent list on which both the central and state legislatures had jurisdiction. This was another aspect of the 1935 Act that was reflected in the new Constitution), but there could be flexibility in increasing its oversight to the other lists as well if required. In addition, the Parliament may refer a particular case to the Supreme Court if it feels that such a reference is required.

The Federal Court had a very limited remit; it could interfere only in federal matters. In addition, it needed a certificate from the requisite high court that the petitioners had the right to appeal to it. In the absence of this certificate, it could not hear matters even if it was a federal question. However, once this certificate was obtained, the Federal Court was quick to construe liberally the questions related to the

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[6] 'The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution. There are provisions for reference or appeal to this Court under Article 317(1) of the Constitution, Section 257 of the Income Tax Act, 1961, Section 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, Section 130-A of the Customs Act, 1962, Section 35-H of the Central Excises and Salt Act, 1944 and Section 82C of the Gold (Control) Act, 1968. Appeals also lie to the Supreme Court under the Representation of the People Act, 1951, Monopolies and Restrictive Trade Practices Act, 1969, Advocates Act, 1961, Contempt of Courts Act, 1971, Customs Act, 1962, Central Excises and Salt Act, 1944, Enlargement of Criminal Appellate Jurisdiction Act, 1970, Trial of Offences Relating to Transactions in Securities Act, 1992, Terrorist and Disruptive Activities (Prevention) Act, 1987 and Consumer Protection Act, 1986. Election Petitions under Part III of the Presidential and Vice Presidential Elections Act, 1952 are also filed directly in the Supreme Court.' (From the website of the Supreme Court of India, http://supremecourtofindia.nic.in/jurisdiction.htm, last accessed 10 September 2015)

matter that it could hear. The ability of the newly-independent Parliament to constitutionally circumvent the orders of the Supreme Court by amendment, most notably in the cases of property and land, which began soon after independence, and thereafter with the privy purses being abolished, meant that some commentators noted that the Court had suffered a decline in the prestige it had inherited from the Federal Court. Although limited in its jurisdiction and frequently overruled by the colonial legislature, the Federal Court had nevertheless carved out for itself a position of respect in handing out objective and, what were viewed as, just rulings in its sphere.

Centre-state relations quickly became part of regular jurisdiction practices. The Court held in favour of the centre that the Constitution had envisioned a quasi-federal structure and gave it the central primacy in the question of acquiring land under the Union and the concurrent list. Gadbois comments after the first decade and a half of Supreme Court decision-making that:

> [T]he most important function performed by the Supreme Court in the Indian polity is that of seeking to reconcile freedom and justice for the individual with the needs of a modern government charged with the promotion of far-reaching social and economic reforms. The Court has found this task to be a difficult one, for a number of its decisions have provoked amendments to the Constitution which have had the effect of limiting its review powers, of reviving legislation earlier declared unconstitutional by the Court, and of restricting the scope of the fundamental rights. Whereas decisions of the Federal Court which embarrassed the British won the acclaim of the Indian nationalist leaders and served to increase the prestige of the Federal Court, decisions of the Supreme Court which have thwarted the Government of the Republic of India have produced the opposite effect. The ease with which the Indian Constitution may be amended in order to overcome the effect of a Supreme

> Court decision indicates that while the Court's jurisdiction is extraordinarily wide, its ultimate power is limited. Ultimately, the Constitution means what the Congress Party says it means, and not what the Court wills. Judicial review has certainly not meant judicial supremacy in India. (Gadbois 1965, 312)

It is apparent from a reading of the articles that the Constituent Assembly envisioned a Court where power would be granted within the federal structure to increase its jurisdiction without conflict with the other branches of government. The Court's attempts at judicial power expansion only succeeded as the Congress Party lost the power to amend the constitution (Chapter Five). Thus, Gadbois' analysis is closely aligned with the Constituent Assembly's view — nobody had wanted to make the Supreme Court superior, they had wanted it to be independent. In fact, in 1950 nobody could even begin to imagine the expansion of judicial power in general, and the power of the Supreme Court, in particular. As Ambedkar put it: 'that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law' (CAD Vol VIII, May 27, 1949, p. 397). The Court, though, had other ideas for itself and fought the Parliament in epic battles to enlarge its jurisdiction. It struck down (as in the judges' cases discussed in chapters 4-5) any attempt by the Parliament to enforce the idea of legislative superiority, which meant in effect that it claimed the power of the last word for itself. Since the early 1990s, step by step, the Court has overcome limitations on its jurisdiction and then expanded even further into new fields via public interest litigation. Judicial review, after all, was a part of the basic structure of the Constitution and could not be tampered with.

> At the cost of repetition it is to reiterate that judicial review is the basic feature of the Constitution. This Court has constitutional duty and responsibility, since judicial review having been expressly entrusted to it as a constituent power, to review the acts done by the coordinate branches, the executive or the legislature under the Constitution, or under law or administrative orders within the parameters applicable to a particular impugned action. (S.R. Bommai v Union of India 1994 SCC (3), 1)

The most significant judicial innovation was inventing implied limitations to amendment power and thus establishing the Supreme Court as a veto player in relation to constitutional change (see Chapter 4); similarly, public interest litigation is based exclusively on judicial decisions and revolutionises the type of issues the Court can hear as well as the remedies and orders by which it can intervene (Chapter 6). Jurisdiction expansion happens in all realms, however, and with minute attention paid to competing institutions and each sphere of the hierarchy of triadic decision-making. The *Administrative Tribunal Act, 1985* was challenged in the case of *S.P. Sampath Kumar v Union of India* 1987 SCR (3) 233 as violating the basic structure of the Constitution due to the creation of new bodies with judicial attributes. The Supreme Court upheld the act but struck down its procedure for appointing the members of the administrative tribunals, as it muddied the separation of powers principle if the appointment was made by the executive, and the act could only be saved if 'the government adopted an appointment process in which the government was required to consult with the Chief Justice and defer heavily to the Chief Justice's recommendations' (Mate 2010, 189). In 1997, in *L Chandra Kumar v Union of India* (1997) 3 SCC 261, the Supreme Court overruled its own judgment in the Sampath Kumar case, stating that removing the tribunals from the purview of the High Courts and allowing appeals only to the

Supreme Court was against the principles of the Basic Structure doctrine. We can again observe a pattern — the threat of retaliation in 1997 was much less than in 1987, and thus the Court aggressively expanded its jurisdiction.

The Court even took aim at the international sphere and established principles of international commercial law in relation to the *Arbitration and Conciliation Act, 1996.* In the case of *Bhatia International vs. Bulk Trading S.A.* (2002) 4 SCC 105, interim protection was sought for the petitioners even though the arbitration was to be conducted in Paris. The Supreme Court read the general provisions of the act in such a way that it could extend it jurisdiction to grant interim protection even to arbitrations conducted outside of India. Based on this case, the Court slowly extended its jurisdiction to allow Indian courts to set aside foreign arbitration awards (*Venture Global Engineering vs. Satyam Computer Services Ltd* (2008) 4 SCC 190), rendering the act almost superfluous in its desire to take from the adversarial court procedure and introduce an element of speedy resolution to commercial matters.

By the end of the 1990s, not one type of jurisdiction limitation had survived and the Supreme Court had reclaimed and expanded jurisdictional spaces in their totality, re-establishing centralising judicial power over any decision-making process throughout the country. Judges have worked hard and jealously protect their power of the last word, and even the Ninth Schedule has come back into the Court's jurisdictional space via basic structure review.

To handle corresponding workloads, the Court has grown in size as well (Table 2.1), with an increasing number of judges sitting on smaller and smaller benches for just a few years before retirement. Often this means — and Chapter Three will elaborate this point with detailed data — that the Supreme Court is speaking with multiple voices, and such polyvocality makes the power of the Court more acceptable. No single judge can take hold of a specific policy agenda for a long period of time. As Figure 2.3 illustrates, almost half of the judges appointed to the Supreme Court have been appointed after the judges' case had put the Chief Justice in control of appointments, meaning that neither of the big political parties has had to worry about appointments of judges with specific

**TABLE 2.1 Number of Supreme Court Judges**

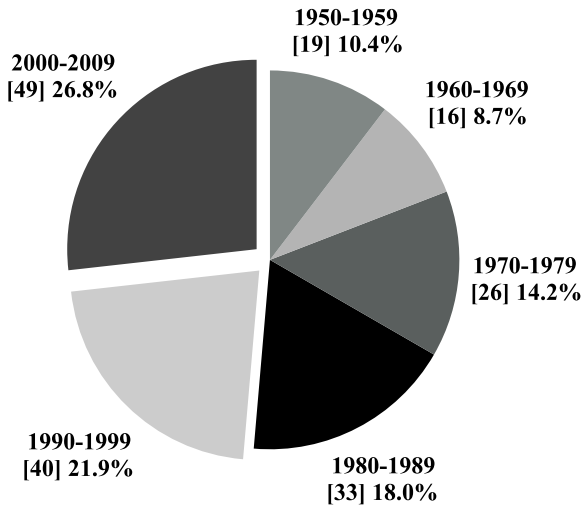
| Year | SC Judges |
|---|---|
| 1950 | 8 |
| 1956 | 11 |
| 1960 | 14 |
| 1978 | 18 |
| 1986 | 26 |
| 2008 | 31 |

*Source:* Supreme Court (Number of Judges) Act, 1956 [as amended, latest amendment 2008].

policy preferences (as the Chief Justice too is often only in power for less than two years). The workload and short tenure of judges and, in particular, the fragmentation of benches thus make it next to impossible that the Court will be captured by a political

party — and even if it was captured, the Court's composition would change quickly again.[7] The workload also implies a signal to other political actors that the Supreme Court is willing to spend a good deal of its time on activities that we can simply label as a 'service court' activities that have no relation to policymaking; for instance, judges spend two workdays per week on hearing admission matters.

**FIGURE 2.3 Supreme Court of India: Distribution of Judicial Appointments per Decade (%), 1950-2009**




*Source:* Compiled by author from *Supreme Court Annual Report 2008-09* and the Supreme Court website.

[7] In this respect, the Indian Supreme Court is different from other courts. The US Supreme Court, for instance, has reduced its workload to 60-70 cases per year and via docket control can carefully select the cases it wants to hear and refuse cases that do not fit into its policymaking agenda (the power not to decide). Also, US Supreme Court justices usually stay in office for decades and are appointed by the president on the basis of their political attitudes, that is, an explicit signal in relation to the political nature of the court. As a result, the question of Supreme Court appointments figures prominently in each presidential election campaign, whereas in India judicial appointments have disappeared from competitive electoral campaigns since the Emergency.

To conclude, a number of threads have been woven together over time. Perhaps Pandit Thakur Das Bharagava had a presentiment of the structural unfolding of the Supreme Court's jurisdiction:

> The Supreme Court would have more unrestricted powers with regard to the safeguarding of the public rights than any former court had. I would submit that under the Constitution the Supreme Court has been given the same criminal jurisdiction that the Privy Council has at present. The Supreme Court has been granted full powers and it may widen them daily by case law. (CAD Vol XI, 18 November, 1949)

Despite political resistance to the Federal Court, the institutional and structural logic of federal institutions and divided sovereignties necessitates judicial review mechanisms; likewise, the yearning for all sorts of veto powers by minorities and traditional forms of legitimacy go hand in hand with the functioning of non-representative institutions, such as courts and their unelected judges. A powerful legal profession was well established at the time of Independence, articulating political ideologies through rights and rule-of-law discourses. These various historical and structural sources of judicial power encouraged the Supreme Court throughout the 1950s and 1960s to pass assertive judgments, leading to a political backlash and jurisdiction stripping, with the real possibility (see Chapter Four) of the judicial review function being abolished during the Emergency.[8] This

[8] India's apex court judges are not alone when it comes to patterns of judicial overreach and subsequent retaliation by other branches. During the first ten years of the US Supreme Court — from its initial session in 1790 — the Court was considered weak, and appointments were rejected because of a lack of prestige. One of the US Supreme Court's most important and controversial decisions was, in *Chisholm v. Georgia, 2 U.S. 419 (1793),* expanding the jurisdiction of federal courts, and challenging the states' sovereign immunity from suits by private citizens was immediately overridden via the 11th Amendment to the constitution: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'

chapter provides an analytical narrative for such jurisdiction stripping, and then assesses the series of judgments that expanded the jurisdiction of the Indian Supreme Court well beyond the original institutional design. In line with the models proposed in Chapter One, the timing of this judicialisation of jurisdiction expansion runs side by side with the transformation of the Indian party system and the decreasing capacity of minority and coalition governments to override the Supreme Court via legislation, let alone make constitutional amendments (see Chapters Four and Five). The Supreme Court's jurisdiction expansion also goes hand in hand with dramatic workload increases, which in turn has had profound implications for court organisation and — as Chapter Three argues — requires theoretical re-orientations in order to understand this judicialisation and judicial power expansion.

# CHAPTER THREE

## *Framing Supreme Court Power: Judicialization Theories in Context*

***Abstract*** This Chapter traces the structures of the theoretical frameworks that inform scholarly analyses of judicial power. Various models and conceptual tools are discussed abstractly and then contextualised in relation to jurisdiction size and court organisation. Chapter Three relies extensively on data to support two elementary but weighty conclusions. Firstly, we distinguish legal formalism as important jurisprudential exercises within legal systems but without any explanatory value for our longitudinal study of judicial power in India. Secondly, a larger, separate dataset is presented to expose fundamental flaws in the standard application of U.S. style social-psychological models to the study of the India's Supreme Court; as soon as we take into account size, workload and institutional organisation these approaches can only offer misleading information for our study — while they may explain judicial decision making in relation to an individual judge, or a small group of judges for a short period of time, such microscopic "snapshot" insights have no explanatory value for our macro-study of the Court as a large institution with rapidly changing personnel and as a "moving image" across six decades. Based on this, Chapter Three concludes that strategic metaphors offer the best insights for the Indian Supreme Court and the most promising basis for a systematic model of judicial power variation across time.

## [3.1] Competing Models of Supreme Court Power

Judicialisation is not easy to define. For Shapiro (1993), its essence is to be found within the triadic dynamic of judging itself, as authoritative third party decision makers incessantly transform the mechanisms of order and dispute (Roberts 1979). Viewed functionally, triadic processes thus also reign over the distribution of preferences and resources, emphasising the essentially political nature of the work courts do — in the words of Alec Stone Sweet: "[t]o move from the dyad to the triad is to construct governance" (Stone Sweet 1996:4). The second dimension of judicialisation relates to normative structures which can be described as a set of institutions, laws, customs or simply the rules of the game. Thus, judicialisation describes a process that stabilises dispute settlement mechanisms by sustaining an interdependence of dyads, triad and rules; simultaneously, judicialisation techniques constantly adapt the normative structure to the demands of a dispute in the process of its resolution.[1] Above all, judicialisation is related to the structures and processes of constitutionalism and politics as successive waves of democratisation in the twentieth century have altered the juridical basis of the modern state and witnessed a sharp rise in judicial power (Stone Sweet 2002: 79).

[1] Follows Fischer (2007)

Our model of judicialisation[2] is therefore based upon a dyadic social structure, characterised by relations of direct exchange between individuals or social groups bound to each other by established principles of reciprocity; i.e. the legal and political actors that transact within the ever growing domain of constitutional. As "dyadic forms are inherently unstable because each party faces powerful incentives to ignore normative obligations," the triadic entity introduces the authority of a dispute resolver as a third party. Finally, triadic dispute resolution usually functions within a normative structure which can be described as a set of institutions, laws, customs, or simply the rules of the game. Thus, judicialisation in general generally describes a process that stabilises dispute settlement mechanisms by sustaining an interdependence of dyads, triad, and rules; simultaneously, judicialisation techniques constantly adapt the normative structure to the demands of a dispute in the process of its resolution. The judicialisation of Indian politics in particular is the process by which triadic dispute resolution and lawmaking is shifting towards the sphere of judges and legalism. Applying this model to the controversies surrounding India's Supreme Court, it is argued that judges have increasingly asserted their own authority in the governance of the India whenever legislative politics, operating on the basis of majority rule, fails in finding efficient solutions. As soon as the executive or constitutional legislature become incapable of action, they will lose control of legislative authority and the Court – as an agency capable of independent or autonomous action – will act where the government and legislative is too fragmented to react.

[2] Follows Fischer (2007).

In such circumstances, policymaking and lawmaking will tend to be judicialised and migrate towards the sphere of the Indian Supreme Court as the only body that is capable of decisive action. These are the conditions of a political system in which we see the development of a divided legislative, a "runaway" bureaucracy and the emergence of a powerful, activist court (Ferejohn 2002: 41 -63).[3] Consequently, the mere institutional provision for judicial review with regard to administrative action and legislative competence is further enriched by the feedback mechanisms within processes of judicialisation. The power of the Supreme Court to "make laws" and to reform as well as create policies and legal institutions through rulings and interpretations grows systematically and continuously.

The next question then is, how "rulings and interpretations" by judges can be understood. If a judicial system is nothing but a 'giant syllogism machine, and the judge acts like a highly skilled mechanic' (Tamanaha 2010, 1) then legal formalism's postulate that judges only apply the law as it pre-exists in the text cannot account for any changes in judicial power unless the constitutional text was changed to encourage judicial assertiveness. Social-psychological models of judicial decision making,[4] on the other hand, provide room for the assumption that judges have sincere ideological preferences. The law can play a role in the formation of judicial policy preferences but the point that truly matters for social-psychological approaches is the argument that different judges will have different preferences and will vote along those lines sincerely — i.e. untampered by strategic considerations about what other actors will do (Segal and

[3] This paragraph follows Fischer (2007).

[4] Not to be confused with cognitive or psychological dimensions of judicial decisions making (Baum 2006).

Speath, 2002). The quantitative data of the following two sections reveals that formalist theories cannot account for judicial power variation and thus have no direct role to play in our arguments; social-psychological models naturally seem to be important factors for explaining judicial power expansion — however, the data in section 3.3 indicates that Indian Supreme Court judges are at the Court for a very short time, sit in small benches on multiple issues, and as a result their individual impact on the Supreme Court and the direction of case law is never negligible in principle, but in practice too small to measure for a longitudinal study.

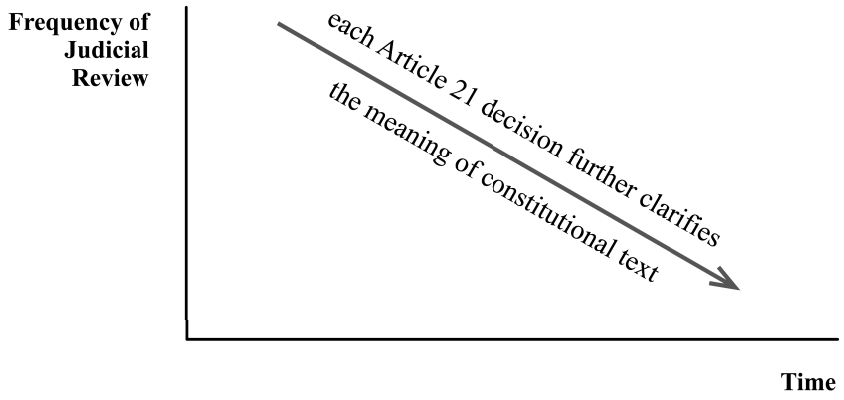
## [3.2] The Legal Lives of the Right to Life: Reinventing the Supreme Court and the Indigenization of Judicial Review

Heraclitus' river fragments encourage us to embrace the universality of change in all constitutional realms, for his assertion "that we never bathe in the same river twice, a brash legal realist might substitute the contention that we live only fleetingly under the same constitution once" (Murphy 1995, 165). Constitutional judicial review, in theory as well as in practice, reinforces such images of Heraclitean flux particularly strongly, given the enigmatic indistinctness and unfathomable generality of much constitutional text. Even where passages of constitutional text have remained unchanged over long periods of time, the meaning of these 'same' sequences of 'changeless' words would still flow like Heraclitus' different waters; and judges — those who are stepping into the river — are of course perpetually changing too.[5]

Despite the seemingly inescapable conclusion that the textual nature of law implies uncertainty of outcome, formalist theories of judicial decision and straightforward ideologies masquerading as jurisprudential techniques — such as "originalism" — view the meaning of constitutional text as fixed; all that judges have to do is to find *the* law.

[5] Plato's scepticism, whether one can step into the river even once (see, for instance, Kahn 1979; or Taraìn 2001, 131, 166) is a much deeper philosophical puzzle, not directly relevant here, but further nurturing our scepticism towards formalistic approaches to constitutional interpretation. We can also leave aside the problems of authenticity, paraphrasing and quotations, as well as the sophisticated nuances between the various versions of the river fragments (see, for instance, Sedley 2003; O'Connell 2006, 72). Heraclitus' river image simply helps us to expose the plainly ahistorical and narrow dimension of legal formalism from a philosophical perspective.

**FIGURE 3.1 Right to Life and Ginsburg's Legal-Formalist Model of Judicial Review of the Party System**




*Source:* Adapted by author from Ginsburg's model (2003, 71).

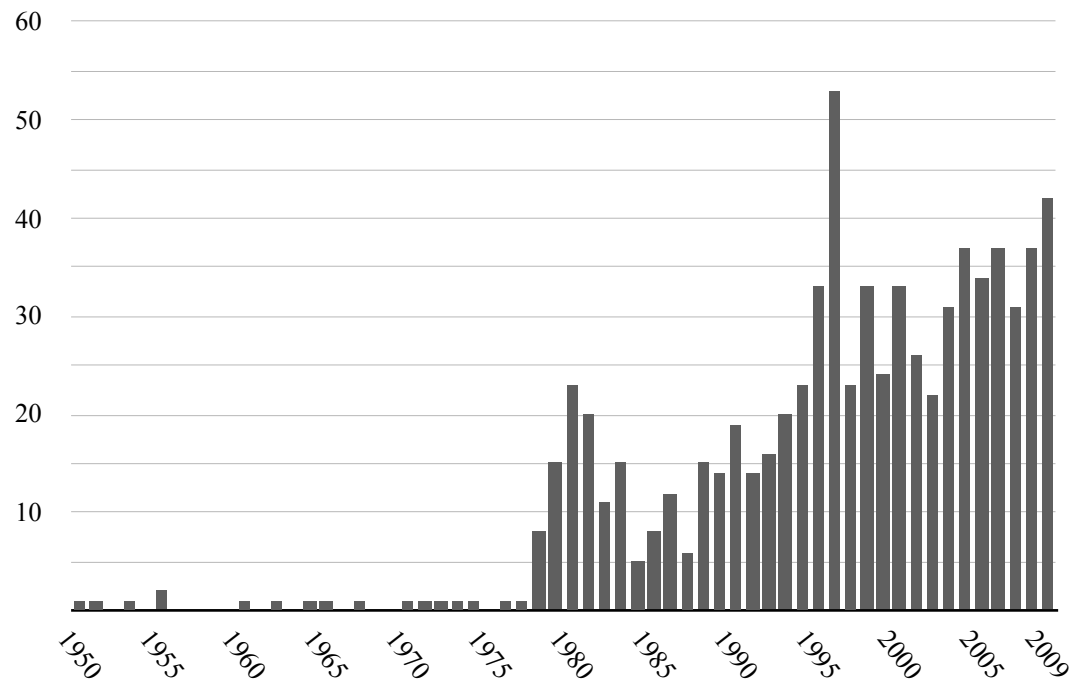
Figure 3.1, as a starting point, presents us with a model built on the assumptions of formalist theory. If the meaning of constitutional text really was fixed and stable, not dependent on context, and if judicial decision making is all about mechanical deduction in search of one right answers,[6] then over time the meaning of Article 21[7] would become fixed and stable. Each interpretation (case decision) would clarify the meaning of the constitutional text, thus there should be less decisions over time. Litigants learn about the meaning of Article 21 with each decision, and since they cannot hope to

[6] Binary thinking — as if a Boolean algebra could feed judicial minds yes-no answers — seems hugely attractive to those who cannot come to terms with the fact that constitutional court judges are unelected decision makers (with the exception of Bolivia); if it was true that legal text had a "right answer" then judicial decision making is not really decision making at all.

[7] Article 21 has never been changed, the text remains identical to the original 1950 version.

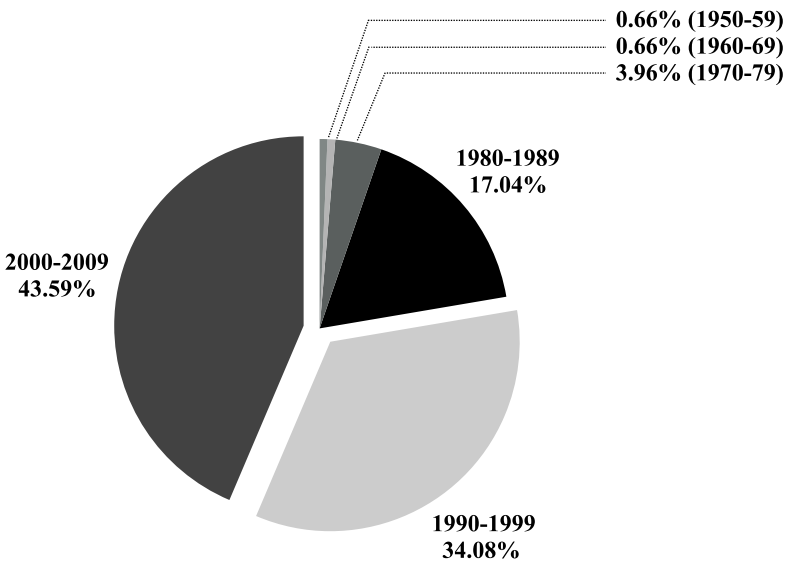
change the judges minds in future decisions they will no longer challenge the Article 21 consensus. However, if we look at the empirical dimension of Article 21 litigation patterns (Figure 3.1 and 3.2) we find exactly the opposite results. The vast majority of Article 21 decisions took place after 1990 (Figure 3.3 highlights the acceleration of the trend) as this short article becomes the cornerstone of judicial activism — Chapter Seven further explores how changes in litigation support

**FIGURE 3.2 Right to Life Cases (Article 21) Reported per Year, 1950-2009**




*Source:* Compiled by author from SCC; n = 40,618 (total number of all reported cases in SCC database); n = 757 (total number of reported Article 21 cases in SCC database).

**FIGURE 3.3 Right to Life: Distribution of Cases Reported per Decade (%), 1950-2009**




*Source:* Compiled by author from SCC; n = 40,618 (total number of all reported cases in SCC database); n = 757 (total number of reported Article 21 cases in SCC database).

structures or contextual shifts (e.g. changing social values) transform judicial agendas as well as the outcomes of judicial decision making; in other words, the model presented in Figure 7.1 goes hand in hand with the results in Figure 3.1. To make matters worse for formalists, Article 21 is one of the few examples, where we can even point towards clear intentions of the Constituent Assembly: B.N. Rau, collecting ideas and materials in the USA as a member of the Constituent Assembly, was expressly advised by U.S. Supreme Court Justice Felix Fankfurter to avoid any sort of constitutionalisation of the

due process principle due to the danger of judicial power expansion and the scope for activist interpretation — plus, Frankfurter warned that it could impose an unfair burden on the judiciary, given the political complexity of the type of cases that started coming to the U.S. Supreme Court because of the U.S. Constitution's due process clause. The Drafting Committee of the Constituent Assembly concurred and a solution was only found when India opted for the Japanese way of framing the due process clause as "procedure established by law" (Khanna 2008, 288), thus signalling that the substantive content and "quality" of such procedures are not questions courts should entertain; this is also one example, in which the Indian Supreme Court deferred to the other branches from the beginning, when in 1950, in the Gopalan decision, the Court put the matter to rest; for a long time Article 21 disappeared completely from the judicial agenda (Figure 3.2). That the very same article would then later become the basis for a new jurisprudence of social and economic rights and would turn the Directive Principles from abstract policy guidelines into specific justiciable rights is just one of the many examples that hint at the importance of context for understanding judicial decision making.[8] The judicial catharsis after the Emergency thus not only established a second age of rights but also reminds us that the "death of the author" applies to constitutional text too:

> As we all know, not all constitutions are written as such. What is more or less theorised, at the same time, is the play and the war between what is written and what is unwritten in that something we call "constitutions." Often called "conventions,"

[8] Chapter Four's analysis of judicial appointments will introduce another example, namely the dramatically changing meaning of the word "consultation" and the scope of the Chief Justice's power.

> the unwritten looms large over the written, at times supplanting what is "written." Histories of slender texts (such as the American) and voluminous texts (such as the Indian) provide vivid examples of the unwritten at play and at war with the written texts. In Roland Barthes' telling image, constitutions are not "writerly," but "readerly," texts. Constitutions entail not just the practices of writing but of reading to the point (as Barthes maintains) that the birth of the reader necessarily entails the death of the author. (Baxi 2000:1183)

In a nutshell, the co-existence of multiple constitutions — the multitude of interpretations — illustrates the fertile contradictions and dialectical tensions within constitutional law. It is fatally flawed to try fit these contradictions within a singular set of postulates — such as legal formalism — and to obscure our understanding of the multiplex nature of the constitutional. Instead of a barren search for interpretative clarity, contradictions can be studies as expressive of constitutional experience and change. Instead of discovering a single fundamental framework of formal rules which create and restrict the relationships between governors and governed, we uncover a multitude of constitutional practices that institute multi-dimensional fields for the negotiation of governmental authority. In place of the monism of formalists, originalists, and legal positivists, we have thus learnt to appreciate constitutions — analogous to Greek conceptions of the divine — as 'polymorphous' (Rudolph and Rudolph 1987, 61) creatures of manifold forms and orientations. How would we then know constitutional meaning or the "living constitutional law" (Ehrlich 1962) if we saw it? In terms of constitutional theory, we should certainly not trust Spinoza's optimism in our cognitive powers and his conception of adequate knowledge of a thing as correct definition. It is more promising to maintain that the movement of constitutional meaning has to be

taken as an ascent of increasing abstraction, while each new platform of conditional understanding leads to new ways of knowing constitutional law; as a consequence, no form of understanding supersedes or corrects other forms of knowing constitutions, as — Sisyphus-like — each postulate implies a call for further investigation within itself, and indeed, 'the irony of all theorising is its propensity to generate, not an understanding, but a not-yet-understood'.[9] Paraphrasing Oakeshott, and returning to Heraclitus' river, judges are *perpetually en voyage*. Judicial power then is not rooted in constitutional design or constitutional meaning per se — certainly, constitutional text does not exist in isolation.

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." (Carroll 1934 [1872], 205)

At the end of the day, whether judges have the last word, whether their judgments are implemented, overturned or even ignored, depends on other actors. In the short term, shared role understandings, shared legal education, shared preferences and believes in the "correctness" of the interpretative decision-making process, can stabilise legal interpretation (Tamanaha 2010, 205). But for longitudinal studies across decades, such low levels of interpretative stability are irrelevant when it comes to explaining the tectonic shifts of constitutional meaning we observe across time — just one example are shifting attitudes and judicial interpretation of constitutional laws governing race and

[9] From Oakeshott's *On Human Conduct*, quoted in McIntyre (2012, 18).

gender discrimination, or same-sex marriage.[10] Around the world, constitutional courts are currently reading equality clauses in such a way as to deduct a right to same-sex marriage — not the text but the context changed; just 40 years earlier exactly the same equality clauses in the same countries had not even stood in the way of judges endorsing laws that criminalised homosexuality.[11] In conclusion then, legal formalist approaches — despite their prominent role in law schools, legal scholarship, elite and even public discourses — have no explanatory value for a longitudinal study that stretches out across six decades. Law matters, but in different ways: as motivation, ideological framework, or cultural practice; whenever our case studies involve questions of legal interpretation and whenever we encounter jurisprudential debates within various legal communities these can be analysed and explained not on the basis of formalism but through thick description.

## [3.3] Contextualisation and Theory Choice

About 70 years ago, C. Herman Pritchett (1941) began to count cases, dissenting opinions, and from his counting project shifted the ground away from legalistic narratives towards empirical observations that reshaped the way we think about the US Supreme Court (Epstein and Knight 2013), pioneering the study of judicial behaviour.

[10] The US Supreme Court waited until 1967 to change its view on the constitutionality of legislation in Southern States criminalising interracial marriage — there was no change in the constitutional text, but changing contexts meant that the same words acquired different meanings.

[11] What seems striking about Indian judicial activism is not the scope of change in the meanings attached to words when judges interpret constitutional text, but rather the speed with which precedent and established canons of interpretation were abandoned during the 1980s (Sathe 2002).

For a long time, social-psychological paradigms dominated this field, in particular the attitudinal model's (Segal and Spaeth 2002) bold view of judges as "politicians in robes" who decide sincerely in line with their policy preferences — like all other political actors.[12] Another milestone, and crucial for this thesis, is the explosion of studies that adopt a strategic approach in the 1990s, following Brian Marks 1989 dissertation (in economics, at Washington University), the 'locus classicus' of the 'modern day study of law and courts' (Epstein and Knight 2000, 627).

Before we can focus exclusively on the strategic paradigm — having ruled out the applicability of legal formalist approaches to longitudinal studies — we need to assess the social-psychological paradigm that has animated the field for such a long time. With respect to India, it is in particular George H. Gadbois' early work on the Indian Supreme Court that has pointed the field in that specific social-psychological direction. From the beginning his work thus described the background of Indian judges along the lines of caste, class, religion and education and other variables (1968 and 1970); even if these are useful pieces of information and suitable variables for many other research questions, they can be dangerously misleading in relation to judicial behaviour. It is too easy to overlook the complexity of judges' motivations and the various ways in which identical backgrounds can play out differently in the development of a judges' preferences. German legal sociologists learnt this the hard way when Kaupen and Rasehorn (1971) studied the bourgeois class and status group background of German judges and directly linked those results to judicial behaviour, trying to establish a

[12] The attitudinal model is exceptionally successful when it comes to predicting judicial behaviour; the type of explanatory theorising that this study aims at, may not even be the attitudinal model's true purpose.

judicial bias against workers in labour law decisions. This study discredited the field for a long time, as it became immediately clear (Rottleuthner 1982) to what extent the complexity of motivations and biases had been underestimated by crude categories such as class and religion (and even at a simplistic level of Kaupen and Rasehorn's analysis, correlation, let alone causality, between class or eduction and a judge's preferences could not be confirmed by other scholars). Thus, Gadbois encyclopaedic achievements (2011) are powerful descriptive tools, but knowledge of a judges social and educational background only would provide the starting point for further research into individual judicial biographies that then explores the relationship between social-psychological variables and judicial-decision making for an individual judge (Chakrabarty 2002, 32). Moreover, the amount of information compiled for Indian judges is of very limited ambition in comparison to the sophistication of US style social-psychological models which collect data from newspaper clippings a judge may have written, his lower court decisions, his choice of clients as a lawyer, his speeches, or even the memo's he wrote as a clerk.[13] Therefore, social-psychological scholarship on Indian judicial behaviour seems currently quite limited (for instance Table 3.1) relying only on the actual voting behaviour as an expression of policy preference rather than conceptualising the vote on a bench of 2, 3, 5 or 7 judges in terms of dispositional or situational attribution. In other words, as we argue in the next section, it would be better to simply make a "black box"

[13] To cut a long story short, U.S. universities and funding agencies have provided an excellent institutional framework for the collection of social-psychological variables over decades, benefitting from a rigorous governmental record-keeping and public access culture (e.g. memos by clerks for judges, archives for judicial correspondence). Contemporary Indian scholarship relies on the efforts of individual scholars, massive but inevitably limited without a single university or law school department committed specifically to the study of judicial behaviour.

approach explicit, rather than to open the Pandora's box of whether a specific judicial attitude derives from gender, class, caste, or religious factors.[14]

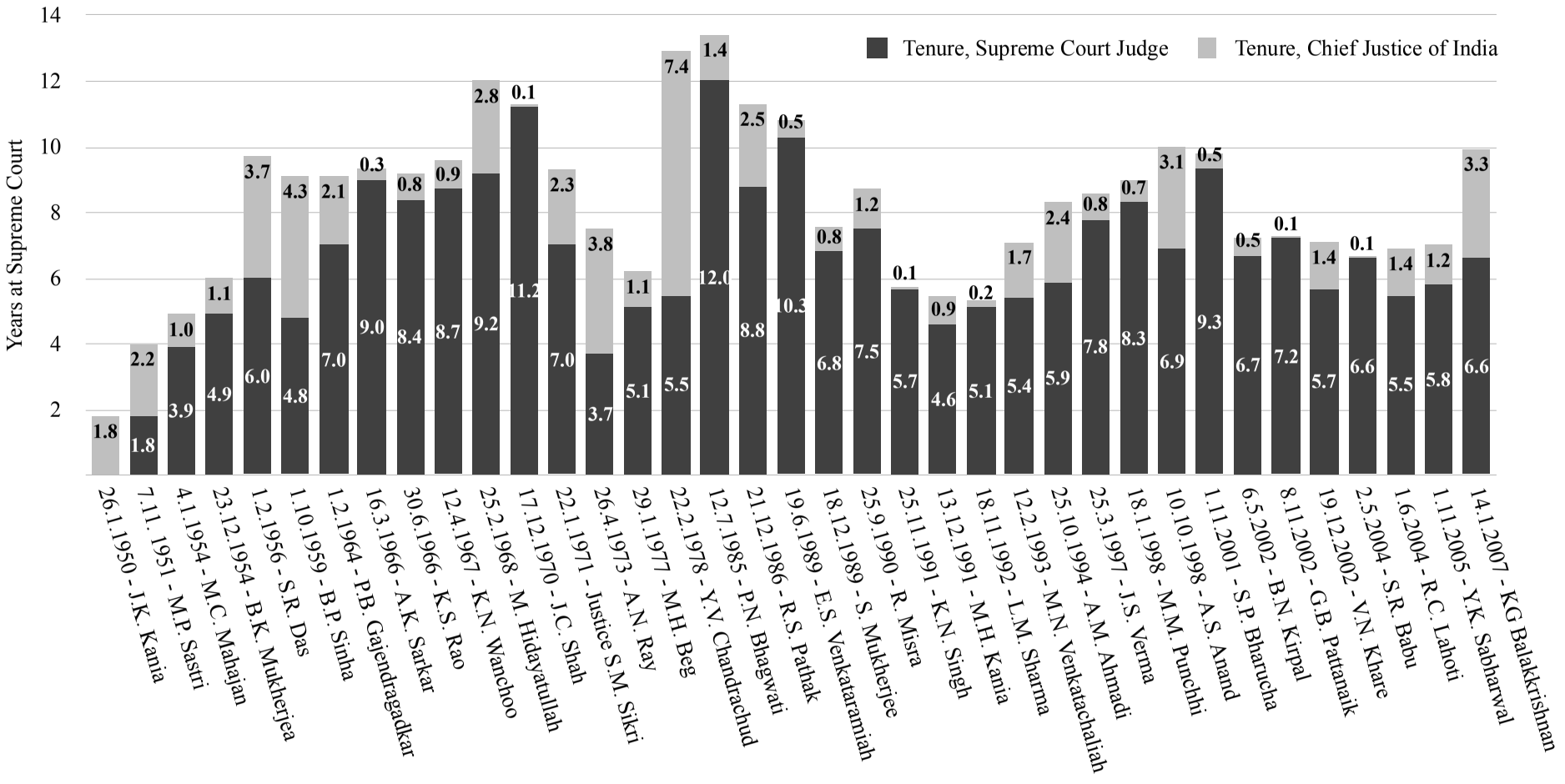
Most importantly, social-psychological approaches fail to take into account workload and court organisation of the Indian Supreme Court. If we imagined a situation in which we had perfect information on Indian judges' social-psychological background as well as policy preferences — and even understood how they relate to each other — the short tenure of Indian Supreme Court judges, the fragmentation of benches and issues (Table 3.2), the constant changes related to bench composition would make any model that tries to take into account the preferences of individual judges too complicated for meaningful insights; above all, the sample size would inevitably be too small as a judge may sit only once or twice on a case related to national security or affirmative action during his 3-5 years at the court; so even if we had perfect information about the judges' social-psychological background, if we knew the preferences of the judge and if he then voted in line with our expectations we still cannot extract any meaningful empirical information from such evidence in relation to the Supreme Court as a composite whole, let alone from a longitudinal perspective. The fact that the Indian Supreme Court had only eight judges in the 1950s may have been responsible for Gadbois' decision to apply U.S. models to India without significant modifications. But even during those first decades, the amount of time a judge spent at court differed radically: well below six years in India (Figure 3.5), compared to 14.9

[14] Of course, the opening of this Pandora's box remains an important research agenda for those studies that are interested in individual judges or benches across short periods of time; however, it will require different methodological approaches, such as participant observation, detailed biographies, or even experimental research (this is where the field in the U.S.A. is moving towards).

years as average for the time period 1789 to 1970 in the USA. After 1970 the gap grows much wider, below five years of average tenure in India compared to 26.1 years for US Supreme Court judges (Calabresi and Lindgren 2005; without a single vacancy at all from 1994 to 2005). Similarly significant, are the different roles for the Chief Justice; from the earliest days of the Indian Supreme Court the rules relating to seniority and retirement resulted in the appointments of more than two dozens of chief justices who were destined to serve for less than two years, often only a few months. As a result, Gupta's[15] interesting observation that 'the institutional support to the business as against the state sharply declined from 64.47 per cent under Sikri to 37.68 per cent under Ray' (1995, 189) has to be read in conjuncture with Table 3.2, illustrating that such periods of shifting judicial policy preferences must fluctuate rapidly due to the short tenure of Chief Justices in India. We find 16 different Indian Chief Justices before 1980 but only three Chief Justices of the U.S. Supreme Court for the time period 1946 to 1986; this trend accelerates and during the time period of the "Rehnquist Court", defined by his role as Chief Justice for almost twenty years (1986-2005), there are again 16 different Chief Justices of the Indian Supreme Court and only three served longer than two years. While the effort that flows into understanding individual judges of the U.S. Supreme Court thus seems well justified, the same information would not hold the same valuable insights for India as the study of individual judicial impact seems much less important than the study of the Court as institution.

[15] Another example for the application of social-psychological models.

**FIGURE 3.4 Tenure of Chief Justices of India, 1950-2009**




*Source:* Compiled by author, from *Supreme Court Annual Report 2008-09* and the website of the Indian Supreme Court for Chief Justice Balakrishnan's retirement date.

**TABLE 3.1 Voting Record of Supreme Court Judges in Fundamental Rights Cases; Non-Unanimous Decisions Only, 1967-76**

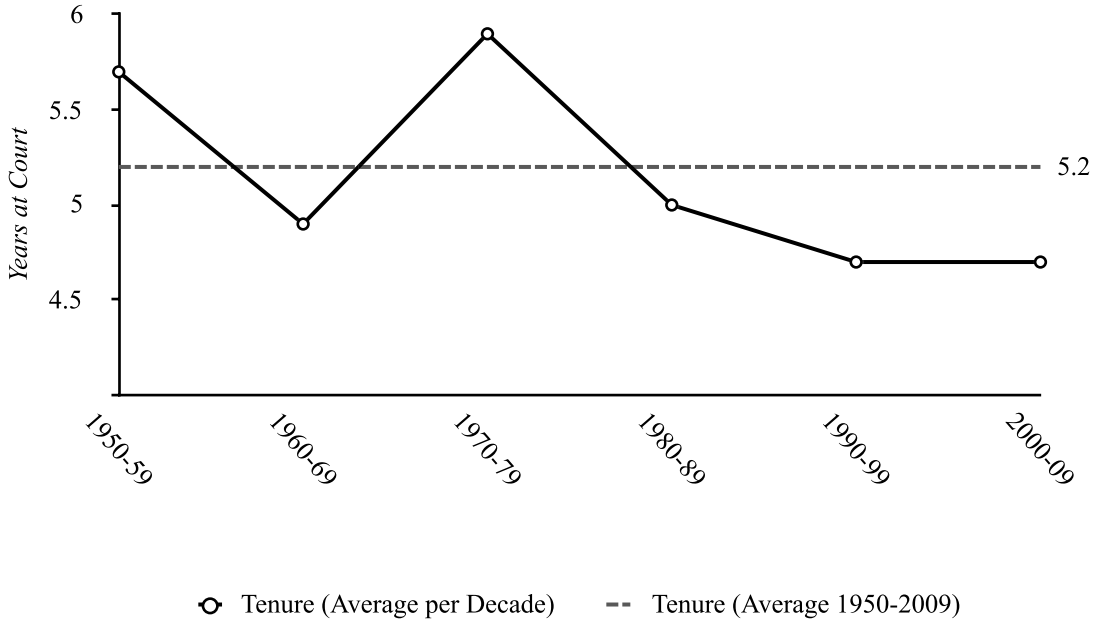
| *Judges* | *Participation in Decisions* | *Per Cent* | *Supporting Majority* | *Per Cent* | *Dissenting* | *Per Cent* | *Pro-Individual* | *Pro-Government* |
|---|---|---|---|---|---|---|---|---|
| Ray | 15 | 65.22 | 12 | 80.00 | 3 | 20.00 | 3 | 12 |
| Hidayatullah | 12 | 52.17 | 6 | 50.00 | 6 | 50.00 | 6 | 6 |
| Shelat | 11 | 47.83 | 8 | 72.73 | 3 | 27.27 | 9 | 2 |
| Sikri | 11 | 47.83 | 9 | 81.82 | 2 | 18.18 | 7 | 4 |
| Bachwat | 8 | 34.78 | 4 | 50.00 | 4 | 50.00 | 0 | 8 |
| Mathew | 7 | 30.43 | 5 | 71.43 | 2 | 28.57 | 1 | 6 |
| Vaidialingam | 7 | 30.43 | 7 | 100.00 | 0 | 0.00 | 5 | 2 |
| Beg | 6 | 26.09 | 5 | 83.33 | 1 | 16.67 | 4 | 2 |
| Khanna | 6 | 26.09 | 3 | 50.00 | 3 | 50.00 | 5 | 1 |
| Mitter | 6 | 26.09 | 5 | 83.33 | 1 | 16.67 | 1 | 5 |
| Shah | 6 | 26.09 | 5 | 83.33 | 1 | 16.67 | 4 | 2 |
| Chandrachud | 5 | 21.74 | 4 | 80.00 | 1 | 20.00 | 1 | 4 |
| Hegde | 5 | 21.74 | 4 | 80.00 | 1 | 20.00 | 4 | 0 |
| Reddy | 5 | 21.74 | 4 | 80.00 | 1 | 20.00 | 2 | 3 |
| Bhagwati | 4 | 17.39 | 3 | 75.00 | 1 | 25.00 | 2 | 2 |
| Bhargava | 4 | 17.39 | 2 | 50.00 | 2 | 50.00 | 3 | 1 |
| Grover | 4 | 17.39 | 3 | 75.00 | 1 | 25.00 | 4 | 0 |
| Palekar | 4 | 17.39 | 2 | 50.00 | 2 | 50.00 | 2 | 2 |
| Subba Rao | 4 | 17.39 | 4 | 100.00 | 0 | 0.00 | 3 | 1 |

During the entire period 1967 to 1976 there were only 23 non-unanimous decisions of the Supreme Court in relation to fundamental rights.

*Source:* Compiled by author from various sections in Chakrabarty (2000).

*Note:* This table does not take into account justices who have participated in less than 4 non-unanimous cases, namely: Justices Alagiriswami, Dayal, Dua, Dwivedi, Fazl Ali, Gajendragadkar, Goswami, Gupta, Iyer, Kailasam, Mudhoklar, Ramaswami, Sarkar, Sarkaria, Shinghal, Singh, Untwalia, Wanchoo.

**FIGURE 3.5 Tenure of Supreme Court Judges, 1950-2009**




*Source:* Compiled by author from *Supreme Court Annual Report 2008-09* and the Supreme Court website; n = 183 (the graph is based on the tenure of all the judges appointed before 2009).

This insight not only applies to longitudinal studies, but even for a short time period, such as the nine years covered by Table 3.1; we can see that in Chakrabarty's (2000) analysis the sample size for the decisions taken by individual judges very quickly collapses into statistical irrelevance.[16] Similarly, Shankar's work (2009) on judicial

[16] Figure 1.4 therefore neither pays attention to the voting of individual judges nor dissenting opinions but simply conceptualises each case as an institutional decision.

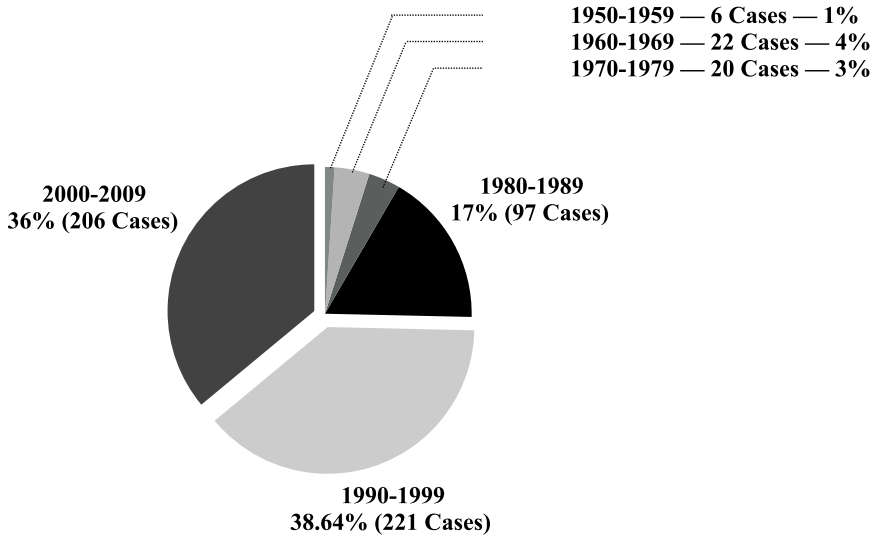
behaviour in terrorism cases is based on complex econometric models but then — according to the author herself — fails to reveal statistically significant insights for individual judges. However, looking at the Court as a whole Shankar finds strong evidence for judicial deference in matters of security laws, especially after the attack on the Indian Parliament in 2001. Accordingly, Shankar's study of "the Court" as a whole provides strong insights, whereas her efforts to study individual judicial behaviour do not produce any significant results (2009, 115).[17] Chapter Three therefore suggests that the short tenure, combined with the workload of the Indian Supreme Court and its institutional response (such as small benches of constantly fluctuating composition) lead to a situation in which the small number of decisions by an individual judge on a specific topic renders us unable to generalise results due to small sample size. While this insight seems microscopic at first sight, it is a crucial building block for the strategic model that section 3.4 develops and that then informs the following chapters.

To explain how short judicial tenure and workload play out in terms of internal Court organisation, we derive empirical evidence emphasising the fragmentation of judicial decision making units from a quantitative analysis of the 572 reservation cases decided by the Indian Supreme Court during the time period 1950-2009.[18]

[17] For instance, Shankar investigates whether the religious background of Supreme Court judges leads to different approaches to judging, but seems unable to find cases with Muslim or Sikh judges (94-95)

[18] The topic of reservations was selected for the following reasons: (1) This topic has led to inter-branch conflict regularly since 1950 (see Appendix); (2) strong judicial policy interventions, such as the creamy layer doctrine, the 50% ceiling and the role of caste for the identification of beneficiaries; (3) constant litigation flow in all parts of the country because of the enormous practical relevance of reservations in day-to-day life.

**FIGURE 3.6 Reservation Cases Reported per Decade (%), 1950-2009**




*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database).

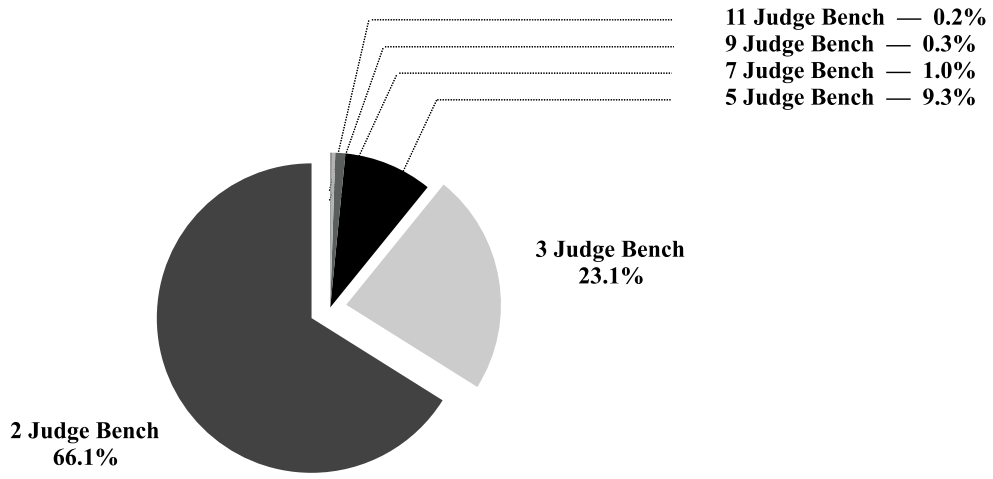
Figure 3.6 introduces the basic shape of our dataset, namely the temporal distribution of all the reservation decisions by the Indian Supreme Court. Similar to all the other quantitative data compiled by this thesis, we observe a rapid acceleration of litigation activity, hence, our analysis corresponds to the workload patterns that we have observed in Chapter Two. As a next step, the 572 cases are coded according to bench size (Table 3.2). It is apparent from the data that the Supreme Court organisation has been changed

**TABLE 3.2 Bench Strength in Reservation Cases, 1950-2009**

| | Total Number of Cases | 2 Judge Bench | 3 Judge Bench | 5 Judge Bench | 7 Judge Bench | 9 Judge Bench | 11 Judge Bench | Average Bench Strength |
|---|---|---|---|---|---|---|---|---|
| **1950-59** | 6 | 0 | 0 | 3 | 3 | 0 | 0 | 6 |
| **1960-69** | 22 | 3 | 2 | 17 | 0 | 0 | 0 | 4.4 |
| **1970-79** | 20 | 7 | 8 | 4 | 1 | 0 | 0 | 3.3 |
| **1980-89** | 97 | 65 | 31 | 1 | 0 | 0 | 0 | 2.4 |
| **1990-99** | 221 | 158 | 46 | 15 | 0 | 2 | 0 | 2.5 |
| **2000-09** | 206 | 145 | 45 | 13 | 2 | 0 | 1 | 2.5 |
| **Total** | 572 | 378 | 132 | 53 | 6 | 2 | 1 | 2.6 |

*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database).

**FIGURE 3.7 Distribution of Bench Strength (%), Reservation Cases Reported**




*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database).

in two important ways. Firstly, the number of judges increased;[19] secondly, more and more cases are decided by increasingly smaller benches, so that fewer judges can decide more cases. Further analysis of bench composition in Tables 3.5 and 3.6 shows that the contemporary Supreme Court organisation manages to decide 88 cases (2006-2009) with 33 judges in total, who participate in reservation cases 200 times in total. On the other hand, the first 88 reservation cases the Court decided (1950-1985) have often been decided by larger benches of five or even seven judges; thus Supreme Court decision making during the first decades required more judicial personnel: 65 judges in total, who participated in reservation cases 303 times.[20]

[19] Details in Table 2.1 as well as Figure 3.8.

[20] Tables 3.3 to 3.6: The first sample of 88 reservation cases decided after 1950 stretches out until 1985. We end up with the number 88 because a good sample size should be well above 50 and only 48 cases were decided before 1980; looking for a cut off point post-1980 it seemed best to pick 1985 so that Chief Justice Bhagwati and Chief Justice Chandrachud are included due to their high standing and because the latter served for seven years, longer than any other Indian Chief Justice. As a next step, the 2006-2009 sample simply derives from taking the last 88 cases of the entire dataset to compare the most recent decisions

**TABLE 3.3 Fragmented Judicial Voice: Supreme Court Judges and Opinion Writing in Reservation Cases, 1950-85**

| Judges | Total Number Opinions Authored | *Opinions Authored, Divided by Bench Size* | | | |
|---|---|---|---|---|---|
| | | 7 Judge Bench | 5 Judge Bench | 3 Judge Bench | 2 Judge Bench |
| P.B. Gajendragadkar | 6 | 0 | 6 | 0 | 0 |
| P.N. Bhagwati | 5 | 0 | 1 | 2 | 2 |
| Y.V. Chandrachud | 5 | 0 | 2 | 2 | 1 |
| A.N. Grover | 5 | 0 | 2 | 0 | 3 |
| K. Iyer | 5 | 0 | 0 | 2 | 3 |
| D.A. Desai | 4 | 0 | 0 | 1 | 3 |
| R.S. Pathak | 4 | 0 | 0 | 2 | 2 |
| O.C. Reddy | 4 | 0 | 0 | 3 | 1 |
| A.N. Sen | 4 | 0 | 0 | 3 | 1 |
| J.C. Shah | 4 | 0 | 1 | 1 | 2 |
| E.S. Venkataramiah | 4 | 0 | 0 | 1 | 3 |
| S.R. Das | 3 | 3 | 0 | 0 | 0 |
| A.N. Ray | 3 | 1 | 0 | 2 | 0 |
| K.N. Wanchoo | 3 | 0 | 3 | 0 | 0 |
| P.K. Goswami | 2 | 0 | 0 | 1 | 1 |
| K.S. Hegde | 2 | 0 | 0 | 2 | 0 |
| R.B. Mishra | 2 | 0 | 0 | 1 | 1 |
| J.R. Mudholkar | 2 | 0 | 2 | 0 | 0 |
| A. Varadarajan | 2 | 0 | 0 | 1 | 1 |
| A. Alagiriswami | 1 | 0 | 0 | 0 | 1 |
| S.M. Fazal Ali | 1 | 0 | 0 | 1 | 0 |
| Venkatarama Ayyar | 1 | 0 | 1 | 0 | 0 |
| M.H. Beg | 1 | 0 | 0 | 1 | 0 |
| V. Bhargava | 1 | 0 | 0 | 0 | 1 |
| S.K. Das | 1 | 0 | 1 | 0 | 0 |
| A.C. Gupta | 1 | 0 | 0 | 1 | 0 |
| M. Hidayatullah | 1 | 0 | 0 | 1 | 0 |
| A.D. Koshal | 1 | 0 | 0 | 1 | 0 |
| G.K. Mitter | 1 | 0 | 1 | 0 | 0 |
| D.G. Palekar | 1 | 0 | 1 | 0 | 0 |
| V. Ramaswami | 1 | 0 | 1 | 0 | 0 |
| K. Subba Rao | 1 | 0 | 1 | 0 | 0 |
| A.K. Sarkar | 1 | 0 | 1 | 0 | 0 |
| Patanjali Sastri | 1 | 0 | 1 | 0 | 0 |
| A.P. Sen | 1 | 0 | 0 | 1 | 0 |
| J.M. Shelat | 1 | 0 | 0 | 1 | 0 |
| J. Singh | 1 | 0 | 0 | 1 | 0 |
| C.A. Vaidialingam | 1 | 0 | 0 | 0 | 1 |
| **TOTALS: 38** | **88** | **4** | **25** | **32** | **27** |

*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database);n = 572 (total number of reported reservation cases in SCC database) and n = 88 (number of reservation cases analysed for bench composition and opinion authorship; the 88 cases are the first 88 cases decided after the creation of the Supreme Court).

**TABLE 3.4 Fragmented Judicial Voice: Supreme Court Judges and Opinion Writing in Reservation Cases, 2006-2009**

| Judges | Total Number Opinions Authored | *Opinions Authored, Divided by Bench Size* | | |
|---|---|---|---|---|
| | | 5 Judge Bench | 3 Judge Bench | 2 Judge Bench |
| S.B. Sinha | 27 | 0 | 0 | 27 |
| K.G. Balakrishnan | 11 | 3 | 5 | 3 |
| Arijit Pasayat | 8 | 0 | 0 | 8 |
| H.K. Sema | 6 | 0 | 1 | 5 |
| B.N. Agrawal | 5 | 0 | 3 | 2 |
| A.K. Mathur | 5 | 0 | 0 | 5 |
| C.K. Thakker | 5 | 0 | 0 | 5 |
| Tarun Chatterjee | 4 | 0 | 0 | 4 |
| A.R. Lakshmanan | 4 | 0 | 0 | 4 |
| R.V. Raveendran | 3 | 0 | 0 | 3 |
| Altamas Kabir | 2 | 0 | 0 | 2 |
| Ashok Bhan | 1 | 0 | 0 | 1 |
| B.P. Singh | 1 | 0 | 0 | 1 |
| D.K. Jain | 1 | 0 | 0 | 1 |
| G.P. Mathur | 1 | 0 | 0 | 1 |
| Lokeshwar Singh Panta | 1 | 0 | 0 | 1 |
| Markandey Katju | 1 | 0 | 0 | 1 |
| P.K. Balasubramanyan | 1 | 1 | 0 | 0 |
| S.H. Kapadia | 1 | 1 | 0 | 0 |
| **TOTALS: 19** | **88** | **5** | **9** | **74** |

*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database) and n = 88 (number of reservation cases analysed for bench composition and opinion authorship; the sample represents the last 88 reservation cases decided before 2009).

**TABLE 3. 5 Fragmented Participation: Supreme Court Judges Sitting on Benches Deciding Reservation Cases, 1950—85**

| Judges | Participation in Decisions (Total Number) | *Participation, Divided by Bench Size* | | | |
|---|---|---|---|---|---|
| | | 7 Judge Bench | 5 Judge Bench | 3 Judge Bench | 2 Judge Bench |
| R.B. Mishra | 13 | 0 | 0 | 8 | 5 |
| O.C. Reddy | 13 | 0 | 1 | 9 | 3 |
| J.C. Shah | 13 | 0 | 7 | 3 | 3 |
| K. Iyer | 12 | 1 | 1 | 6 | 4 |
| E.S. Venkataramiah | 12 | 0 | 1 | 6 | 5 |
| R.S. Pathak | 11 | 0 | 0 | 4 | 7 |
| K.N. Wanchoo | 11 | 0 | 11 | 0 | 0 |
| P.N. Bhagwati | 9 | 1 | 3 | 3 | 2 |
| P.B. Gajendragadkar | 9 | 0 | 9 | 0 | 0 |
| S.M. Fazal Ali | 8 | 1 | 1 | 6 | 0 |
| Y.V. Chandrachud | 8 | 0 | 2 | 5 | 1 |
| K.S. Hegde | 8 | 0 | 3 | 3 | 2 |
| M. Hidayatullah | 8 | 0 | 7 | 1 | 0 |
| S.M. Sikri* | 8 | 0 | 7 | 1 | 0 |
| D.A. Desai | 7 | 0 | 1 | 1 | 5 |
| A.N. Grover | 7 | 0 | 2 | 2 | 3 |
| A.N. Sen | 7 | 0 | 0 | 6 | 1 |
| A. Varadarajan | 7 | 0 | 0 | 6 | 1 |
| M.H. Beg | 6 | 1 | 1 | 3 | 1 |
| V. Bhargava | 6 | 0 | 2 | 1 | 3 |
| A.N. Ray | 6 | 1 | 3 | 2 | 0 |
| B.P. Sinha* | 6 | 1 | 5 | 0 | 0 |
| G.K. Mitter | 5 | 0 | 4 | 1 | 0 |
| J.M. Shelat | 5 | 0 | 4 | 1 | 0 |
| N. Rajagopala Ayyangar* | 4 | 0 | 4 | 0 | 0 |
| Raghubar Dayal* | 4 | 0 | 4 | 0 | 0 |
| S.R. Das | 4 | 3 | 1 | 0 | 0 |
| K.C. Das Gupta* | 4 | 0 | 4 | 0 | 0 |
| J.R. Mudholkar | 4 | 0 | 4 | 0 | 0 |
| B.K. Mukherjea* | 4 | 2 | 2 | 0 | 0 |
| V. Ramaswami | 4 | 0 | 3 | 1 | 0 |

***Continued on next page.***

**TABLE 3.5** *Continued from previous page*

| Judges | Participation in Decisions (Total Number) | *Participation, Divided by Bench Size* | | | |
|---|---|---|---|---|---|
| | | 7 Judge Bench | 5 Judge Bench | 3 Judge Bench | 2 Judge Bench |
| R.S. Bachawat* | 3 | 0 | 3 | 0 | 0 |
| Vivian Bose* | 3 | 2 | 1 | 0 | 0 |
| S.K. Das | 3 | 1 | 2 | 0 | 0 |
| A.C. Gupta | 3 | 1 | 1 | 1 | 0 |
| Syed Jafar Imam* | 3 | 1 | 2 | 0 | 0 |
| J.L. Kapur* | 3 | 1 | 2 | 0 | 0 |
| K.K. Mathew* | 3 | 1 | 0 | 1 | 1 |
| K. Subba Rao | 3 | 0 | 3 | 0 | 0 |
| Patanjali Sastri | 3 | 2 | 1 | 0 | 0 |
| A.P. Sen | 3 | 0 | 1 | 2 | 0 |
| J. Singh | 3 | 0 | 1 | 2 | 0 |
| C.A. Vaidialingam | 3 | 0 | 2 | 0 | 1 |
| Fazl Ali* | 2 | 2 | 0 | 0 | 0 |
| Venkatarama Ayyar | 2 | 1 | 1 | 0 | 0 |
| V.B. Eradi* | 2 | 0 | 0 | 1 | 1 |
| P.K. Goswami | 2 | 0 | 0 | 1 | 1 |
| P.S. Kailasam* | 2 | 0 | 0 | 2 | 0 |
| Harilal J. Kania* | 2 | 2 | 0 | 0 | 0 |
| M.C. Mahajan* | 2 | 2 | 0 | 0 | 0 |
| D.G. Palekar | 2 | 0 | 2 | 0 | 0 |
| P.J. Reddy* | 2 | 0 | 1 | 0 | 1 |
| A.K. Sarkar | 2 | 0 | 2 | 0 | 0 |
| V.D. Tulzapurkar* | 2 | 0 | 0 | 1 | 1 |
| N.L. Untwalia* | 2 | 0 | 0 | 2 | 0 |
| A. Alagiriswami | 1 | 0 | 0 | 0 | 1 |
| I.D. Dua* | 1 | 0 | 0 | 1 | 0 |
| S.N. Dwivedi* | 1 | 0 | 1 | 0 | 0 |
| Ghulam Hasan* | 1 | 0 | 1 | 0 | 0 |
| B. Jagannadhadas* | 1 | 0 | 1 | 0 | 0 |
| H.R. Khanna* | 1 | 1 | 0 | 0 | 0 |
| A.D. Koshal | 1 | 0 | 0 | 1 | 0 |
| S. Mukharji* | 1 | 0 | 0 | 1 | 0 |
| R.S. Sarkaria* | 1 | 0 | 0 | 0 | 1 |
| M. P. Thakkar* | 1 | 0 | 0 | 1 | 0 |
| **TOTAL: 65** | **303** | **28** | **125** | **96** | **54** |

* Judges who participated in reservation cases, but never wrote any opinions.
*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database) and n = 88 (number of reservation cases analysed for bench composition and opinion authorship; the 88 cases are the first 88 cases decided after the creation of the Supreme Court).

**TABLE 3.6 Fragmented Participation: Supreme Court Judges Sitting on Benches Deciding Reservation Cases, 2006-2009**

| Judges | Participation in Decisions (Total Number) | *Participation, Divided by Bench Size* | | |
|---|---|---|---|---|
| | | 5 Judge Bench | 3 Judge Bench | 2 Judge Bench |
| S.B. Sinha | 27 | 0 | 0 | 27 |
| K.G. Balakrishnan | 12 | 4 | 5 | 3 |
| Markandey Katju | 12 | 0 | 0 | 12 |
| C.K. Thakker | 12 | 5 | 1 | 6 |
| R.V. Raveendran | 11 | 2 | 4 | 5 |
| Lokeshwar Singh Panta | 10 | 0 | 1 | 9 |
| Arijit Pasayat | 10 | 2 | 0 | 8 |
| D.K. Jain | 9 | 0 | 3 | 6 |
| Dalveer Bhandari* | 7 | 2 | 1 | 4 |
| Harjit Singh Bedi* | 6 | 0 | 0 | 6 |
| Tarun Chatterjee | 6 | 0 | 0 | 6 |
| Cyriac Joseph* | 6 | 0 | 0 | 6 |
| A.R. Lakshmanan | 6 | 0 | 0 | 6 |
| A.K. Mathur | 6 | 0 | 0 | 6 |
| H.K. Sema | 6 | 0 | 1 | 5 |
| B.N. Agrawal | 7 | 0 | 3 | 2 |
| P.K. Balasubramanyan | 5 | 3 | 0 | 2 |
| P.P. Naolekar* | 5 | 0 | 1 | 4 |
| Altamas Kabir | 4 | 0 | 1 | 3 |
| S.H. Kapadia | 4 | 2 | 0 | 2 |
| P. Sathasivam* | 4 | 0 | 1 | 3 |
| V.S. Sirpurkar* | 4 | 0 | 0 | 4 |
| G.P. Mathur | 3 | 1 | 1 | 1 |
| J.M. Panchal* | 3 | 0 | 2 | 1 |
| Y.K. Sabharwal* | 3 | 3 | 0 | 0 |
| G.S. Singhvi* | 3 | 0 | 2 | 1 |
| Aftab Alam* | 2 | 0 | 0 | 2 |
| H.L. Dattu* | 2 | 0 | 0 | 2 |
| Arun Kumar* | 2 | 1 | 0 | 1 |
| Mukundakam Sharma* | 2 | 0 | 0 | 2 |
| Ashok Bhan | 1 | 0 | 0 | 1 |
| B, Sudershan Reddy* | 1 | 0 | 0 | 1 |
| B.P. Singh | 1 | 0 | 0 | 1 |
| **TOTALS: 33** | **200** | **25** | **27** | **148** |

∗ Judges who participated in reservation cases, but never wrote any opinions.

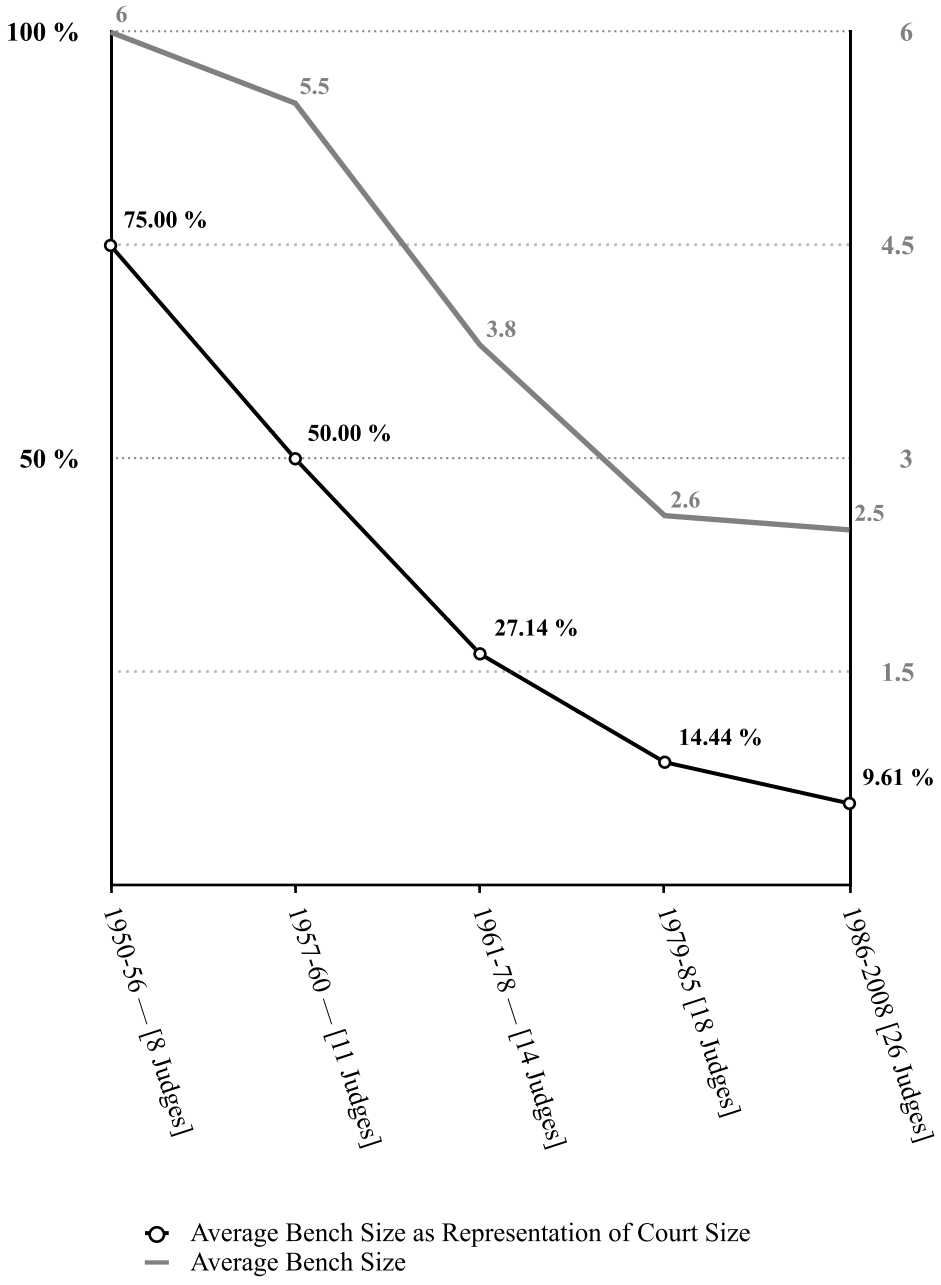
*Source:* Compiled by author from SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database) and n = 88 (number of reservation cases analysed for bench composition and opinion authorship; the sample represents the last 88 reservation cases decided before 2009).

These findings have significant implications for the judicial voice, namely shrinking representativeness and polyvocality. Representativeness simply describes the relationship between the size of the Court and the weight of the voice judicial, reminding us that the trend of shrinking bench sizes has to be understood in relation to the trend of a growing court. To give an example, an unanimous 5-judge bench decision in 1950 means that 5 judges speak for a Court of 8 judges, giving the decision a representativeness-weightage of 62.5%. In 2004, an unanimous 2-judge bench decision means that 2 judges speak for a court of 26 judges, giving the decision a representativeness-weightage of 7.7%. Figure 3.8 reveals how these developments play out across six decades, providing further support for the principal theoretical implication that the "conclusions" of social-psychological studies of individual judicial behaviour are hollowed out by the actual low weight of individual judicial opinions.

Combining the trends of growing court, growing workload, and shrinking bench size, our dataset also explains why the sample size for social-psychological studies regularly remains too small for inferential statistical analysis. Table 3.3 and Table 3.4 reveal that during their five years at the court Indian Supreme Court judges have to write a plethora of opinions without opportunities for specialisation given the discontinuities of small benches composition combined with the diversity and scope of workload. This means that social-psychological scholars searching for the preferences of individual Indian Supreme Court judges — say for fundamental rights (Chakrabarty 2000) or for terrorism cases (Shankar 2009) — will often find just a handful of cases.[21]

[21] Other courts are organised along the lines of specialist benches (e.g. a tax bench that then hears all tax cases) and judges work for 8 to 16 years on the same bench, hearing only hundreds of cases per year, and not thousands; every week, Indian Supreme Court judges lose two full work days just dealing with admissions matters.

**FIGURE 3.8 Shrinking Bench Size in Relation to Growing Court (Reservation Cases)**




*Source:* Compiled by author from *Supreme Court Annual Report 2008-09* and SCC; n = 40, 618 (total number of all reported cases in SCC database); n = 572 (total number of reported reservation cases in SCC database).the Supreme Court website.

The narrative mode of the Indian Supreme Court thus is one of radical polyvocality, with multiple, rapidly changing, judicial voices speaking about the same legal fields. Both, legal formalist as well as social-psychological approaches are blind to such relationships between judicial-decision making and the actual context of court organisation. With their tendency to structure judicial decision making as an input-output-system both theories provide unsatisfactory and incomplete accounts of the Indian Supreme Court in general, and from a longitudinal perspective in particular. Section 3.3 therefore has paid attention to the details of intra-institutional design, opening the "black box" of court organisation in order to explore at least some of the internal dynamics and external workload pressures that structure judicial decision making and thus must shape our theory choice. As a next step, we further expand our theoretical framework from intra-institutional towards inter-institutional contexts.

## [3.4] Towards Strategic Accounts of Supreme Court Power

Even if we assumed that judging was a mechanistic exercise, the purely logical application of the governing law to the facts of a case producing single correct outcomes, we could still make a cogent case that judges have good reasons for strategic decision-making: whether a judge deliberately pursues policy or ideological goals or whether a judge is convinced of his judicial objectivity and sincere in his belief that he merely discovers the law, none of these diverging ends affects the utility of strategic thinking in principle. Both, a judge trying to impose a policy preference on politicians

as well as a judge trying to impose the 'correct' interpretation of constitutional rules on the other branches of government, require sophisticated strategic behaviour to achieve their goals. Any court decision can trigger a response from the other branches. If the costs of a judgment are high, institutional action springs in and the other branches may decide to overrule the Court. However, this is not just a question of abstract institutional design but also political reality: overriding the Supreme Court comes with transaction costs, such as the time and effort it takes to pass legislation and the task of building a majority (for constitutional amendments such costs are even higher because of additional institutional hurdles). Figure 3.9 depicts the ideal preference points of all the

**FIGURE 3.9 Hypothetical Distribution of Preferences over the Question of Compensation for the Expropriation of Land**


*Source:* Adapted by author from Eskridge (1991). The figure shows hypothetical ideal points for any actor who can introduce or veto legislation.

G = Government ideal point. P = Parliament ideal point. PR = President ideal point. SC = Supreme Court ideal point.

actors involved in setting and applying the rules related to the expropriation of land. The arrangement of ideal points in Figure 3.9 is not purely hypothetical as we can use the Bela Banerjee case and Nehru's Statement of Objects and Reasons[22] in the *Constitution (Fourth) Amendment Act, 1954* to build an analytical narrative. The sequence of moves begins with the decision of the Indian Supreme Court on December 11, 1953 in *State of West Bengal vs. Bela Banerjee* 1954 AIR 170. A five judge bench, by unanimous decision and the opinion written by Chief Justice Shastri, declares sec. 8 of the *West Bengal Land Development and Planning Act*, 1948 unconstitutional and void as the principles on which compensation is paid are based on 1946 market values only. The Supreme Court also asserts that compensation 'is a justiciable issue to be adjudicated by the court' (para 562). In terms of Figure 3.9 the policy preference expressed in the Bela Banerjee case is represented as (SC). As a next step, President (PR), Parliament (P) and the Government of India (G) can decide whether to ignore the judgment, to overturn it, or retaliate against the Supreme Court in other ways.[23] It is the Government which chooses to act next, introducing a constitutional amendment and overseeing its passage through Parliament and Presidential assent before May 1955. Sec. 2 of Art. 31 of the Constitution is substituted, the new clause reads as follows"

> No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the

[22] Dated and signed by Nehru December 17, 1954.

[23] The President could only speak out against the judgment or encourage Parliament or Government to act; apart from overturning the decision, other forms of retaliation are for instance, court budget cuts, attacks on judicial independence, or court packing by appointing new, additional judges.

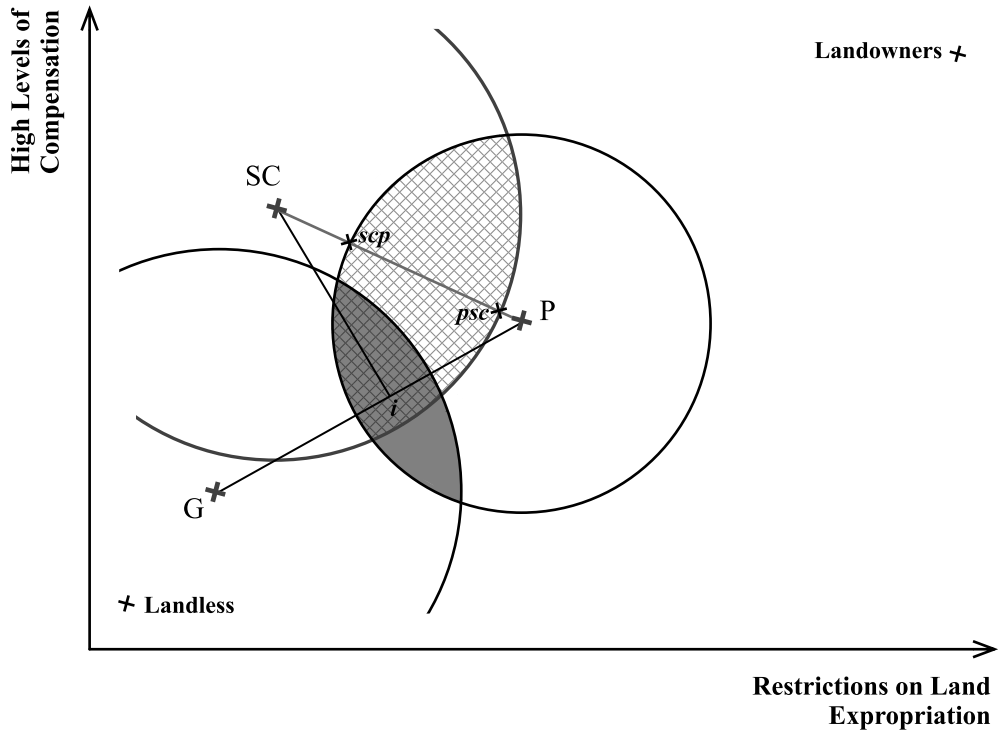
> compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

As a result, the decision of the Supreme Court in the Bela Banerjee case is overturned and expropriation and compensation policies now continue to be formulated and implemented in line with the Government's preferences (P). This represents not just a defeat but also a missed opportunity for the Supreme Court. Whether the Court's preference point (SC) is based on the judges' sincere belief in their correct legal interpretation of the Constitution (formalism) or whether the judges think of themselves as policy- or law-makers is irrelevant for our strategic model;[24] the question is not about good policy and good law, the question is why the Indian Supreme Court does not act with more strategic savvy and places its decision between (P) and (PR), thus at least opening up the possibility that the other actors can accept the judgment and decide not to invest their time and political capital into overturning the Court. The Supreme Court then would have not gotten everything it wanted but at least would have brought the policy a little bit closer in line with its own preferences. By ignoring the other actors completely the Court not only ensured maximum loss for a particular case but even provoked retaliation in the form of jurisdiction stripping, taking the question of what constitutes fair compensation away from all courts completely.

If we refine our strategic model further, and integrate the idea of "tolerance intervals" of the various actors (Figure 3.10) we can then construct a suitable model for

[24] Similarly, we are not interested in the social-psychological dimension as to why and how the judges have developed their preferences.

**FIGURE 3.10 Strategic Model with Tolerance Intervals: Example Land Reforms and Constitutional Amendments**




SC = Supreme Court ideal point.

P = Parliament ideal point.

G = Government ideal point.

= Winset, Government and Parliament.

= Winset, Parliament and Supreme Court.

= Winset, Government, Parliament and Supreme Court.

= Tolerance intervals for each actor.

*i* = Equilibrium (in equilibrium models).

*scp-psc* = Parliament-Supreme Court Optimal Winset (as soon as a Government loses its two-thirds-majority in the Lok Sabha, or with stronger opposition in the Raja Sabha, these preferences aquire more importance in unconstitutionality matters; for example, the Swatantra Party became influential as soon as it increased the difficulty to pass constitutional amendments).

explaining patterns of judicial power expansion as well as contraction. Epstein, Knight and Shvetsova (2001) introduced the idea of tolerance intervals[25] into the study of strategic judicial decision making, which provides another useful heuristic tool for understanding the power of the Indian Supreme Court; especially to understand why the Court lost again and again, and for so long, and how the Indian Supreme Court then starts to win and eventually breaks free of the traditional restraints and controls of separation of power games in the 1990s.

Figure 3.10 reframes the Bela Banerjee case along the lines of Brian Marks' separation-of-powers model (1989), placing the ideal points (G), (P) and (SC) within a two-dimensional policy space, and paying careful attention to the tolerance intervals of the three key players. Our starting point is now the assumption that a strategic court is aware that its range of possible decisions is constrained by the preferences of other actors. In addition, we expect the Court to learn[26] and to become better at understanding the tolerance intervals to avoid retaliation and disempowerment. For this strategic model we do not need much in terms of assumptions: We 'proceed from the assumption that social phenomena are to be explained as the outcome of interactions among intentional actors […] but that these interactions are structured, and the outcomes shaped by the characteristics of the institutional settings in which they occur' (Scharpf

[25] Tsebelis calls the same idea 'indifference curves' (2002) — the key fact remains that each player always prefers points closer to him than further away, the tolerance interval indicates all the points that are "acceptable" to an actor; as long as a court decision falls within a tolerance interval, the other actor will not retaliate. Maybe the most important dimension of the strategic model is thus the possibility for judicial disempowerment and de-judicialisation (neither seem to be concerns of Stone Sweet's dyad-triad theorising for France, but crucial research dimensions for India until the emergency).

[26] The strategic model fits the ambition of longitudinal perspectives as well, as the repetition of the "games" underlying the strategic model tie sequences together, thus connecting them across time — whereas the snapshots of textual interpretation or judicial behaviour disconnect.

1997, 1). As a next step, Chapter Four explores the promise of the strategic approach to generate new substantive insights into the most famous and most important judicial innovation of the 20th century— the basic structure. Figure 4.1 is directly connected to Figure 3.10, and the chapters are closely connected via the success of the Swatantra Party in the 1967 election (from 18 to 44 seats), and the loss of seats by the Congress party (from 361 to 283). In Figure 3.10, the optimal winset for a Parliament-Supreme Court alliance is marked as line scp-psc. Chief Justice Subba Rao's strategic calculations are solid, and even his bet on the Congress' loss of amendment power in 1967 (see Figure 5.3) pays off as the Supreme Court decides the Golak Nath case February 27, 1967 and blocks Parliament from amendment fundamental rights altogether. It is rational to assume that a Government without solid amendment power in Parliament would not be able to stop smaller players, such as the pro-property Swatantry party, to shift the policy away from the Government's ideal point. This decision's radical, direct and immediate impact on politicians — and in this respect Chapter Four will demonstrate how Golak Nath is very different from Kesavananda — provokes years of anti-Supreme Court rhetoric and all sorts of retaliation by the other branches. In addition, the fact that Chief Justice Subba Rao resigns after the Golak Nath case in February, and then runs for presidential office May 1967 with Swatantra support, further undermines the ability of other actors to trust the Supreme Court. Chapter Five then continues to apply the model presented here, focusing on the repetition of strategic decision making and illustrates that the tolerance intervals of the other branches expand under coalition and minority government rule to such an extent as to give the Supreme Court almost complete freedom in terms of situating its ideal

preferences in any policy space (except reservations). Last but not least, Chapter Six asks to what extent we have to adjust our strategic model in light of India's basic structure constitutionalism and the transformation of the role of the Supreme Court in separation-of-powers games.

# CHAPTER FOUR

## *Kesavananda and the Rules of the Game: Political Origins of the Basic Structure*

***Abstract*** Chapter Four applies game theory to the workings of the Indian Supreme Court. The arguments presented model the Court's most legendary decisions in terms of a separation of powers game, with players and strategies and the epistemological tools of winning and losing. The game theory applied is on a basic level, and the purpose of this chapter is not to make any advances in formal political theory but to go beyond the normative dimension of inter-branch conflicts and develop a systematic framework for analysing judicial decisions as responses to institutional constraints in order to systematically explain the political origins of the basic structure doctrine and how its deep entrenchment fundamentally transformed the rules of the separation of power games in India through heresthetics. Thus, the chapter concludes that the original basic structure cases are not only about winning and losing, but also about the fact that the court — although apparently losing overall — has managed to change the rules of the game. Over time, the interactive process of judicial reviews has unfolded dynamically, but only when elections and the diffusion of political power in the other branches of government open up the space for — if not invite — judicial power expansion.

## [4.1] Pouvoir Constitué and Pouvoir Constituant: Theoretical and Practical Implications of a Paradox

An uncanny coincidence has occurred within the history of modern written constitutions. In his famous debates with James Madison, Thomas Jefferson disparaged the search for the durability of constitutional laws and lamented the theocratic constitutional undertones applied by those who 'look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred, to be touched' [letter to Samuel Kercheval, July 12, 1816 (Appleby and Ball 1999, 215)]. In 1789, Jefferson had already discussed with Madison sunset clauses for laws, and partially implemented the idea in early US legislation (Ranchordás 2014, 18). The optimal duration of a constitution, Jefferson stipulated, was 19 years, freeing future majorities from present day ones. He was, basing his thinking on the average life expectancy of Europeans at the time (Elkins, Ginsburg and Melton 2009, 1). Uncannily, the quantitative analysis by Elkins, Ginsburg and Melton1 revealed that the average lifespan of constitutions was 17 years — and the constitutional crisis triggered by the Golak Nath decision,2 could have easily condemned the Indian Constitution to precisely such an average lifespan of 17 years and one month after its inauguration. Instead, the

[1] Their database includes all written constitutions from 1789 to present. All constitutions were translated into English.

[2] *Golak Nath v. State of Punjab*, AIR 1967 SC 1643; date of the decision is February 27, 1967.

famous judicial opinions in Kesavananda Bharati vs. State of Kerala3 vindicated judicial power through a strategic retreat from the unsophisticated doctrines set out by the Golak Nath case. In Golak Nath, the sort of mistake that derails constitutions was a direct attack on the other branches, causing an immediate and significant limitation of their powers — resulting in strong retaliation via constitutional amendments. The Kesavananda basic structure doctrine establishes implied limitations on Parliament's amendment power merely as an abstract principle, but without any immediate impact on any politician. This nurtures judicial power by stealth as nobody loses anything and nothing becomes concrete when the court hands down a decision; thus, there are really no stakeholders yet. Who could be concerned about whether some day in the distant future a Supreme Court may assert the right to veto constitutional amendments.

Nevertheless, the theoretical earthquake was so strong that the other branches took note. Kesavananda pushes Indian constitutionalism beyond Dicey's parliamentary sovereignty ideas and into the realm of French and, in particular, German constitutional theory. Chapter Two has illustrated how such ideas travel and how every legal transplant undergoes processes of indigenisation.

For the basic structure doctrine, the metaphor of migration is particularly apt as Abbe Sieyes' distinction between constituent and constituted power inspired great debates within Austrian and German Staatslehre — in particular, in Heidelberg, between Carl Schmitt and Anschütz, and via Schmitt's colleague, Ernst Forsthoff. His doctoral student, Dieter Conrad would eventually 'migrate' to India.[4] Of course, neither Kelsen,

[3] (1973) 4 SCC 225.

[4] Sieyes' political pamphlet *What is the Third Estate?* already had a concrete political objective in the constitution making of revolutionary France (Colon-Rios, 84).

Schmitt nor Anschütz, nor the judges deciding the Kesavananda case, could escape the paradox within Sieyes' distinction (Laughlin and Habermas). 'Constitutional doctrine presupposes the existence of that which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution (Weiler 2001, 184). On the contrary, instead of resolution, the circularity of the argument seems to be its key characteristic and a driving force behind inherent conceptual openness and the constant movement of constitutional life. Whatever the level of theoretical sophistication, at some point constitutional scholars or actors fall on one or other side of the equation. Anschütz, who always spoke out in favour of a legal revolution through amendment power, resigned from his post in 1933. Schmitt, Anschütz's critic, underwent a sea change by embracing new constitutional theories to serve the Nazi regime. Kelsen would immigrate and continue to struggle to come to terms with the political implications of legal positivism. The Supreme Court of Pakistan based the judgments empowering the first phase of dictatorship on Kelsen's constitutional theory and changing Grundnorms.

In all these cases, the theoretical implications of the paradox of constitutional power remain unresolved. At peculiar constitutional moments (Ackerman), a constitutional system follows one path or another. There is no logic or better normative reasoning that can be applied to it — 'the life of the law has not been logic; it has been experience.'[5] When Dieter Conrad spoke about implied limitations of the amending power at Banaras Hindu University (February 1965), he did not resolve this paradox. But he gave Indian lawyers the all important rhetorical tools to reframe Diceyan

[5] Oliver Wendell Holmes, quoted in Lefebvre (2008, 98).

parliamentary sovereignty.[6] We know from the written briefs that Palkhivala — the lead lawyer in the Kesavananda case arguing against Parliament's unlimited amendment power — used and cited Conrad's work, and eventually the Supreme Court cited Conrad too and embraced his core idea.

As Kesavananda leaves Indians with a new type of paradox, it is important to keep in mind that Dicey's parliamentary sovereignty collapses too as a theory when it comes face to face with significant constitutional moments.[7] We know that Motilal Nehru's father cited Dicey extensively, and Dicey is also one of the few academics who is mentioned in the constituent assembly. It is plausible to assume that Nehru must have encountered Dicey's work as a student in England and that Dicey must have played a prominent role in the way Nehru articulated the role and powers of Parliament. Some of the best evidence on this derives from Lord Butler's memoirs. —Staying with Nehru in 1954, Lord Butler had conversations with him that touched on constitutional history, and we have the following report:

> The gradualness of the progress towards self-government meant that Indians themselves had grown used to the daily administration of parliamentary government: that it also at the same time made inevitable the domination of the Congress party was unavoidable. When, in 1954, I stayed with Nehru in Delhi, he affirmed without hesitation that our Government of India Bill, founded as it was Dicey and Anson, the two great constitutional lawyers, was the basis of the Independence Bill itself. (Butler of Saffron Walden 1971, 60)

[6] That the Constituent Assembly had not been elected on the basis of an adult franchise and chose an easy amendment procedure precisely because it questioned its own democratic legitimacy illustrates that those opposing implied limitations of amendment powers had equally good arguments — it is not a binary question of right or wrong, but rather a positioning within the circularity based on the context.

[7] The German Constitutional Court Judge, Böckenförde, thus uses the term Grenzbegriff.

It is also likely that Nehru and other politicians followed Irish developments carefully — but whether they picked up on Dicey's constitutional theory flip-flopping is unknown. The original doctrine of parliamentary sovereignty has been discussed in Chapter One and is summed up by Dicey as follows:

> Neither the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law. Each embodies the will of the sovereign legislative power; each can be legally altered or repealed by Parliament; neither tests the validity of the other. Should the Dentists Act, 1878, unfortunately contradict the terms of the Act of Union, the Act of Union would be pro tanto repealed ... The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. (A.V. Dicey, 1885)

This radical statement collides with Dicey's writing in relation to Irish home rule:

> The statesmen of 1707, though giving full sovereign power to the Parliament of Great Britain, clearly believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws ... [T]he enactment of laws which are described as unchangeable, immutable, or the like, is not necessarily futile. The declaration contained in the Act for Securing the Protestant religion and Presbyterian Church government within the Kingdom of Scotland, which is embodied in the Act of Union ... is not unmeaning (A.V. Dicey and R.S. Rait, 1920).

Dicey reaches new heights when he calls for armed rebellion and stipulates that the unelected House of Lords represents the true will of the nation. As the Ireland Act 1914 was passed — after four consecutive elections had produced a majority in favour of Irish home rule — by the House of Commons (but without the Lords' consent), Dicey

commented: ' … acts of oppression on the part of a democracy, no less than of a king, which justify resistance to the law, or, in other words, rebellion' (quoted in McLean and McMillan 2007, 438).

Not much follows from all these paradoxes and contradictions. In a nutshell, this thesis — and Chapter Four in particular — does not advance the argument that such normative and theoretical constitutional debates are irrelevant. They shape and inspire the discourses that frame institutional decision making and influence the preferences of legal and political actors; we merely postulate that in the realm of constitutional practice, the normative and the theoretical are always at best epiphenomenal. The purpose of Chapter Four is not to engage with the paradox of constituent and constituted power, adding yet another layer to a debate that is structured to be circular. One scholar, who would not have been surprised by the gap between constitutional theory and reality, and the fact that so many great constitutional theorists have seen their theories melt away when turned to practice, is J.A.G. Griffith, who taught that a constitution 'lives on, changing from day to day, for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened, that would be constitutional also' (Griffith 1979, 19).

## [4.2] A Revionist Analysis of India's Basic Structure

The following section adopts a reductionist, nomothetic perspective on the Supreme Court and the separation of powers in India: reductionism is a necessary and potent tool for constructing the game argument and to bring the strategic approach into play prominently and in opposition to the existing basic structure debate, which is heavily normative.[8] The judicial decision can trigger either compliance, i.e. judges win, or backlash (overriding decisions or retaliation aiming at the institutional independence of the court) by the other branches, i.e. judges lose. That is, the image of a separation of powers game is only a basic aspect of constitutional design. But it helps us straight away to imagine how institutional structures can matter for judicial decision-making and how the logic of institutionalism encourages us to think about the Indian Supreme Court not as an autonomous legal but as a rational, strategic decision-maker, seeking to maximise preferences, on the one hand, and to avoid sanctions, on the other. Irrespective of the specific ideological orientation of Indian judges at various points in time, the separation of powers game allows us to understand judges as strategic players that navigate a policy space just as other Indian political actors do.

[8] The strategic approach in Chapter Five is similarly reductionist, as it only looks at the interplay between the court, the legislature and the executive, although it begins to introduce strategic alliances outside the realm of Montesquieu and the separation of powers, looking at divided, fragmented sovereignty and thus alliances between the court and media elites, cause lawyers, bar associations and litigation organisations. Normative constitutional thought can play an important role, not in the sense of a right or wrong binary code and a map for finding 'constitutional truth', but indirectly by shaping political ideologies and influencing the specific preferences of specific constitutional actors.

Figures 4.1 and 4.2 demonstrate the relationship between the players: the Supreme Court strikes down laws believed to be unconstitutional; clearly, until the 1980s at least, judges rarely had the last word in the matter (see Chapter Five). Instead, the legislature and the executive often chose to override the Supreme Court, even if it meant passing a constitutional amendment (other forms of retaliation could be judicial transfers, budget cuts or simply ignoring judgements at times; ordinary legislative statutes can also modify the terrain of constitutional decision-making through modifying procedures and jurisdiction). Consequently, figures 4.1 and 4.2 also illustrate the capacity of the other branches to amend the Constitution and to correct a judicial decision found to be sub-optimal. The interpretative process is thus shaped through these various strategic mechanisms of interaction between political actors. The Indian Supreme Court, then, participates in political dialogues with other forces, dialogues that create the understanding of what the Constitution says over time. Hence, in order to understand the emergence of the basic structure doctrine, we have to trace the interactions between the court and other actors in shaping the interpretation of laws and the Constitution. The exercise of judicial power — whether or not it is to strike down a constitutional amendment — is directly affected by the preferences and by the power of other branches. As figures 4.1 and 4.2 indicate, we can assume that Supreme Court judges may wish to decide cases in certain ways, maybe sincerely in line with their own policy preferences or their understanding of what the law says, but judges can stop themselves from doing so by their awareness of the preferences of other branches. Judicialisation theory, therefore, is important not because courts have some mystical ability to understand the intentions of

**FIGURE 4.1 Timeline: Law vs. Politics in India (1950-1973)**

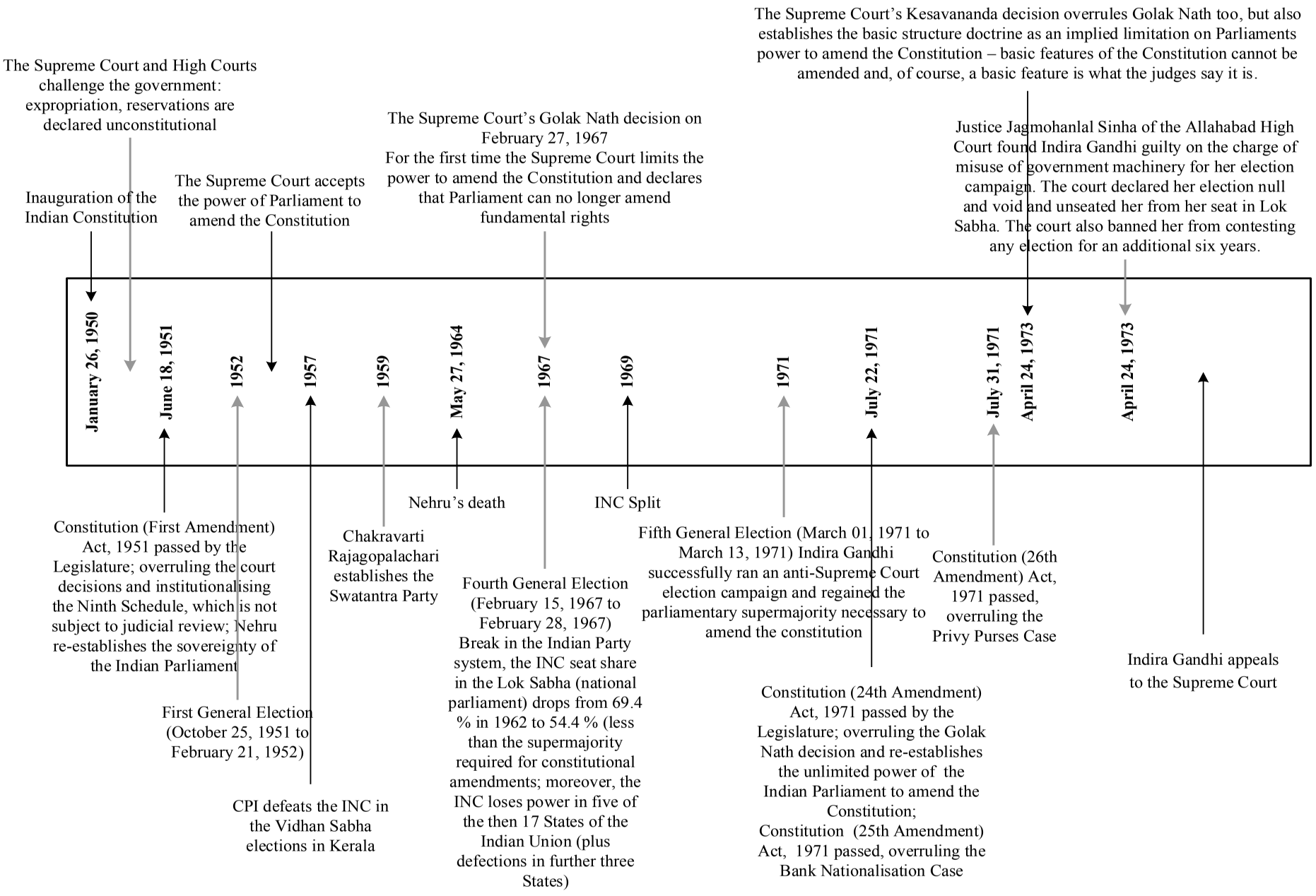
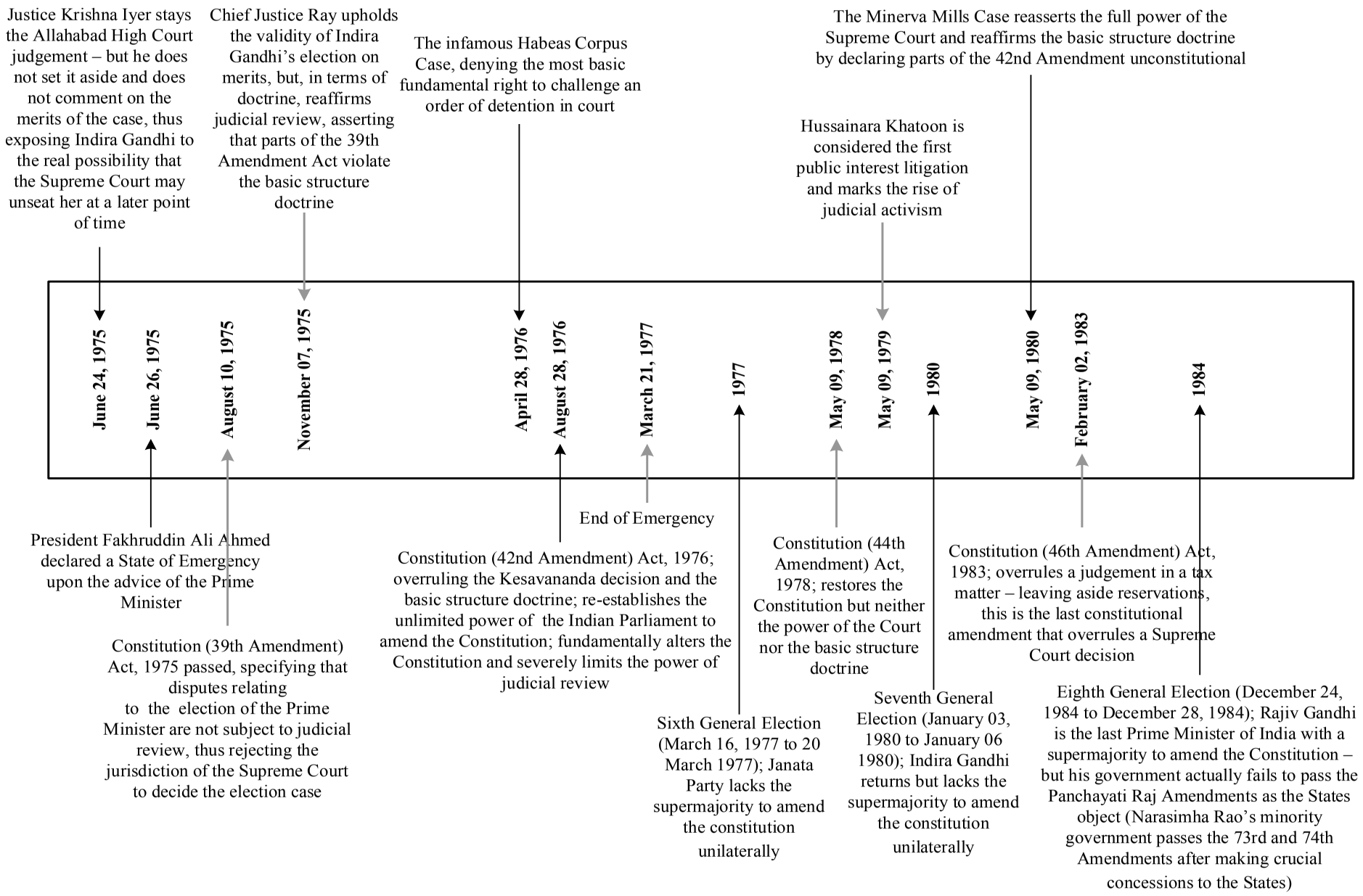


**FIGURE 4.2 Timeline: Law vs. Politics in India (1973-1984)**



the political founders, but because it enables us to see more precisely what the constitutional boundaries of a system are. The basic structure is revealed, not by the pronouncements of a special class of wise men, but through continuous interaction among branches of government. Judges make laws as a process; they do not discover it. In terms of legal realism, the Indian Supreme Court has never been constrained by interpretative rules of 'exegesis' — but the judges are constrained by other political actors. The timelines underline that there is a risk of false assumptions, missteps and errors: if judges challenge powerful political actors at the wrong point in time, they may provoke a counterattack that can undermine the judicialisation process. Strategic judicial thinking is thus key to the ongoing process of interpretation, as the constitution is continually being developed and, more or less, subtly adjusted to new political conditions. Judicialisation is deepened whenever the Supreme Court does not have to fear a counterattack from either the executive or the legislative — for instance, because other branches are too weak or because of influence and the political preferences of other actors have already become judicialised and aligned with the Supreme Court's preferences.

Chapter Four has a special place in this thesis, as the Raj Narain case, the first in a series of case studies on the question of 'what do judges maximise?', does not raise any complex problems in a short-term sequence bounded by the sheer struggle for institutional survival — we do not have to distinguish various time phases with different policy preferences, or change judges with different preferences; rather, our assumption is confined to the most basic judicial self-interest in the institutional integrity of the

court.[9] The judges must have been aware that their predecessors overreached themselves twice — in 1950 and in 1967 — and then backtracked and chose not to challenge the sitting government in the 1973 Kesavananda decision and during the emergency. The basic structure is, first, a retreat, and we would be wrong to conceptualise winning as a question of judicial assertion. To understand the political origins of the basic structure doctrine, the chapter remained attentive to the *longue durée,* as characterised by Ferdinand Braudel.

The case study presented in Chapter Four focuses on a single game, a short sequence of events in a short period of time, and only one key aspect of judicial strategy. Chapter Five looks at recurring sequences of separation of powers games over longer periods of time, and then the thematic case studies of Chapters Five to Eight explore further the strategic dimensions of judicial decision-making.[10] Needless to say, the Raj Narain case discussed in this section is peculiar due to its authoritarian context — in other words, the checks and balances functioned without elections, thus putting the judiciary on a weak footing. The emergency was at its root, a struggle between the desire for political supremacy, on the one hand, and a sacrosanct judiciary, on the other. As Austin puts it: 'But the short-run need was clear to the Prime Minister and her

[9] The most plausible assumption as a first step is to illustrate the ways that Indian judges negotiate the law politics tension differently at different points of time (This tension is about the ideal typical images of what judging is, within the judges' heads — even if a judge preferred 'purely' legal decision making, they may decide that political considerations must come first in some cases.).

[10] There are many strategic dimensions that will not be explored in this thesis: SC judges are acting strategically all the time, when sitting on a bench, convincing colleagues and building majorities. Other elements of strategy could be the role of the Chief Justice, assigning cases and exercising docket control within the PIL cell. In the case of India, which has low judiciary salaries, a very low compulsory retirement age and many government perks that disappear after retirement, the question of what judges do after leaving the court seems important too, given that almost none of the judges stop work, but continue to serve in embassies, government institutions and commissions, and very often in arbitration proceedings.

associates: to protect her prime ministry and her Emergency proclamation from judicial challenge.' Most authors conceptualise this struggle in terms of normative political philosophy (*pouvoir constituant* vs. *pouvoir constitués*) and view the basic structure doctrine as a question of interpretative logic. For legal realists, it is a question of strategy and institutional struggle.

The story begins to unfold in the Allahabad High Court. The facts of the case were, as Justice Krishna Iyer later puts it, typical of a humdrum case. In 1971, there was an election contest between Raj Narain and Indira Gandhi in Rae Bareli, which Indira Gandhi won. Raj Narain was convinced that she had done so through corrupt practices. He therefore filed a case calling for the election result to be invalidated and he won his case. On June 12, 1975, Justice Jagmohanlal Sinha of the Allahabad High Court ruled agains the prime minister, finding Indira Gandhi guilty (misuse of government machinery for her election campaign). While allowing for a stay, the order of the High Court left no doubt that the prime minister's election was null and void, that she had to be give up her seat in Lok Sabha, and would be banned from electoral contests for the next six years.

Indira Gandhi appealed and Justice Krishna Iyer announced the judgement on the case during the vacation of the Court — on June 24, 2975 — and granted a conditional stay of the order of the Allahabad High Court as well as allowing Indira Gandhi to continue in office as prime minister. But he did impose restrictions on her as a member of the Lok Sabha: for the time she could attend Parliament, she could not vote or draw a salary as a member. However, the possibility of defeat at the hands of Supreme Court

judges was too much for Indira Gandhi. Two days later, on June 26, 1975, she opted for emergency rule.

The story continues with her efforts to formally limit the powers of the Supreme Court and to exclude election disputes from its jurisdiction. In the statement of objects and reasons of the Constitution (39th Amendment) Act, 1975, H.R. Gokhale elaborated on behalf of Indira Gandhi:

> Article 71 of the Constitution provides that disputes arising out of the election of the President or Vice-President shall be decided by the Supreme Court. The same article provides that matters relating to their election shall be regulated by a parliamentary law. So far as the Prime Minister and the Speaker are concerned, matters relating to their election are regulated by the provisions of the Representation of the People Act, 1951. Under this Act the High Court has jurisdiction to try an election petition presented against either of them.
>
> 2. The President, the Vice-President, the Prime Minister and the Speaker are holders of high offices. The President is not answerable to a court of law for anything done, while in office, in the exercise of his powers. A fortiori matters relating to his election should not be brought before a court of law but should be entrusted to a forum other than a court. The same reasoning applies equally to the incumbents of the offices of Vice-President, Prime Minister and Speaker. It is accordingly proposed to provide that disputes relating to the election of the President and Vice-President shall be determined by a forum as may be determined by a parliamentary law. Similar provision is proposed to be made in the case of the election to either House of Parliament or, as the case may be, to the House of the People of a person holding the office of Prime Minister or the Speaker. It is further proposed to render pending proceedings in respect of such election under the existing law null and void. The Bill also provides that the parliamentary law creating a new forum for trial of election matters relating to the incumbents of the high offices abovementioned shall not be called in question in any court.

With the help of the 39th Amendment Act, Indira Gandhi absolved herself completely, and it is interesting to note her efforts to use every legislative device to ensure that the judges would not come after her through a judicial interpretative backdoor.[11]

> 4. Insertion of new article 329A.-In Part XV of the Constitution, after article 329, the following article shall be inserted, namely:-
>
> 329A. Special provision as to elections to Parliament in the case of Prime Minister and Speaker.-(1) Subject to the provisions of Chapter II of Part V [except sub-clause (e) of clause (1) of article 102], no election-
>
> (a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;
>
> (b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election, shall be called in question, except before such authority [not being any such authority as is referred to in clause (b) of article 329] or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.
>
> (2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.
>
> (3) Where any person is appointed as Prime Minister or, as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition

[11] Given the arguments advanced in this thesis, legislative skill will never save the lawgiver as judicial review is a function of preferences and the distribution of political power.

> referred to in clause (b) of article 329 in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in clause (1).
>
> (4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election to any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.
>
> (5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).
>
> (6) The provisions of this article shall have effect notwithstanding anything contained in this Constitution.

Against this background, the election dispute between Indira Gandhi and Raj Narain remained before the judges of the Supreme Court of India.[12] Where Justice Krishna Iyer failed to resolve the dispute in a strategic fashion, Chief Justice Ray

[12] The case was decided on November 7, 1975 and is reported as *Indira Nehru Gandhi vs. Raj Narain* 1975 (Supp) SCC 1.

offered a lesson in judicial skills. So far, there has been no attempt to apply traditional game-theory approaches in the study of this case.

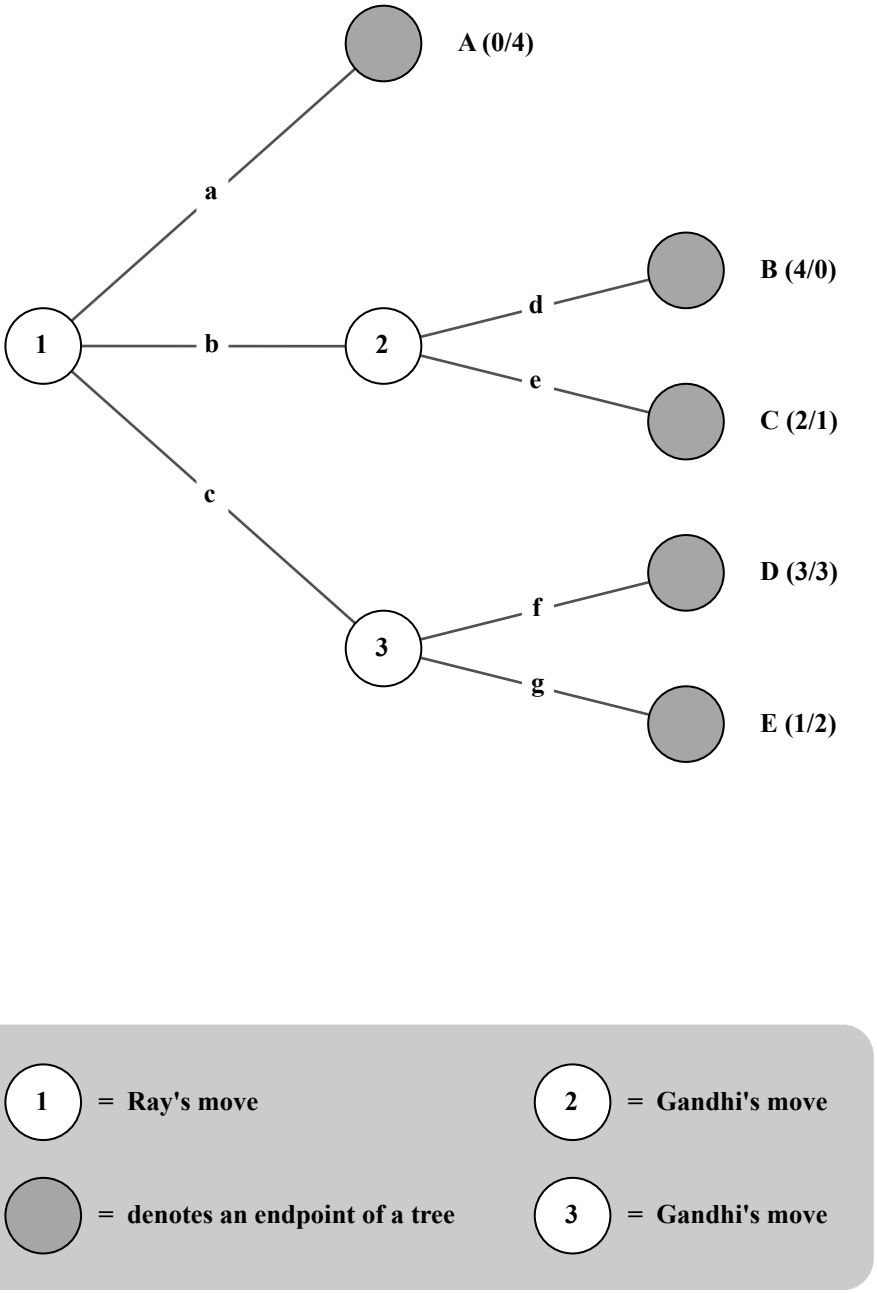
It is reasonable to begin the analysis by reconstructing the election case as a two-person, non-zero-sum game, with Indira Gandhi and Chief Justice Ray as players.[13] To begin with, it is useful to first construct a decision tree that encapsulates the alternatives available to the players at each stage of the conflict (see figure 4.3), with the corresponding possible outcomes (see table 4.1).

[13] This is a simplified model as the decision was actually taken by a five judge bench — the decision-making process of judges as a group is a separate game that requires no further attention here.

**Table 4.1: Judicial Review Strategies, Indira Gandhi v. Raj Narain**

| Outcome | Sequence of Choices | Description | Indira Gandhi's Value | Chief Justice Ray's Value |
|---|---|---|---|---|
| *A* | *a* | Election upheld,<br>Prime Minister's complies,<br>Prime Minister in power,<br>Legitimacy bonus for Prime Minister,<br>39th Amendment upheld,<br>Jurisdiction and judicial power reduced,<br>Basic structure weakened. | **4** | **0** |
| *B* | *b-d* | Election struck down,<br>Prime Minister's complies,<br>Prime Minister not in power,<br>No legitimacy bonus for Prime Minister,<br>39th Amendment struck down,<br>Jurisdiction and judicial power strengthened,<br>Basic structure strengthened. | **0** | **4** |
| *C* | *b-e* | Election formally struck down,<br>Prime Minister does not comply,<br>Prime Minister in power,<br>No legitimacy bonus for Prime Minister,<br>39th Amendment formally struck down,<br>Jurisdiction and judicial power formally strengthened,<br>Basic structure formally strengthened. | **1** | **2** |
| *D* | *c-f* | Election upheld,<br>Prime Minister's complies,<br>Prime Minister in power,<br>Legitimacy bonus for Prime Minister,<br>39th Amendment struck down,<br>Jurisdiction and judicial power strengthened,<br>Basic structure strengthened. | **3** | **3** |
| *E* | *c-g* | Election upheld,<br>Prime Minister does not comply,<br>Prime Minister in power,<br>Legitimacy bonus for Prime Minister,<br>39th Amendment formally struck down,<br>Jurisdiction and judicial power formally strengthened,<br>Basic structure formally strengthened. | **2** | **1** |

**FIGURE 4.3 Decision Tree for Indira Gandhi v. Raj Narain**




*Notes:* Please read in conjunction with Table 4.1; lowercase letters indicate choices and uppercase letters denote outcomes, both described in table and text.

As the case is pending before the court, the initial move is clearly Chief Justice Ray's. If he simply accepts the 39th Amendment, the lawsuit will be dismissed, and the game is over; the choice a of the judge leads to outcome A and no countermoves are necessary. If Chief Justice Ray opts for b and strikes down the election as well as the 39th Amendment, there will be no reason for the prime minister to comply (unless she values legitimacy over political power). If the chief justice decides in favour of the prime minister's election on the basis of the merits of the case, but at the same time reaffirms the basic structure doctrine and strikes down the 39th Amendment, there will be good reasons for the prime minister to comply and opt for it.[14]

While many commentators have emphasised the significance of the personal political views of the judges appointed by Indira Gandhi, in particular Chief Justice Ray, Chapter Four illustrates that this is not sufficient to explain the Supreme Court's response to India's authoritarian interlude. On the contrary, the key argument in this chapter is that the behaviour of Indian judges under emergency rule is attributable largely to institutional factors. This analysis emphasises that textbook accounts of the basic structure have overstated the legal dimensions of the cases and judicial activism in 'contriving' the decision. Conversely, politics and law makes strange bedfellows. To the extent that the basic structure was a 'political' decision, it seems to work as a tacit political compromise between two institutions that have most often been considered mortal enemies in the early parts of the drama of Indian constitutional history. While

[14] Because of the difficulty of arriving at estimates of cardinal utility with respect to the outcomes for the two players, we can only attempt to judge the relative merits of the outcomes for each of them. Since there are five such outcomes, I assign the value four to the most preferred, three to the next most preferred, and so on down to zero for the least preferred. The analysis assumes throughout that institutional factors (judicial power vis-a-vis executive and legislative) are paramount for both players.

this game fails to produces clear winners and losers in the short term, section 4.4 illustrates the tremendous impact of the basic structure in the long run: what is more, the strategic perspective of actors is a useful building block for the key hypothesis that political diffusion creates judicial power, and decisions change as judges no longer have to fear constitutional amendments. This will be explored in the next section with reference to judicial assertion in the realm of judicial appointments and transfers.

## [4.3] Separation-of-Powers Games and the Dynamics of Judicial Supremacy after the Emergency

The emergency period provides a window on the harshest forms of executive retaliation against the Supreme Court, such as jurisdiction stripping and the threat by the Swaran Singh Committee of further loss of jurisdiction:

> The committee has further recommended that a new directive be included in Article 39 to provide that the state shall direct its policy also to secure population control, through family planning or other suitable measures. It has proposed that parliament may, by law, provide for the imposition of such penalty or punishment as may be considered appropriate for any noncompliance with, or refusal to, observe any of these duties. To safeguard the fundamental duties from being challenged in any court of law the committee has suggested the inclusion of an explicit provision that 'no law imposing such penalty shall be called in question in any court on the ground of

> infringement of any of the fundamental rights or on the ground of repugnancy to any other provisions of the constitution'.[15]

Similarly, without checks and balances, the emergency period took the punitive transfer of judges and the politicisation of the appointment of judges to a new level. In 1976, shortly after emergency was declared, there was a mass transfer of 16 high court judges who had displeased the government, and this was acceded to by the Chief Justice A.N. Ray in direct contravention of the convention until then of the consent of the judge being transferred being required as well as the consent of the Supreme Court chief justice (Dua 1983, 467; Noorani 1980). When Chief Justice Ray retired, the government again ignored the seniority convention, superseding Justice Hans Raj Khanna, who had retained his nerve during the emergency and had been the sole dissenting voice in some of the notorious cases (such as the habeas corpus decision) and installed Justice Mirza Hameedullah Beg as the chief justice of the Supreme Court.

We continue to observe executive interference in judicial appointments and transfers even after the emergency and despite the fact that the Janata government not only repealed the 42nd Amendment and reintroduced the seniority principle in the appointment of judges; the discussion on basic structure and cancelling the mass transfer of the high court judges a year earlier helped distance the new government from the previous one, although not all judges were reinstated or transfers cancelled (Nariman 2012: 185-188). The norm of appointing the senior-most judge to the chair of chief justice had become convention when Justice Kania succeeded Justice Spens as the

[15] 'Duty is right, rights are left: Swaran Singh committee recommends new chapter on fundamental duties in the Constitution', *India Today*, July 15, 1976; available at: <indiatoday.intoday.in/story/swaran-singh-committee-recommends-new-chapter-on-fundamental-duties-in-the-constitution/1/436571.html>; last accessed October 10, 2015).

chief justice of the Federal court (as mentioned in Chapter Two). The Congress government went against this convention twice and threatened to upset the independence of the judiciary by packing it with sympathetic judges as well as appointing judges without the agreement of the chief justice. When Nehru had tried to appoint a judge who was not the most senior, the pressure exerted by the other judges prevented this from happening. But during the Indira years, the violence and hooliganism that marked politics cowed the judiciary. Justice Gajendragadkar was appointed as chief justice despite Justice Sinha, a judge senior to him, being next in line, but this was because of Justice Sinha's illness and it occurred with his acquiescence. The more balanced approach of the Janata government had given the judges a taste of how public approbation for right action could be. Though some of the judges tried to act in the area of social rights, they were careful not to step on the government's political or economic toes until the 1990s and continued to be circumspect when it came to defence or territorial issues. Justice Y.V. Chandrachud was appointed chief justice in 1978 as the Janata government sought to upturn convention. This was despite him not being popular given his compliance with the judgment in the habeas corpus case. Yet the support of the new government seemed to work wonders for the Supreme Court because it started infusing its orders with a new zest for judicial review. In the 1977 case of Maneka Gandhi v. Union of India (1978) 1 SCC 248, it started what would turn out to be a long and path-breaking journey into the examination of Article 21. Justice Krishna Iyer found good use for his eloquence as did Justice Bhagwati, as they set about improving their image as well as that of the Supreme Court, which had been tarnished during and immediately after the emergency.

But the court could not help but be drawn into the political struggle that was going on outside its doors. It decided to uphold the Janata government's decision to dismiss nine Congress state governments (State of Rajasthan & Ors v. Union of India (1978) SCR 1). This was a move that was reciprocated when the central Congress government dismissed the Janata state governments using the same judgment as that applied to Indira Gandhi two years later) and in the special reference case (In re Special Courts Bill (1979) 1 SCC 38), where it upheld the constitutionality of special courts and suggested ways to make these courts constitutional (Dua 1983: 470).

While the Court had flexed its muscles in the Janata era, this quickly changed when Indira Gandhi came back to power in 1980. The case against Sanjay Gandhi was also dropped even though it had been found that he had tampered with the witnesses (he was accused of burning the negatives of a film supposedly lampooning the Congress, Sanjay Gandhi and his mother, although the producer denied this). Even though he was convicted and sentenced, the decision was overturned. All 35 criminal cases against Sanjay Gandhi were thereafter withdrawn or settled (Dua1983:473).

The judiciary was mixed in its reactions to the powerful Gandhi family and the Congress party and so for a while, certain judges were towed the party line. By his own admission, after losing his nerve, Chief Justice Chandrachud, now post emergency, stood up against them. As a chief justice appointed by the Janata party, he was not a favourite, but the decisions in the Minerva Mills case (AIR 1980 SC 1789) and others antagonised the Congress government further. In an article published in 1981, he stated his position that the head of the judiciary does not interfere with the Cabinet and so the

head of the executive should not interfere with the functioning of the judiciary (Dua 1983: 474).

Matters were coming to a head, and the government refused to extend the terms of O.N. Vohra, who had passed the order of imprisonment for Sanjay Gandhi, and S.N. Kumar, who was labelled a Janata candidate and was recommended by Chief Justice Chandrachud. This was in addition to hints made of large scale transfers of judges appointed during the Janata government (this was evidenced by a letter written by the then law ministers to governors of Congress-ruled states) and the transfer to the Kerala high court of the chief justice of the Madras high court, M.M. Ismail, and the transfer of Chief Justice K.B.N. Singh of the Patna High Court to the Madras High Court. A case was brought before the Supreme Court with regard to Justice Kumar's removal and these other issues.

The predecessor to this case was the 1978 case of Union of India v. Shanklal Chand Himmatlal Sheth 1978 (1) SCR 423, where the transfer of a judge without his consent was held to be against the spirit of the Constitution. But this was a case brought after the Congress had lost power and did not result in the vicious battle that was to follow in the next case.

The case recorded as S.P. Gupta v, Union of India (1982) 2 SCR 365 was bombastic, in that it basically allowed the government to do as it wished. The three to two judge majority decision held that the chief justice's consent for transfer was not required; he only needed to be consulted. The transfer from one high court to another was in order and there could be a transfer of judges. Although Justice Bhagwati later claimed to be very social minded at this time, he seemed to take pleasure in

embarrassing the chief justice, as did Justice Krishna Iyer, who made his personal battles public (Dua 1983: 477). This decision was very public evidence of this divided and weak judiciary. An article in *India Today* after this judgment categorises the position of the judges as left, right and centre, and in the context of the Minerva Mills (AIR 1980 SC 1789) case, which had come before the court before the judges transfer case, suggests there were deep rifts between the judges — including public disagreements between Justice Tulzapurkar and Justice Krishna Iyer and between Justice Bhagwati and Chief Justice Chandrachud. It also records the combative nature of government-judiciary relations with regard to the primacy of fundamental rights or directive principles (the government preferring the latter) and ends by stating:

> Left, right or centre, the judges who crown the pyramid of the Indian judicial system will have to step very warily before pronouncing judgement on an issue that has extremely important implications for Indians and Indian democracy.[16]

And yet the government was not satisfied. As Dua succinctly put it:

> Apart from the issue of parliamentary supremacy in constitutional matters and despite the historic suicide committed by the Supreme Court in the Judges Transfer case, the ruling party is not likely to give up its tirade against the judiciary until it toes the government line. (Dua 1983: 478)

The second judges case came 12 years after this, and by sheer dint of being vocal about social issues and working with the idea of social action and public interest litigation, judges like Justice Bhagwati did much to restore their reputation as well as the

[16] Supreme Court: A Bench Divided: 1981, <indiatoday.intoday.in/story/supreme-court-a-considerably-controversial-public-institution/1/401490.html>; last accessed 15 October 2015.

reputation of the Court. By this time, both Indira Gandhi and Sanjay Gandhi were long gone. The judges had changed, with the Supreme Court seeing nine chief justices during this period.

The Congress party that came to power in late 1984 had 78.5% of the seats in the Parliament. It was the largest majority that the party or any other had enjoyed in Parliament until then. Shortly after, allegations of appointments of sympathetic judges were rife. The chief justice publicly declared that the consultation and appointment of judges was not a transparent process. The supreme irony was that the judge who took office as chief justice in 1985 was Justice P.N. Bhagwati, and when his list of recommendations for the appointment of judges went to the government, it used his own judgment in the first judges cases to decline to appoint many of the names on this list. The lack of clarity and the public squabbling between the judiciary and the executive created the conditions for another case to come before the courts. The fundamental struggle for the court was in asserting its validity not to mind its supremacy at this point.

Rajiv Gandhi, who was prime minister, was accused of 'court packing'. An article of the time records the government flouting its own guidelines and continuing the practice of systematically trying to weaken the judiciary:

> the Government was violating its own guidelines by permitting junior judges to act as chief justices in at least 10 high courts for over a year in 1981-82 and again in 1984-85. Nor did the policy change after Rajiv Gandhi took over as prime minister. … The three appointments of chief justices since then — to Allahabad, Madhya Pradesh and Jammu & Kashmir — follow the same pattern in violating the

> guidelines.
>
> ...
>
> The Supreme Court evidently concurs with the widespread belief that all this has been done in order to pack the judiciary with pro-Congress (I) judges. During the hearing, Sen observed that after the retirement of the chief justice in Madhya Pradesh, the next judge in seniority was 'kept as the acting chief justice so that he clears all the 10 names recommended for appointment' to the court by the Government.
>
> The message was clear: keep a judge in an acting position so that he concurs with the Government's recommendations on appointments to the bench in the hope of getting confirmed himself.
>
> There is circumstantial evidence to back this: in the last 15 months, of the 53 high court judges appointed, no fewer than 32 were made by acting high court chief justices, and 25 of these were in two courts, Allahabad and Madhya Pradesh.[17]

The large majority in Parliament and the Congress governments in most states rendered it almost moot that the judiciary could wag the dog. The executive retained total control of appointments and transfers:

> The views of the bench headed by Tulzapurkar, who ranks next to Bhagwati in seniority, indicate that the judiciary is likely to remain divided on this issue. But since the Government has already made it clear in Parliament that all high courts in the country will be headed by chief justices from outside benches, the court is unlikely to be able to do much.
>
> Central Government spokesmen deny the charge that it is undermining the judiciary. Says Law Minister Asoke Sen: 'A loyal judge is not worth his salt. We cannot let the judiciary degenerate as that will undermine the rule of law.'
>
> But judicial circles believe that Sen has not been able to carry the rest of the government with him. Sen's junior minister Hans Raj Bhardwaj has played a key

[17] Flouted Guidelines, http://indiatoday.intoday.in/story/supreme-court-accuses-government-of-packing-judiciary-with-sycophant-judges/1/354213.html, last accessed 15 October, 2015.

> role in many appointments, and he has been touring state capitals to discuss potential candidates for elevation to the high courts.
>
> With divisions in the Supreme Court and such differences within the Government, the course of events can hardly be smooth. But eventually it will be the nature of the appointments made which will determine whether the judiciary will flounder or flourish.[18]

Even though the judiciary was slowly garnering some goodwill for itself, the problems of appointments, the loyalty of judges, corruption charges and even the attempted impeachment of one of the sitting judges of the Supreme Court (V. Ramaswamy) generated a lot of controversy and bad press for the judiciary, with connections being drawn to its lack of collective spine during the emergency.

The air of despair in the country was also felt with regard to the empty seats in the courts as judges appointments were stalled. The V.P. Singh government had lasted a year and had kept the appointment of 67 judges pending (Chandrachud 2014:117). This led to the filing of a PIL in 1990 by the Supreme Court Advocates on Record Association (advocates who had taken an exam to be registered to enable them to file pleadings in the Supreme Court). The three-judge bench that heard this case referred it to a larger bench as it was felt that the issues it raised required reconsideration of the earlier first judges case.(Subhash Sharma v. Union of India 1990 SCR Suppl (2) 433). The Union raised a preliminary objection as to the justiciability of the issue in light of the first judges case, but this was later withdrawn by the Attorney General appointed by the next government.

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[18]Flouted Guidelines, <indiatoday.intoday.in/story/supreme-court-accuses-government-of-packing-judiciary-with-sycophant-judges/1/354213.html>; last accessed October 15, 2015).

In his judgment, Justice Rangnath Misra, writing for the three judge bench, observed:

> We are living in an age when all traditional institutions are under scrutiny, suspicion and challenges of reassessment. If the current mood of disillusionment infects the core of the law and its institutions, we may have lost our last opportunity for the preservation of freedom under the Law. It is, therefore, a matter for immediate attention of all concerned — and of Government in particular — that the need is recognised and the Administration of Justice is made a plain subject and given appropriate attention. (par. 16)
>
> We are alive to the position that in S.P. Gupta's case this aspect has been held to be not justiciable. We do not agree with the opinion expressed by the majority on this aspect and are of the opinion that that aspect requires reconsideration. For the present we suggest to Government that the matter should be reviewed from time to time and steps should be taken for determining the sanctioned strength in a pragmatic way on the basis of the existing need. If there be no correlation between the need and the sanctioned strength and the provision of judge-manpower is totally inadequate, the necessary consequence has to be backlog and sluggish enforcement of the Rule of Law.
>
> …...
>
> We may, at this stage, advert to the Constitution (Sixty-Seventh Amendment) Bill, 1990, which is pending before the Parliament. In the statement of objects and reasons of this Bill, it has been stated: 'The Government of India have in the recent past announced their intention to set up a high level judicial commission, to be called the National Judicial Commission for the appointment of Judges of the Supreme Court and of the High Courts and the transfer of Judges of the High Courts so as to obviate the criticisms of arbitrariness on the part of the Executive in such appointments and transfers and also to make such appointments without any delay. The Law Commission of India in their 121st Report also emphasised the need for a change in the system.'

> This part of the statement obviously accepts the position that Government are satisfied that there is basis for criticism of the arbitrariness on the part of the Executive and the modality adopted following S.P. Gupta's ratio has led to delay in the making of appointments which the Constitutional Amendment seeks to eliminate. (par. 26, 27)

The order is unequivocal when it states that the primacy of the chief justice and the consultative process were not properly considered in the first judge's case and that the weakening of the judicial review was a weakening of the constitutional importance of such review.

During this time, two governments had fallen (the Chandrashekhar government fell after four months and, before that, the V.P. Singh government had collapsed after almost a year). Fresh elections were declared, but during the campaigning the leader of the Congress party, Rajiv Gandhi, was assassinated. The Congress came back to power again on a wave of sympathy, this time for Indira Gandhi's son, who had become prime minister under similar circumstances.

The nine-judge bench heard the second judges case on 6 October 1993. The number of judges on the bench was increasing with every case: the first case of Sankal Chand Sheth had a five judge-bench, S.P. Gupta had a seven-judge bench, and this case had a nine-judge bench. The judiciary was fighting for its life, and lack of forces was not going to keep it from victory. There was no doubt that the larger bench could overrule and be free from the order of a smaller bench. The bench was relatively strong also: it was relatively free because the government at the centre had its own problems of a crumbling economy requiring large-scale reforms, lack of confidence and a series of no-confidence motions in Parliament that it had to overcome. The majority of judges

were the senior-most judges of the court and represented different regions of the country (Chandrachud 2014:121). The case was recorded as Supreme Court Advocates on Records Association v. Union of India AIR 1994 SC 268. Of the five opinions recorded, two were dissenting ones.

The judges had to answer two main questions:

> the primacy of the opinion of the Chief Justice of India in regard to the appointments and transfer of the Judges to the Supreme Court and the High Court, and in regard to the transfers of High Court Judges/Chief Justices; and Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts. (par.415)

The court order, written by Chief Justice Verma, states:

> These questions have to be considered in the context of the independence of the judiciary, as a part of the basic structure of the Constitution, to secure the 'rule of law' essential for the preservation of the democratic system, the broad scheme of separation of powers adopted in the Constitution, together with the directive principle of 'separation of judiciary from executive' even at the lowest strata, provide some insight to the true meaning of the relevant provisions in the Constitution relating to the composition of the judiciary. The construction of those provisions must accord with these fundamental concepts in the constitutional scheme to preserve the vital and promote the growth essential for retaining the Constitution as a vibrant organism. (par. 421)

The order notes the flowery language and the controversial nature of Justice Bhagwati's order in the S.P. Gupta case despite the tame ending of that judgment, and it spelt out a new procedure for the appointment of judges The judges then held by a majority that the

opinion of the chief justice would be binding on the President for appointment of supreme court judges. There would be only two exceptions to this rule: the president could decide on an appointment if, in case of the appointment of high court judges, there was a disagreement between the chief justice of the supreme court and the high court and, second, if the next senior-most judge of the supreme court disagreed with the chief justice. There were certain other minor points in the case, but for our purposes, the fact was that this was the first time the judges had claimed primacy over the legislature and thus began the ascent of the Supreme Court.

The political situation in the country was not improving: there were two elections and four governments in this time. The judiciary was also making life difficult, having passed orders on the Representation of Peoples Act, 1951 and on corruption, in addition to a host of environmental cases, and was constantly requiring the legislative to improve its performance. There were efforts to curb this self-created monster, including efforts by the Congress party to move a bill to make judicial appointments political again, as well as to limit public interest litigation, but the ruling party did not have the requisite majority and the opposition found a new ally in the courts (Chandrachud 2014: 134-136) in making the ruling government's life miserable.

The court exploited its new role and grew from strength to strength in the accountability it demanded from the legislature and executive, even though it gave little in these areas of itself. It finally grew so uncontrolled that the only charge that could be levelled was the politicking of the judges themselves, and this led to the third judges case, which was again a nine-judge bench. This meant they could not overrule the earlier case but only interpret it, and the judgment was written by Justice Sam Piroj

Bharucha, who had been on the bench for the previous case. The case was brought as a reference from the President to the court in its advisory capacity.

The short order first states:

> We record at the outset the statements of the Attorney General that — (1) the Union of India is not seeking a review or re-consideration of the judgment in the second Judges case, and (2) that the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference. (par. 11)

The judge then goes on to discuss the second judges case and outlines the guidelines for the appointment of judges in this light:

> 1. The expression 'consultation with the Chief justice of India' in Articles 217(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of Indian does not constitute 'consultation' within the meaning of the said Articles.
>
> 2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has bot been made in consultation with the four senior-most puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.
>
> 3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior-most puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with two senior-most puisne Judges of the Supreme Court.

> 4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.
> 5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.
> 6. 'Strong cogent reasons' do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.
> 7. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.
> 8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.
> 9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India. (par. 44)

This goes beyond the usual patterns of judicial law making through interpretation, and enters the realm of explicit rule. From the point of view of the executive, and in particular the prime minister, the judgment constitutes a judicial coup d'état, abrogating established rights and amounting to a unilateral rewriting of constitutional conventions by the Supreme Court. The court itself expressed the significance of the decision in the following — almost theocratic — description:

> The foregoing considerable deliberation leads to an inexorable conclusion that the opinion of the Chief Justice of India in the process of constitutional consultation in the matter of selection and appointment of Judges to the Supreme Court and the High Courts as well as transfer of Judges from one High Court to another High Court is entitled to have the right of primacy. In sum, the above logical conclusion and our special sense dictate: Like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the CJI being the highest judicial authority, has a right of primacy, if not supremacy to be accorded, to his opinion on the affairs concerning the 'Temple of Justice'. It is a right step in the right direction and that step alone will ensure optimum benefits to the society.[19]

## [4.4] Heresthetics: When Losers Win, When Judges Change the Rules of the Game

Ginsburg's study of judicial review in Asia (2003) — focusing on constitutional courts in Korea, Mongolia and Taiwan — dedicates only a few paragraphs to the Indian Supreme Court, yet it still provides a suitable starting point for our concluding analysis for Chapter Four.

> In 1971, after the Twenty-fifth Amendment sought to preclude judicial review of property rights claims, the Supreme Court struck down parts of the amendment as conflicting with the constitution's 'basic structure'. Indira Gandhi's government attacked the court as an institution, announcing publicly that it intended to limit appointments to those sympathetic to it and bypassing the usual seniority norm

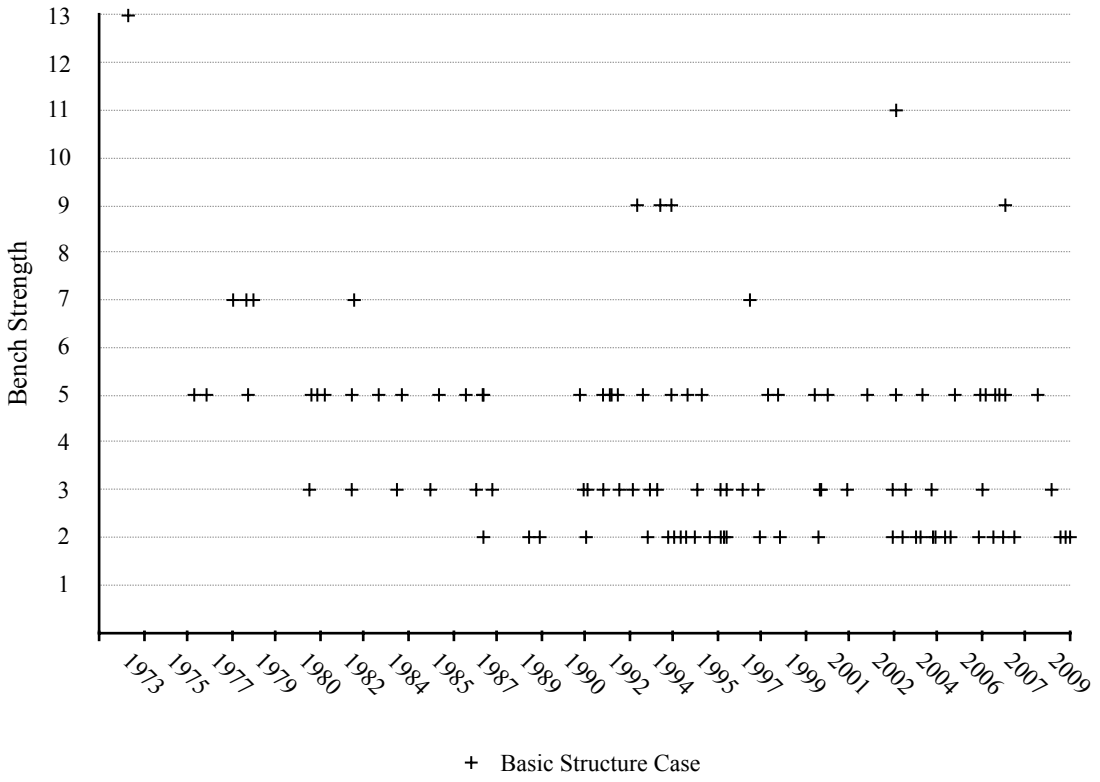
[19] Par. 197.

> concerning appointments to the chief justiceship. When Gandhi declared emergency rule in 1975, the Parliament passed a constitutional amendment preventing the court from scrutinising future constitutional amendments for conformity with the constitution. In the face of these attacks on jurisdiction and threats to judicial independence, the court largely submitted to politicians' desires. While this stance was criticised by many, it did mean that the court was able to maintain institutional integrity to fight another day. After emergency rule ended, the court became bolder and rejected the amendment that had purported to prevent review of constitutional amendments. (Ginsburg 2003: 97)

Despite the fact that this account of the facts and the law is a little misguided, Ginsburg's astute theoretical intuition still provides a sound rationale for our focus on political power within a separation-of-powers context, as is commonly found in positive political theory. Without making any specific claims about the nature of the strategic institutional concern shown by the Supreme Court, Ginsburg's succinct observation that the court lived to 'fight another day' immediately draws attention to the prospect of institutional retaliation as an obvious concern of judges. Strategy may not be the only reason why Indian judges have shown institutional deference during the emergency — but it suggests that it is a material factor. If we take into account the full complexity of executive-judiciary relationships during the emergency regime as well as the sophistication of the election case decision, we can also go beyond Ginsburg's characterisation of the Indian Supreme Court judges as a matter of fact; much more so, the Indian Supreme Court 'borrowed a leaf from Chief Justice John Marshall's book, edging principles forward while deciding for those most likely to oppose them in practice' (Helfer and Slaughter 1997, 314). The judges, contrary to Ginsburg's claim, were not allowed to delay their decisions but had to pass judgement in a number of

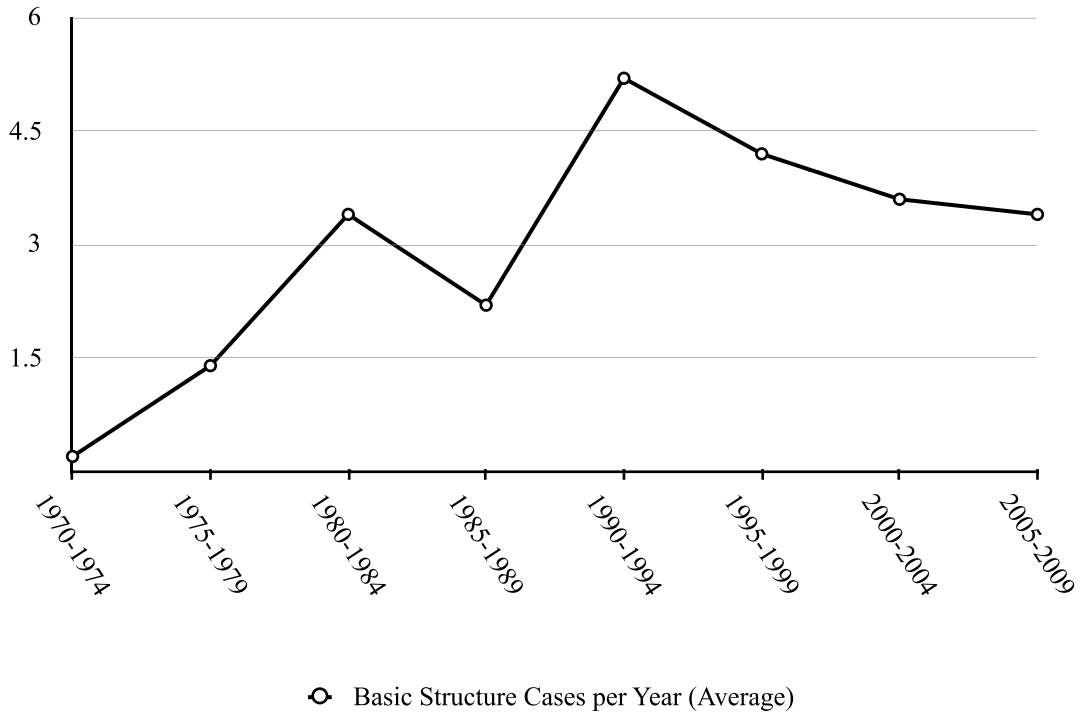
important cases, in particular the dispute relating to Indira Gandhi's election. Instead of a simple 'fight another day strategy', the Supreme Court immediately claimed the power of the basic structure doctrine, paradoxically combining it with judicial self-restraint in terms of the practical outcomes of the litigation against Indira Gandhi. In this way, the court avoided, in the short run, the fierce opposition to the judicial assertion that we saw from 1950 to 1977. In the long run, we see how the basic structure became part of the routine agenda of the Indian Supreme Court, both in terms of the numbers of cases — three to four per year (figure 4.2) — and in terms of the doctrine spreading across all bench sizes of the

**FIGURE 4.4 Distribution of Basic Structure Cases: Bench Strength and Frequency**




*Source:* Compiled by author from SCC; n = 40,618 (total number of all reported cases in SCC database); n = 118 (total number of reported basic structure cases in SCC database).

**FIGURE 4.5** **Basic Structure Cases: Average Number of Cases Reported per Year**




*Source:* Compiled by author from SCC; n = 40,618 (total number of all reported cases in SCC database); n = 118 (total number of reported basic structure cases in SCC database).

Supreme Court, thus losing its association with India's largest and unique bench, namely the 13 judges who decided the Kesavananda case (figure 4.3). After the emergency, looking at court-executive tensions in relation to appointments and transfer, we observe a court that displays a lot of strategic savvy and did not assert its basic structural power against any powerful opponents; but when the time came, and elections and politics kept reinforcing governmental instability in the 1990s, the court claimed (invented) total judicial control over appointments and transfers. Looking at the basic structure through the lens of game theory thus points towards the origins of the ability or institutional capacity of the Indian Supreme Court to impose its will on other actors to defend its institutional integrity, and then to enlarge its jurisdiction. The basic structure introduced new rules of the game by stealth, and for the losing party, a manoeuvre that we can best understand via Riker's work on heresthetics.

With the emergence of the 'chaos theorem' of voting at the end of the 1970s, social choice theory illustrated that majority rule equilibria virtually never appear and that the voting chaos ensures disequilibria or voting cycles. While equilibria of preferences might produce stable institutional rules, the institution itself remains in equilibrium in its own right.

> The losers [in a constitutional rule system] are likely to want to change the committees and jurisdictions in the hope of winning on another day. In the end, therefore, institutions are no more than rules and rules are themselves the product of social decisions. Consequently, the rules are also not in equilibrium. One can expect that losers on a series of decisions under a particular set of rules will attempt (often successfully) to change institutions and hence the kind of decisions under them. (Riker 1980: 445)

Riker offers an explanation in terms of the notion of heresthetics or 'the dynamic manipulation of the conditions of choice' (Riker 1984). His intuition that losers will attempt to change an institution is certainly plausible (Schofield 2004), and with the basic structure, we find a radically altered institutional environment, in which the Supreme Court empowers itself as a veto player in the constitutional amendment process, thus radically altering the power of the other branches to change the constitution (which is actually the key power they had to change the rules of the game themselves). In other words, the Supreme Court reinvents itself as a veto player whenever the other branches are tempted to change the rules of the game; at first, this takes the shape of merely preserving the court's institutional integrity and jurisdiction, but Chapter Six illustrates how far the basic structure can go in the long run.

> The distinction between these strategies is that rhetoric consists of an appeal to the reason or emotion of the auditor, while heresthetic requires no appeal because it consists of a redefinition of the situation. Sometimes, of course, redefinition is rendered salient and palatable by rhetorical flavoring, but for heresthetic maneuvers, the flavoring is only incidental. (Riker 1990, 48)

In the Raj Narain election case, the Supreme Court emerges as a master of heresthetics, giving Indira Gandhi everything she really wants — a valid election and a legitimacy bonus through judicial support — while the 'price tag' of a basic structure argument redefines the entire electoral corruption case from the particular to the general: whether courts can review election cases in principle, and whether judicial review is part of a basic structure. The heresthetic manoeuvre consists of agenda control — the judges redefine 'what is this case about' and thus change the conditions of choice: Indira

Gandhi no longer faced a situation in which the exercise of judicial review equalled the cancellation of her election, loss of her prime ministership and a criminal record. Therefore, she had to undo judicial review powers to avoid such dire consequences. Instead, she then faced a Supreme Court which offered her an entirely different choice: a valid election confirmed and legitimated by the Supreme Court judges (the legitimation implying the validity of judicial review) as long as she recognised that the judges remained committed to the basic structure and were unwilling to give it up. As the basic structure is a fuzzy idea, without any precise meaning and without any immediate costs for Indira Gandhi or any other Congress politician, the heresthetic manoeuvre presented her with an attractive choice. Most politicians will not worry too much about the long-term impact a principle such as the basic structure may have. Plus, there is always the option to attack the Supreme Court again at a later point of time, or to interfere even more strongly in judicial appointments and transfers to control courts (and maybe even benefit from their regime support).[20]

Apart from the regular flow of Supreme Court decisions engaging with basic structure doctrines that both figures illustrate (4.2 and 4.3), the most significant aspect of the afterlife of parliamentary sovereignty is the politicians' praise for the basic structure that we encounter today. When the NDA pushed for a national commission to

[20] From Arthur Miller, we learn about the distinction between stage time and street time — 'to enter a theatre is to acknowledge that we enter a time warp in which the normal laws of physics no longer apply. Time flows at a speed determined by the author. The price of entry into this world is that we experience a temporal anomaly in which past and present may co-exist within a factitious moment' (Bigsby 2005, 124). Similar to Miller's idea of condensed time and keeping in mind that courts and theatres are not unrelated (Geertz, Negara), we can think of time warps and the bending of time as a crucial element of judicial heresthetics. Instead, in Miller's idea of condensed time (Willy Loman's story is played out in two hours, not 62 years), judges have the power to stretch and postpone — i.e. create extended time — legal doctrines and principles may have a two hours existence within the actual court room proceedings but play out over decades, becoming practically relevant only 20 or 30 years later (which means low or even no costs when it comes to accepting them, politicians and their shorter time horizons).

review the working of the constitution, the Congress party opposition undermined the review through a basic structure discourse — while, at the same time, prime minister Vajpayee and his government framed the commission's terms of reference as basic structure bounded:

> To examine in the light of the experience of the past 50 years as to how best the Constitution can respond to the changing needs of an efficient, smooth and effective system of governance and socio-economic development of a modern India within the framework of the parliamentary democracy, and to recommend changes, if any, that are required, in the Constitution without interfering with its basic structure or features.[21]

Political actors learn to support the basic structure. Many BJP and NDA politicians may have yearned for judicial interventions during the emergency, in particular if jailed and unable to rely on habeas corpus. Furthermore, in the 1990s of course, Congress had learnt about being out of power — the power to appoint judges, declare emergency rule, impose the president's rule — and how it could be thus affected. Knowing that these powers are exercised by political opponents half of the time changes the calculus of consent — a powerful Supreme Court seems more of a boon than a threat: politicians view the court not just as an enemy, but as a protector, a long-term guarantor of entrenched policies, as an actor who can extend a friendly hand (see Chapter Eight), a shield for blame avoidance, and a forum for policymaking or vetoing when out of power (see Chapter Seven and public interest litigation). In contrast to the conflicts of the first

[21] Quoted in Venkatesan (2000), *A Controversial Review*. Frontline (17:4).

25 years of constitutional history, today, almost all party manifestoes celebrate the basic structure and commit themselves to agitation within constitutional boundaries.

Using analytical narratives framed by game theory, the focus on the basic structure in Chapter Four reinforces our argument that the decisions of the Indian Supreme Court are dependent on the expected conduct of future players, such as the Parliament, which may choose to overrule the Supreme Court or choose other forms of retaliation. If the Supreme Court can expect that the Parliament and executive are too weak, divided or dysfunctional to override court decisions or to retaliate against judgments in other forms, nothing is beyond its power to review it and a political scenario of actors that welcomes this power. The judiciary has won, against fierce resistance. The question never has been whether the textual interpretation of the constitution is correct or not. As a sphere of rhetoric, the plausible is good enough, and there can be no doubt that the argument in favour of implied limitations of amendment power is sound, just as the argument for an unlimited amendment power of Parliament is coherent and logical.[22] Paraphrasing Griffiths (see above, end of section 4.1), the basic structure, specifically, and the expansion of judicial power, generally, are what occur. As a next step, Chapter Five establishes elections as focus for explaining what happens in constitutional politics and why judicial power increases, sticking to the same game rationale as Chapter Four, but moving across much longer time periods, with repeat game sequences and actors who learn to better predict the behaviour of other players.

[22] (Jacobsohn 2006).

# CHAPTER FIVE

## *The Vanishing Amendment Process: Judicializing Constitutional Change*

***Abstract*** Chapter five explores the judicialisation of constitutional change. Two processes run side by side, both reinforcing the power of the Indian Supreme Court: On the one side, we observe the vanishing of the formal constitutional amendment process, illustrating the diminishing power of Parliament as an agent as well as a guardian of constitutional change. On the other side, we cannot escape to note the rise of the Supreme Court: first, as a powerful veto-player in amendment processes — emerging slowly in the seventies. Then, as a powerful "agenda-setting" as well as agenda enforcing agent since the early 1990s, imposing its will to constitutional change upon legislature and executive. In a nutshell, the court is becoming more powerful, while Parliament, the institution which had been originally in charge of drafting, debating, and passing constitutional amendment acts, ceases to produce substantial legislative commands that govern constitutional change. Following Chapter Four, we thus continues to explore the judicialisation of the core of the Indian polity as the Supreme Court takes almost total control over the rules of the game — not merely via basic structure heresthetics but also because other actors have mostly lost the capacity to engage with constitutional politics.

## [5.1] Amendment Politics: Battleground for Judicial Ascendency

The question of constitutional change has often played a key role in Indian politics and the formal constitutional amendment process provides an instructive guidebook to the study of judicial power.[1] Chapter Five extends the strategic paradigm to the question of constitutional change. Who changes the constitution? Who has the last word? If the Constitution sets the rules of the game, this may be the most significant aspect of judicial power. The clash between the various branches of government over the question of constitutional amendment had not been inevitable though; it was not necessary that the SC adopted a narrow minded approach to the scope and functioning of property rights — given the post-partition and poverty contexts, the insistence on property rights was unfortunate to say the least. Consequently, it is not wrong to think of the Court as provoking Parliament, and undermining its standing in Indian society — culminating in

[1] There is a vast body of literature relating to legal and normative debates about the limits of amendment power and the scope of judicial review. Basu's (1999, 2001) commentaries on the Constitution illustrate the jurist's perspective on separation-of-powers-games and account for all details of the legal rules surrounding the amendment process. Sathe (1989) and Austin (1999) have looked at individual amendments and provide a historical narrative with respect to important constitutional cum political controversies. Both books are of great help, yet, both do not provide a theoretical framework that could be linked to a political scientists' view of the entire amendment process since 1950. Similarly, Sathe as well as Austin concentrate on the substantive aspects of the amendments' contents, not the institutional design of the amendment process. Two other important books have been written by Bhardwaj (1995) and Pylee (2003). Both give minute details of the legislative history of all Amendment Acts since Independence, however, the texts are of an encyclopaedic nature – not analytical. The two best books on individual amendments in the 1970s have been written by Rajeev Dhavan (1978a, 1978b). Again, the analysis is mainly engaged in discussing individual amendments and their contents from a normative, 'macro-angle'; they neither consider the institutionalised process of amending the constitution nor the micro-politics of constitutional change. In a nutshell, there are a number of 'classics' dealing with constitutional amendments in India but they all have an entirely different research agenda and, what is more, their methodological techniques are poles apart from those projected by Chapter Five.

Indira Gandhi's election campaign 1971, with explicit anti-court slogans. While Chapter Four has explored the dynamics of judicial politics in the context of snapshots of specific case studies, Chapter Five places Indian judicial politics in time. In other words, Chapter Five is a moving image, focusing on time, and especially the sequencing of decisions in inter-branch separation-of-power-games, as the central dimension in which judicial power evolves.

The quarrels between Parliament and the Supreme Court about limitations of amendment power and judicial vetoes were mostly triggered by land reform legislation (in the name of the social revolution) and judicial review of it. The Golak Nath case (1967) reversing precedents, was the first case that defended property rights by the radical assertion that Parliament's power to amend the Constitution was limited. As the judges thus denied the legislature the right to abridge fundamental rights as laid down by Part III of the Constitution, Parliament set itself on collision course with the judges, culminating in strong anti-judiciary rhetoric in Indira Gandhi's election campaign. As the formal procedures for amending the Indian Constitution are simple, and at most require that an amendment bill is passed "in each House by a majority of the total membership of that House, and by a majority of not less than two-thirds of the members of that House present and voting," the massive mandate of the 1971 elections made it then easy for the dominant Congress party to amend the Constitution in response to unwelcome judicial pronouncements and to keep conservative judges away from the economic policy. Congress's electoral success became the democratic mandate to pass and implement further constitutional amendments in accordance with a socialist electoral campaign. Eventually, the 24th and the 25th Amendment were passed, thus,

allowing for large scale nationalisations in industry and commerce – and "saving" the social revolution from a conservative and capricious Supreme Court. In terms of theory, we observe again how India's colonial tradition of parliamentary sovereignty (Westminster style) clashed with a written constitution and judicial review (American style). In terms of practice, India's judges did not prove sensitive enough to understand the rules of the game and the tolerance intervals of the other branches. Failing to adapt to the strong position of the legislator, many judicial decisions merely invited retaliation without hope for persuasion. At least, in Kesavananda, judges begin to reassess the role and relevance of the Directive Principles of State Policy, as laid out in Part IV of the Constitution, which 'set forth the humanitarian socialist precepts that were the aims of the Indian social revolution,' the majority of the judges still declared that Golak Nath had been wrongly decided and upheld the validity of the 24th and 25th Amendment; Chapter Four has analysed this as a heresthetic manoeuvre. Judges did their best to arrive at Kesavananda judgment in a very confusing and contradictory way, extending the power of judicial review via the invention of the basic structure doctrine but without practical impact but merely proclaiming certain basic features of the Constitution to be beyond Parliament's power of amendment. Nevertheless, the Court yet again misread the tolerance intervals of the other branches and Indira Gandhi amended the Constitution to override this decision — this time however, she was not empowered by elections but empowered herself by declaring an internal emergency (1975-1977), which gave her the power to push the 42nd Amendment through a Parliament controlled via emergency rule.[2]

[2] Following Fischer (2007).

At the end of the 1970s the following compromise emerged: After Indira Gandhi lost the 1977 elections, the Janata government would try to override the 42nd Amendment, yet, needed the support of the Congress to pass constitutional amendment bills so that the 44th Amendment falls short of a complete repudiation of the 42nd Amendment. In the bargaining process surrounding the 44th Amendment, the left-leaning Janata government ensured an end to the disputes over the constitutional status of the right to property by removing it from the fundamental rights section of the Indian Constitution once and for all. At the same time, the basic structure doctrine has been accepted over time by the legislators, so that the judges have safeguarded their right to control the constitutional amendment process. The Supreme Court, more attuned to separation-of-power games[3] during the 1980s, has accepted the abolition of constitutionalised property rights without reservations — at the same time, the judges also understand the collapse of Parliament's amendment power in the 1990s and step by step redefine the Supreme Court, going beyond the original basic structure role of simple veto-player in the amendment process. Chapter Four has already illustrated how the Supreme Court single handedly removed the Prime Minister and any other member of the executive from the judicial appointments process; this is equivalent to agenda setting and agenda-implementation in the realm of constitutional change and Chapter Five assesses in greater detail the structural changes that have transferred amendment power away from Parliament.

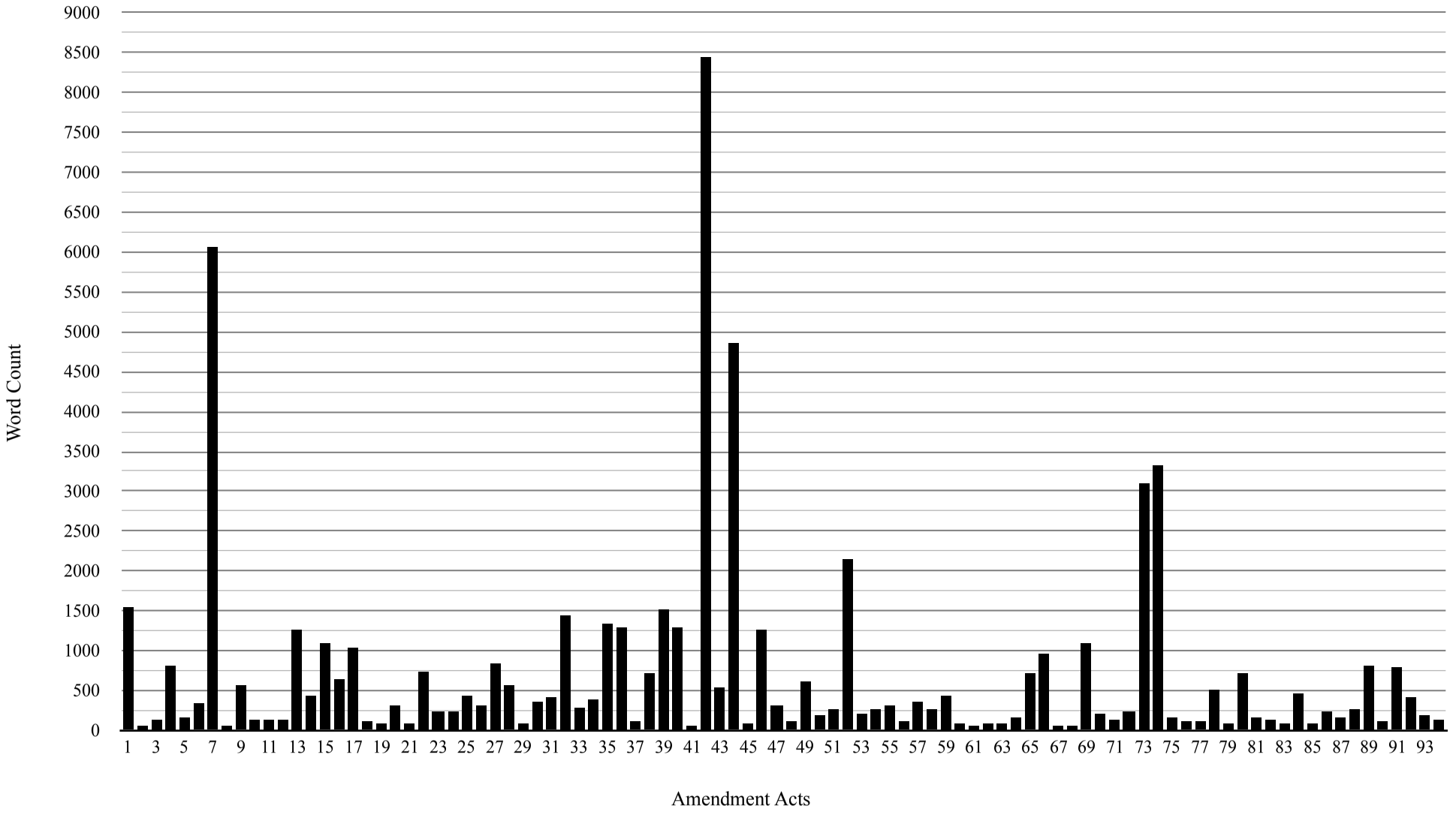
[3] Following Fischer (2007).

## [5.2] The Diffusion of Amendment Power through Elections

To begin with, the first specific question posed is how to best decipher the patterns and characteristics of India's seemingly chaotic and rapid amendment process[4] to understand the changing nature of separation of powers games before and after the Emergency. Firstly, Chapter Five proposes a fresh look at our empirical standards for the systematic study and measurement of judicialisation of formal constitutional change: we argue that the customary indicator for measuring Parliament's ability to change the constitution — the average number of amendments passed per year (Lutz 1994) — has to be modified according to length, type, significance (qualitative) as well as debating time and voting patterns. To begin with, Figure 5.1 and Figure 5.2 show some of the main characteristics of amendment patterns in India as the measurement of the length of amendment acts already provides a more accurate quantitative image than the simple amendment rate (Table 5.1). Almost diametrically opposed to the pie-charts that deal with increases in

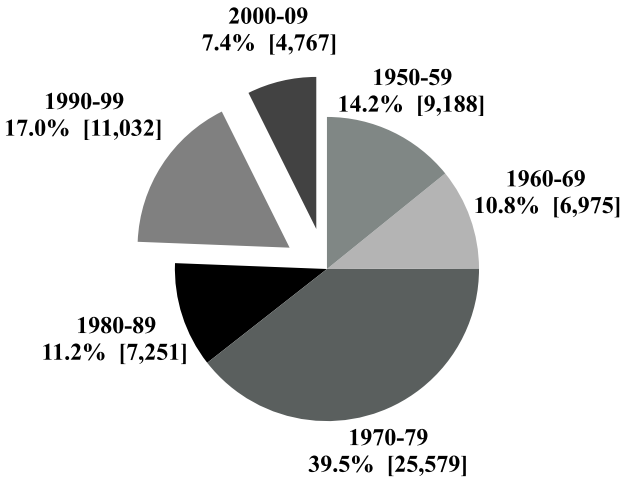
[4] Popular mythologies hold that the Indian Constitution is constantly, maybe even too frequently, amended. However, from a comparative perspective, India's amendment rate does not stand out. The country with the highest amendment rate is New Zealand; Austria, Brazil and Portugal have amendment rates similar to India's. The Constitution of the Federal Republic of Germany has been amended at least once a year and the Constitution almost doubled in size (10,636 words in 1949 and 17,050 words in 1994), a process that is mainly linked to the fine tuning of the federal system (the amendment with respect to Germany's unification was significant, but a one-off and cannot account for the extent of constitution change). Comparative studies of amendment rates usually link a high amendment rate to federalism, length of the constitution and the difficulty of the amendment process (e.g. simple-size or qualified majorities, bicameralism, referendum). Given this background and given that India's Constitution (a) governs an entire subcontinent, (b) provides for an abundance of complex federal institutions, (c) is one of the longest Constitutions of the world, and (d) codifies a fairly simple amendment process, some of the really interesting questions are: Why is it not amended more often and what would be the benefits of a higher or a more moderate amendment rate?

**Figure 5.1 Length of Amendment Acts: Simple Word Count, 1950-2009**




*Source:* Compiled by author from IndiaCode.

**FIGURE 5.2 Length of Amendment Acts (Simple Word Court) per Decade, 1950-2009**

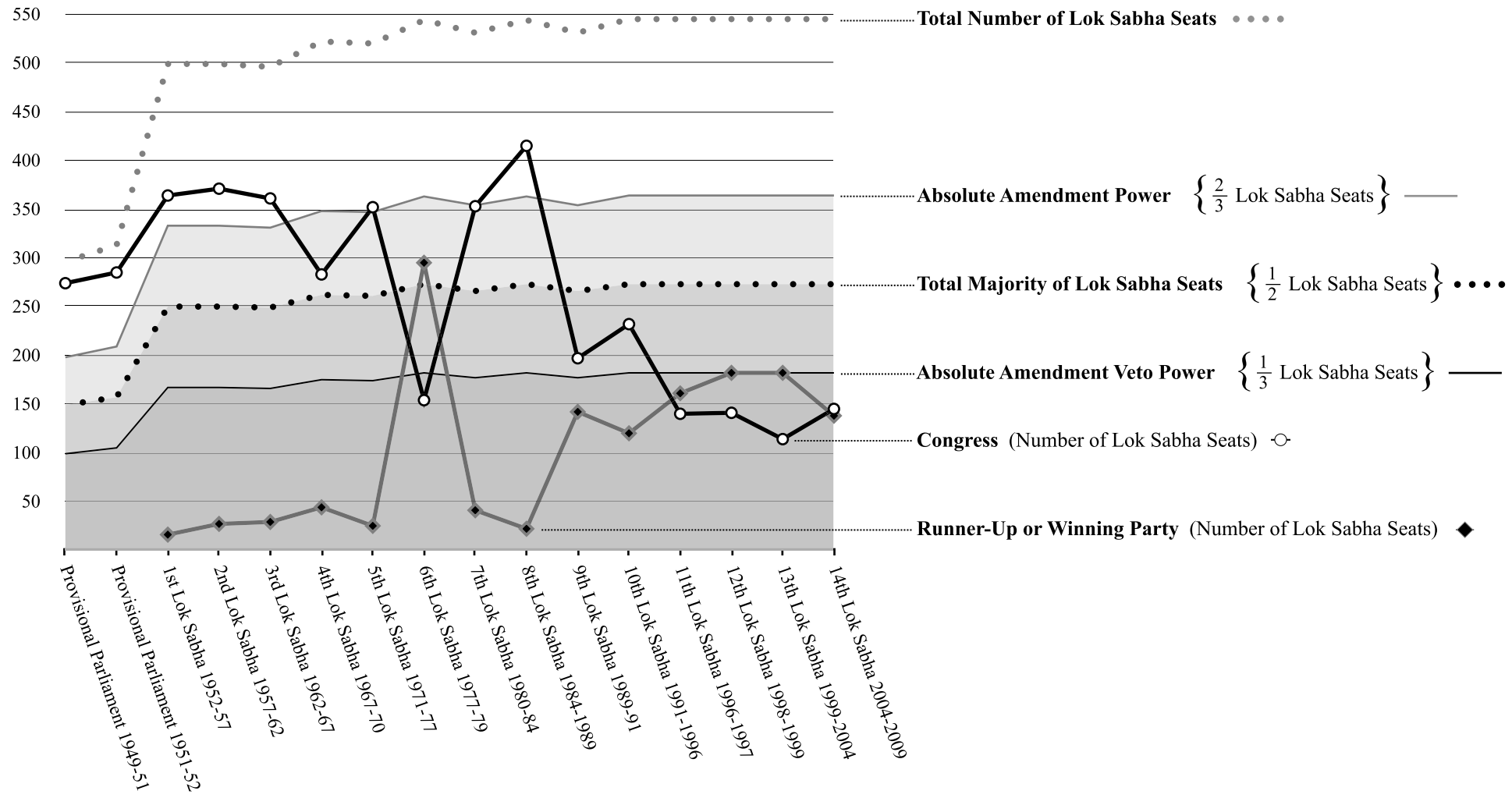



*Source:* Compiled by author from IndiaCode.

judicial activity and a rise in cases published or cases filed, we see a reduction of legislative activity in relation to constitutional amendments after the 1970s. This is an interesting puzzle as constitutional design proceeds under the assumption that constitutional institutions have predictable consequences — and the formal rules governing the passage of amendment acts by Parliament have never changed. As a first step then, we can speculate that different circumstances make constitutional institutions operate differently. A good example to illustrate the importance of context for understanding constitutional design is the operation of the similar formal constitutional amendment procedures in Switzerland and in Australia. 'Both involve referendums for ratification of constitutional amendments requiring double majorities, i.e. a majority of

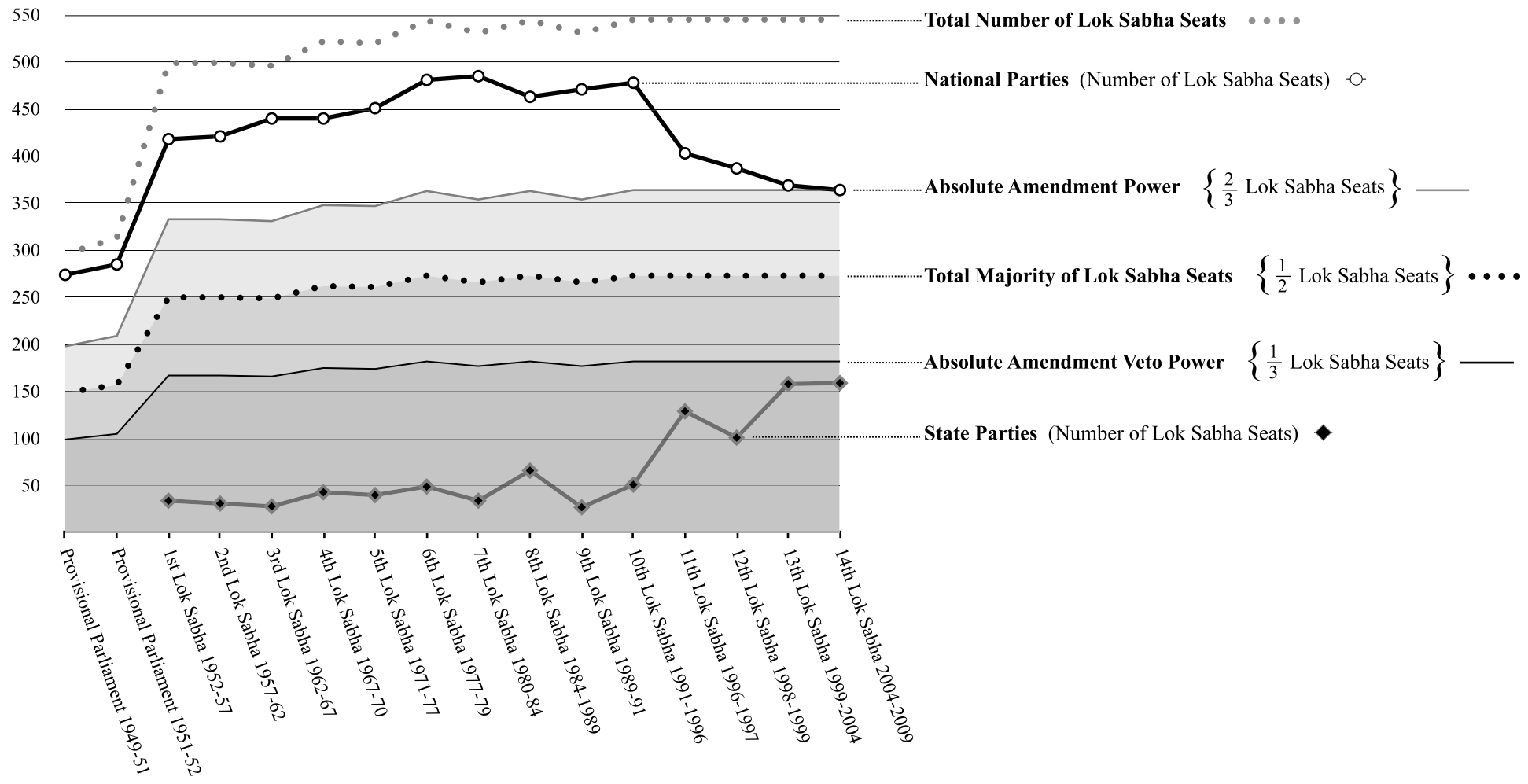
the federal population and majorities in a majority of the constituent units. In Switzerland over 110 formal constitutional amendments have met this requirement since 1891, but in Australia of 42 attempts since 1901 only 8 have succeeded' (Watts 1999: 2). Constitutional change, then, appears to take place within a web of distinct political, social contexts. For India, as most amendment acts require not more than "special majorities" in the national legislature, India's amendment procedure has been aptly described as "facile," avoiding the difficulties that are usually associated with formal constitutional change in other countries, such as a referendum or the formation of a convention. Figure 5.3 and Figure 5.4 suggest that this facile amendment procedure has provided a sturdy institutional advantage for Congress system, as long as it could control the supermajorities required by Article 368. However, as the shift towards coalition governments and the emergence of strong regional parties closed the doors to the amendment process (Figure 5.3 and Figure 5.4), the Supreme Court is left in charge of revising the constitutional text by means of interpretation and taking an 'activist' stance. a significant change in amendment patterns has been brought about by other events, e.g. the transformation of India's party system. As the Indian National Congress's ceased to dominate the commanding heights of India's polity, the amendment patterns change: constitutional amendments are no longer an intra-party affair but are shaped by inter-party compromises and the rise of strong regional parties. The increasing fractionalisation of the Union legislative as well as the rise of powerful regional parties (which have, for instance, successfully blocked any amendment restricting State rights since 1977) can only be explained with reference to the socio-political context.

**FIGURE 5.3 Amendment Power**




*Source:* Compiled by author from ECR(G) and Kashyap (1994; 2008).

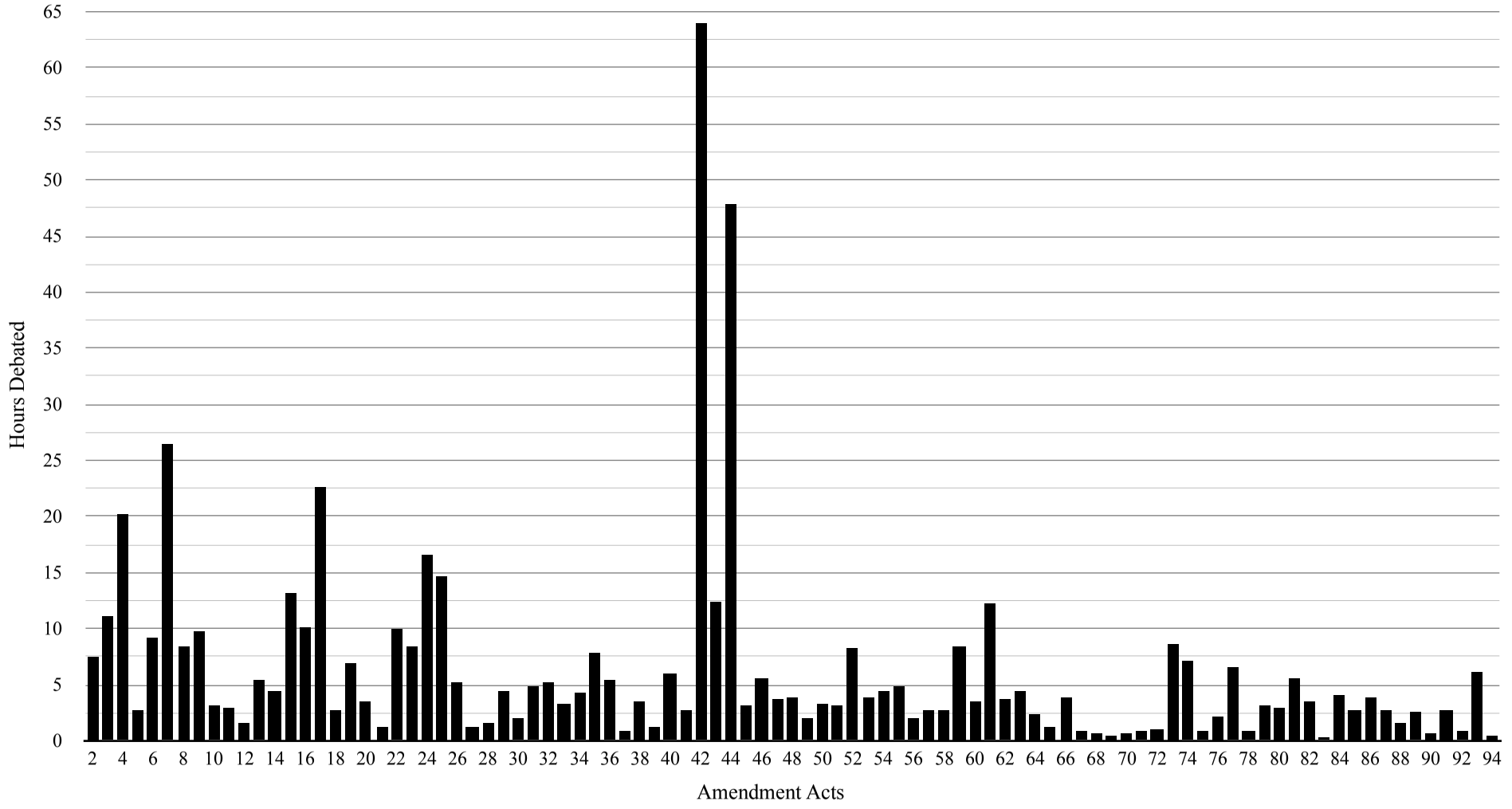
**FIGURE 5.4 Amendment Power and Federalization Trends within the Party System**




*Source:* Compiled by author from ECR(G) and Kashyap (1994; 2008).

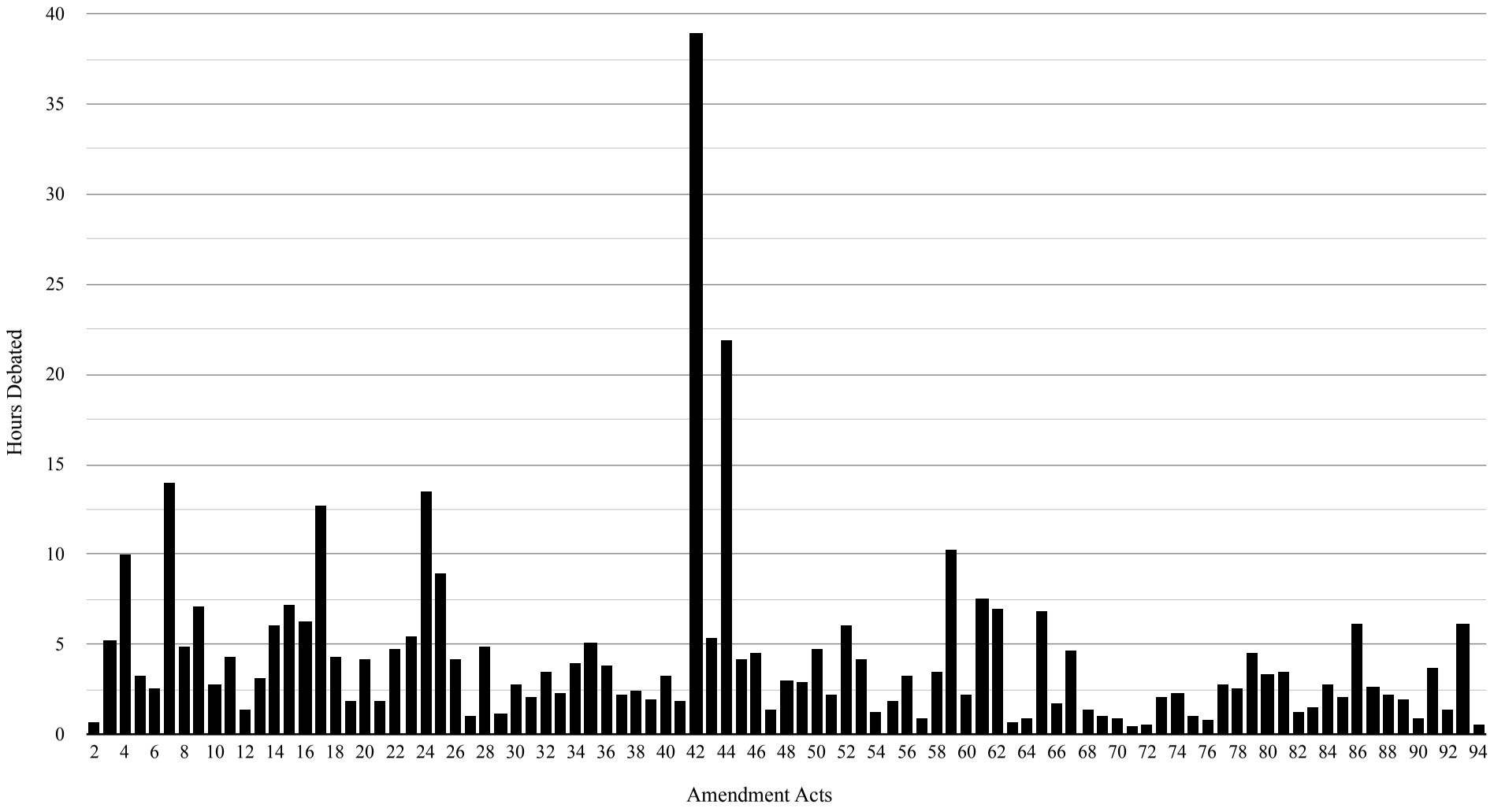
For instance, Congress wins 364 seats in 1952, overall there were 489 seats in the Lok Sabha. This means that the amendment blocking power is 164 - even if all members of the Lok Sabha were present and voting, any party controlling 164 votes can block any amendment. The Congress party majority is so large however that only 125 seats are left for other parties. That means Congress is 38 seats above the number of seats required for total control of the amendment process. Congress can block and pass any amendment that the party approves (of course within the party, factions have different constitutional preferences). Since Congress had absolute amendment power from 1950 (provisional Parliament) until the 9th Lok Sabha it is a useful indicator, showing the scope of change within the party system and the depth of transformation of amendment politics. The next question posed is how the judicialisation of constitutional change after the Emergency has been consolidated as a stabilising and stable political practice, transforming the separation of power settlements of the 1950s without upheaval? The following three data sets illustrate this further, in addition to measuring the length of amendments, we observe similar, even stronger, trends for debate time [Figures 5.5-7], yes votes [Figures 5.8-9], no-votes [Figures 5.10-5.12], all indicators illustrating how Parliament silently withdrew from almost all constitutional controversies after 1990.

**Figure 5.5 Duration of Lok Sabha Debates (Hours) per Constitutional Amendment, 1952-2009**



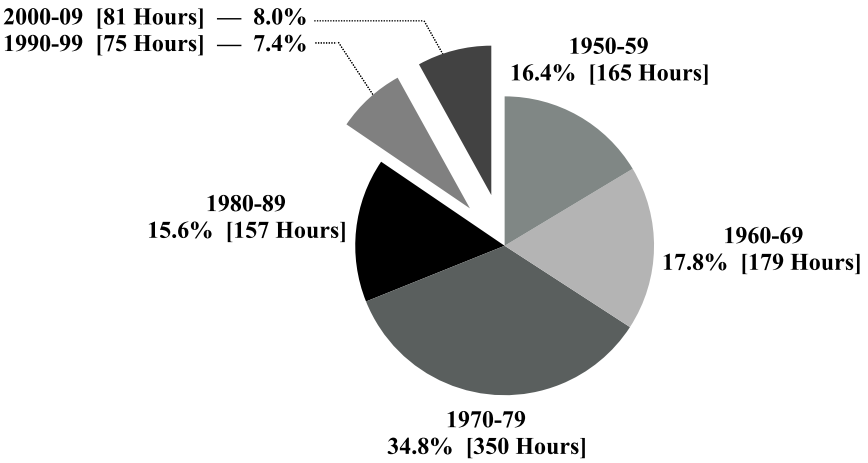

*Source:* Compiled by author from Lok Sabha debates. The First Amendment Act was passed by the Provisional Parliament (single chamber), total debate time 39.6 hours.

**Figure 5.6 Duration of Rajya Sabha Debates (Hours) per Constitutional Amendment, 1952-2009**



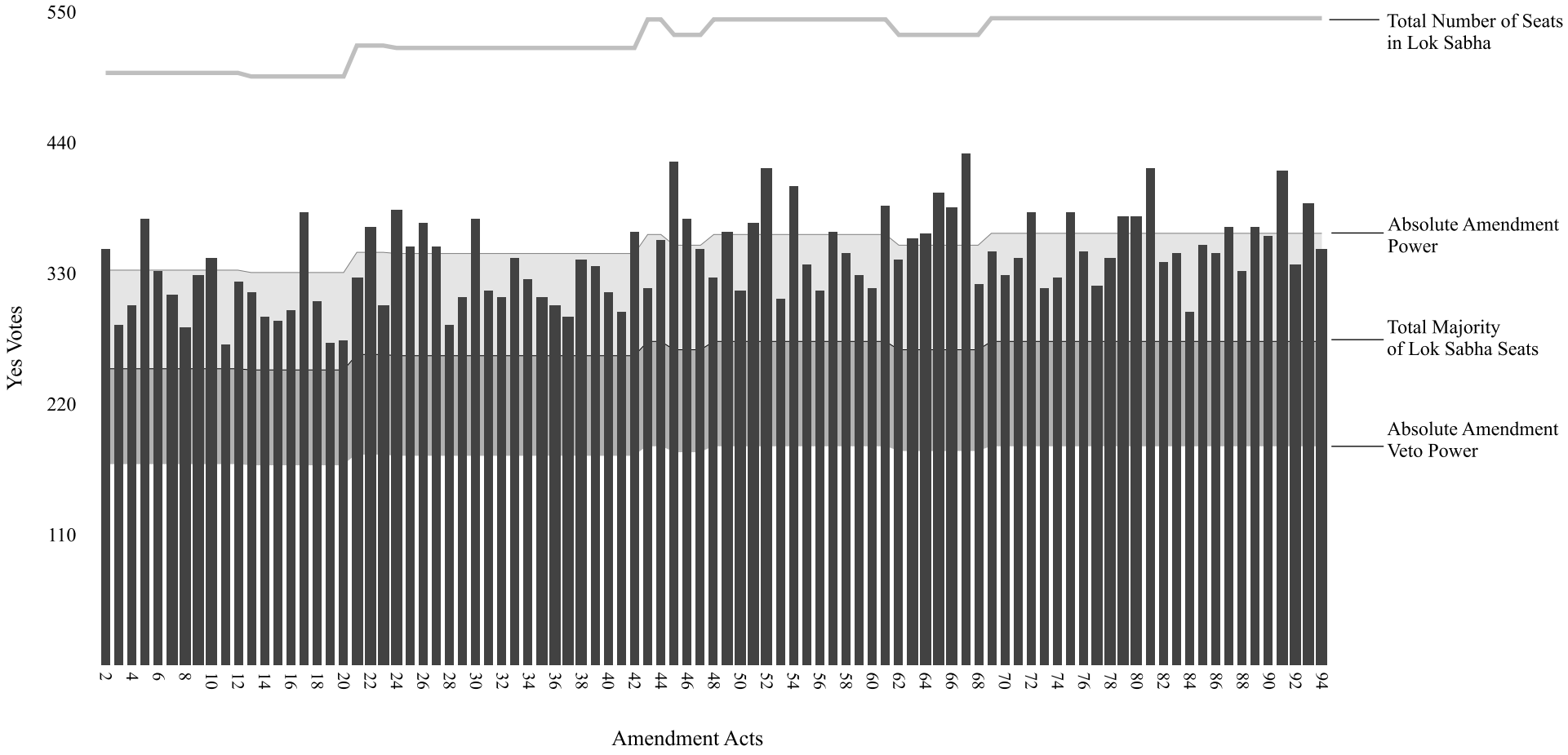

*Source:* Compiled by author from Rajya Sabha debates. The First Amendment Act was passed by the Provisional Parliament (single chamber), total debate time 39.6 hours.

**FIGURE 5.7** **Total Duration of Parliamentary Debates (Lok Sabha and Rajya Sabha) on Constitutional Amendments (Hours/per Decade), 1950-2009**



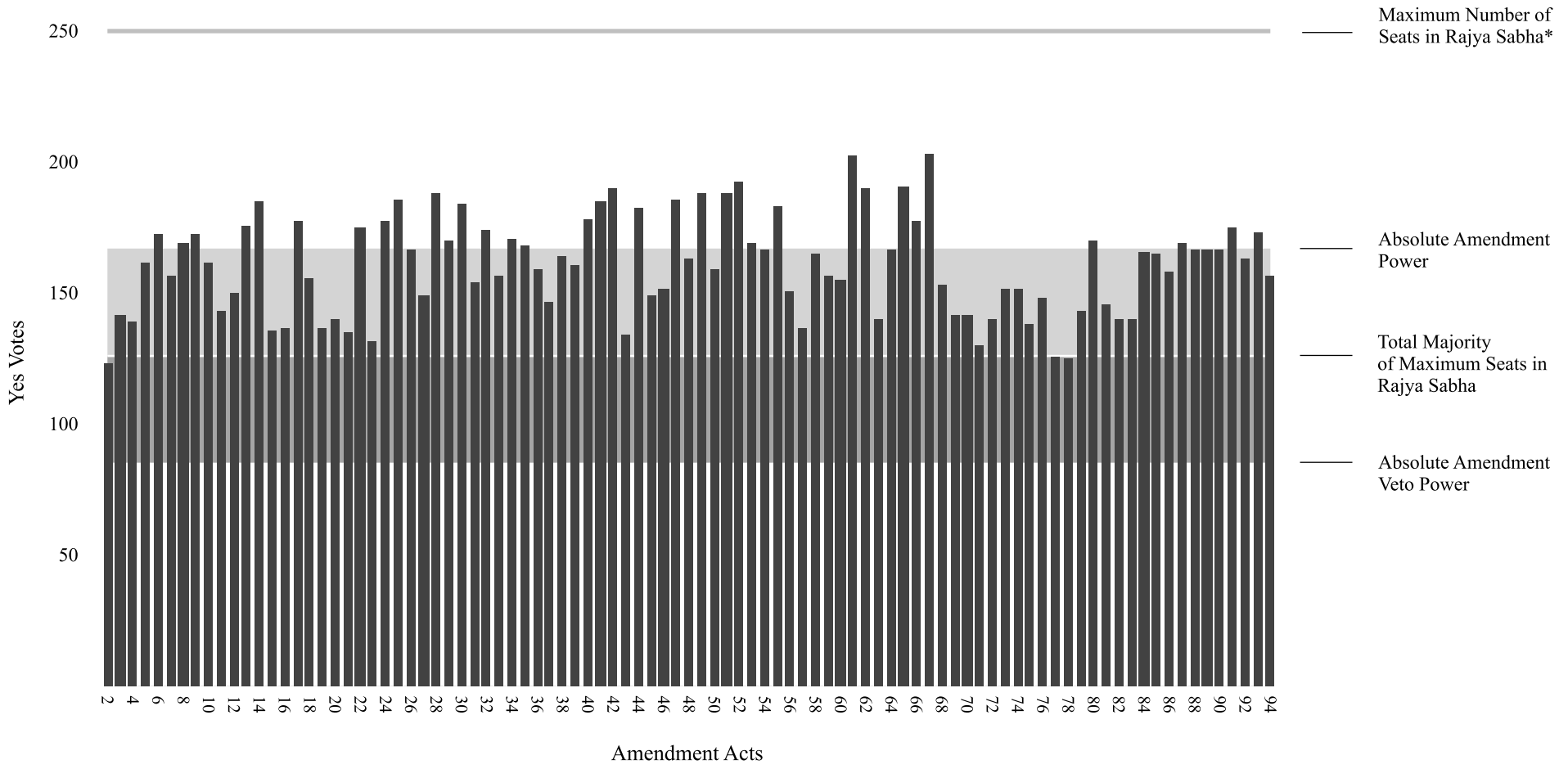

*Source:* Compiled by author from the debates of the Provisional Parliament (single chamber) for the *First Amendment Act, 1951;* from Lok Sabha and Rajya Sabha debates for the 2nd to 94th Amendment Act.

**Figure 5.8 Lok Sabha Yes Votes per Constitutional Amendment Act, 1952-2009**




*Source:* Compiled by author from Lok Sabha debates. The First Amendment was passed by the Provisional Parliament (a single chamber with 313 seats at the time of passage), total number of votes 248, with 228 yes votes and 20 no votes.

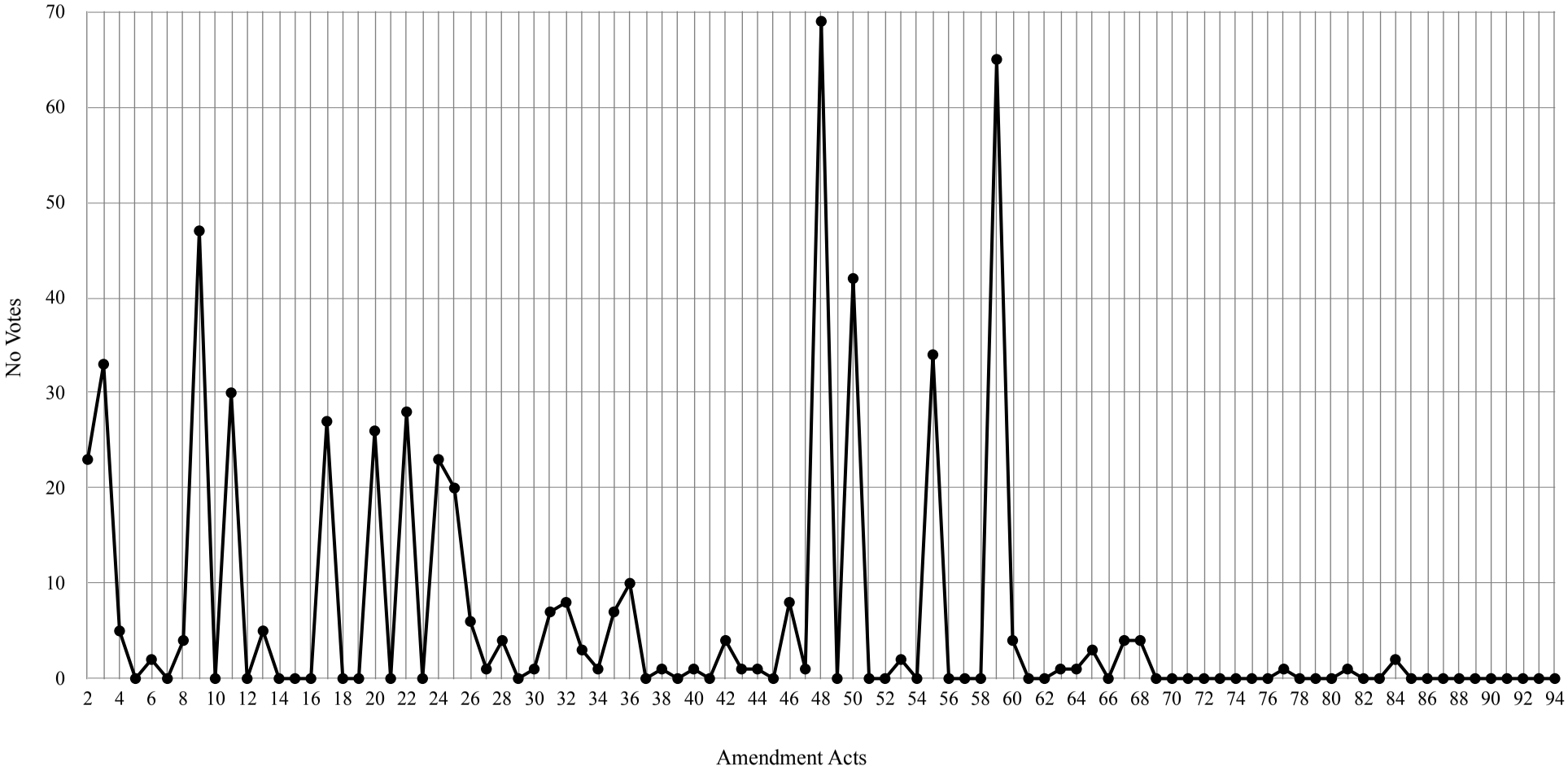
**Figure 5.9 Rajya Sabha Yes Votes per Constitutional Amendment Act, 1952-2009**




*Source:* Compiled by author from Rajya Sabha debates. The First Amendment was passed by the Provisional Parliament (a single chamber with 313 seats at the time of passage), total number of votes 248, with 228 yes votes and 20 no votes.

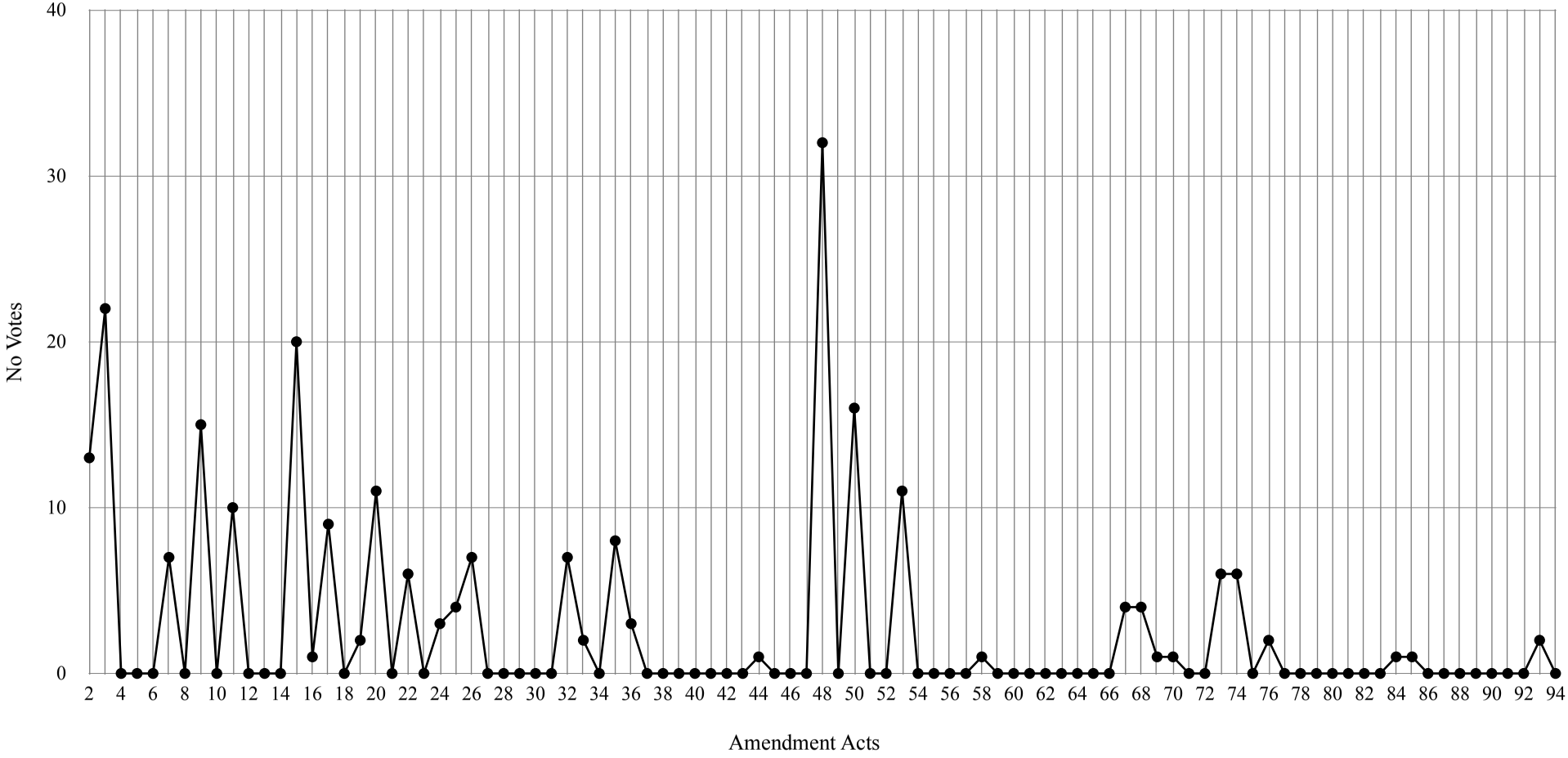
* The actual number of Rajya Sabha seats increases from 216 [204 elected members] in 1952 to 245 [233 elected members] in 1987, with no changes till date (Election Commission 2014, 17).

**Figure 5.10 Lok Sabha No Votes per Constitutional Amendment Act, 1952-2009**



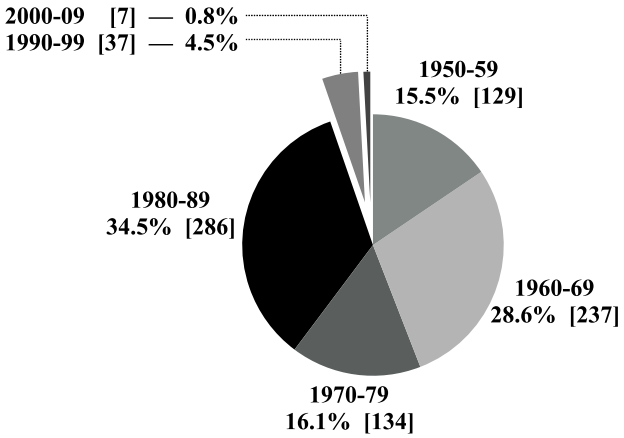

*Source:* Compiled by author from Lok Sabha debates. The First Amendment was passed by the Provisional Parliament (a single chamber with 313 seats at the time of passage), total number of votes 248, with 228 yes votes and 20 no votes.

**Figure 5.11 Rajya Sabha No Votes per Constitutional Amendment Act, 1952-2009**




*Source:* Compiled by author from Rajya Sabha debates. The First Amendment was passed by the Provisional Parliament (a single chamber with 313 seats at the time of passage), total number of votes 248, with 228 yes votes and 20 no votes.

**FIGURE 5.12 Total Number of No Votes in Relation to Amendment Acts (Provisional Parliament, Lok Saba, Rajya Sabha) per Decade, 1950-2009**




*Source:* Compiled by author from Parliamentary Debates.

Not one of these indicators alone[5] provides the structure for a conclusive narrative but taken together the similarity of trends — less debate time, disappearance of no-votes — reinforces the idea of a vanishing amendment process. Controversial constitutional debates, like panchayati raj reforms, have mainly disappeared from Parliament. If an amendment makes it to the floor of either House, the necessary yes-votes seem guaranteed and negotiated beforehand; in particular, for the 13th LS we find that

[5] In addition, the following section will add thick description to "thin numbers"; the 42nd amendment, for instance, is about twice as than the 44th amendment. This does not mean of course that the 42 amendment is twice as important: the 44th amendment briefly states that half of the sections of the 42 amendment have been repealed — without using many words. Hence, while the 42nd amendment added a lot of new text (longer word count) the 44th amendment deleted a lot of text from the constitution with the straightforward statutory legal instruction of 'repealed.'

amendment debates are scheduled for the same day, so that the required quorum is present and multiple amendments are passed on the same day without any meaningful debate. The vanishing amendment process thus does not have to be understood as a sign of organisational weakness — there are elements of effectiveness, as political parties have the capacity to identify which bills will be going nowhere and thus any controversial initiative does not even make it to the floor to begin with; a process is in place in committees and amongst parties for sorting out amendments before they reach the realm of Parliamentary debate. They are then passed quickly — with less debate time.[6] Most importantly, we no longer find any significant sections of Parliamentarians who show up for debates and express their dissent by voting no — needless to say, this is not due to an absence of political conflict but because controversial amendment politics no longer take place within the parliamentary forum. At the same time, the fact that the amendment processes changes radically, and that constitutional politics have been dislocated from the floor of Parliament does not mean that amendment power has vanished too — as the Appendix and the next section of Chapter Five illustrate there are realms of strong cross-party policy consensus and Parliament can still overturn Indian Supreme Court judgments on reservations within a few weeks.

[6] The only exception to this pattern — as there are not many examples of failing amendments — seems to be the amendment for the introduction of gender quotas in all legislatures but as the Appendix and the narrative illustrate, reservations and quotas stand out as the only topic.

## [5.3] Persistent Puzzles: Fluctuating Amendment Power and the Transfer of Amendment Power from Parliament to the Supreme Court

It was Wednesday morning, 31 October 1984, when Indira Gandhi stepped out of her Bungalow at one Safdarjang Road in New Delhi, and greeted two guards, Beant Singh and Satwant Singh, standing along the path to her office. 'The two men were no more than seven feet away as she greeted them. Beant Singh drew a .38 revolver and fired three shots into her abdomen. As she fell to the ground, Satwant Singh pumped all 30 rounds from his Sten automatic weapon into her crumpled body. At least seven bullets penetrated her abdomen, three her chest and one her heart. The Prime Minister was dead'.[7] For those who study India's elections and her legislatures, this assassination constitutes one of those rare events that thrust scholars outside the realm of normal expectations, and into the realm of the uncertain and outside our model: probabilities are becoming so small to be non-computable and extreme outliers, not the force of regular occurrences, govern the chain of events. Such unexpected events highlight our problem of induction, undermine our ability to analyse India's constitutional history within the realms of causality and determinism. In fact, there are multitudes of overlapping black swan events that disrupt the structure of constitutional politics: the assassination of Indira Gandhi catapults her son into the post of prime minister with absolute amendment power — Figure 5.3 shows that no other government ever had had a better starting point for changing the constitution via the formal amendment process. Yet,

[7] Smith, W. (1984). 'Indira Gandhi: Death in the Garden', *Time* (November 12, 1984).

having massive legislative support on paper does not translate into amendment power automatically and Rajiv Gandhi fails to pass the panchayati raj reforms. It is then the assassination of Rajiv Gandhi which brings Rao into power, who makes the necessary compromises to take into account the wishes of State governments and then manages to pass the panchayati raj reforms; thus, a minority government can achieve more than a government with absolute amendment power, depending on type of politician and the prime minister's political skill set. In a nutshell, without such narratives and attention to qualitative evidence we cannot make sense of the fluctuations of in the ways amendment power manifests itself.[8]

The analytical narrative of constitutional amendments is presented as a table (Appendix) since the amount of information and type of information (taxonomy & patterns) are a perfect match for a table-style-arrangement. The Appendix thus introduces a set of categories (all in capital letters) that allows for grouping of recurring amendment topics (e.g. federalism, taxation, language). Hence, the Appendix allows us to fuse quantitative and qualitative insights and to find further patterns where quantitative evidence alone may have left us puzzled. Instead of simply counting amendments as an indicator of constitutional change, we get better results if we use the Appendix to understand the content of each amendment, the parts of the constitution that are being changed (or restored) and the difference between ruptures and continuous flows of constitutional change (e.g. the increase in official languages).

[8] The large amounts of data collected for Chapter Five hint at the fact that this Chapter had originally been conceptualised on the basis of quantitative models; however, the search for meaningful correlation was long and hard and unsuccessful. Despite strong trends — such as the vanishing amendment process or the increase in political competition that Table 5.2 presents — the long and deep experience of parliamentary politics of skilled politicians like Rao and Vajpayee seems to make all the difference in the realm of amendment politics.

**Table 5.1 Amendment Variables: Distribution of Formal Constitutional Change in Relation to Lok Sabha**

| | | 1952-57 1st LS | 1957-62 2nd LS | 1962-67 3rd LS | 1967-70 4th LS | 1971-77 5th LS | 1977-79 6th LS | 1980-84 7th LS | 1984-89 8th LS | 1989-91 9th LS | 1991-96 10th LS | 1996-97 11th LS | 1998-99 12th LS | 1999-04 13th LS | 2004-09 14th LS |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Total* | **Amendments Passed** | 6 | 5 | 8 | 3 | 19 | 2 | 3 | 14 | 7 | 10 | 0 | 0 | 14 | 2 |
| | **Length of Amendments** (Combined Word Count) | 7,574 | 1,042 | 4,958 | 1,035 | 20,165 | 4,865 | 1,673 | 5,406 | 2,143 | 8,974 | 0 | 0 | 4,533 | 321 |
| | **Amendment Debate Time** (for Amendments Passed) | 77h | 26h | 69h | 20h | 155h | 60h | 13h | 66h | 17h | 30h | 0h | 0h | 38h | 7h |
| *Average* | **Amendment Rate** (per Year) | 1.2 | 1 | 1.6 | 0.8 | 3.2 | 0.8 | 0.6 | 2.9 | 5.4 | 2.0 | 0 | 0 | 3.3 | 0.4 |
| | **Length of Amendments** (per year) / [per sitting] | (1,515) [11] | (208) [2] | (1,012) [9] | (272) [2] | (3418) [33] | 2027 [18] | 335 [4] | 1103 [11] | 1648 [20] | 1831 [21] | 0 [0] | 0 [0] | 1054 [13] | 64 [1] |
| | **Amendment Debate Time** (per year) | 15.5h | 5.2h | 14h | 5.3h | 26.5h | 24.8h | 2.6h | 13.4h | 13.3h | 6.1h | 0h | 0h | 8.8h | 1.4h |
| *Lok Sabha Indicators* | **Lok Sabha, Duration** Years / (Days) | 5.0 (1813) | 5.0 (1821) | 4.9 (1797) | 3.8 (1395) | 5.9 (2137) | 2.4 (883) | 5.0 (1818) | 4.9 (1793) | 1.3 (467) | 4.9 (1787) | 1.6 (569) | 1.1 (413) | 4.3 (1581) | 5.0 (1828) |
| | **Sessions / Sittings** [Sittings per Session] | 15 / 677 [45] | 16 / 581 [36] | 16 / 578 [36] | 12 / 469 [39] | 18 / 613 [34] | 9 / 267 [30] | 15 / 464 [31] | 14 / 485 [35] | 7 / 109 [15] | 16 / 423 [26] | 6 / 125 [21] | 4 / 88 [22] | 14 / 356 [25] | 15 / 332 [22] |
| | **Bills Passed** | 327 | 322 | 264 | 213 | 463 | 128 | 326 | 320 | 56 | 267 | 61 | 56 | 283 | 246 |
| | **Bills Passed per Year** | 65.9 | 64.6 | 53.7 | 55.8 | 79.1 | 52.9 | 65.5 | 65.2 | 43.8 | 54.6 | 39.2 | 49.5 | 65.4 | 49.2 |

*Source:* Compiled by author from Lok Sabha and Rajya Sabha Debates, *IndiaCode*, and the *Statistical Handbook 2012, Ministry of Parliamentary Affairs*.

Notes: The First Amendment Act, 1951, was passed by the Provisional Parliament, 26.11.1949-17.04.1952. If the internal emergency was treated as a seperate category, the amendment rate for the he Fifth Lok Sabha from 1971 //// # Emergency amendments were 38-42 = 5 Acts, 8137 Words

**Table 5.2 Amendment Variables and Political Competitiveness Indicators**

| | 1952-57 1st LS | 1957-62 2nd LS | 1962-67 3rd LS | 1967-70 4th LS | 1971-77 5th LS | 1977-79 6th LS | 1980-84 7th LS | 1984-89 8th LS | 1989-91 9th LS | 1991-96 10th LS | 1996-97 11th LS | 1998-99 12th LS | 1999-04 13th LS | 2004-09 14th LS |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Amendments Passed (per Year)** | 6 (1.2) | 5 (1) | 8 (1.6) | 3 (0.8) | 19 (3.2) | 2 (0.8) | 3 (0.6) | 14 (2.9) | 7 (5.4) | 10 (2.0) | 0 (0) | 0 (0) | 14 (3.3) | 2 (0.4) |
| **Number of Parties Contesting Elections** | 55 | 16 | 29 | 25 | 52 | 34 | 36 | 38 | 117[a] | 145 | 208 | 176 | 169 | 230 |
| **Effective Number of Parties (votes)*** | 4.53 | 3.98 | 4.40 | 5.19 | 4.63 | 3.40 | 4.25 | 3.99 | 4.80 | 5.10 | 7.11 | 6.91 | 6.74 | 7.60 |
| **Number of Parties Represented in Parliament** | 22 | 12 | 20 | 19 | 24 | 18 | 17 | 21 | 24 | 24 | 28 | 39 | 39 | 40 |
| **Effective Number of parties (seats)*** | 1.80 | 1.76 | 1,85 | 3.16 | 2.12 | 2.63 | 2.28 | 1.69 | 4.35 | 3.70 | 5.83 | 5.28 | 5.87 | 6.50 |
| **Average Margin of Victory†** | 22.6% | 19.2% | 14.8% | 13.7% | 23.9% | 26.1% | 18.2% | 19.5% | 15.4% | 14.1% | 11.9% | 10.0% | 10.0% | 12.2% |
| **Registered Voters (millions)** | 173 | 193 | 216 | 259 | 274 | 321 | 356 | 379 | 498‡ | 498 | 592 | 605 | 619 | 671 |
| **Turnout** | 61.2% | 62.2% | 55.4% | 61% | 55.3% | 60.5% | 56.9% | 63.6% | 62.0% | 56.7% | 57.9% | 62.0% | 60.0% | 58.1% |
| **Number of Candidates Contesting** | 1,874 | 1,519 | 1,985 | 2,369 | 2,784 | 2,439 | 4,629 | 5,312 | 6,160 | 8,668 | 13,952 | 4,750** | 4648 | 5435 |
| **Candidates Losing Deposit** | 40% | 33% | 43%% | 51% | 61% | 56% | 74% | 80% | 81% | 86% | 91% | 73% | 73% | 78% |
| **Re-elected MPs** | na | 222 | 228 | 202 | 228 | 144 | 157 | 243 | 165 | 258 | 196 | 250 | 262 | 220 |
| **First-Time MPs** | na | 316 | 280 | 321 | 311 | 377 | 329 | 290 | 274 | 225 | 299 | 217 | 185 | 271 |
| **Prime Minister Changes** | 0 | 0 | 2 | 0 | 0 | 2 | 2 | 0 | 2 | 1 | 3 | 1 | 0 | 1 |
| **Cabinet Changes††** | 0 | 0 | 0 | 0 | 0 | 2 | 1 | 0 | 2 | 1 | 3 | 3 | 11 | 3 |

[a]After the anti-defection laws of 1985 the number of unrecognised parties jumped from 9 in 1984 to 85 in 1989, then increasing consistently to 173 in the 2004 general election.
* Laakso and Taagepera (1979). // † Due to the *Two-Member Constituencies Abolition Act, 1961,* the data for 1952 and 1957 is based on single member constituencies only.
‡ Voting age reduced to 18 years, *Constitution (61st Amendment) Act, 1988.* // **Deposit raised: 500 to 10,000 Rupees, *Representation of the People (Amendment) Act, 1996.*
†† Following Woldendorp's definition of government (1998), these figures are compiled from Sridharan's Table 6 (2012, 323), counting each change in the party composition of the Cabinet and yielding particularly interesting results for Vajpayee (1999-2004).

***Source:*** Compiled by author from LSD, RSD, ECR(G), EC Press Information Release (March 14, 2014), Sridharan (2012), *India Code, Statistical Handbook 2012* (Ministry of Parliamentary Affairs), *Times of India* (May 17, 2014), Vaishnav (2013), Weiner and Osgood (1975).

**TABLE 5.3 Amendments and the Distribution of Formal Constitutional Change in Relation to Government Type and Prime Minister**

| | | |
|---|---|---|
| NEHRU - Congress<br>(Single Party Majority) | **1st Amendment 18.6.1951**<br>**16th Amendment 5.10.1963** | 16 Amendments<br>253.8 h<br>13,573 Words |
| SHASTRI - Congress*<br>(Single Party Majority) | **17th Amendment 20.6.1964** | 1 Amendment<br>35.3 h<br>1,049 Words |
| I. GANDHI - Congress**<br>(Single Party Majority) | **18th Amendment 27.8.1966**<br>**42nd Amendment 18.12.1976** | 25 Amendments<br>317.2 h<br>21,706 Words |
| DESAI - Janata Party<br>(Surplus Coalition with Majority Party)<br>Executive Coalition: 2 Parties | **43rd Amendment 13.4.1978**<br>**44th Amendment 30.4.1979** | 2 Amendments<br>87.5 h<br>5,414 Words |
| I. GANDHI - Congress<br>(Single Party Majority) | **45th Amendment 25.1.1980**<br>**48th Amendment 26.8.1984** | 4 Amendments<br>29.4 h<br>1,789 Words |
| R. GANDHI - Congress†<br>(Single Party Majority) | **49th Amendment 11.9.1984**<br>**61st Amendment 28.3.1989** | 13 Amendments<br>112.3 h<br>5,290 Words |
| V.P. SINGH - Janata Dal led NF (Minority Coalition)<br>Executive Coalition: 5 Parties<br>Legislative Coalition: 2 Parties | **62nd Amendment 25.1.1990**<br>**67th Amendment 4.10.1990** | 6 Amendments<br>38.0 h<br>2,084 Words |
| SHEKHAR - Samajwadi Janata Party<br>(Single Party Minority Government)<br>External Support: Congress | **68th Amendment 12.3.1991** | 1 Amendment<br>1.9 h<br>59 Words |
| RAO - Congress††<br>(Single Party Minority Government)<br>External Support: Varying/Undeclared | **69th Amendment 21.12.1991**<br>**78th Amendment 30.8.1995** | 10 Amendments<br>43.4 h<br>8,974 Words |
| VAJPAYEE - BJP led NDA (Minority Coalition)<br>Executive Coalition: 13 Parties<br>Legislative Coalition: 6 Parties | **79th Amendment 21.1.2000**<br>**92nd Amendment 7.1.2004** | 14 Amendments<br>75 h<br>4,533 Words |
| M. SINGH - Congress led UPA (Minority Coalition)<br>Executive Coalition: 6 Parties<br>Legislative Coalition: 14 Parties | **93rd Amendment 20.1.2006**<br>**94th Amendment 12.6.2006** | 2 Amendments<br>13.2 h<br>321 Words |

*Source:* Compiled by author from *IndiaCode*, Sridharan (2012) and Ziegfeld (2012).

*Notes:* The hours in the right column refer to the total debating time in both houses (Provisional Parliament for the 1st Amendment); the word count refers to the combined length of amendment acts.
* The 17th Amendment was introduced in the Lok Sabha on the day of Nehru's death and then debated in both houses while G.L. Nanda was Prime Minister, receiving presidential assent after Shastri had taken office.
** While Indira Gandhi's government was a single party minority government - after the 1969 Congress split, before the 1971 elections - only the 23rd Amendment was introduced and passed (a routine ten-years extension of reserved seats in legislatures). Amendments 38 to 42 were passed during the internal emergency period.
† The 49th and 50th Amendment had been introduced before the assassination of Indira Gandhi and were passed while Rajiv Gandhi was Prime Minister but before his 1984 election victory.
†† The Rao government became a single party majority government December 1993 but only Amendments 75 to 78 fall into that time period.

A good example for the importance of the Appendix is the 9th Lok Sabha. If we were limiting ourselves to a quantitative view of the world, it would look like the 9th Lok Sabha, and the unstable minority coalition under V.P. Singh, followed by the unstable single party minority government under Shekhar, has the highest amendment rate, namely 5.4 amendments per year, or in other words 7 amendments passed within 467 days and only 109 sittings of Parliament (see Table 5.1 and Table 5.3). While this may be true in terms of the standard indicators political scientists use to study formal constitutional change, it also misleading. This is where the Appendix comes into play, illustrating the amendments passed by the 9th Lok Sabha are dominated by the emergency in Punjab. Out of the 7 amendments passed by the 9th Lok Sabha, four amendments simply extend special emergency powers in relation to Punjab — this is not a question of constitutional change, but simply reflects the changes to the rules for emergency declaration and extension after 1977 — in other words, the constitution works exactly in the way it was intended to in 1977, putting Parliament in charge of serious emergencies. Two of the other three amendments passed by the 9th Lok Sabha are reservation amendments — the long term plan for the establishment for a National Commission for Scheduled Castes and Scheduled Tribes (replacing the Special Officer) and the routine extension of reserved seats by ten years, which passes — since Independence — each time within hours and mostly without any no votes; plus, the 9th Lok Sabha changes the Ninth Schedule to accommodate routine amendments to State land reform legislation that are already included in the Schedule. As a result, the 9th Lok Sabha has actually not brought about a word of constitutional change - but merely took caretaker style control of routine constitutional work. These are the sort of

arguments, throughout Chapter Five for which the Appendix is crucial, providing supporting evidence in a straightforward manner. As well as this, the Appendix illustrates that Parliament can still be in charge of constitutional developments, when the Supreme Court fails to understand (or ignores) public opinion: Every time the Supreme Court intervenes in the realm of reservation policy, Parliament is able to overrule the Court within months.[9]

Taken together, these findings suggest three periods of intensive constitutional change: The session of the First Lok Sabha as a period of rapid constitutional change due to the first conflict between Parliament and the judiciary as well as the "delayed" constitution-making process. The second period of rapid change occurs between 1970 and 1977 and is dominated by the second clash between politicians and judges (electoral fraud allegations against Indira Gandhi and the scope of judicial review). A third period of concentrated constitutional politics begins and ends with the session of the tenth Lok Sabha and the panchayat raj reforms. In terms of structural changes the Chapter has advanced the argument that changing political contexts de facto changed what remained de jure an unchanged amendment process: What used to be a "facile amendment" procedure has become a difficult hurdle to clear as coalition politics and regional parties begin to dominate Indian politics. While Parliament now mainly produces a large number of "lame-duck amendments" India's judiciary has thus found the political space to reinvent itself in terms of judicial assertion within the realm of constitutional change

[9] Particularly interesting for the BJP led NDA, as the Court's limitations on reservations are immediately undone and the policy expanded.

as well.[10] Since 1983, Parliament has been unable to overrule a Supreme Court decision, with the important exception of cases relating to questions of India's reservation policies where a strong policy consensus stretches across all coalition cleavages (Appendix). Otherwise, the power to bring about decisive constitutional change now vests with India's Supreme Court.

[10] Chapter Four has already analysed how the Indian Supreme Court turned the judicial appointments process on its head — clearly an example of the Court setting and implementing an agenda of constitutional change. Another prominent example, discussed in Chapter Two, would be the Ninth Schedule Case, *I.R.Coelho vs. State of Tamil Nadu* AIR 2007 SC 861, which extended basic structure review into the realm of the Ninth Schedule and thus set aside the 1st amendment to some extent *S. R. Bommai vs. Union of India* AIR 1994 SC 1918 is a similarly significant landmark case for understanding the power of the Supreme Court to change the "constitutional rules" of the game, simply by hinting at the justiciability of President's rule and putting curbs on the exercise of Art. 356.

# CHAPTER SIX

## *Under Basic Structure Rule: The Representation of the People (Third Amendment) Act, 2002, and the Judicialization of the Electoral System*

***Abstract*** How has the Constitution's basic structure played out over time? Chapter Six provides a case study approach to the Association for Democratic Reforms case, a public interest litigation that upheld the judicial construct of 'a right to information' and rewrote the Representation of the People Act, 1950. This is one of the few examples in which all political parties agreed to override the Supreme Court decision that candidates standing for election had to declare their assets and disclose any criminal record. The Supreme Court set the agenda, implemented it via judicial legislation and, last but not least, pushed aside any legislative objections from the other two branches as unconstitutional. The chapter thus begins with "normal" dimensions of judicial power — the governing with judges, exploring how the day-to-day resolution of electoral disputes by the Indian Supreme Court judicialised the preferences of all actors over time. The Association for Democratic Reforms case, however, is more aptly described as a new form of judicial power — governed by judges — as the Basic Structure moved the Supreme Court outside the confines of regular separation-of-power games, fusing agenda setting, law making and veto-player roles within a single judicial institution.

## [6.1] Governing with Judges: Elections and the Supreme Court

The Supreme Court has been exceptionally active in the field of electoral politics. It would not be amiss to state that in large part, it has created the system as it stands today through judicialisation. It has supported and made powerful the Election Commission, which is a highly regarded and respected institution. It has refused to question the Commission's decisions on fact, although it has tinkered with and kept the ultimate interpretation of issues such as what constitutes a corrupt practice or the extent to which the use of language or religion to sway voters can be used. The Court has encouraged the creation of a multiparty-system because of its strict interpretation of anti-defection laws, which forced political actors to create new parties rather than join existing ones. It decided which of the state's policies could use the instrumentality of election laws to bring about the sort of social engineering it approved of and, finally, it created a robust discourse on anti-corruption, transparency and good governance by ensuring that laws demanding the declaration of assets, disclosure of criminal records and the right to information were enacted.

Political scientists looking at the mechanics of electoral democracy in India seldom realise the extent of judicialisation and its role as a catalyst within the process of

the evolution of India's electoral system. Judicialisation governs every legislative loophole to keep the voting process moving forward, focusing on the preferences of judges and judicial law making. Judicial interventions in electoral systems are a normal part of judicial routines around the globe. Courts settle electoral disputes, intervene in electoral processes and shape electoral systems in general and everywhere. For instance, in India, judges might decide, whether a candidate really is a member of the Scheduled Caste after conversion or re-conversion or whether a symbol offends a community?[1] From the early days of Indian elections, laws have required interpretation and disputes have had to be settled, thus creating rules. In the *Shubhnath vs Ram Narain* AIR 1960 SC 148 case, the Supreme Court adjudicated on what constituted a corrupt practise when it held that the symbol of a cock, which seemed to suggest not voting for the candidate would incur his displeasure, was undue influence as the cock had religious significance for the Adivasi tribal population in the constituency. In *Ramanbhai Ashabhai Patel vs Dabhi Ajithkumar Fulsinji* 1965 SCR (1) 712, five years later, the mere use of a star was not held to be corrupt as it did not have an obvious and clear religious context, although it too was linked to the religious dhruva star in Hindu philosophy. In these case examples, the Supreme Court decided when an action fell short of what it deemed improper, thus holding onto the reigns of interpretation, even for issues that were very similar. In the religious symbols cases, for instance, in Ramanbhai, it stated that nothing could be called a Hindu symbol as Hinduism has a large pantheon and contains many ideas. The Court could just as well have decided the

[1] *G.M. Armugam vs. S Rajagopalan* 1976 SCR (3) 82.

opposite; what matters is the presence and legitimacy of an institution that settles disputes, what Stone Sweet calls the move from the dyad to the triad.

Table 6.1 points towards more assertive forms of judicial power and judicial making not linked to specific disputes but more abstract policy interventions. The Election Commission, in particular, is one of the actors that learned to use PIL to shift electoral laws in specific directions and bypass the legislative and executive branches. We can describe these as higher level of judicialisation as the agenda is set in the style of policymaking, and the judicial decision does not derive from a specific dispute but from rather abstract ideas. For instance, in *People's Union for Civil Liberties v Union of India* (2009) 3 SCC 200, a case later referred to a Constitution bench and which was decided in 2013, the Supreme Court followed the arguments presented by NGOs as well as the Election Commission and introduced a new ballot design, including the right to a 'none of the above' vote — generations of political scientists will have to study the impact of this case. Similarly, the imposition of strict anti-defection laws by the Supreme Court (Nikolenyi 2008) is an important reason for the fractionalisation of the Indian party system. [2]

[2] Although, this is an example of routine judicialisation patterns as the anti-defection agenda emerged from the other branches and was introduced as a constitutional amendment by a two-thirds majority.

**TABLE 6.1**

**Percentage of Public Interest Litigation Cases Dealing with Election Commission Matters**

| Year | Number of PIL Writ Petitions | Election Commission Matters (%) |
|---|---|---|
| 1997 | 215 | 1.29 |
| 1998 | 177 | 1.60 |
| 1999 | 158 | 1.72 |
| 2000 | 183 | 0.39 |
| 2001 | 182 | 1.42 |
| 2002 | 199 | 3.25 |
| 2003 | 177 | 0.44 |
| 2004 | 193 | 7.80 |
| 2005 | 227 | 3.72 |
| 2006 | 243 | 3.28 |
| 2007 | 258 | 5.77 |

*Source:* Compiled by author from the *Annual Report of the Supreme Court of India 2008/9* and Gauri (2009).

To illustrate the key differences between regular judicialisation — governing with judges as opposed to being governed by judges — we explore a series of acts passed in relation to Panchayat elections. The case originated as an appeal against writ petitions filed in the High Court at Chandigarh. The issue at the heart of the matter was the validity of the *Haryana Panchayati Raj Act, 1994* which disqualified people having

more than two children a year after the commencement of the act from standing for Panchayat elections.[3] A quick overview of the chronology of the acts serves to put the Haryana Act in context. Haryana was one of seven states that enacted such legislation; Rajasthan introduced this rule first for both the Panchayat and municipal elections in 1992, Andhra Pradesh introduced this rule in 1993, Orissa introduced it in 1993, Himachal Pradesh and Madhya Pradesh in 2000, and Maharashtra in 2003 (with retrospective effect from 2002), while Chhattisgarh enforced the law it inherited from Madhya Pradesh upon its recognition as a separate State (Buch 2005). In the writ petition against the Haryana Act, it was argued that this provision of the act was arbitrary and discriminatory and violated Article 14 of the Constitution, and also that the disqualification did not serve the purpose the act sought to achieve, namely the structuring of local elections. The other main argument was that it interfered with the freedom of religion and violated Article 25 of the Constitution. The Court answered both objections in the negative and stated that no discrimination had arisen.

In response to the first issue, the Court said that Article 14 forbids class legislation but it does not prohibit classification for the purpose of legislation and discusses the tests for this intelligible difference citing case law from India and abroad. The Court almost summarily dismissed the argument that the provision did not serve the purpose of the act by saying it served the purpose of the act, as one of the aims in creating grass-roots governance models was family planning and welfare. 'There is no merit in the

[3] The use of election laws as a means for furthering public policy in medical campaigns against tuberculosis and leprosy has been upheld by the Supreme Court; in *Dhirendra Pandua vs State of Orissa* (2008) 17 SCC 311, the Supreme Court accepted the constitutionality of Section 38 of the *Orissa Municipal Act, 1950*, which disqualifies candidates suffering from such a disease putting forward their names.

submission. We have already stated that one of the objects of the enactment is to popularise Family Welfare/Family Planning Programme. This is consistent with the National Population Policy.'[4] This was also the rationale with regard to the argument that the section was discriminatory, as the Court held that the section was directly related to the general purpose of the statute and since people with two children were distinct from those having more or less children, as a distinct group they were subject to legislation and so the policy decision was not open to judicial scrutiny.

In response to objection 2, the Court said that there is no discrimination against any religious practice or faith as per Article 25 as the act did not stop people having more than two children, it just forbade them from standing for Panchayat elections. The Court also states that such policies could be implemented step by step, and implementing it only for certain posts was not necessarily discriminatory. It also did not find it odd in any way that only a few states have this legislation. Even more interestingly, it was happy to decide that in one state, the omission of the word 'living' implied all children living and dead, and in another, the use of the word implied that in that state, parents who had suffered the loss of their third child could stand for elections. Similarly, we find cases in which children were adopted by the candidate would disqualify them or the child might be given up for adoption to the candidate's brother so that the candidate would not be disqualified. In each of these cases, the judicial intervention specified the rules and judicialised over time. In the following sections, we shift towards a very different form of judicial power in its raw Weberian meaning of making others do something they do not want to do. A qualitative close-up of the

[4] *Javed vs State of Haryana* (2003) 8 SCC 369.

landmark decisions Union of India (UOI) v Association for Democratic Reforms (ADR), 2002, (hereafter 'the ADR case') and People's Union for Civil Liberties (PUCL) vs. Union of India, 2003, Peoples Union for Civil Liberties v Union of India 2003 (4) SCC 399) (hereafter the 'PUCL case') renders a clear picture of the judges' powerful impact on free and fair elections. Both cases address the problem of the criminalisation of elections after the 170th Report of the Indian Law Commission (1999), while the Vohra Committee of the Ministry of Home Affairs already had called for election law reforms. In a nutshell, the Supreme Court adopted the Law Commission's recommendations for debarring any candidate if he faces charges in any court in respect of certain criminal offences; any candidate seeking to contest an election will have to reveal all details regarding criminal cases (pending) as well as correct statements of assets owned by the candidate, his spouse and dependant relations. The most important aspect of our narrative is the fact that this has become the law of the land because the Supreme Court struck down legislation overriding its original judgement under the basic structure doctrine.

## [6.2] The Right to Information — Pure Judicial Power?

It is necessary to trace the evolution of the right to information laws as an excursus because it serves to show how the main case study, dealing with transparency and corruption in elections, turned on this issue and galvanised public opinion to such an extent that it fed into the debate for a strong RTI Act, which then was passed in 2005.

So, the progression of the two cases symbiotically fed each other, and we are able to explore the full extent of judicialisation as the right to information is a judicial innovation to begin with and, consequently, the entire judicial intervention in electoral laws stems from judicialisation.

The passing of the RTI Act in India coincided with increases in moves towards transparency around the world — yet for India the push towards the act came from the judiciary.[5] The story behind the formulation of this act began much earlier and again highlights the importance of the 'little' or minor judicialisation issues leading to such upheaval in governance mechanisms. For the first real movement was an effort to find out about what daily wages were being paid to unskilled labourers. As early as 1987, the Mazdoor Kisan Shakti Sanghathan in Devdungri in Rajasthan began agitating for information on minimum wages.[6] Movements such as these and the increasing importance of transparency in good governance slowly led to a progression via the courts towards formal legislation on the issue. The legislative movement for the Right to Information Act, 2005, exposes the full scope of the judicialisation of governance discourses and the ordering of political preferences in terms of legal debates. In 1996, a retired Supreme Court judge, Justice P.B. Savant was put at the helm of legislative drafting efforts by the National Campaign for People's Right to Information (NCPRI) and Press Council of India (PCI). The Government constituted committee, chaired by H.D. Shourie, also proposed a draft law in 1997, which was later Parliament as the

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[5] According to data compiled by Ackerman (Ackerman et al. 2006) India passed the law at a time when there was most activity in relation to freedom of information laws around the world.

[6] *The Movement For Right to Information in India - People's Power for the Control of Corruption 1999*, <www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20Movement%20for%20RTI%20in%20India.pdf>, last accessed September 24, 2015.

Freedom of Information Bill, 2000. After recommendations by the Parliamentary Standing Committee on Home Affairs, the *Freedom of Information Act, 2002* was passed by Parliament, December 2002, with presidential assent January 2003 - then, due to lack of notification, the Act never came into force (RTIFR 2013, 30).[7] The change in government from BJP to Congress in 2004 meant the 2002 Act was dropped and a reworked act, which claimed to have answered more of the misgivings of the parties involved, was passed five years later. The Right to Information Act 2005 came into force four months after being passed, on 12 October 2005. The PUCL case order, however, leaves no doubt who the judges credited with the enactment of an RTI law — as the right to information had already been invented and 'entrenched' by judicial decisions and the provisions of the act reflected the existing case law. As Justice Reddi stated in the second paragraph of his opinion:

> Freedom of expression and right to information in the Constitution of our democratic Republic, among the fundamental freedoms, freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post independent era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the constitutional courts. Barring a few aberrations, the Executive Government and the Political Parties too have not lagged behind in safeguarding this valuable right which is the insignia of democratic culture of a nation. [(2003) 4 SCC 399]

[7] While the enactment of a Union act was slow, the States had enacted their own versions of RTI statutes in line with court decisions and their established parameters of the new right. Amongst the first were Tamil Nadu and Goa, which enacted legislation in 1997 and Karnataka and Rajasthan followed suit in 2000 and Delhi in 2001; a year later, Maharashtra and Assam followed.

## [6.3] Elections and the Right to Information: From Inter-Branch Conflict to Judicial Command

If the right to information had been a creature of judicialisation to begin with, the extension of the idea into the realm of elections would take place against powerful, yet futile, opposition by the executive and legislature. The Association for Democratic Reforms case[8] was filed before the Delhi High Court in 1999 for directions to implement the 170th Law Commission Report by making changes to Rule 4 of the Conduct of Elections Rules 1961. The Law Commission had made recommendations for ensuring election processes that were 'more fair, transparent and equitable' and 'to reduce the distortions and evils that have crept into the Indian electoral system' by making a comprehensive study of the Representation of Peoples Act, 1951. One recommendation was the debarring of a candidate if he had charges brought against him in a court with respect to certain offences. In addition to furnishing details if a candidate had pending criminal cases against him, the recommendation was that the financial position and assets of the candidate and immediate family should also be declared.

The ADR in its petition in the High Court stated that successive governments had not acted on these recommendations. But in its order, the High Court correctly ruled that legislating was not in its purview and it could not therefore pass any order amending the act or rules. However, at the same time the High Court held that information about the candidate was essential to the voter to ensure they knew who they were voting for, and

[8] *Union of India (UOI) vs.Association for Democratic Reforms*, (2002) 5 SCC 294.

this was covered under their fundamental rights. In this regard, it directed the Election Commission to 'secure to voters' certain information regarding each candidate. This information included whether they were being prosecuted or accused of any offence punishable with imprisonment, what their assets as well as the assets of the spouse and dependent relations were, facts giving an 'insight into the candidate's competence, capacity and suitability for acting as a parliamentarian or legislator, including details of his/her educational qualifications' as well as their capacity to run for that office:

> Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof. 2. Assets possessed by a candidate, his or her spouse and dependent relations? 3. Facts giving insight to candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications. 4. Information which the election commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature. [(2002) 5 SCC 294]

Both the Indian National Congress, which was in opposition, and the BJP government appealed and asked that the Supreme Court hold that the High Court should not have directed Election Commission to directly implement these changes — instead the writ petitioners who filed the public interest litigation should have been ordered to approach Parliament instead. In short, the unified stance of the political parties was simply ignored.

The Peoples Union for Civil Liberties in the meantime had also filed a writ petition in 2001 under Article 32:

> [P]raying that writ, order or direction be issued to the respondents — (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP / MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her, and (c) to frame such guidelines under Article 141 of the Constitution by taking into consideration 170th Report of Law Commission of India. (par. 6)

The two cases were heard together and a joint order was passed. The Solicitor General argued on behalf of the government that the changes directed by the High Court should not come into effect until amendments were made to the act and that various provisions of the existing act contained in effect what these two petitions sought to do. He submitted that political parties would decide on the amendments and the High Court had gone outside the Representation of the People Act in the declaration of assets issue as the act as it existed did not provide for it.

The lawyer for the intervening party, the Congress, argued that the CAD had provided evidence that there had been discussions on educational qualifications and such criteria were expressly rejected. This was also true with regard to a declaration of the property a candidate might have. The Election Commission filed a counter affidavit to this, and its lawyer argued that the criminalisation of politics was an issue the Election Commission was greatly troubled by and had, since 1997, actively engaged with, and a lack of resolution meant that 'law breakers have become law makers'**.** It also recommended that prospective candidates declare their assets and that offences be

punishable with more than two years' imprisonment where charges had been brought by a court.

The Supreme Court order of the three-judge bench notes that Election Commission and High Court have identical preferences with regard to transparency rules in relation to pending criminal cases as well as assets and educational qualifications. Above all, the Supreme Court had no doubts about its judicial law-making powers:

> The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.

The order records the statement of one of the counsel for the original petitioners and states that:

> [D]emocracy is a part of the basic structure of our Constitution; and rule of law and free and fair elections are basic features of democracy' and that the 'entire history, background and the antecedents of the candidate are required to be disclosed to the voters so that they can judiciously decide in whose favour they should vote. (par. 18)

The Court whittled the issue down to two main questions, namely:

> 1. Whether the Election Commission is empowered to issue directions as ordered by the High Court? 2. Whether a voter — a citizen of this country — has right to get relevant information, such as, assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

It then brings in the Basic Structure argument in the next paragraph, wherein it says that the Election Commission's ability to control all elections was a fundamental tenet of democracy and thus basic to the Constitution.

> Further, it is to be stated that — (a) one of the basic structures of our Constitution is `republican and democratic form of government'; […] Under Article 324, the superintendence, direction and control of the conduct of all elections' to Parliament and to the Legislature of every State vests in Election Commission. The phrase `conduct of elections' is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections. (par. 21)

The order quotes various sources to lend weight to the argument that democracy was based on the voter and their right to know. The scope and ambit of Article 324 was discussed and the Court sought to establish that it 'operates in areas left unoccupied by legislation', and that when a statute is silent, there is no bar to the authority acting as it deems proper, since silence is not to be construed as a bar on such action.

> Finally, in our view this Court would have ample power to direct the Commission to fill the void, in absence of suitable legislation, covering the field and the voters are

> required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets immovable, moveable and valuable articles it would have its own effect. (par. 45)

At the end of the judgement, the Court provides a seven-points summary, holding that 'the jurisdiction of the EC is wide enough to include all powers necessary for the smooth conduct of elections'; that the limit of plenary power is when an act of law on an issue exists and when it is silent, the Commission has the right to act and is 'a reservoir of power' till the vacuum is filled (Kanhiya Lal case); that elections include the entire process; to maintain purity and transparency, the expenses can be asked for by the EC; the right to information means that the electorate shall have access to relevant information — and here it quotes the international Covenant of Civil and Political Rights; that a reading of all past Supreme Court judgements shows that the Supreme Court has ample jurisdiction under Article 32 read with Articles 141 and 142 to issue directions to the executive to serve public interest; and, finally, that the right to know is included in Article 19(1) (a). It states that the High Court order could not be said to be unjustified, but it modified it to the extent that it directed the Electoral Commission to call for information on criminal offences, assets and educational qualifications. Without doubt, this judgment, decided on 2 May 2002, fundamentally changed the *status quo* of

electoral laws as well as general public policies relating to the electoral process. It constituted an unprecedented judicial intervention into candidate selection, intra party governance and inter-party relations; also, it fundamentally shaped campaign styles and campaign issues (assets of opponents and so on). Moreover, there can be no doubt that the Supreme Court's decision contradicted the policy preferences of the legislative as Parliament was quick to pass the *Representation of the People (3rd Amendment) Act, 2002,* overriding the Court's decision in the ADR case. The second public interest litigation, pursued by the People's Union for Civil Liberties, India's most active 'cause lawyer,' thus arose out of the need for the judges to clarify their understanding of the separation of powers as well as the effects of legislation overturning earlier judgements. The majority judgement in the PUCL case at the outset states bluntly that the amending legislation was *ultra vires* because, by overturning the judgment, the legislature was assuming judicial power for itself.

Justice Shah began his judgement with a colourful analogy:

> There was an era when a powerful or a rich or a strong or a dacoit aged more than 60 years married a beautiful young girl despite her resistance. Except to weep, she had no choice of selecting her mate. To a large extent, such a situation does not prevail today. Now, young persons are selecting mates of their choice after verifying full details thereof. Should we not have such a situation in selecting a candidate contesting elections? In a vibrant democracy — is it not required that a little voter should know bio-data of his/her would be Rulers, Law-makers of Destiny-maker of the Nation? (PUCL case, para. 2)

The circumstances of this second case were as follows: While the appeal against the ADR case was brought to the Supreme Court by the Union government, they also took legislative steps to circumvent the issue. During the course of the hearing in the Supreme Court, and before the judgment could be pronounced and an order passed, the ordinance was repealed, and on December 20, the *Representation of People (Third Amendment) Act, 2002* was passed. It came into force with retrospective effect. Parliament and Government thus override judicial decisions, the Amendment reads as follows:

> 33A. Right to information .— (1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub- section (1) of section 33, also furnish the information as to whether-
>
> (i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;
>
> (ii) he has been convicted of an offence [ other than any offence referred to in sub-section (1) or sub- section (2), or covered in sub- section (3), of section 8] and sentenced to imprisonment for one year or more.
>
> (2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub- section (1) of section 33, also deliver to him an affidavit sworn specified in sub- section (1). by the candidate in a prescribed form verifying the information
>
> (3) The returning officer shall, as soon as may be after the furnishing of information to him under sub- section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub- section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

> 3. Insertion of new section 33B.- After section 33A of the principal Act as so inserted, the following section shall be inserted and shall be deemed to have been inserted with effect from the 2nd day of May, 2002 , namely:- 33B. Candidate to furnish information only under the Act and the rules.- Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.

The sequence of moves does not end with the legislative override. The PUCL filed a case immediately challenging the ordinance, but by the time the matter was heard, it had already been passed as an act. The order, dated March 13, 2003, records that the petition was against the ordinance, but since the wording of the sections in the act were the same as in the ordinance, the Court accepted the amendment application filed by PUCL, allowed the modification of the petition as challenging the act and struck down the two sections. The order asserts that the legislature cannot pass a law in direct contravention of a court order so as to render the directions of that order irrelevant or require the instrumentalities of the state, i.e. the Election Commission, to flout Supreme Court decisions.

While Justice Reddi in his order expresses his wish that PUCL had been referred to a Constitution bench, it is perhaps telling that the government and all of the political parties did not have any hope that the Constitution bench would go against the order of the three judges in the ADR case. In the new order, the court used the word ‘diktat’ with regard to the Supreme Court’s recommendations, which the legislative attempt at amendment did not choose to follow. The Court further stated in the course of its order

that the right to information once recognised as a fundamental right could not be truncated.

> [T]he Legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts […] A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding. […] we would reiterate that the primary duty of the Judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the Constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. […] That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision. […]. It is also equally settled law that the Court should not shirk its duty from performing its function merely because it has political thicket […] merely because the question has a political complexion that by itself is no ground why the court should shrink from performing its duty under the

> Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. It is necessary to assert the clearest possible terms, particularly in the context of recent history, that the Constitution is suprema lex, the paramount law of the land, and there is no department or branch of Government above or beyond it (para. 9).

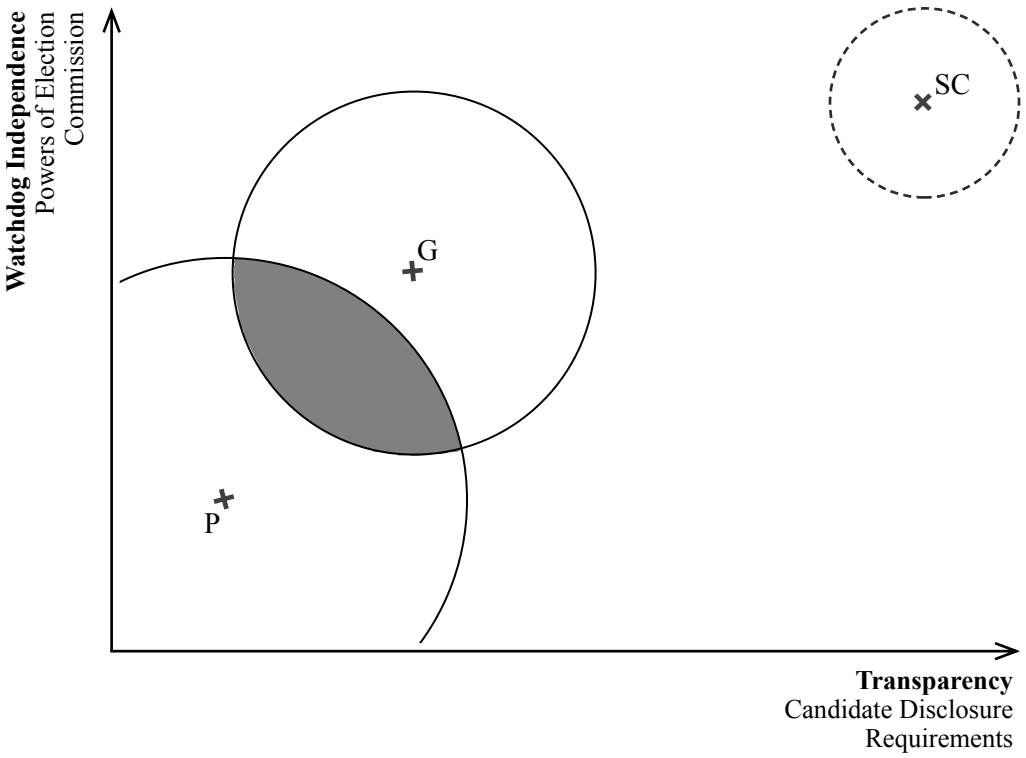
In a word, the Supreme Court of India declared the *Representation of People (Third Amendment) Act, 2002*, null and void and ordered the Election Commission to ensure the original judicial instructions were implemented.

## [6.4] Governed by Judges: Beyond the Marksian Model

Putting this case into the context of the Marksian model discussed in Chapter Three, we can develop a new formal analysis of legislative-judicial interaction in the context of the judicialisation of the electoral process to illustrate the impact of the Basic Structure. Regardless of the fractionalisation of the political system, the possibility of a presidential veto or the influence of legislative committees, this model is based on Brian Marks' classic rational choice approach to judicial power (Marks 1989) and the general assumption that the Supreme Court of India will opt for those interpretations of the Constitution that are as close as possible to judicial policy preferences, yet, do not carry

the danger of being overturned by legislative action. Studying the influence of judicial decisions on the legislature provides an important insight into the measurement of the judicialisation of the electoral process. The purpose of Figure 6.1 is to determine the policy space accessible to the Indian Supreme Court and thus the power of the judges to implement their own policy preferences.

**FIGURE 6.1** **Election Law Reforms: Marksian Separation of Powers Model and Basic Structure Implications**




SC = Supreme Court ideal point.

G = Government ideal point.

P = Parliament ideal point.

= Winset of the status quo for Government and Parliament.

= Tolerance intervals, Government and Parliament.

= Tolerance intervals, Supreme Court.

In this particular case, we have moved beyond a mere political competition model of checks and balances as the traditional separation-of-powers model no longer applies. Normally, the successful judicialisation of a specific policy field implies that the judges face a legislature and government that is unlikely to overturn their decisions, or rather, that judges are aware of the tolerance intervals of other branches (hence the learning experience from the property disputes). Applying the Marksian model from Chapter Three, we assumed that the Supreme Court's decision would have to fall in the area, *winset of the status quo for government and parliament* (Figure 6.1). The ability of the Indian Supreme Court to completely ignore the policy preferences as well as the tolerance intervals of the executive and legislature is what makes this case so remarkable. For the Representation of People (Third Amendment) Act, 2002, the story no longer unfolded along the lines of general separation-of-powers games, and Marks' model fails to explain a Basic Structure game. The legislative amendment was a classical override move, invalidating the judicial decision and explicitly stipulating that candidates only had to furnish information if required by the act and not by any judicial decision. In most countries, even those with very strong Supreme Courts, the game would end at that point (at best, judges might by stealth and over a long time shift the meaning of the amendment act via interpretation). However, with a strong and established Basic Structure doctrine this story continued in India as the Court came back into the game and declared that the legislature was overstepping its boundaries by framing a law that literally nullified the Supreme Court order — essentially forcing the legislature to adopt the Court's view and negating the possibility of overriding occurring in the Basic Structure sphere. Consistent with Shapiro's political jurisprudence, these

cases exemplify the political elements of judicial decision-making as the judges clearly understood the changing political context and then enforced new policy preferences despite a majority of legislators preferring the old policies. As well as this, the PUCL case is a striking demonstration of judicial power, a *de facto* overriding of a legislative amendment, although it is obvious that the judges had perfect and complete information about the preferences of the legislature. In other words, the Supreme Court of India was able to choose not to defer to the other branches of government.[9] In terms of Marks' spatial model (Figure 6.1), the ADR case represents a simple Court (SC) decision (ideal point) within a two-dimensional policy space. Secondly, the legislature (P) and the executive (G) overturned the judges' decision via legislation and pulled the law back into the area, *winset of the status quo for government and parliament*. Usually, as suggested in Chapter Three, an equilibrium would emerge over time, maximising the preferences of all three institutions. In a Basic Structure game, however, the Supreme Court does not have to move at all, and not even the Court's tolerance interval seems to be particularly important from the perspective of judges (however, Parliament and Government can exert at least a little bit of influence as long as they move within the Court's tolerance interval in Basic Structure matters). The fact that the Supreme Court's second decision, namely the PUCL case, remained at SC and did not constitute any movement towards G or P, points towards the extraordinary power of the judges and provides several lessons. 'Among the most important of these is the primacy of policy preferences; that is, judicial specialists generally agree that justices, first and foremost, wish to see their policy preferences etched into law' (Epstein and Knight 1998, 10).

[9] Following Fischer (2007).

For regular judicialisation patterns, we see 'how legislators are gradually placed under the tutelage of the constitutional court or, more precisely, the pedagogical authority of constitutional case law' (Stone Sweet 2000, 149). For Basic Structure cases, there is no need for much tutelage and the Court simply is as assertive as it wants to be. Finally, the current institutional distribution of power sanctions an almost absolute judicialisation of law making that goes beyond the normal levels of judicial policymaking and the regular reception of judicial decisions by legislators. Within the sphere of electoral laws, the Indian Supreme Court has managed to govern the exercise of legislative power directly and without mediation.

The Supreme Court confirmed that a citizen's right to elect his representative could not be limited by statutory provisions except as permitted by the Constitution — and of course, it is the judges who say what the constitution is or rather what the Basic Structure is. Over time, the heresthetical manoeuvrings of the 1970s that practically deferred to the other branches and only spoke about the Basic Structure as an idea, unfolded and empowered the Court in a unique way. In summary, the Court no longer has to be strategic in such constellations but can implement its own policy preferences without taking into account the preferences of Parliament and Government. In a way, instead of strategic decision-making, the Supreme Court can decide sincerely and without regard to the opinion of other branches. Of course, this should not be misread as absolutist judicial power: a successful Supreme Court must take into account, strategically, public opinion, elite opinion (especially the media) and the benefits that accrue from the added legitimacy of the Election Commission and other support constituencies (such as the Bar Association). The court is not autarkical and not all

powerful, but in some cases, the Basic Structure doctrine means that the Indian Supreme Court is powerful enough to turn the prime minister, cabinet and Parliament into institutions of irrelevance.

There is another story attached this chapter's conclusion that involves the strategic cunning of the Supreme Court in relation to public opinion. Just like the public interest litigation for transparency of assets and criminal records, there was a public interest litigation seeking judicial intervention on delimitation and constituency size[10] (because of demographic developments, a vote in the North today counts much less than a vote in the South, but this is obviously a political Pandora's box, with not much to gain and everything to lose for most political parties. Since 1971, politicians have stuck to the decision to avoid the complexity of constituency boundaries and put a constitutional freeze on delimitation through constitutional amendments, embracing gaps in voting shares and then extending the *status quo* of constituency boundaries until 2031 (via the 87th Amendment Act, 2003). The Supreme Court knew of course that such a topic engendered at least as much opposition as support — across the Indian public, amongst elites, and within the Court's support constituencies — and, as a result, simply ignored the case and the issue in general, and did not even seem to be tempted to waste its political capital on a classic win-lose, divided constituencies, topic.

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[10] In 2007, a BJP MP, Vijay Jolly, who ran an NGO called the Delhi Study Group, filed a PIL on delimitation in the Supreme Court entitled Delhi Study Group v Union of India, but the case has been ignored. The Supreme Court refused to entertain the argument that proportionate appropriation of seats could be part of the basic structure, *J&K National Panther's Party v. Union of India* (2011) 1 SCC 228. Given the model of judicial decision-making embraced in this thesis, such decisions are not based on textual or logical arguments: it would be possible to construct a plausible argument either way. When the Supreme Court supports transparency in relation to criminal records and assets the judicial decision is supported by numerous support constituencies as well as public opinion. If the Supreme Court interfered with constituency boundaries, such support from other actors would be fragmented at best.

# *CHAPTER SEVEN*

## *India's Rights Revolution: Expansion of Judicial Policy Making Spaces*

***Abstract*** While this thesis focuses on the changing political opportunity environment through elections, we have also recognised path dependency patterns within which judges themselves can participate, bringing about circumstances that empower them even further. Public interest litigation is at first an institutional innovation that invites new actors into the courtroom but then built new support constituencies through social and economic rights after the Emergency. This Chapter documents the evolution of this field of jurisprudence as another example of 'when judges change the rules of the game' and the other branches are too weak to check and balance judicial power. As a result, Chapter Seven brings into focus judicial institutional innovations that have revolutionised access to the Court as well as the remedies and other tools with which the Supreme Court intervenes in governance. While the expansion of judicial policymaking into many spheres of public life has been explored by different scholars at different times, this chapter seeks to shift the debate towards quantitative data and the impact of PIL on court organisation. On this basis, Chapter Seven argues against Epp's view that there has only been a weak rights revolution in India and explores further heresthetical manoeuvres in favour of judicial power expansion: the power not to decide and *de facto* docket control.

## [7.1] Evaluating and Explaining Public Interest Litigation

Two narratives run side by side: To begin with, it seems obvious to any observer of Indian economic and social development that the pace of law and social change is chronically lagging behind constitutional utopias; at the same time, there are numerous examples where Indian litigants and courts have skilfully utilised rights to contribute to meaningful social change. India's legal system, like other legal systems, has to be conceptualised as a structurally conservative institution. As a general rule, litigants who are resource strong and repeat players enjoy strategic advantages, and it is difficult to think of law as 'empowering' even if we assume that courts side with the disempowered:

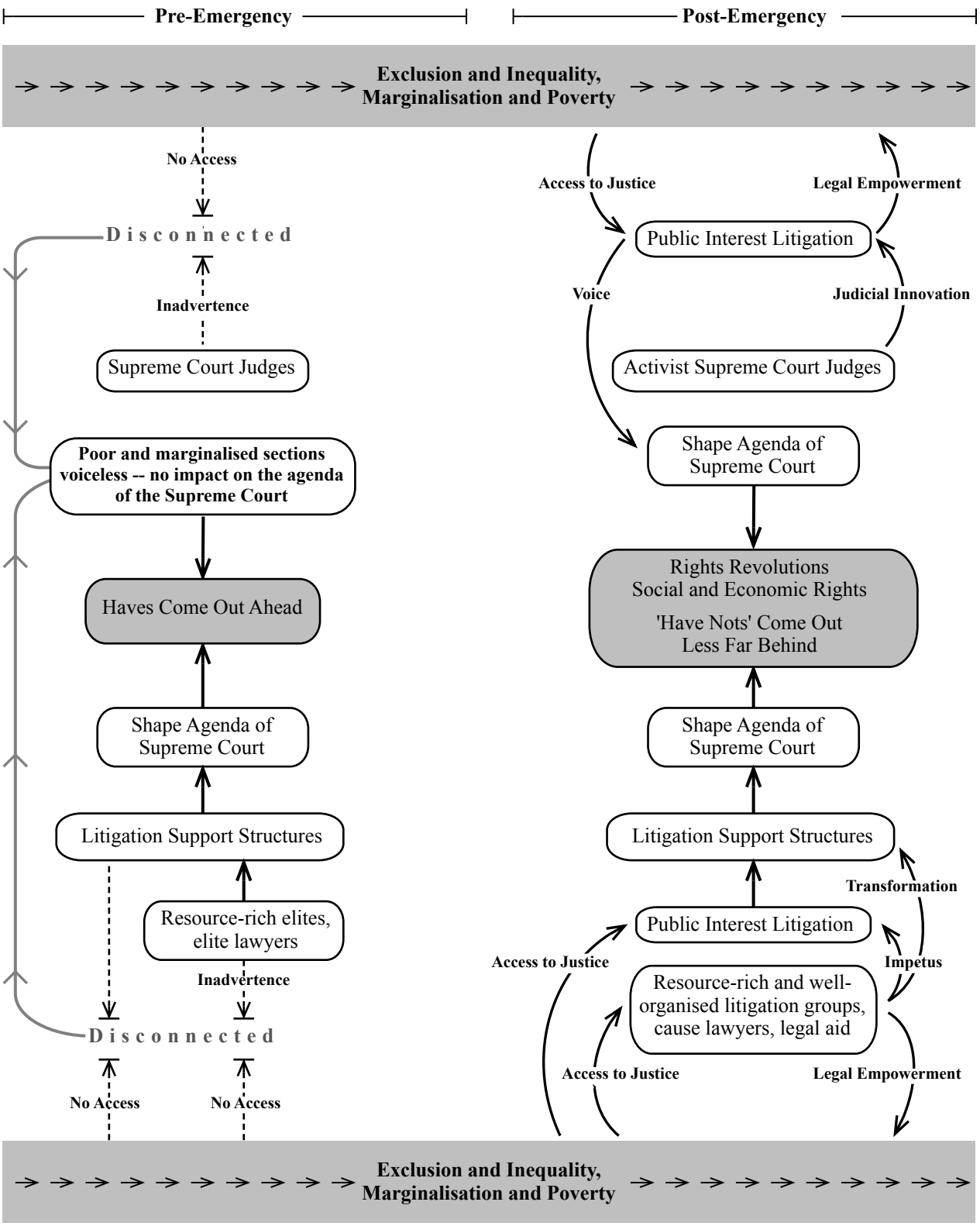
> That courts can sometimes be induced to propound rule-changes that legislatures would not make points to the limitations as well as the possibilities of court-produced change. With their relative insulation from retaliation by antagonistic interests, courts may more easily propound new rules which depart from prevailing power relations. But such rules require even greater inputs of other resources to secure effective implementation, and courts have less capacity than other rule-makers to create institutional facilities and re-allocate resources to secure implementation of new rules. Litigation then is unlikely to shape decisively the distribution of power in society. (Galanter 1974, 149-50)

What is more, there 'is wide agreement that access to justice in India requires reforms that would enable ordinary people to invoke the remedies and protections of the law' (Galanter and Krishnan 2004, 789-90). In the process of trying to meet constitutional aspirations, representations of legal entitlements remain at the centre of the political imagination. To assess the relevance of India's 'rights revolution' for questions of judicial power (Epp 1998; Ignatieff 2000), it is necessary to trace an evolving constitutional jurisprudence that has asserted greater powers of judicial review and to chart its influence on contemporary legal and political practices. It is clear that the intellectual origins of the Indian rights revolution have had a contentious history, leading back to the formal articulation of various demands for rights during the independence movement since 1895 as well as the language of rights of the Karachi Resolution of 1931 (Reddy and Dhavan 1994). The concern of this Chapter, however, is less with the history or the discernible patterns of juristic thought and more with investigating the working of rights after positivisation provided the opportunity for their institutional effectiveness.[1] Figure 7.1 illustrates the institutional flows that have re-set the agenda of the Supreme Court through access and through litigation support structures. Through the modern process of constitutionalisation, rights have integrated themselves into the fabric of positive law, engendering a radical shift in our understanding of how the character of law as the sphere of subjective rights — rather than rules — transforms into fundamental norms that infiltrate and shape the architectonic principles of legal order (Alexy 2002; Habermas 1996, 247-248).[2]

[1] The other PIL debate, which is also not directly relevant for this thesis, is the question of whether PIL has been captured by urban middle classes and elites. This is indirectly relevant in terms of understanding the SC agenda and which cases the judges accept and decide in line with government preferences.

[2] Follows Fischer (2007).

**FIGURE 7.1 Rights Revolutions from Above and from Below**



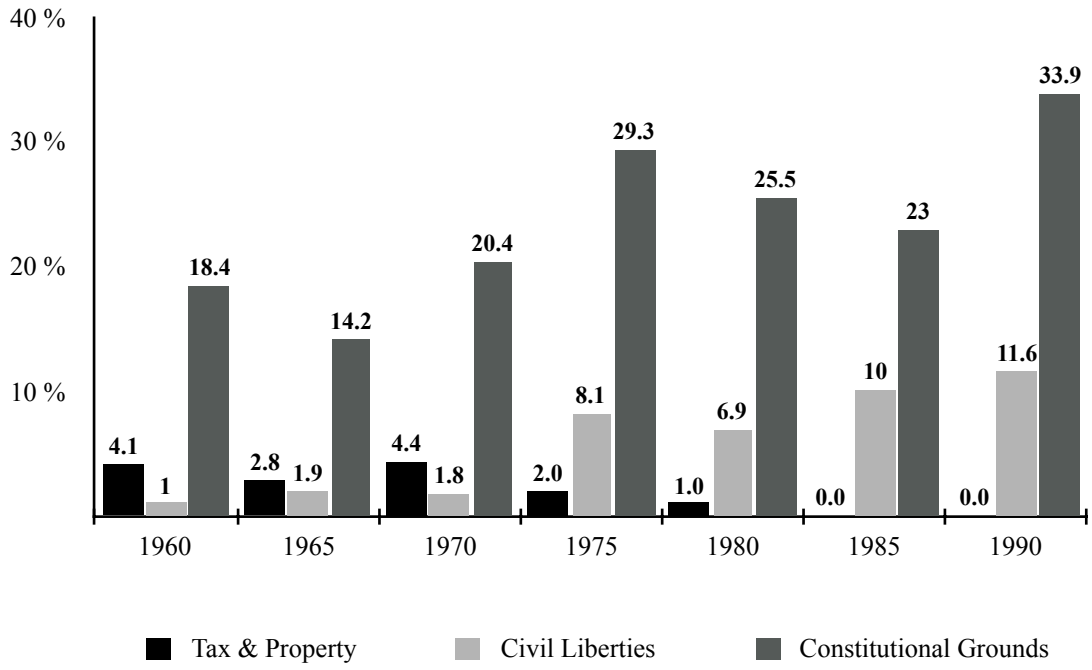

*Note:* The trope of 'the haves coming out ahead' on the one side, and the organizational and structural disadvantages of the 'have nots' on the other, derives from Galanter (1974). Since the Emergency, constant efforts in the realms of resource capacities (e.g. legal aid, cause lawyering) and litigation reorganisation (through public interest litigation) have opened up new access routes to the Supreme Court for new actors, resulting in both, the creation of different rules of the game as well as a radical transformation of judicial agendas.

Epp argues that rights revolutions are driven from below, by changes in the litigation support structure, and finds that significant shifts occurred during the Emergency. Middle classes and elites became politicised, and money and opposition resources (organisational skills) that used to flow into elections now flow into litigation. Indian scholars, such as Baxi and Sathe, present a different argument in which an activist judiciary drives — from above — the empowerment of those at the bottom. Chapter Seven can deal with both explanations, and Figure 7.1 demonstrates that the outcome remains the same, whether changes in judicial agendas come from below or from above. The key purpose of Chapter Seven is to update Epp's data, and thus to argue against his conclusion that India experienced only a weak rights revolution. It is important to point out that the theoretical framework provided by Epp, namely the importance of well-organised litigation support structures for powerful judiciaries, remains intact. The only conceptual shortcoming in his model is the absence of social and economic rights (Figure 7.2), and thus he fails to see India's real rights revolution, such as the expansion of the Article 21 cases illustrated in Chapter Three.

Secondly, Epp's data is limited to published decisions and, furthermore, to small sample sizes from cases printed by reporters.[3] The focus on reported cases has a faute de mieux quality. It will not capture all legal activity and it is not a watertight empirical image of the working of the Supreme Court, but it is the best image we have. Working only with reported cases even has advantages: cases reported are, in reality,

[3] Epp's research took place before the digitisation of Indian case law, while this thesis benefits from much larger sample sizes and electronic search tools.

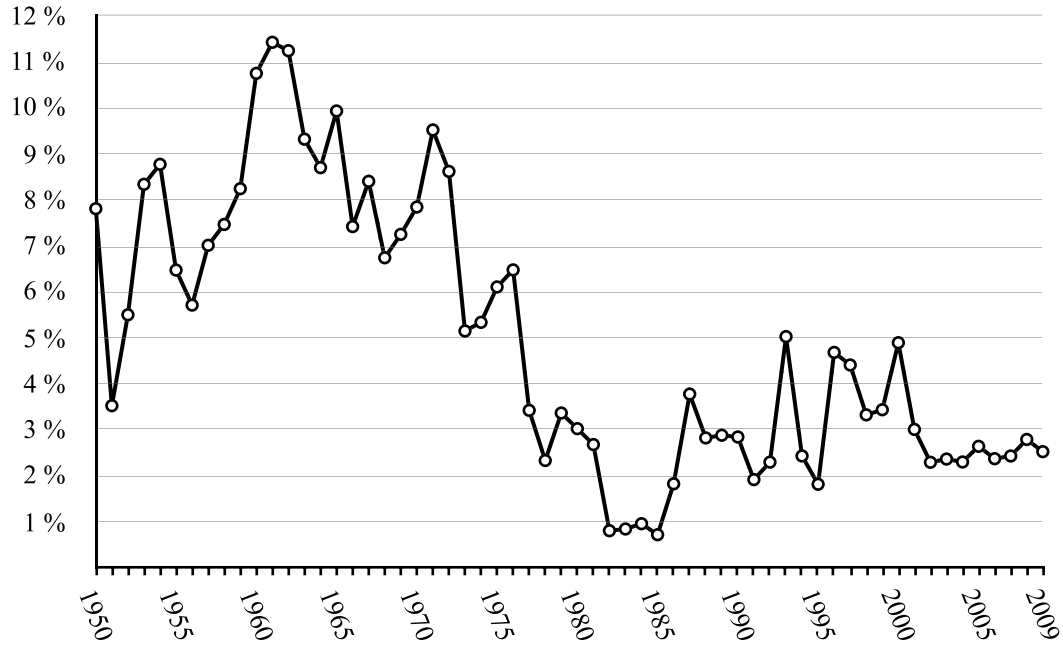
**FIGURE 7.2** **Epp's Rights Revolution Data: Distribution of Tax & Property Cases, Civil Liberties Cases and Constitutional Cases (% of Cases Reported), 1960-1990**




*Source:* Compiled by author from Epp (1998).

representative actions, whose results will be used to resolve a number of other actions. A study of reported cases has a great representative value: it is, firstly, indicative of the spread of litigation. Secondly, a study of reported decisions captures the amplificatory effects of apex court judicial activity. That is to say, Epp's data (and our data in most of the other Chapters) deals with the sort of judicial activity that provokes responses in

**FIGURE 7.3 Reported Cases as Percentage of Total Number of Disposals per year (%)**




*Source:* Compiled by author from the *Annual Report of the Supreme Court of India 2008/9* and SCC.

other legal and non-legal milieus. The mere act of reporting brings the decision to the attention of legal and other communities, as well as highlighting the doctrinal, symbolic and policy importance of Supreme Court cases, generating circulatory effects.[4]

The next section of this Chapter explores the emergence of public interest litigation (PIL) concerning the question of *locus standi* and the liberalisation of standing, which set the tone of judicial activism in India as civil rights groups, consumers, bonded labour groups, environmental activists, women's rights groups and individual petitioners brought their grievances to the courts.

[4] This paragraph follows Chalmers (2001) analysis of the method of working with reported cases.

> Judicial activism at its foundational moment generated a great deal of social euphoria. There was considerable excitement at the emergence of judicial catharsis in the period 1977 to 1979 where leading Supreme Court Justices apologised, in word and deed, to the people of India for judicial abdication during the 1975-7 Emergency period. A new people-oriented profile of judicial power and process began to emerge. In this sense, constitutional interpretation almost assumed the dimensions of a new social movement that had as its principal mission the task of taking peoples' suffering seriously as almost the very essence of constitutional adjudication. (Baxi 2000, 157)

For the early days of PIL, the Indian Supreme Court's approach has been aptly labelled 'social action litigation' (Baxi 1985), a straightforward empowerment and access to just mechanism for marginalised sections of Indian society, ensuring their participation in judicial proceedings and allowing them to shape judicial agendas (see Figure 7.1, bottom up pattern). This is to say, third parties — lawyers, activists, NGOs and rights advocacy groups — could bring the grievances of other individuals or groups to the attention of the judges.

Yet the scope of empowerment through PIL was determined by the litigation support structure available (e.g. legal aid, litigation support groups, civil liberties organisations). In this respect, Indira Gandhi's imposition of emergency rule (1975-77) acted as a catalyst for the emergence of social movements and civil liberties organisations.

## [7.2] Changing the Rules of the Game: Access, Activism, Remedies — Judicial *Coups d'Etat*?

The courts, driven by what many scholars have termed a sense of shame post-Emergency, started viewing themselves as guardians of the Constitution in a very literal sense. They began opening up and expanding the scope of rights guaranteed in the Constitution but also started coming up with what judges and scholars admit were creative remedies to fit with fundamental rights, which they considered important for social and economic justice. In addition, they also tinkered with interpretations enabling them to look into the backyard of the executive and the legislature in purely political or economic arenas. This is not to say that the courts were always on the side of justice for the deprived. Studies and critiques by judges themselves were quick to put on record instances where the disempowered were not given a chance to defend themselves, two very commonly cited examples of this being the rights of slum dwellers and the rights of the tribes affected by the Narmada dam.[5]

> In order to permit fuller access to Courts, PIL has been marked by a departure from procedural rules extending to the form and manner of filing a writ petition, appointment of commissions for carrying out investigation, and giving a report to Court, and the appointment of lawyers as amicus curiae to assist the Court. (Muralidhar and Desai 2000, 161)

[5] (*Olga Tellis v Bombay Municipal Corporation 1985* SCR Supl (2) 51 and the *Narmada Bachao Andolan* case (2000) 10 SCC 664).

One of the first instances of a substantial act of judicial creation was the idea of continuing mandamus, thus inventing a new remedy and a new tool of judicial governance. In the 1979 case of a prisoner approaching the court on behalf of another prisoner who was being tortured, reported as *Sunil Batra v Delhi Admin* (1980 SCR (2) 557, Justice Krishna Iyer outlined the basic reason for PIL even when remedies were present in other statutes for criminal acts, such as the torture of prisoners in custody.

> But the dynamic role of judicial remedies, after Batra's case, imparts to the habeas corpus writ a versatile vitality and operational utility that makes the healing presence of the law live up to its reputation as bastion of liberty even within the secrecy of the hidden cell. (par. 3)

Around the same time, another prison case, dealing this time with the conditions of under trial prisoners, came before the Court in the *Hussainara Khatoon vs Home Secretary, State of Bihar* 1979 SCR (3) 532.[6] The Supreme Court mentioned the pressing need for legal aid and the requirement to create a system that would give the poor access to justice. In Hussainara Khatoon, the Court asked for updates on the status of the prisoners and further developed the idea of continuing mandamus. Justice

[6] This case is of particular importance for lawyers, and often labelled the first public interest litigation case because of the topic (undertrials marginalised in prisons without) but also the impressive cause lawyering (Cunningham 1987). An interesting side note is the fact that the case is decided against a Janata government in Bihar while the Janata Party is still in power in Delhi. Mostly, public interest litigation cases during the 1980s constitute mainly regime support. The Janata government, however, was genuinely committed to a strong and independent Supreme Court, 'restored the rule of law and basic democratic freedoms through significant constitutional amendments, was "riding a human rights wave," and the Janata Party, in power from 1977 to 1979, was politically weak' (Ruparelia 2013, 24). Combining Epp's view — the experience or authoritarian rule and Janata as backlash — and Ginsburg, weak politicians entrench judicial review as "insurance" — we can see that these models work well for specific cases.

Bhagwati also quoted American case law again in the *SP Gupta case, 1982 (2) SCR 365*, when he said notions of standing had to be liberally construed to enable effective access to justice. The scope of judicial law making related not just to access but also to remedies, he said:

> It is a fascinating exercise for the Court to deal with public interest litigation because it is a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public law are expanding far and wide and new concepts and doctrines which will change the complexion of the law and which were so far as embedded in the womb of the future, are beginning to be born. (par. 24)

In N*ilima Priyadarshini v State of Bihar 1987 Supp SCC732*, a woman had been detained against her will. The Court took note of a letter to take action in this case, although a later investigation found the letter had not been written by her. Nevertheless, the court took cognisance of the letter and passed orders against wrongful imprisonment. This also shows that a cumbersome and outdated penal code might make the PIL route easier for litigants to pursue.

In the *1997 Vineet Narain (1998 1 SCC 226)* case, the court went into the question of how to ensure executive action and again had to come up with a creative solution. As C.J. Verma, who wrote the opinion, put it at the start of his order:

> The primary question was: Whether it is within the domain of judicial review and it could be an effective instrument for activating the investigative process which is under the control of executive? The focus was on the question, whether any judicial

> remedy is available in such a situation? However, as the case progressed, it required innovation of a procedure within the constitutional scheme of judicial review to permit intervention by the count to find a solution to the problem. This case has to develop a procedure within the discipline of law for the conduct of such a proceeding in similar situation. […] the procedure devised was to appoint the petitioners' counsel as the amicus curiae and to make such orders from time to time as were consistent with public interest. (par. 1)

The Court in this case ensured that the Central Vigilance Commission (CVC), which had been a paper tiger, was given teeth and was charged with monitoring and assessing the CBI.[7] The Court thus took matters into its own hands, issuing directions to the extent that the other arms of government would not be informed even of the actions taken by the CBI. By now, continuing mandamus was taken as a settled method of keeping track of the enforcement of its orders. Such remedies and applications of almost dormant oversight mechanisms have helped the Court find solutions to problems by merely enforcing existing structures.

All in all, PIL became a parallel governance system by lawyers and judges. The means of enforcement of these judgments has been public naming and shaming of governmental agencies and departments that do not follow court orders and, in many cases, the senior civil servant in charge of that department. The other mechanism is to hold these parties in contempt of court, inviting whatever legal consequences contempt might have. This means the courts do not merely rely on the normative and persuasive power of judicialisation but also can wield a stick to ensure enforcement.

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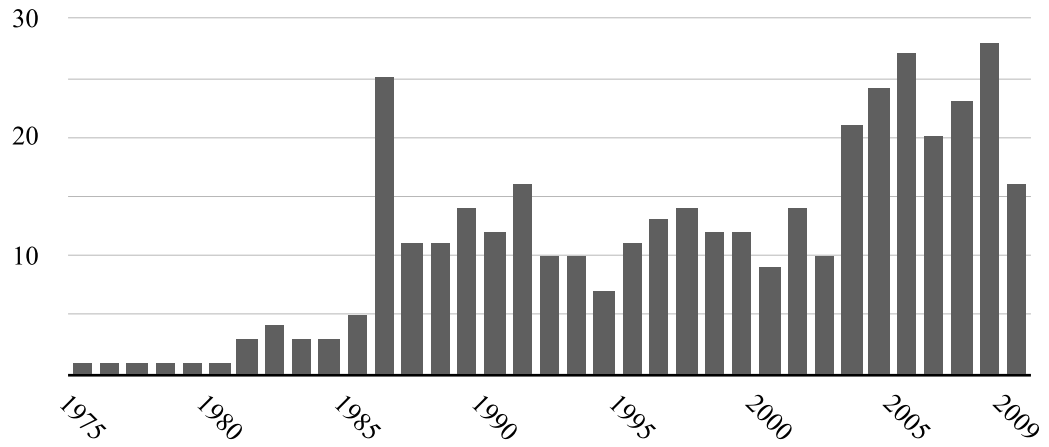
[7] The CVC was set up by the Government in February 1964 as a result of the recommendations of the Committee on Prevention of Corruption, 'to advise and guide Central Government agencies in the field of vigilance'; <cvc.gov.in/cvc_back.htm>; last accessed October 10, 2015).

## [7.3] Justiciability: Horizontal and Vertical Judicialisation

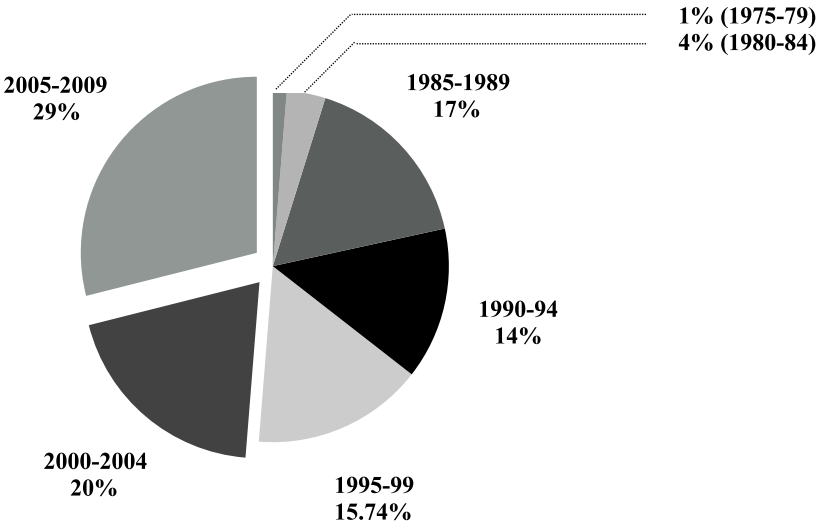
Public interest litigation thus expands judicialisation vertically, ensuring bottom-up access to the Supreme Court, as well as horizontally, as every issue becomes justiciable. Of particular interest in this respect, further challenging Epp, is a fresh quantitative approach to studying India's rights revolution. Firstly, if we work with reported cases like Epp — but on the basis of the SCC electronic database — we observe a steady rise in the number of PIL cases reported (Figures 7.4 and 7.5), and, in contrast to Epp's data, even an acceleration in PIL activity during the last ten years (Figure 7.5).

**FIGURE 7.4 Public Interest Litigation Cases Reported per Year, 1975-2009**




*Source:* Compiled by author from SCC; n = 40,618 (total number of all reported cases in SCC database); n = 394 (total number of reported public interest litigation cases in SCC database).

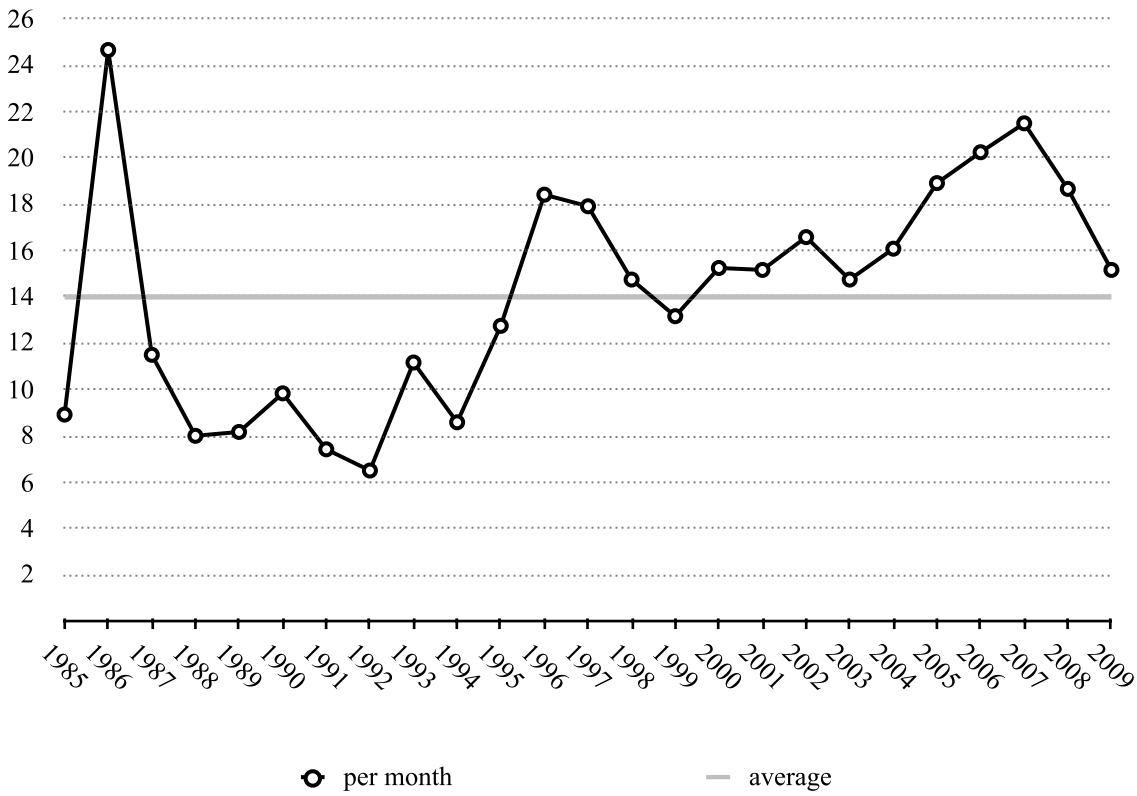
**FIGURE 7.5 Public Interest Litigation: Distribution of Cases Reported (%), 1975-2009**




*Source:* Compiled by author from SCC; n = 40,618 (total number of all reported cases in SCC database); n = 394 (total number of reported public interest litigation cases in SCC database).

In addition, the Supreme Court's annual report has revealed that the number of PIL petitions filed per month — whether accepted or rejected, whether published by a case reporter or not — has increased as well, and remained stable, mostly well above the average of 14 petitions per month.

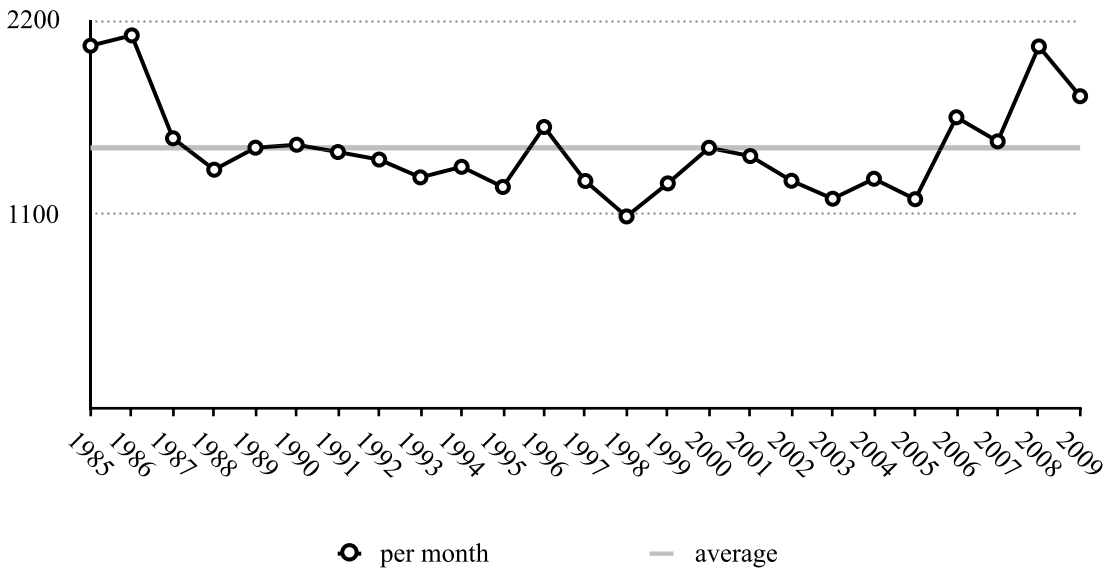
**FIGURE 7.6 Number of Public Interest Litigation Writ Petitions Filed per Month**




*Source:* Compiled by author from the *Annual Report of the Supreme Court of India 2008/9*.

The data therefore points to a strong rights revolution in terms of judicial output as well as the quantity of PIL cases that are brought to court. In addition, the most significant indicator may well be the invention of epistolary jurisdiction, i.e. letter applications.

**FIGURE 7.7 Number of Public Interest Litigation Letters Received per Month**




*Source:* Compiled by author from the *Annual Report of the Supreme Court of India 2008/9*.

The Supreme Court has been flooded with letter applications, and could easily decide on up to 2,000 PIL cases per month if it wanted to. The ability to ignore PILs (there are really no fixed rules except the administrative rules the Supreme Court issues from time to time in its administrative capacity) means the court even has docket control. It can pick up *suo motu* the missing pension payments of a widow whose husband served in the Indian Army and can ignore multiple PILs about disappearances in Punjab. The court knows very well which cases create new support constituencies (Baxi calls it

judicial populism) or are win-win ones (judicial declarations on the need for better education, better food and cleaner air, which are hardly controversial).[8]

Apart from the various types types of evidence in favour of a strong rights revolution and judicialised discourses that inspire all sorts of actors to bring their grievances and ideas to the attention of the judiciary, the most remarkable aspect in relation to letter petitions is that they constitute another judge-made revolution and have even led to the creation of a specific PIL cell within the Supreme Court. Letter petitions or episolatory jurisdiction in the court begun quite early, with letter petitions being accepted in the Hussainanara Khatoon case and the Sunil Batra case in 1979. Justice Krishna Iyer, mentioning the phenomenon in 1979 in the second Sunil Batra case while introducing the case facts, said:

> This, writ petition originated, epistolary fashion in a letter by a prisoner, Batra, to a Judge of this' Court (one of us), complaining of a brutal assault by a Head Warden on another prisoner, Prem Chand. Forms were forsaken since freedom was at stake and the letter was posted on the Bench to be metamorphosed into a habeas proceeding and was judicially navigated with electric creativity, thanks to the humanist scholarship of Dr. Y. S. Chitale as amicus Curiae and the erudite passion for affirmative court action of Shri Soli Sorabjee, the learned Solicitor General. Where the prison process is dehumanized, forensic help, undeflected by the negative crudities of the adversary system, makes us dare where we might have daunted. The finest hour of justice comes when court and counsel constructively collaborate to fashion a relief in the individual case and fathom deeper to cure the institutional pathology which breeds wrongs and defies rights.

[8] On the other hand, there are also those cases in which the court cannot avoid to lose some judicial political capital because some groups are bound to lose, for example, the height of the Narmada dam (somebody loses) or decriminalisation of LGBT communities leaves the court in the middle of divided opinion.

Even cases of remarkable national and international importance can have their origin in a simple letter, such as in the Narmada case:

> In November, 1990 one Dr. B.D. Sharma wrote a letter to this Court for setting up of National Commission for Scheduled Castes and Scheduled Tribes including proper rehabilitation of oustees of Sardar Sarovar Dam. This letter was entertained and treated as a writ petition under Article 32 of the Constitution being Writ Petition No. 1201 of 1990. (par. 32)

The Court also took cognisance of a telegram sent to the house of a judge (Justice Kuldip Singh in the case of *Paramjit Kaur v State of Punjab* (1996) 7 SCC 20, in a case that initially started out as a writ for habeas corpus with regard to a missing person but turned into an investigation of mass cremations in Punjab).[9]

Questions in relations to organising the administration of PILs have been left untouched by the legislature. The Supreme Court has set out only administrative guidelines with regard to the types of and process for letters to be accepted as petitions. This was done in a December 1988 full court decision (on the Supreme Court's administrative side), when guidelines were set out on the types of letters the court would accept as well as the procedure for bringing them to court. This was on the watch of chief Justice Bhagwati and nine other judges who signed the administrative order. The Registry was to accept PILs in 10 categories, which included bonded labour, neglected

[9] The Court did not get involved in controversial questions of national security. Court files thus routinely migrate back to the bottom of the pile — only with the distance of time were six officers were convicted in 2006 for the murder of the missing person and investigations were ordered by the Court.

children, minimum wage issues and jail issues unless they could be effectively dealt with by the concerned high court concerned. This also included allegations against jail authorities as well unless the allegations were serious or concerned with torture or custodial death. The letters were to be first screened by the PIL cell (created by the judges for this purpose), and only those that fell into the categories above would be dealt with by the court. Moreover, only the registrar, as opposed to any junior officer, was supposed to order which petitions were to be lodged.

Another judicial *coup d'état* was the judicial self empowerment to bring cases to the court on *suo motto* basis. *Suo motu* cognisance of cases was another aspect of PIL that was introduced early on. The court used this to enquire into cases and also to involve institutions in cases before them even if they had not been made parties. In *Vincent Panikurlangara v Union of India* (1987) 2 SCC 165, the Supreme Court held that when statutory bodies were joined or called upon to participate *suo motu* by the Supreme Court, they were bound to do so because of the public importance of PIL cases. It has taken *suo motu* cognisance in a variety of cases, but there does not seem to be any rule or underlying pattern for which cases they decide to take *suo motu* cognisance of and which cases they do not.

As per the statutes, the Supreme Court can only take *suo motu* cognisance in matters of contempt of court, but the court has used the concept to look at issues it is made aware of. In one such case, a bench initiated *suo motu* proceedings when noting the large-scale destruction of property in agitations in *Re: Destruction of Public and Private Properties v. State of A.P.* (2009) 5 SCC 212. In another case, *Re Death of 25*

*chained inmates v Union of India* (2002) 3 SCC 31, it was as a result of the publishing of newspaper articles:

> It is plenary power exercisable outside the purview of ordinary law to meet the demand of justice. Article 136 is a special jurisdiction. It is residuary power. It is extraordinary in its amplitude. The limits of Supreme Court when it chases injustice, is the sky itself. (*PSR Sadanantham vs. Arunachalam* (1980) 3 SCC 141, par. 403)

In conclusion then, the story of PIL reminds us of the heresthetical manoeuvres we encountered in relation to the basic structure doctrine. It all began with cases which the government supported, such as the justiciability of the directive principles or the forceful implementation of the *Bonded Labour Abolition Act, 1976*. Judicial activism in the 1980s thus often provided regime support, and hardly any assertion was made against the core preferences of the Union government. Moreover, every time the Supreme Court supports a government cause, the new procedural rules become embedded more deeply and the rules of the game change. Establishing an inquisitorial-style judicial intervention mechanism and de facto docket control, the Supreme Court today can pick and choose its PIL cases and successfully claims the power not to decide. By the 1990s, political parties no longer had the strength to build a majority to address PIL reforms, which would have provided a useful check on the power of the Court. As a next step, the judicial power expansion explored in Chapter Seven is examined in relation to the content of judicial policymaking in Chapter Eight and with special reference to political economy. The social revolution mandate of the Constitution provides a sturdy ideological backbone, not just in terms of the tools that the Supreme

Court can invent and use, but in terms of the substantive dimensions of judicial activism. For instance, the social revolution mandate is an essential element of one of the most important public interest litigation decisions, *S.P. Gupta* case, with Justice Bhagwati's long and famous exposition on the question of locus standi and liberalisation of standing, setting the tone of judicial activism in India.[10]

> It is necessary for every Judge to remember constantly and continually that our Constitutional is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function. It has to use the words of Granville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice. The British concept of 'justicing', which to quote Justice Krishna Iyer (Mainstream, November 22, 1980), 'is still hugged by the heirs of our colonial legal culture and shared by many on the Bench' is that 'the business of a Judge is to hold his tongue until the last possible moment and to try to be as wise as he is paid to look'. ( *S.P Gupta vs. Union of India* 1981 Supp SCC 87, par. 27)

[10] Follows Fischer (2007).

# CHAPTER EIGHT

## *Which Road to Social Revolution? Judges and the Political Economy*

***Abstract*** This chapter explores the scope of economic policymaking by India's Supreme Court, as well as new judicial functions in the context of India's liberal economic reforms of the 1990s. While liberal economic policies and elite discourses emphasise the benefits of competition and free markets, the corresponding constitutional preferences remain embedded in legal provisions and traditions that favour a state controlled economy and heavy social engineering in the name of economic, political and social equality. The conflict between liberalisation, on the one hand, and established socialist constitutional practices, on the other, means that India's Supreme Court judges take centre stage in the domain of the political economy, having the power to either stall or accelerate any reform processes by means of judicial review. This chapter illustrates how political parties and all their coalition constellations fall short of the numerical supermajorities necessary to amend the Constitution in line with a changing political economy. Moreover, the chapter's analysis of disinvestment policies highlights the full extent of Indian coalition governments' weaknesses as fragmentation and indecision spread to the realm of statutory law-making: even cabinet decision-making remains blocked until the Supreme Court 'extends its friendly hand' (Whittington 2005) so that pro-disinvestment BJP ministers must eventually rely on the intervention of an allied court to implement their policy preferences against the opposition from coalition partners as well as from within their party. The chapter concludes by studying the wider impact of constant court interventions, namely the articulation of politics (who gets what, when and how) and policy preferences as judicialised rights discourses of constitutions across all spheres of governance.

## [1.1] Constitutional Ideologies, Elite Politics and Missing Supermajorities

As liberalisation and the global marketplace have become firmly established in the rhetoric and practice of elite politics (Varshney 1998), the political momentum for economic change has kept falling short of the numerical majorities to amend the Constitution. Consequently, there is a remarkable gap between economic policies and constitutional commitments, with the Indian constitutional *status quo* emerging as its own legal regime for economic governance. In contrast, fundamental transformations of the political economy usually go hand-in-hand with constitutional reform politics in other countries. For example, the fourth amendment to China's constitution introduced protections for "inviolable" private property in 2004; throughout the 1990s, Eastern European countries entrenched property rights in new constitutions; and South Africa's new constitution radically broke with the socialist policy preferences of the African National Congress, such as land reform and nationalisation, triggering an Africa-wide wave of constitutional reforms readjusting property rights (Wily and Mbaya 2001). The constitutionalisation of balanced budgets and debt ceilings in European countries (Adams et al. 2014) further demonstrates the presence of constitutional reform politics in other nations which, like India, are established constitutional democracies.[1]

Given the absence of similar constitutional reform politics, India's Supreme Court judges play a major role in the field of economic liberalisation, having the power to

[1] The Appendix illustrates the absence of constitutional amendments that correspond to India's liberal economic reforms.

either stall or accelerate the reform process by means of judicial review. Unrestrained by the political obstacles of electoral politics, the court has sketched a dialectical reform of the constitutional political economy, exercising judicial restraint as the means of production are freed from state control and endorsing judicial activism as the judges advocate the interweaving of the distribution and consumption of wealth with the goals of social revolution. Based on an analysis of judicial policymaking as well as constitutional reform debates, this chapter maintains that the Supreme Court, armed with the constitutional ideology of the social revolution, acts as a powerful veto player and agenda setter as India's policies are shifting from 'empirical gradualist' (Morris-Jones 1959, 415) socialism to empirical gradualist liberalisation and globalisation.

Technical blueprints for engineering social and economic change from above have been common, and previous chapters have demonstrated the interdependence of political economy and constitutional legal developments, in particular in relation to land. India's Constituent Assembly had colossal developmental and even greater redistributive ambitions at the end of the 1940s.

> Nehru's state was a purposive state. It was unashamedly socialist even though while moving the Objectives Resolution before the Constituent Assembly, he was aware that the word 'socialist' was missing. But, socialism was not just a stated objective, it was the very essence of the task that India had embarked herself upon. Nehru's socialism manifested itself in the very structure of the Constitution. Socialism was not a dream of the masses; but the responsibility of the state. (Dhavan 1992, 47—48)

There was broad agreement that, unless the problems of poverty and inequality within society were addressed and solved 'all our chapter constitutions will become useless

and purposeless'.[2] Throughout the first three decades of independence, political actors then inserted their own socialist policy preferences within the constitutional text, culminating in the abolition of constitutional protection for the right to property; reciprocally, the Constitution further embedded ideologies of socialism and social revolution into the warp and weft of Indian politics. From the beginning, the Constitution was first and foremost a social document, '[t]he majority of its provisions are directly aimed at furthering the goals of the social revolution' (Austin 1966, 50); to date, constitutional text and constitutional practices continue to embody the ideal of inculcating economic, political and social equality in the politics of the subcontinent.

In addition, the Constituent Assembly's socialist visions of a new political economy also reflected the experience of imperialism, which the key policymakers had come to view much more in terms of the imperatives of capitalist production than as an ideology of civilisational or racial domination. 'It would therefore be foolish to conceive of Indian independence merely as a political condition [...]. Political independence would not remove India's vulnerability to economic imperialism' (Khilnani 1998, 71—72). In short, and at the most basic level, the Constituent Assembly carved 'democratic socialism' (Dhavan 1992, 48) into the fundamental structures of the 'constitutional political economy' (Elster 1994) in order to give effect to the social revolution mandate and to respond to the apprehension of the vulnerability of India's economic interests in an open international economy.

In a nutshell, and in contrast to today, the constitutional political economy at independence was attuned to the emerging model of economic development — and

[2] Jawaharlal Nehru, CAD, Volume II, 317 (January 22, 1947); Rothermund (1966).

whenever there was a need for further fine-tuning or for overriding judicial decisions, an easy amendment procedure kept a sovereign parliament in control as policymakers blended a mixed economy with centralised planning (see Appendix as well as Figure 5.3 for Congress' absolute amendment power). The state-directed regulatory schemes sheltered as well as controlled the private sector, and India's government-owned public sector unequivocally dominated key industries. Notwithstanding the intermittent shifts in emphasis, the vital structures of these policy fundamentals were not subjected to significant changes until the early 1990s. Four decades of planning, however, have not delivered the promised social revolution.

> Poverty in the country-side and the city continues to destroy the lives of hundreds of millions. And, as the example of the East Asian economies has dazzled the world, the dusty failures of the Indian state to devise anything like an effective policy of trade — fundamental to the raison d'état of any modern state — appear increasingly inexcusable. Gandhians and socialists, environmentalists and free-market liberals all agree that something has gone wrong. (Khilnani 1998, 62)

It is difficult, though, to evaluate what has gone wrong and what or who is to blame. Economists inevitably differ in their judgments, each of them drawing on convoluted, often counterfactual, technical details, differing in their emphasis on domestic or international contexts. India's project of development is further complicated by the country's robust democratic politics, in which ideological designs as well as practical economic policies often do not withstand the pressures and claims of voters. Prime Minister Rajiv Gandhi, for instance, found himself with a strong parliamentary majority, yet unable to sustain his efforts to "modernise" the Indian economy during the second

half of the 1980s (Jenkins 1999). Nevertheless, he had put liberalisation on the political agenda before increasing domestic deficits and a severe foreign-exchange crisis brought India's economy to the brink of bankruptcy and collapse soon after the end of the Cold War. In response to this crisis, the country embarked upon a reform process that gave a fresh and strong emphasis to liberalisation, deregulation and globalisation. Today, there is little doubt about India's status as a potent emerging market and by the mid-1990s, the *Economist* had already much admired the reforms as 'nothing less than a repudiation of India's distinctive approach to development — a repudiation, that is, of Nehru's vision of socialist self-reliance' (Corbridge and Harriss 2000, 157).

At the same time, the preamble of the Constitution still venerates the Indian polity as a 'sovereign socialist secular democratic republic'.

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN *SOCIALIST SECULAR* DEMOCRATIC REPUBLIC and to secure to all its citizens:
> JUSTICE, social, economic and political;
> LIBERTY of thought, expression, belief, faith and worship;
> EQUALITY of status and of opportunity;
> and to promote among them all
> FRATERNITY assuring the dignity of the individual and the *integrity* of the Nation;
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.[3]

[3] Preamble; words in italics were inserted by the Constitution (42nd Amendment) Act, 1976.

Similarly, the Ninth Schedule, added by the *Constitution (1st Amendment) Act, 1951*, which provides a safe haven from judicial review for the land reform legislation by India's States, irrespective of inconsistency with fundamental rights, remains in effect, and so do the constitutional amendments that have transformed the fundamental right to 'acquire, hold and dispose property'[4] into a much weaker, only statutory, right to property.[5] In 1983, five years after the *44th Amendment Act, 1978*, Justice Chinnappa Reddy summed up the relationship between the social revolution and the right to property, holding that '[t]he fundamental right to property has been abolished because of its incompatibility with the goals of justice, social, economic and political and equality of status and of opportunity and with the establishment of a socialist democratic republic, as contemplated by the Constitution'.[6] The judges have not changed their mind so far,[7] and it is often forgotten that India is embracing the principles of a market economy without any formal constitutional guarantees of the right to property and without constitutional protection from arbitrary expropriation. While the transformation of property regimes has been seen as a key constitutional challenge in post-socialist Eastern Europe (Stark and Bruszt 1998) as well as China (Oi and Walder 1999), India's economic reforms, in contrast, unfold in the context of

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[4] Article 19(1)(f) in the 'original' unamended constitutional text.

[5] Article 300-A: 'No person shall be deprived of his property save by authority of law', inserted by the Constitution (44th Amendment) Act, 1978; Article 300-A not only lacks the status of a fundamental right but also rules out constitutional judicial review with respect to questions of just and equitable compensation.

[6] State of *Maharashtra v. Chandrabhan Tale* AIR 1983 SC 803 (par. 2).

[7] See, for instance, *Dharam Dutt v. Union of India* (2004) 1 SCC 712: 'the right to property had ceased to be a fundamental right and the newly engrafted Article 300A of the Constitution requires only authority of law for depriving any person or his property' (par. 68).

insecure and ill-defined property rights, thus, simply ignoring the most fundamental benchmark of liberal constitutionalism (Fitzpatrick 2006). Needless to say, the absence of formal constitutional guarantees of the right to property has neither stopped the flow of foreign direct investment nor the growth of the economy — in fact, the ease of the process of acquisition of land by the state often lays the ground for the speedy development of industrial areas and infrastructure. For instance, Bangalore's world famous IT corridor and software technology parks could not have been built without the *Karnataka Industrial Areas Development Act, 1966,* which allowed for the acquisition of agricultural lands without paying much compensation or having concern for the needs and rights of the affected rural communities.[8] It is a tragic irony that the abolition of property rights during the heyday of the socialist state and in the name of social justice has left many marginalised people unprotected — subjected first to the needs of a self-serving and self-justifying socialist state and, today also, to the demands of private economic power. What is more, the question of property rights is a stark reminder of the complexity of the social revolution and the ideological nature of constitutional adjudication (Kennedy 1997). Some authors equate constitutional law with repression or view the Supreme Court as a forum that tends to reinforce the prevailing hegemony (e.g. Bhushan 2004). Others see India's constitutional system as

[8] Since 1966, the *Karnataka Industrial Areas Development Act* has enabled the state to acquire nearly 57,000 acres of land all over Karnataka. A report on the impact of this Act and a summary of some ongoing cases in various courts of Bangalore has been published by the Alternative Law Forum in Bangalore; see Of Master Plans and Illegalities in an Era of Transition, available at: <www.altlawforum.org>. In general, without constitutional guarantees of the right to property, the courts seem unable to protect individual plaintiffs from unjustified expropriation or low compensation payments; see, for instance, *Chameli Singh v. State of U.P.* (1996) 2 SCC 549; *New Reviera Coop. Housing Society v. Special Land Acquisition Officer* (1996) 1 SCC 731; *Butu Prasad Kumbhar v. Steel Authority of India* (1995) Supp (2) SCC 225; *Jilubhai Nanbhai Khachar v. State of Gujarat* 1995 (1) SCC 596.

inherently beneficial and continue to hold the Indian Supreme Court in high esteem: 'on a comparative basis, it may be true to say that no apex court in any democratic country has shown as much dynamism, humanism, creativity, and empathy with the cause of the poor and the downtrodden as the Supreme Court of India has done' (Jain 2000, 99).

The perseverance of the constitutional ideology of the social revolution, thus, remains the paramount constitutional paradigm. Expectations that liberal economic reforms might challenge the "socialist consensus" have so far remained unfulfilled and the social revolution laid out by the Constitution continues as market-oriented economic policies are introduced and consolidated.

## [8.2] Disinvestment: Judicial Policy Support for Weak Political Elites

The widening gap between constitutional semantics and the new economic policies undermines the coherence of the constitutional structure; interestingly, though, there seem to be no efforts being made to synchronise constitutional reforms and new economic policies — on the contrary, face-to-face with markets and competition, the constitutional reform suggestions of political parties simply aim at continuity and satisfying the popular call for further extensions of social, economic rights — further stressing the social revolution's imperativeness. This section illustrates that the political forces favouring basic changes in India's economic policies have not been able to translate the momentum for economic reforms into a constitutional discourse, meaning the political consensus necessary for constitutional amendments has not been achieved.

Consequently, as the supermajorities required for amending the Constitution's political economy seem to be out of reach of coalition governments and their fragile political alliances, one cannot remain blind to the policymaking potential of the judges. A powerful, active judiciary, armed with a constitutional text that is thoroughly committed to social revolution, hangs over economic reformers like a sword of Damocles — or in the case of disinvestment, the judges extend a friendly hand and provide policy support for reformers.

In 1996 the Common Minimum Programme budget speech announced the establishment of the disinvestment commission. A Department of Disinvestment was created for the purpose on 10 December 1999, and on 6 September 2001, it became the Ministry of Disinvestment. Its mandate included disinvestment as well as restructuring, and it aimed to bring about greater transparency in central public sector enterprises and improvements to corporate governance. But the idea of disinvestment met with a high degree of resistance, as ministers did not want to give up control of the public sector units under their charge. Although disinvestment was a process that began in 1991-92, by 2000 only two PSUs were loss-making enterprises at the time of their sale (according to the government website on disinvestment). The minister in charge of disinvestment was Arun Shourie. He soon started giving public interviews about his frustration with the process as various members within and outside the government wanted to delay or stop the process of disinvestment.

> Though the Government has already agreed in principle to disinvest all non-strategic PSUs, there is still strong opposition. For instance, all 48 PSUs under the Heavy Industries Ministry are non-strategic and should, ideally, be privatised. But Heavy

> Industries Minister Manohar Joshi is against disinvestment of five PSUs (see The Last Emperor). There are other ministers, not as vocal as Joshi, but equally opposed to privatisation of PSUs under their control. (*India Today*, August 27, 2001)

In 1996, the Ministry of Industry constituted a commission, the Public Sector Disinvestment Commission, for a period of three years under G.V. Ramakrishna. The term was extended at the end of this period for another three months. Thereafter, a Dr R. H. Patil headed the commission or two years from 2000 to 2001. Together the commissions submitted 20 reports of over 95 cases. Under the terms of reference, the Commission had to advise the government on disinvestment of CPSEs, or what the website calls 'strategic sales'. The government classified PSUs according to strategic and non-strategic areas and arms ammunition and defence, atomic energy except for agriculture medicine and non-strategic industries, power and railway transport. All other industries were non-strategic and the government sought to reduce its stake in these areas from 51% to 26%, and even below that level. The commission resigned in 2004 when the PA government was formed.

The ministry's website documents that the Ministry of Disinvestment:

> [H]ad communicated to the Commission on 23 January 2002 that all Non-Strategic PSEs including subsidiaries but excluding IOC, ONGC and GAIL stand referred to the Commission for it to prioritise, examine and make recommendations in the light of the existing Government policies as articulated on 16 March 1999 and the Budget speeches of Finance Minister from time to time.[9]

[9] <www.divest.nic.in/discommission.asp>; last accessed, September 15, 2015.

It was against this background that the case of disinvestment in the two oil companies came before the Supreme Court. This resulted in what the Bombay Stock Exchange website describes as:

> **2004-05-2008-09**: The issue of PSU disinvestment remained a contentious issue through this period. As a result, the disinvestment agenda stagnated during this period. In the 5 years from 2003-04 to 2008-09, the total receipts from disinvestments were only Rs. 8515.93 crore.
>
> **2009-10-2013-14**: A stable government and improved stock market conditions initially led to a renewed thrust on disinvestments. The Government started the process by selling minority stakes in listed and unlisted (profit-making) PSUs. This period saw disinvestments in companies such as NHPC Ltd., Oil India Ltd., NTPC Ltd. [10]

Bharat Petroleum and Hindustan Petroleum were only two of five companies that came under the lens of disinvestment. This was traditionally a very lucrative and powerful ministry and the loss of these public companies meant that the value of the ministry's portfolio would diminish. A public interest litigation case was brought to the court in 2000.

The philosophy behind disinvestment was to sell companies when they were in their prime to enable the government to achieve a maximum gain from the sale. It was part of a concentrated move begun in the early 1990s under the Congress-led government — thus there actually is support across party lines — to move away from government owned companies.

[10] <www.bsepsu.com/historical-disinvestment.asp>; last accessed, September 15, 2015.

The Public Interest Litigation was brought to the Supreme Court by the Centre for Public Interest Litigation, and the order was passed on 16 September 2003 by a two-judge bench comprising S. Rajendra Babu and G.P. Mathur. The question was whether majority shares in HPCL and BPCL could be sold to private parties:

> [W]without Parliamentary approval or sanction as being contrary to and violative of the provisions of the *ESSO (Acquisition of Undertaking in India) Act, 1974,* the *Burma Shell (Acquisition of Undertaking in India) Act, 1976* and C*altex (Acquisition of Shares of Caltex Oil Refining India Limited and all the Undertakings in India for Caltex India Limited) Act, 1977*.

The court held that the wording of the Act required that the statutes had to be amended suitably before the disinvestment could continue. They added that this was the reason the Maruti Udyog disinvestment action had not been challenged and that it was on a different footing compared to the present case, even though Maruti Udyog was also acquired under an Act. They reiterated that there was no challenge to the disinvestment policy of the government. The court confined itself to ruling only on companies governed by acts and ensuring the judgment did not stand in the way of the disinvestment policy in general.

The judgment in itself does not adequately reflect the high drama that surrounded it, especially the conflict within the Cabinet. The Minister for Petroleum, Ram Naik, was against disinvestment:

> The battle between the Petroleum and Disinvestment Ministries over privatisation of two oil companies will now take place another day but both are geared for war. The Ministries have marshalled their arguments and are all set to take up the cudgels for

> and against disinvestment of the Hindustan Petroleum Corporation Limited (HPCL) and the Bharat Petroleum Corporation Limited (BPCL) as soon as the Attorney-General gives his advice on the legal issues. Informed sources here say that it was the Petroleum Minister, Ram Naik's intervention that led to the deferring of the decision by the Cabinet Committee on Disinvestment on Friday night. He apparently pointed out that it would not be correct to go ahead with any decision on this issue till the Attorney-General's views were known since a commitment had been made to Parliament. The sources say that the Disinvestment Minister, Arun Shourie, on the other hand, was keen on taking a view on the HPCL privatisation, especially since it had been delayed by three months since the last CCD meeting on September 7. Mr. Naik's arguments, however, held sway as the Deputy Prime Minister, L.K. Advani, felt the need to maintain propriety in terms of commitments made to Parliament. Ultimately, after some discussion, it is believed that the Prime Minister, Atal Behari Vajpayee, concurred with these views and a decision was taken to defer all discussion on HPCL and BPCL.[11]

Ultimately, the lack of consensus within the BJP, within the coalition and even within the Cabinet meant that the two companies could not be sold. This was ultimately a pyrrhic victory for the petitioners of this PIL and those opposed to disinvestment as a bigger company, Indian OIL Corporation, which had been designated one of the government's Navratna companies (an accolade for central public sector enterprises that performed particularly well) was then sold to meet disinvestment targets. Although the Supreme Court decision did create a pause, the judges had not really opposed the policy of disinvestment, and their decision circumvented any future opposition to disinvestment by clearly stating that the move was not disallowed by any provision of the Constitution.

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[11] <www.thehindu.com/thehindu/2002/12/29/stories/2002122904391000.htm>; last accessed, September 15, 2015.

## [8.3] Social and Economic Rights: Judicial Policy Support and Agenda Setting for Politics from Below

Disenchantment with India's mixed economy and economic planning has spread to the Supreme Court too, with the result that the judges have often thrown their weight behind economic reforms. Yet judicial policy preferences may still come to haunt the liberalisation process. In this respect, the main arguments advanced here concern the distinction drawn by Ashutosh Varshney (1999) between elite and mass politics in the process of economic liberalisation: 'Elite concerns — investment tax breaks, stock market regulations, custom duties on imported cars — do not necessarily filter down to mass politics' (Varshney 1999, 223). They also do not impinge very much on the social revolution as not many people are affected by them in a direct or obvious manner. On the other hand, if India's economic reforms — privatisation of the public sector, restructuration of labour laws, agricultural reforms and the reduction of fiscal deficits to low levels (Varshney 1999, 225) — shift further towards the terrain of mass politics, the judges will have to make much harder choices and find it more difficult to reconcile liberalisation and the social revolution. Thus, the first central contestation of this Chapter is that the Supreme Court, a key actor within the institutional matrix of economic reforms, functions as a powerful — yet often ignored — policymaker whenever liberal reforms conflict with the goals of the social revolution. In the words of Justice Banerjee:

> There cannot possibly be any doubt that the socialistic concept of the society as laid down in Part III and IV of the Constitution ought to be implemented in the true spirit of the Constitution. Decisions are there of this Court galore wherein this Court on more occasions than one stated that democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity.[12]
>
> As a matter of fact this Court has been candid enough on more occasions than one and rather, frequently to note that socialism ought not to be treated as a mere concept or an ideal, but the same ought to be practised in every sphere of life and be treated by the law courts as a constitutional mandate since the law courts exists for the society and required to act as a guardian-angel of the society. As a matter of fact the socialistic concept of society is very well laid in Part III and Part IV of the Constitution and the Constitution being supreme, it is a bounden duty of the law courts to give shape and offer reality to such a concept. [...] The primary impact of socialism as a matter of fact is to offer and provide security of life so that the citizens of the country may have two square meals a day, and maintenance of a minimum standard of life, it is expected, would lead to the abridgment of the gap between the have-s and have not-s. The feudal exploitation and draconian concept of law ought not to outweigh the basis structure of the Constitution, or its socialistic status. Ours is a socialist State as the Preamble depicts and the aim of socialism, therefore, ought to be to distribute the common richness and the wealth of the country in such a way so as to sub-serve the need and the requirement of the common man. [...] 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 succour for livelihood through labour.[13]

[12] *G.B. Pant University of Agriculture & Technology v. State of Uttar Pradesh* AIR 2000 SC 2695 (par. 3); the case relates to a labour dispute, decided in favour of the regularisation of contract workers as full employees.

[13] *Secretary, H.S.E.B. v. Suresh AIR 1999 SC 1160* (par. 1-3 and par. 7); this case too concerns regularisation of contract workers as full employees.

The practical significance of these judgements should not be overestimated, as the organised sector of India's labour market, i.e. the government administration at the central, state and local level, as well as public and registered private firms, employ only about 8.5 per cent of the country's labour force of about 350 million people (Zagha 1999, 161). Yet, the ideological content of the Supreme Court's decisions, as spelled out by Justice Banerjee, are a cornerstone of India's political economy, since the broad consensus on a socialist framework has been central and instrumental to the emergence of the state's capacity to act as a third actor: 'The state as a third actor began its autonomous career in independent India as a creature of Nehruvian socialism' (Rudolph and Rudolph 1987, 62). As a result of the 42nd Amendment, which introduced the word socialism in the Preamble of the Constitution, the Supreme Court upheld the constitutionality of the laws on the nationalisation of private property, introduced a fundamental right to 'equal pay for equal work', struck down the *Central Civil Services (Pension) Rules, 1972*, as they had failed to achieve the establishment of a welfare society, regularised casual workers with parity in pay with regular workers and seeks to reduce inequalities in income. As well as this, the Supreme Court has exercised judicial restraint as Parliament has passed dozens of fresh amendment acts and more than tripled the number of acts placed under the Ninth Schedule.

The perseverance of the social revolution's constitutional ideology, thus, is the second important concern of the arguments presented here, as the constitutional text continues to sanction a command polity model, imagining the state as 'sovereign — differentiated, autonomous, and authoritative' (Rudolph and Rudolph 1987: 14).

Step by step, the Supreme Court has thus emerged as a crucial and powerful agenda setter, defining specific indicators of development as non-negotiable cornerstones of economic policies. For instance, the court established the right to education in the Mohini Jain case, reiterating this position in the Unnikrishnan case (the vast majority of right to education cases dealt with higher education but resulted in a lot of attention on primary education in the country in the long run).

The evolution of the right to education began with the case of *Mohini Jain v State of Karnataka*, which ostensibly dealt with the payment of extra sums of money known as capitation fees to colleges to admit students. But the court observed that fees put education out of reach for many in the country. It came to this conclusion because it said the capitation fees showed a clear class bias, where the rich could access education when the poor could not. The order prefaces its directions against fees with the following comment:

> The preamble promises to secure justice 'social, economic and political' for the citizen. A peculiar feature of the Constitution is that it combines social and economic rights along with political and justiciable legal rights. The preamble embodies the goal which the State has to achieve in order to implement social justice and to help make the masses free. The securing of social justice has been specifically enjoined as an object of the State under Article 38 of the Constitution. Can the objective which has been so prominently pronounced in the preamble and in Article 38 be achieved without providing education to the large majority of citizens who are illiterate? [14]

[14] *Mohini Jain v State of Karnataka* 1992 AIR 1858.

This judgement was reconsidered in the case of *Unni Krishnan v State of Andhra Pradesh* 1993 1 SCC 6, where the majority of three judges held that education was a fundamental right but toned down the effect of the earlier judgment by stating that though education up to the age of 14 was a fundamental right, thereafter free education would be available based on the economic capacity of the state. But the *TMA Pai case* AIR 2003 SC 355 a few years later overruled most of the Unnikrishnan case. — adding to the confusion.

The results of the earlier cases were huge financial losses, the inability to fund the running of educational institutions and empty seats, and both private institutions and government institutions were finding it difficult to function.

The Justice B.N. Kirpal's majority judgment sought to remedy the Unnikrishnan decision in the 11-judge TMA Pai case (2002). As can be seen, the judgements of the Kirpal era (including the Narmada case outlined in the earlier chapter) the Supreme Court sought to balance economic necessity with social justice requirements, but not always very successfully. This judgment introduced quotas — seats that would be reserved for poor students even in unaided institutions but where the institutions could decide how to administer this, aided institutions would have to reserve seats and government-run institutions would have to accommodate the maximum number of students for free though all of them could follow the merit system in their institutions within the quotas.[15]

Crucial for our analysis is the agenda setting role of the Indian Supreme Court. The Unni Krishnan case and the focus it gave to third-party organisations and activists

[15] This is what Dhavan termed half-baked capitalism as the money to support the ruling was not allocated.

as well as individuals trying to obtain admission in schools in urban areas resulted in an amendment to the Constitution and the insertion of a new Art. 21A guaranteeing the right to primary education for children from the ages of 6 to 14 as a fundamental right (86th Amendment Act, 2002; Sripati and Thiruvengadam, 20014). As discussed in Chapter 5, the Supreme Court has emerged as the key player in the realm of constitutional change: Step one, the judicial innovation judicialises education policies as rights discourse; step two, the Supreme Court recognises a fundamental right to education via Art. 21 and thus de facto and de jure brings about constitutional change; step three, the other branches implement the agenda outlined by the Supreme Court, firstly through constitutional amendment, secondly through the *Right of Children to Free and Compulsory Education Act, 2009.* In a nutshell, judicial power here has shifted completely from the realm "making other actors do something against their will" towards the realm of influence, shaping the preferences of other actors through non-coercive judicialisation of political discourses.

## [8.4] The Stickiness of Judicialisation

This chapter demonstrated how the ideological fundamentals of the constitutional ideology have remained untouched as liberalisation has changed India's political economy. Public interest litigation revolutionised access to justice in India, and the democratisation of the judicial process has led to an extraordinary extension of social, political and economic rights to marginalised sections of Indian society — while much

of the rest of the world implemented the World Bank's Washington consensus. In other words, as economic planning and socialist modes of production have been reformed or abandoned in line with competitive market policies, the Supreme Court judges have pursued the social revolution in the context of distributive justice and a judicialised rights discourse. Consequently, the central contestation of this chapter emphasises the role of judicialisation in channelling the structural changes of liberalisation and globalisation. India has escaped the global discourse of statelessness as the norms and values and the ideologies and principles enshrined in the Indian Constitution argue the case for a higher level of stateness in order to control and transform the political effects of new economic policies as well as transnational production-consumption networks. For better or worse, the Supreme Court judges and India's constitutional discourse refuse to go along with global ideological hegemonies. Today, the 'untrammelled hegemony of Anglo-American ideological premise' (Evans 1997, 64) is one of the most salient forces shaping the specific character of the current global economy, including the extent to which globalisation is viewed as entailing the eclipsing of state control. India's resistance to the unimaginative visions of statelessness underline the institutional centrality of the state and the importance of diverging ideologies. The Constitution, the constitutional court and the constitutional discourse, as well as constitutional reform debates, are crucial determinants of how India has tried to find its own version of a liberal economy embedded in a social revolution. '[T]he Indian Constitution is a National Charter pregnant with social revolution, not a legal parchment barren of militant value to usher in a democratic, secular, socialist society which belongs equally to the masses including the harijan-girijan millions hungering for a humane deal after

feudal-colonial history's long night'.[16] As India's liberalisation movement has fundamentally altered its economic and development strategies, elements of state autonomy might have 'leaked away, upwards, sidewards, and downwards' (Strange 1995), yet, they never just evaporated. As seen through the eyes of India's Supreme Court judges, an eclipse of the state is not in sight as the constitutional commitments to the social revolution have not been abandoned and the new political economy is being sustained with the promise of state-administered social and economic justice.

The full extent of judicialisation — the prevalence of rights discourses and framing of political debates through constitutional text— has been brought to the forefront by the *National Commission to Review the Working of the Constitution* (NCRWC), which submitted its Final Report in spring 2002. The fierce opposition to the Commission and the political posturing at the time of its establishment undermined the exercise of reviewing India's constitutional experience after 50 years. Nevertheless, the Final Report, as was submitted to the government, spells out central policy preferences in the field of constitutional reform. As well as this, the NCRWC's suggestions are surprisingly similar to the general debates in India's law journals. As a result, the final report mirrors many of the dominant ideological themes of the established constitutional rights discourse, with a strong emphasis being placed on social and economic rights.[17]

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[16] Justice Krishna Iyer, *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India* AIR 1981 SC 298 (par. 11).

[17] The absence of any suggestions to constitutionalise certain aspects of economic reforms or to re-introduce a fundamental right to property supports the contestations advanced in this chapter. Even the former Prime Minister Atal Behari Vajpayee, a key initiator and staunch defender of the Review Commission, did not talk about the need for inserting liberal economic policies in the constitutional text but rather warned of 'an open-door policy' and affirmed the relevance of protecting small and cottage industries to increase employment as well as greater state investments in the agricultural sector. Vajpayee also gave the Commission a specific task: 'The country is also faced with a pressing challenge to quickly remove regional and social imbalances by reorienting the development process to benefit the poorest and the weakest.'

Otherwise, it is further promoting the enhancement of welfare rights: 'A new article, say article 21-C, may be added to make it obligatory on the state to bring suitable legislation for ensuring the right to rural wage employment for a minimum of eighty days in a year'.[18] The role of the judiciary in the integration of directive principles of state policy and fundamental rights has been commended by the NCRWC, which calls this process 'constitutionalising' social and economic rights. Yet, in the eyes of the Commission, this process has not been adequate for fulfilling the goals of the founding fathers. These points have been repeatedly stressed in the report, showing the inescapable nature of the social, economic and rights-oriented concerns of the Commission and the view that only a high level of stateness can achieve such ends. In this context, the right to food, the right to livelihood and right to work are a higher priority than mere economic growth as measured by a rise in national income. In search of the right parameters of development and having eschewed models from developed nations, the commission has tried to carve out India's place through an inventive argument, which states that these justiciable rights cannot be spoken of without providing and ensuring employment — which goal thus becomes the ground for both social and economic policies.

The role of judicialisation in this picture is important to point out, as in all these scenarios, state control or regulation or sensitisation are key concepts stressing the need for further laws, orders and administrative bodies to deal with and solve the socio-economic crisis. Not only does the Commission suggest increasing the ambit of the State, it also recommends public good duties to be enjoined in private organisations,

[18] NCRWC (1) 91, par. 3.13.2.

thus enforcing a more strident socialism in the voice of the Constitution. Under the heading 'Social obligations of the private sector', the report states that since 'investment in the private sector is largely from and by public bodies (Government bodies and Banks which handled Public Finds) the private sector too has social responsibilities to perform' (ibid. 82). The NCRWC's recommendation that under Article 51 A of the Constitution, it should be the duty of industrial organisations to provide education to the children of their employees is one case in point. Even more interesting is the Commission's recommendation with respect to disinvestments:

> The Commission recommends that it should be mandatorily stipulated in the Memoranda of Understanding of privatisation or dis-investment of public sector undertakings that the policy of reservation in favour of SCs, STs and OBCs shall be continued even after privatisation or disinvestment in the same form as it exists in the government, and this should be incorporated in the respective statutes of reservation. As a measure of social integration, there should be a half per cent reservation for children who have one parent SC/ST and the other parent in non-SC/ ST, and this reservation should be termed as reservation for the Casteless. (ibid. 117)

Concepts that have till now been confined to the realm of the government and public institutions have been judicialised as rights and constitutional entitlements.

> Decolonisation of our jurisprudence, heavily soaked in Anglo-American legal literature, is a desideratum if the wretched millions of the Indian earth are to enjoy distributive justice and share in the work, wealth and happiness of Bharat. Regrettable but true, the socialist structure of our constitutional order — a basic feature, as ruled by the Supreme Court in the past — is being subverted by a coup

> engineered by Fund-Bank pressure and M.N.C. infiltration into Indian economic space, making swadeshi (Gandhi), self-reliance (Nehru) and democratic economic sovereignty (Constitution) mere abracadabra. The judicature, with power to strike down contra-constitutional manoeuvres, has specifically held in Nakara Case plus that socialist factors are basic features and inviolable. We thus face a juris-crisis and the Court must act. Which way? It is anybody's guess. Will it be the Waterloo of the Preamble, Parts III, IV and IVA, as interpreted by the Apex Court? (Iyer 1997, 172)

It may be difficult to uphold judicial restraint as liberalisation shifts towards mass politics and the court has to decide in matters relating to labour laws or subsidies. An interesting case to assess the direction of judicial preferences is *Dalmia Cement v. Union of India,* which upheld the J*ute Packaging Material (Compulsory Use in Packing Commodities) Act, 1987*, although the judges had to admit that the requirement by law to use jute bags as packaging had extremely negative effects on the industries concerned. However, the judges put the welfare of agriculture first:

> Article 38 of the Constitution enjoins the state to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice — social, economic and political — informs all the institutions of the national life striving to minimise inequalities in income and endeavour to eliminate inequalities in the status, facilities and opportunities of individuals and groups of people residing in different areas or engaged in different vocations. As stated earlier, agriculture is the mainstay of the rural economy and agriculture, therefore, is an industry. For the tiller of the soil, his livelihood depends on the production and return of the agricultural produce and sustained agro-economic growth. The climatic conditions throughout India are not uniform. They vary from tropical to moderate conditions. Tillers of the soil being an unorganised sector, their voice is scarcely

heard and is not even remotely voiced in these cases. Their fundamental right to cultivation is as a part of their right to a livelihood. It is a bastion of economic and social justice envisaged in the preamble and in Article 38 of the Constitution. As stated earlier, the rights, liberties and privileges assured for every citizen are linked with corresponding concepts of duty, public order and morality. Therefore, the jural postulates form the foundation for the functioning of a just society. The fundamental rights ensured in Part III are, therefore, made subject to restrictions, that is, public purpose in Part IV Directives, public interest or public order in the interest of the public. In enlivening the fundamental rights and the public purpose in the directives, Parliament is the best judge for deciding what is good for the community, by whose suffrage it comes into existence and the majority political party assumes governance of the country. The directive principles form the fundamentals of their manifestos. Any digression is unconstitutional. The Constitution enjoins upon the executive, legislature and judiciary to balance the competing and conflicting claims involved in a dispute so as to harmonise the competing claims to establish an egalitarian social order. It is a settled law that the fundamental rights and the directive principles are the two wheels of the chariot: no one of the two is less important than the other. Break one and the other will lose its efficacy. Together, they constitute the conscience of the Constitution for bringing about social revolution under the rule of law. [(1996) 10 SCC 104, par. 21]

From this perspective, let us consider the constitutionality of the provisions of the Act. The Statement of Objects and Reasons and the preamble of the act indicate that it intends to provide a livelihood to nearly four million rural agricultural families and 2.5 lakh industrial workers. The ancient agri-based jute industry occupied a significant position in the national economy, in particular in the economy of the north-eastern region of the country. It is an agri-based and labour-intensive industry. It is also an export-oriented one, and its raw material is based entirely on indigenous jute produced by the agricultural families. Parliament avowedly intends to protect the interests of the persons involved in jute production: the jute industry, therefore, requires protection. (ibid., par. 50)

The Supreme Court seems to follow a twofold strategy: the social revolution is defended as the judges identify new groups as beneficiaries of state actions and create new patterns of distribution as well as rights that can be claimed against the state (e.g. the Supreme Court has also entrenched a right to work via Art. 21). Similar developments can be observed with respect to the right to food, which the judges deduce from the context of the right to life, Art. 21. To sum up, the judges seem to be content to apply a wider definition of socialism that is at ease with the market economy as long as the state is capable of controlling the material resources produced and as long as wealth is distributed to best serve the social revolution.

The chapter's analysis of the impact of judicialisation, in combination with a stalled amendment process, illustrates the ordering and re-ordering of constitutional priorities as India transforms its economy. To sum up, the evidence that we can extract from cases and judicialised rights discourses points to a vision of a high level of stateness, even after liberalisation. Today's constitutional framework does not really provide for an ideological shift from 60 years ago. The state is viewed as responsible for the same functions — yet, it is accepted that the Indian state needs a new set of tools to fulfil its tasks. What is at stake is the question of state autonomy, the maintenance of "command politics". India then is a good example of the relevance of ideological channelling of politics through judicialisation. The Supreme Court judges recognise that liberalisation increases both — the potential returns from effectual state action and the costs of state ineffectiveness. India's Constitution and the judicialised policy discourses establish the degree to which the political effects of economic change are mediated by superimposed interpretative frameworks; through judicialisation, the constitution becomes

consequential not just for individual cases and not just for the insights it offers, but because of its potential impact on economic policy.

## *Chapter Nine*

# *The Music of the Veena: An Autochthonous Court*

As the Constituent Assembly of India met for the first time, on Monday, the 9th of December 1946, Sachchidananda Sinha, greeted the Honourable Members of the Assembly with his prayer that the Constitution may be 'reared for "Immortality," if the work of man may justly aspire to such a title, and it may be a structure of adamantine strength, which will outlast and overcome all present and future destructive forces.'[1] Three years later, it seemed that rather the *Government of India Act,* 1935, had been reared for "immortality" and as a structure of "adamantine strength" outlasted the intervention of the Constituent Assembly (Rothermund 2006, 245). The Nehruvian constitutional settlement in 1950 could thus be called an "export" of a majoritarian Westminster model given that about 250 of the 395 articles of the 1950 Constitution are literally or substantially identical with the *Government of India Act*, 1935 as passed by the British parliament (Rudolph and Rudolph 1987, 72). Therefore, it is easy to understand the dissatisfaction of those who had yearned for autochthony: 'We wanted the music of the veena or the sitar, but here we have the music of an English band. (K. Hanumanthaiyya, CAD, 17 November 1949.[2] However, though foreign in origin, the indigenization of India's constitution has continuously taken place at the operational level and in the context of the day to day administration of justice; in particular, the working of the Indian Supreme Court — and the ways Indians have worked the Court through a "user theory of law" (Nader, 1984, 26) — have brought about a constitutional form sui generis as well as a unique body of constitutional jurisprudence deriving from

[1] CAD, 9 December 1946; Sachchidananda Sinha, Provisional Chairman of the Constituent Assembly, in his Inaugural Address.

[2] CAD, 17 November 1949.

a distinct institutional organisation that has been shaped by distinctively Indian contexts: mega-sized jurisdiction and corresponding workload and hyper-diversity, poverty and the problem of legal empowerment. When it came to solving these puzzles Indian judges have never been shy. From the early decisions of the Federal Court to the contemporary judicialisation of transparency campaigns, this thesis has analysed many bold judicial decisions that have shaped modern India and there can be no doubt that countless Supreme Court cases have directly affected the lives of millions of Indians. Taking together size of the jurisdiction, the unbounded approach to justiciability, and a political system that has created a perfect environment for judicialisation, it seems safe to say that India's Supreme Court is the most powerful court in the world.

It is not only Indian judges and Indian politicians who see the Court as a potent and powerful actor; judicial power has transformed the entirety of India's governance structures to such an extent that civil society often looks to judges first. When Jean Drèze and the People's Union for Civil Liberties wanted to address food security and malnutrition, they neither made an effort to speak to politicians or to approach parliamentary committees — instead they judicialised their preferences as a "right" to food and poured their time and resources into the filing of a public interest litigation at the Supreme Court.[3] Like many other reformers and social movements they concluded that winning victories in courts is the best way to advance the cause of social change; and to understand the full scope of judicialisation we only need to remind ourselves of how quickly judicial bargaining power then turned employment guarantees from a key litigation demand into landmark social security legislation and the passing of the

[3] *PUCL vs Union of India* (Writ Petition [Civil] No. 196 of 2001. The role of litigation support structures has been discussed mainly in Chapters Six and Seven.

*National Rural Employment Guarantee Act*, 2005. Above all, this thesis has tried to explore the political origins of such judicial empowerment — in case of the right to food, new pressures from below change judicial agendas through changing litigation support structures. This means that — with the *Right of Children to Free and Compulsory Education Act,* 2009 (Chapter) — the two most important acts of Indian welfare legislation of the 21st century derive from the Court.

In case of the Narmada dam, judicialisation derived from the paralysis and political gridlock within the various branches of government as Prime Minister Manmohan Singh tried to delegate his decision-making powers to the Indian Supreme Court so that he could never be blamed for deciding the height of the dam in favour of one section of his coalition government at the expense of the other (Wood 2007). The Prime Minister's refusal to invest his own political capital into the resolution of political disputes within the UPA coalition, eventually led to a Supreme Court order reminding him that — as Prime Minister — he can either follow or refuse to follow the recommendations *Review Committee of the Narmada Control Authority* and that in case of a tie within that committee, the Prime Minister would be empowered to make a final and binding decision. Long gone are the days of Prime Minister's letters to Chief Ministers and few other examples illustrate the transformation of India's constitutional structure as well as this Supreme Court order to the Prime Minister; The Hindu's headline — 'Supreme Court empowers Manmohan to resolve Narmada dam dispute' (April 18, 2006) — thus summarises the shift from parliamentary to judicial supremacy in a few words.

Throughout this thesis we have seen how judicial power expansion also flowed from events and developments outside of the realm of judicial decision-making, namely the transformation of the Indian party system. Prime Minister Atal Bihari Vajpayee, summed up all our data and observations in relation to fractionalisation, political competition, volatility and power diffusion when he commented on the NDA's defeat in 2004: 'we do not know why we lost, those who were victorious do not know why they won' (Times of India, November 24, 2004). Such hyper-competitiveness of Indian elections underlay and will continue to drive politicians' support for powerful judges; we have explored numerous examples of cases in which political actors tried to achieve through litigation what could not be achieved through the ballot box. Maybe the most remarkable narrative in this respect was the Supreme Court's intervention in the BJP's cabinet infighting about disinvestment and how mere judicial signalling then allowed almost all political actors to realign in line with privatisation plans.

The extent of judicialisation and judicial power is beginning to overwhelm even the Indian Supreme Court; Justice Agrawal observed during oral Supreme Court proceedings:

> We are fed up with this government. There is no accountability and nobody bothers about laws or guidelines. Nobody in the government works and the whole government has become non-functional. That is why PILs are filed. When we pass orders, those in power complain about judicial activism. When they are out of power they are happy and they come here [to the Court] for remedy. (The Hindu, August 6, 2008).

With these backgrounds in mind, we had embraced Shapiro's 'political jurisprudence" (1964; 1983; Shapiro and Stone Sweet 2002) as a valid starting point for situating phenomenological accounts of the radical empowerment of India's Supreme Court within a longitudinal framework of strategic metaphors.

> The core of political jurisprudence is a vision of courts as political agencies and judges as political actors. Any given court is thus seen as a part of the institutional structure of American government basically similar to such other agencies as the Interstate Commerce Commission, the House Rules Committee, the Bureau of the Budget, the city council of Omaha, the Forestry Service, and the Strategic Air Command. Judges take their places with the commissioners, congressmen, bureaucrats, city councilmen, and technicians who make the political decisions of government. In short, the attempt is to intellectually integrate the judicial system into the matrix of government and politics in which it actually operates and to examine courts and judges as participants in the political process rather than presenting law, with a capital L, as an independent area of substantive knowledge. Quite fundamentally, political jurisprudence subordinates the study of law, in the sense of a concrete and independent system of prescriptive statements, to the study of men, in this instance, those men who fulfil their political functions by the creation, application, and interpretation of law. (Shapiro 1964, 296-7)

Combining our strategic account of judicial decisions with Chief Justice Hughes' classic comment that 'the constitution is what the judges say it is' (1907, quoted in Roddey Holder 1997, 5) we have found the following pattern: Judges have increasingly asserted their own authority in the governance of the India whenever legislative politics, operating on the basis of majority rule, failed in finding efficient solutions. As soon as the executive or legislature become incapable of action, they will lose control of their

political authority and the Court — as an agency capable of focused, autonomous action — will act where the government and legislative is too divided to react. In such circumstances, policymaking and lawmaking will tend to be judicialised and migrate towards the sphere of the Indian Supreme Court as the only body that is capable of decisive action and ensuring political stability (Mitra 1999). It has been shown that judicial decision-making and judicialisation patterns are ultimately and inevitably shaped and altered by structural forces, be they economic, social, or — in India's case — mostly political. The thesis departs from conventional explanations of judicial power in India, arguing that neither judicial behaviour nor normative political philosophies can account for the stunning rise of judicial power in India. Following Ran Hirschl the rise and fall of judicial power is explained through the search for political origins as the continuous presence of elections — the sine qua non of Indian democracy — has continuously increased complexity and uncertainty, and thus the demand for judicial review as "insurance."

It is in this context, that this thesis has added the Indian Supreme Court to a general portrait of judges as "single-minded seekers of legal policy" (George and Epstein 1990, 325). Just as comparative studies of courts around the globe have documented a hefty rise in ''the power of judges'' after the second World War, we observed the luxurious ascendancy of the Indian Supreme Court throughout the last three decades, as the endogenous rights revolution of the 1980s, the judicial *coups d'états* of the 1990s and the great innovation of basic structure constitutionalism have expanded the concept of judicial review in ways "unparalleled in the annals of world judiciary" (Baxi 1999, 174).

# *EPILOGUE*

## *The Personal and the Recent*

It is not easy to dare to add an epilogue, thus traversing the boundaries of doctoral thesis writing to some extent. At the same time, there are earthquakes of such magnitude that to ignore them would be misleading.

Summer 2001, I was happy co-authoring — with Professor Subrata K. Mitra — my first peer-reviewed journal article on the judicialisation of India's personal law system. We were relying on High Court cases that awarded large maintenance payments to divorced Muslim women, thus, doing the very opposite of what the public thought the Rajiv Gandhi government had enacted into law following the Shah Bano controversy. We had heard from Professor Werner Menski that the Indian scholar Danial Latifi had filed a public interest litigation to clarify this aspect of judicial policy-making on an all-India basis, yet, as with so many other controversial public interest litigation cases, the Supreme Court decided not to decide for more than ten years. Shortly after we had submitted the final version of our article, the Indian Supreme Court suddenly decided *Danial Latifi vs Union of India* 2001 (7) SCC 740 on September 28, 2001. It was no coincidence (numerous Indian scholars have written about this) that the Supreme Court of India made this decision two weeks after 9/11, and it is quite likely that the judgment had been written a long time ago and the Court was simply waiting for the right moment ; in this case, the issue would not get much media attention, and especially Muslim communities would be pre-occupied and unable to carefully digest the case that came after Shah Bano.

The fact that we had anticipated and spoken about such developments before they happened strengthened my resolve to engage with judicialisation studies and to focus on

the Indian Supreme Court. For a long time, all trends seemed to be flowing together beautifully, and in particular the UPA II was a "judicial-power-dream" come true; I felt confident that 2009 was a suitable cut-off date.

The BJP victory 2014 did not shock me much. Firstly, it just added another layer of unpredictability over Indian elections and a politician's risk of losing his seat seems greater than ever. Secondly, it will take a long time to understand whether 2014 will have a systemic impact and newspapers seem to underestimate the increased importance of vote transfers from pre-electoral allies and the continued centrality of coalition politics. Thirdly, Chapter Five's analysis of amendment politics immediately clarifies that the BJP's victory, though very impressive, does not even bring the party close to amendment power. However, the *Constitution (Ninety-ninth Amendment) Act, 2014* did come as a shock as I would not have expected Parliament to open the next battlefront in relation to judicial appointments. I put aside my doubts and stuck to the cut-off year 2009, thus ignoring that the *judicial coup d'état* of the 1990s — when the Supreme Court deposed the Prime Minister from his established seat in the judicial appointments process — now had had a new coda. Since October 16, 2015, things look again differently, as the Supreme Court of India, for the first time in history, has simply struck down the entire Ninety-Ninth Amendment Act and the related statutory law by invoking the basic structure doctrine. While there is a lot to say about judicial appointments and accountability, if Modi's victory really ushers into a new phase of a two-party system, then the Supreme Court was wise to postpone the debate about how judges should be appointed. Leaving aside all those questions, what has happened on October 16th had almost no political ramifications: politicians shrugged their shoulders and I have yet to

find a single attack on the basic structure doctrine. This is true judicial power, and also a little bit of heresthetics — like Kesavananda the judgment stretches out across more than a thousand pages and the "transaction costs" of reading such a long judgment are probably too high for many politicians.

# *APPENDIX*

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **1** | 18.6.1951 | PP | CIVIL AND POLITICAL RIGHTS (freedom of speech) / LAND REFORMS / NINTH SCHEDULE (addition to the Constitution) / RESERVATIONS (entrenchment of policy) / RIGHT TO PROPERTY. | OVERRIDES SC | SUBSTANTIATES ENTIRE RESERVATIONS POLICY |
| **2** | 1.5.1953 | 1-LS | ELECTIONS (Vidhan Sabha and Lok Sabha constituencies, delimitation in line with 1951 census). | | |
| **3** | 22.2.1955 | 1-LS | FEDERALISM (distribution of legislative powers, favouring Union) | | |
| **4** | 27.4.1955 | 1-LS | LAND REFORMS / NINTH SCHEDULE / NATIONALIZATION (entrenchment of nationalization policies and state monopolies) / RIGHT TO PROPERTY (reaffirmation of full state control over natural resources and public utilities). | OVERRIDES SC | |
| **5** | 24.12.1955 | 1-LS | FEDERALISM (federal map, consultation of States for alteration of boundaries and names). | | |
| **6** | 11.9.1956 | 1-LS | FEDERALISM (distribution of legislative powers, favouring Union ) / TAXATION (sale or purchase of goods). | OVERRIDES SC | |
| **7** | 1.11.1956 | 1-LS | FEDERALISM (federal map, language — implementation of the States Reorganisation Act at constitutional level) / JUDICIARY (appointments and transfers). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **8** | 5.1.1960 | 2-LS | RESERVATIONS (special representation in legislatures, extension until 1970). | | QUOTAS IN LEGISLATURES |
| **9** | 28.12.1960 | 2-LS | TERRITORY (entrenchment of the Indo-Pakistan Agreements 1958, 1959 and 1960). | FOLLOWS SC ADVISORY OPINION | |
| **10** | 11.8.1961 | 2-LS | TERRITORY (integration of Dadra and Nagar Haveli). | | |
| **11** | 19.12.1961 | 2-LS | ELECTIONS (alteration of electoral process for Vice-President and general clarification in relation to vacancies in electoral colleges). | | |
| **12** | 20.12.1961 | 2-LS | TERRITORY (integration of Goa, Daman and Diu). | | |
| **13** | 1.12.1963 | 3-LS | FEDERALISM (federal map, creation of Nagaland) / FEDERALISM (distribution of legislative powers, various autonomy guarantees for Nagaland). | | |
| **14** | 1.12.1963 | 3-LS | ELECTIONS (introduction of legislatures for some Union Territories) / TERRITORY (integration of Pondicherry). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **15** | 5.10.1963 | 3-LS | CIVIL SERVICE (rank, reduction of rank and criminal charges) / JUDICIARY (retirement age, transfers and salaries) / TERRITORY (entrenchment of Union claim to continental shelf). | | |
| **16** | 5.10.1963 | 3-LS | FEDERALISM (new oath — affirming the "sovereignty and integrity of India" — for candidates for elections, members of legislatures and public officials). | | |
| **17** | 20.6.1964 | 3-LS | LAND REFORMS / NINTH SCHEDULE / RIGHT TO PROPERTY. | OVERRIDES SC | |
| **18** | 27.8.1966 | 3-LS | FEDERALISM (consultation of Union Territories for alteration of boundaries and names). | | |
| **19** | 11.12.1966 | 3-LS | ELECTIONS & JUDICIARY (abolition of election tribunals, institutionalization of High Court jurisdiction for election petitions). | | |
| **20** | 22.12.1966 | 3-LS | JUDICIARY (validation of 'wrongful' appointments, postings, promotions and transfers of groups of District Judges, in particular in Uttar Pradesh, and confirmation of all their previous decisions and orders). | OVERRIDES SC | |
| **21** | 10.4.1967 | 4-LS | LANGUAGE (addition of Sindhi to 8th Schedule). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **22** | 25.9.1969 | 4-LS | FEDERALISM (federal map, formation of an autonomous state within Assam). | | |
| **23** | 23.1.1970 | 4-LS | RESERVATIONS (special representation in legislatures, extension until 1970; exception for Nagaland). | | QUOTAS IN LEGISLATURES |
| **24** | 5.11.1971 | 5-LS | AMENDMENT POWER (restoration of Parliament's unlimited amendment power). | OVERRIDES SC | |
| **25** | 20.4.1972 | 5-LS | JUDICIARY (judicial review in relation to Directive Principles limited) / NATIONALISATION (banks) / RIGHT TO PROPERTY. | OVERRIDES SC | |
| **26** | 28.12.1971 | 5-LS | FEDERALISM (Princely States, cessation of all forms of recognition granted to rulers 1950 and abolition of privy purses). | | |
| **27** | 30.12.1971 | 5-LS | FEDERALISM (federal map, implementation of the North-Eastern Areas Reorganisation Act at the constitutional level). | | |
| **28** | 29.8.1972 | 5-LS | CIVIL SERVICE / JUDICIARY (remuneration, leave and pension of pre-Independence appointments to the civil service can be revoked by Parliament, also retrospectively; such decisions are not subject to judicial review). | PRE-EMPTIVE, PARTIAL ABOLITION OF JUDICIAL REVIEW | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **29** | 9.6.1972 | 5-LS | LAND REFORM / NINTH SCHEDULE / RIGHT TO PROPERTY. | OVERRIDES SC | |
| **30** | 27.2.1973 | 5-LS | JUDICIARY (civil appeals to Supreme Court on the basis of the importance of the question of law and no longer on the basis of the value of the subject matter of dispute; partial implementation of the 44th and 45th Law Commission Reports). | | |
| **31** | 17.10.1973 | 5-LS | ELECTIONS (Vidhan Sabha and Lok Sabha constituencies, delimitation in line with the 1971 census; increase of number of seats in Lok Sabha, adjustments for representation of smaller States) / RESERVATIONS (adjustments to reservation of seats for Scheduled Castes in relation to North Eastern States). | | QUOTAS IN LEGISLATURES |
| **32** | 1.7.1974 | 5-LS | JUDICIARY (new Administrative Tribunal for public employment for Andhra Pradesh, setting aside High Court jurisdiction; upheld and revalidated all pre-1974 appointments, postings, and promotions and transfers of candidates from Backward Areas in Telangana) / RESERVATIONS (entrenched Telangana quotas with respect to education, civil service and public sector employment). | OVERRIDES SC | BACKWARD AREAS |
| **33** | 19.5.1974 | 5-LS | ELECTIONS (new procedure for resigning a seat in Union and State legislatures). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **34** | 7.9.1974 | 5-LS | LAND REFORM / NINTH SCHEDULE / RIGHT TO PROPERTY. | OVERRIDES SC | |
| **35** | 1.3.1975 | 5-LS | FEDERALISM (federal map, implementation of Government of Sikkim Act, 1974; association of Sikkim with the Union at the constitutional level; addition of 10th Schedule to Constitution to entrench terms of association). | | |
| **36** | 26.4.1975 | 5-LS | FEDERALISM (federal map, Sikkim recognised as a full-fledged State and erasure of 10th Schedule). | | |
| **37** | 3.5.1975 | 5-LS | ELECTIONS (legislature for Arunachal Pradesh following the Union Territory model). | | |
| **38** | 1.8.1975 | 5-LS(E) | EMERGENCY POWERS / JUDICIARY (presidential powers in relation to the declaration & continuation of emergency rule as well as presidential promulgation of ordinances no longer subject to judicial review; assertion of the presidential power to suspend fundamental rights). | PRE-EMPTIVE, PARTIAL ABOLITION OF JUDICIAL REVIEW | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **39** | 10.8.1975 | 5-LS(E) | ELECTIONS & JUDICIARY (declares pending court proceedings relating to corruption and the election of Indira Gandhi null and void; validity of the election of Prime Minister, Speaker, of the President, Vice-President no longer subject to judicial review) / LAND REFORM / NATIONALIZATION / NINTH SCHEDULE (mainly land reform legislation, but for the first time the Ninth Schedule is also used for other issues, specifically to exclude electoral laws and security legislation from the scope of judicial review) / RIGHT TO PROPERTY. | PRE-EMPTIVE, PARTIAL ABOLITION OF JUDICIAL REVIEW | |
| **40** | 27.5.1976 | 5-LS(E) | LAND REFORM / NINTH SCHEDULE (mainly property rights and land reforms, but continues to include other types of legislation, e.g. foreign exchange manipulation, Essential Commodities Act) / RIGHT TO PROPERTY / TERRITORY (entrenchment of Union claim to all resources related to continental shelf, exclusive economic zone and the maritime zones of India). | OVERRIDES SC | |
| **41** | 7.9.1976 | 5-LS(E) | CIVIL SERVICE (age of retirement of chairman and members of public service commissions). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **42** | 18.12.1976 | 5-LS(E) | AMENDMENT POWER (restoration of parliament's unlimited amendment power after Kesavananda decision) / DIRECTIVE PRINCIPLES (addition of free legal aid, protection of environment, participation of workers in management) / ELECTIONS (delimitation freeze: constituency boundaries adjustments, due with each new census per decade, postponed from 1980 to 2000) / EMERGENCY (expansion emergency powers, full legalisation of internal deployment of armed forces and Union forces) / FEDERALISM (distribution of legislative powers, favouring Union) / FUNDAMENTAL DUTIES (new addition to the Constitution) / JUDICIARY (abolition of all forms of judicial review with respect to the disqualification of members of legislatures; abolition of constitutional judicial review with respect to the prevention of "anti-national activities"; abolition of the Supreme Court's power of constitutional judicial review in relation to all State laws; abolition of the High Courts' power of constitutional judicial review in relation to all central laws; imposition of a minimum Supreme Court bench size of seven judges for constitutional judicial review cases and declarations of unconstitutionality only on the basis of a majority of not less than two-thirds of the judges sitting; minimum High Court bench size of five judges for constitutional judicial review cases and declarations of unconstitutionality only on the basis of a majority of not less than two-thirds of the judges sitting; introduction of a new part in the Constitution to Establish Administrative Tribunals, with appeal only to the Supreme Court and thus limiting the jurisdiction of the High Courts) / PREAMBLE (addition of the words "socialist, secular" and "unity and integrity"). | TOTAL TRANSFORMATION OF JUDICIAL REVIEW | |
| **43** | 13.4.1978 | 6-LS | JUDICIARY (revocation of all elements of the 42nd amendment that had limited judicial review; full restoration of constitutional judicial review, both for High Courts and Supreme Court; bench size and special majority requirements for declarations of unconstitutionality repealed, quashed the constitutional provision that allowed for special status laws for the "prevention of anti-national activities"). | RESTORATION OF JUDICIAL REVIEW | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **44** | 30.4.1979 | 6-LS | CIVIL AND POLITICAL RIGHTS (expansion of fundamental rights and limitation of preventive detention powers; habeas corpus reinforced and guaranteed also during emergency periods) / DIRECTIVE PRINCIPLES (addition of a sub-section on substantive equality as a goal) / ELECTIONS & JUDICIARY (restoration of judicial review in relation to the election of Prime Minister, Speaker, of the President, Vice-President) / EMERGENCY (new safeguards against misuse of emergency powers in relation to declaration; continuation only if approved by a two thirds majority in Parliament; President's rule limited to six months) / NINTH SCHEDULE (removed security laws, restoring the convention of exclusive use of the Ninth Schedule for land reform legislation) / REPEAL (amended the 42nd Amendment Act itself, rescinding numerous parts of it, thus restoring the related constitutional sections to their previous version) / RIGHT TO PROPERTY (completely abolished; all relevant sections removed from the fundamental rights section, new Article 300A on property declaratory only, without constitutional remedies and compensation). | STRENGTHENS JUDICIAL REVIEW | |
| **45** | 25.1.1980 | 7-LS | RESERVATIONS (special representation in legislatures, extension until 1990). | | QUOTAS IN LEGISLATURES |
| **46** | 2.2.1983 | 7-LS | TAXATION (implementation of the 61st Law Commission report to close legal loopholes and empower both Union and State governments to solidify their sales tax policies). | OVERRIDES SC | |
| **47** | 26.8.1984 | 7-LS | LAND REFORM / NINTH SCHEDULE. | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **48** | 26.8.1984 | 8-LS | EMERGENCY (President's rule in Punjab extended to two years). | | |
| **49** | 11.9.1984 | 8-LS | FEDERALISM (federal map, formation of an autonomous tribal area in Tripura). | | |
| **50** | 11.9.1984 | 8-LS | FUNDAMENTAL RIGHTS (applicability of fundamental rights always had been limited in relation to members of the Armed Forces; extension of this principle to other state security forces and intelligence personnel). | | |
| **51** | 29.4.1985 | 8-LS | RESERVATIONS (expansion of special representation for Scheduled Tribes in North Eastern State legislatures and Lok Sabha). | | QUOTAS IN LEGISLATURES |
| **52** | 15.2.1985 | 8-LS | ELECTIONS (entrenchment of anti-defection rules across various sections of the Constitution, added a new 10th Schedule governing the process of disqualification of elected members of legislatures on ground of defection). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **53** | 14.8.1986 | 8-LS | FEDERALISM (federal map, constitutional implementation of the settlement with the Mizo National Front and recognition of the Union Territory of Mizoram as a full State) / FEDERALISM (distribution of legislative powers, various autonomy guarantees for Mizoram). | | |
| **54** | 14.3.1987 | 8-LS | JUDICIARY (higher salaries for Supreme Court and High Court judges; empowerment of Parliament, for the future, to specify judicial salaries by regular law-making). | RENUMERATION OF JUDGES | |
| **55** | 23.12.1986 | 8-LS | FEDERALISM (federal map, recognition of Union Territory of Arunachal Pradesh as full State, with specific privileges for the Governor due to the sensitive location of the State). | | |
| **56** | 23.5.1987 | 8-LS | FEDERALISM (federal map, Union Territory of Goa, Daman and Diu reorganised as State of Goa and Union Territory Daman and Diu). | | |
| **57** | 15.9.1987 | 8-LS | RESERVATIONS (massive expansion, until the delimitation review process scheduled for 2000, of special representation for Scheduled Tribes in the legislative assemblies of the States of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland). | | QUOTAS IN LEGISLATURES |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **58** | 9.12.1987 | 8-LS | LANGUAGE (empowerment of the President to revise, update and publish the authoritative Hindi translation of the Indian Constitution and oversee the translation of all constitutional amendments into Hindi). | | |
| **59** | 30.3.1988 | 8-LS | EMERGENCY (special emergency powers of the President in relation to Punjab only; limited to two years). | | |
| **60** | 20.12.1988 | 8-LS | TAXATION (increase of the ceiling of profession tax that can be levied by States). | | |
| **61** | 28.3.1989 | 8-LS | ELECTIONS (voting age reduction, from 21 years to 18 years). | | |
| **62** | 25.1.1990 | 9-LS | RESERVATIONS (special representation in legislatures, extension until 2000). | | QUOTAS IN LEGISLATURES |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **63** | 6.1.1990 | 9-LS | EMERGENCY (revoking the 59th Amendment special presidential emergency powers in relation to Punjab). | | |
| **64** | 16.4.1990 | 9-LS | EMERGENCY (extension of the validity of the proclamation of emergency and postponement of Assembly elections in Punjab by another six months). | | |
| **65** | 7.6.1990 | 9-LS | RESERVATIONS (replacement of the Special Officer for the Scheduled Castes and Scheduled Tribes with a permanent National Commission for Scheduled Castes and Scheduled Tribes; specification of the duties and investigative powers of the Commission in detail). | | PERMANENT NATIONAL COMMISSION |
| **66** | 7.6.1990 | 9-LS | LAND REFORM / NINTH SCHEDULE. | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **67** | 4.10.1990 | 9-LS | EMERGENCY (extension of the validity of the proclamation of emergency and postponement of Assembly elections in Punjab by another six months). | | |
| **68** | 12.3.1991 | 9-LS | EMERGENCY (extension of the validity of the proclamation of emergency and postponement of Assembly elections in Punjab by another twelve months). | | |
| **69** | 21.12.1991 | 10-LS | FEDERALISM (reorganisation of the Union Territory of Delhi as National Capital Territory of Delhi with special status among the Union territories). | | |
| **70** | 12.8.1992 | 10-LS | ELECTIONS (electoral college for presidential elections enlarged, adding the Legislative Assemblies of the Union territory of Pondicherry and the National Capital Territory of Delhi. | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **71** | 31.8.1992 | 10-LS | LANGUAGE (addition of Konkani, Manipuri and Nepali to 8th Schedule). | | |
| **72** | 14.12.1992 | 10-LS | RESERVATIONS (constitutional recognition of the Memorandum of Settlement by the Government of India with Tripura National Volunteers, 1988, allowing for further expansion of special representation of Scheduled Tribes in the Tripura legislature). | | QUOTAS IN LEGISLATURES |
| **73** | 20.4.1993 | 10-LS | FEDERALISM (entrenchment of Panchayati Raj institutions and a new era of village governance) / FEDERALISM (distribution of legislative power; new 11th Schedule, empowerment of States to determine the scope of delegation of powers to Panchayats; fiscal and budgetary framework for Panchayats also becoming subject to specific State legislation) / RESERVATIONS (for all direct elections from territorial constituencies for Panchayats, compulsory quota regime for SC, ST and women; optional quota regime for Backward Classes). | | QUOTAS IN LEGISLATURES |
| **74** | 20.4.1993 | 10-LS | FEDERALISM (entrenchment of urban local bodies and a new era of metropolitan governance) / FEDERALISM (distribution of legislative power; new 11th Schedule, empowerment of States to determine the scope of delegation of powers to urban governance bodies; fiscal and budgetary framework for urban bodies also becoming subject to specific State legislation) / RESERVATIONS (for all direct elections from territorial constituencies for urban governance bodies, compulsory quota regime for SC, ST and women; optional quota regime for Backward Classes). | | QUOTAS IN LEGISLATURES |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **75** | 5.2.1994 | 10-LS | FEDERALISM (empowerment of States to introduce specific Tribunals to reduce the burden of rent and tenancy litigation on regular courts); JUDICIARY (appeals in rent and tenancy litigation at discretion of Supreme Court only). | FOLLOWS SC OPINION | |
| **76** | 31.8.1994 | 10-LS | FEDERALISM & RESERVATIONS (rescinding the Supreme Court's Mandal decision in relation to the fifty per cent ceiling on the total scope of reservations, continuity of Tamil Nadu's reservation policy based on a sixty-nine per cent ceiling) / NINTH SCHEDULE (breaking with the constitutional convention to use the Ninth Schedule for land reform only to protect Tamil Nadu's sixty-nine per cent ceiling from judicial review). | OVERRIDES SC | SCOPE OF RESERVATION IN EDUCATION AND EMPLOYMENT |
| **77** | 17.6.1995 | 10-LS | RESERVATIONS (rescinding the Supreme Court's Mandal decision in relation to reservation in matters of promotion). | OVERRIDES SC | RESERVATIONS IN MATTERS OF PROMOTION |
| **78** | 30.8.1995 | 10-LS | LAND REFORM / NINTH SCHEDULE. | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **79** | 21.1.2000 | 13-LS | RESERVATIONS (special representation in legislatures, extension until 2010). | | QUOTAS IN LEGISLATURES |
| **80** | 9.6.2000 | 13-LS | FEDERALISM (devolution of financial resources, changing the scope and composition of vertical fiscal transfers on the basis of the Report of the 10th Finance Commission: bringing almost all central taxes into a shareable pool and adjusting connected transfers to the States from discretionary to mandatory). | | |
| **81** | 9.6.2000 | 13-LS | RESERVATIONS (rescinding the Supreme Court's Mandal decision in relation to reservations for backlog vacancies and special recruitment drives, separating all backlog vacancies from the calculation of the fifty per cent ceiling rule). | OVERRIDES SC | SCOPE OF RESERVATION IN PUBLIC EMPLOYMENT |
| **82** | 8.9.2000 | 13-LS | RESERVATIONS (setting aside of a 1996 Supreme Court decision, permitting lower qualifying marks or lesser levels of evaluation in favour of reserved category candidates in matters of promotion). | OVERRIDES SC | RESERVATIONS IN MATTERS OF PROMOTION |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **83** | 8.9.2000 | 13-LS | FEDERALISM & RESERVATIONS (certification of non-existence of Scheduled Caste populations in Arunachal Pradesh, exempting this State's Panchayat institutions from the constitutional requirements relating to reservation of seats for the Schedules Castes). | | QUOTAS IN LEGISLATURES |
| **84** | 21.2.2002 | 13-LS | ELECTIONS (extension of the 1976 delimitation freeze until 2026, further postponing the constitutionally mandated adjustments of the number of seats in Lok Sabha and Legislative Assemblies in line with each census per decade; while the total number of seats allotted to each State remained unchanged, the amendment allowed for the readjustment of the number of reserved SC and ST seats on the basis of the 1991 census). | | QUOTAS IN LEGISLATURES |
| **85** | 4.1.2002 | 13-LS | RESERVATIONS (various Supreme Court decisions dissociated the accelerated promotion of SC and ST candidates from a corresponding, accelerated seniority status; this amendment, with retrospective effect, restored consequential seniority in matters of promotion of SC and ST candidates). | OVERRIDES SC | RESERVATIONS IN MATTERS OF PROMOTION |
| **86** | 12.12.2002 | 13-LS | RIGHT TO EDUCATION (new Art. 21A entrenching a right to education for all children under fourteen; new directive principle in favour of early childhood care for all children under six; new fundamental duty, Art. 51A, clause (k); parents' and guardians' duty to provide opportunities for education). | FOLLOWS SC OPINION | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **87** | 22.6.2003 | 13-LS | ELECTIONS & RESERVATIONS (direction to the 4th Delimitation Commission, constituted in 2002 to carry out a readjustment of the number of seats reserved for the Scheduled Castes and Scheduled Tribes, to use the 2001 census and not, as initially specified by the 84th Amendment Act, the 1991 census). | | QUOTAS IN LEGISLATURES |
| **88** | 15.1.2004 | 13-LS | TAXATION (empowerment of States, levying, collection and appropriation of value added tax). | | |
| **89** | 28.9.2003 | 13-LS | RESERVATIONS (splitting of the permanent National Commission for Scheduled Castes and Scheduled Tribes into two independent commissions, namely a National Commission for Scheduled Castes and a National Commission for Scheduled Tribes). | | PERMANENT NATIONAL COMMISSIONS |
| **90** | 28.9.2003 | 13-LS | FEDERALISM & RESERVATIONS (federal map and special representation; recognition and implementation of the Memorandum of Settlement on Bodoland Territorial Council, 2003, specifying reservation rules for all constituencies now located in the newly created Bodoland Territorial Areas District). | | QUOTAS IN LEGISLATURES |
| **91** | 1.1.2004 | 13-LS | ELECTIONS (expansion of anti-defection rules to include bulk defections and splits) / EXECUTIVE (imposition of cabinet size limits on Centre and all States). | | |

**Amendments to the Constitution of India, 1950-2009: Issues and Relation to Supreme Court**

| AA | CIF | Lok Sabha | Issues | Relation to Supreme Court | Relation to Reservations |
|---|---|---|---|---|---|
| **92** | 7.1.2004 | 13-LS | LANGUAGE (addition of Bodo, Dogri, Maithili and Santhali to 8th Schedule) / TAXATION (empowerment of Union, service tax). | | |
| **93** | 20.1.2006 | 14-LS | RESERVATIONS (addition of a new clause to Art. 15, allowing for reservations, if enacted by law, in all educational institutions, including private educational institutions, whether aided or unaided by the State) / MINORITIES (continuation of the non-use of reservations in minority educational institutions). | OVERRIDES SC | RESERVATIONS IN EDUCATIONAL INSTITUTIONS |
| **94** | 12.6.2006 | 14-LS | FEDERALISM (federal map, alteration of special provision for a minister in charge of tribal welfare in line with new States: extension to Chhattisgarh and Jharkhand, revocation for Bihar). | | SPECIAL PROVISION FOR TRIBAL WELFARE |

# *Abbreviations*

| | |
|---|---|
| AA | Amendment Act |
| AICC | All India Congress Committee |
| AIR | All India Reporter |
| All | Allahabad |
| Amdm | Amendment |
| Art. | Article |
| ASIL | Annual Survey of Indian Law |
| Cal | Calcutta |
| CBI | Central Bureau of Investigation |
| CIF | Coming into Force |
| CII | Confederation of Indian Industry |
| Bom | Bombay |
| BomLR | Bombay Law Reporter |
| BJP | Bharatiya Janata Party |
| CAD | Constituent Assembly Debates |

| | |
|---|---|
| CJ | Chief Justice |
| CPI | Communist Party of India |
| CPI (M) | Communist Party of India (Marxist) |
| CSDS | Centre for the Study of Developing Societies |
| Del | Delhi |
| EC | Election Commission |
| ECR(G) | Election Commission Reports (General Elections) |
| HC | High Court |
| INC | Indian National Congress |
| JP | JP (Janata Party) |
| LA | Legislative Assembly |
| LC | Law Commission |
| LCR | Law Commission Report |
| LS | Lok Sabha |
| LSD | Lok Sabha Debates |
| J | Judge/Justice |
| Mad | Madras (Chennai) |
| Manu | Manupatra |
| MLA | Member of Legislative Assembly |

| | |
|---|---|
| MP | Member of Parliament |
| NDA | National Democratic Alliance |
| NGO | Non-Governmental Organisation |
| OBC | Other Backward Classes |
| PIL | Public Interest Litigation |
| POTA | Prevention of Terrorism Act |
| PUCL | People's Union of Civil Liberties |
| RPI | Republican Party of India |
| RS | Rajya Sabha |
| RSD | Rajya Sabha Debates |
| RTIA | Right to Information Act |
| s. | Section |
| SC | Supreme Court |
| SCC | Supreme Court Cases |
| SCJ | Supreme Court Journal |
| SCR | Supreme Court Reporter |
| Supp. | Supplement |

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