

Education, Labor Rights, and Incentives

Contract Teacher Cases in the Indian Courts

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July 2010



Abstract

Since the liberalization of India's economy beginning in the early 1990's, the government has increasingly employed contract workers to perform various state functions, including in the education sector. Yet, little research has been done to examine how courts have reacted to this shift in government labor policy. This paper looks at all reported cases involving contract teachers in the Indian Supreme Court and four High Courts over the last thirty years. It finds that although almost never explicitly overturning precedent, the judiciary in India has increasingly become less

sympathetic to contract teachers demands, particularly at the Supreme Court level. The paper then argues that the Court could use its power of judicial review to engage the government in a dialogue, not unlike some of its earlier decisions in the 1980s and early 1990s. The Court can help guide the government to create a labor policy that not only achieve better results for students, but better working conditions for teachers. Such a dialogic approach could potentially be adopted to help reframe the government's contract labor policy more generally.

This paper—a product of the Human Development and Public Services Team, Development Research Group—is part of a larger effort in the department to understand how the rule of law affects development. Policy Research Working Papers are also posted on the Web at <http://econ.worldbank.org>. The authors may be contacted at nickrobinson5@gmail.com and vgauri@worldbank.org.

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Education, Labor Rights, and Incentives: Contract Teacher Cases in the Indian Courts

Nick Robinson* and Varun Gauri**

Introduction

Since the liberalization of India's economy beginning in the early 1990s, the government has increasingly employed contract workers to perform various state functions, from cleaning sewers to collecting taxes. The education sector has been no different. Contract teachers have become an ever-more visible face in India's public schools.

Debates over the merit of these teachers have been fierce. Proponents of contract teachers see these teachers as a way to bypass what they see as under-performing regular teachers. Opponents argue that contract teachers are unfairly paid less than regular teachers for the same kind of work, are subject to arbitrary dismissals and harassment, and do not teach as well as regular teachers.

Over the past several years contract teachers have publicly confronted the government with complaints about their poor pay and tenuous job security in confrontational, and sometimes violent, demonstrations. For example, in Orissa in 2001, after a centrally sponsored non-formal education scheme was withdrawn leaving 40,000 contract teachers unemployed, seven teachers badly injured themselves while attempting self-immolation inside the residence of a prominent politician.¹ Demonstrations in the state continued

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1 *Seven ex-teachers injured while attempting self-immolation*, REDIFF.COM, Aug. 11, 2001, available at <http://sportschat.rediff.com/news/2001/aug/11oris.htm>

over the next several years, including in 2008 when 200 contract teachers blocked the state's chief minister into his residence and four female teachers were injured in the ensuing scuffle with security.² In Jharkhand one contract teacher was killed in 2007 when police *lathi* charged a group of contract teachers calling for regularization and protesting an exam to test their teaching abilities.³ In 2008, a female contract teacher was shot dead in Haryana by police firing rubber bullets into a crowd of hundreds of contract teachers demanding that they be allowed to fill vacant regular teacher posts.⁴ In Chattisgarh fifty contract teachers were arrested in 2008 during a march demanding the government raise their Rs. 1,000 (\$22) monthly honorarium.⁵ Three contract teachers were wounded in Kashmir in 2007 after police baton charged teachers demanding regularization.⁶ Over a dozen contract teachers were injured in Bihar in 2009 when police clashed with thousands of striking teachers who had taken to the streets after the Chief Minister declared they would have to take an aptitude test before being able to get a salary increase and could be fired if they did not pass it.⁷ In February 2010, a female teacher in Punjab died from wounds suffered from self-immolation atop a water tanker where she was demanding regularization.⁸ From Madhya Pradesh to the Andaman Islands contract teachers have gone on hunger strikes and regular strikes.⁹

² *Teachers block main road*, THE HINDU, March 18, 2008, available at <http://www.hindu.com/2008/03/18/stories/2008031856630300.htm>; In the previous year (2007), some 10,000 contract teachers staged a demonstration demanding regularization in front of the Orissa Legislative Assembly. See *Contract teachers on the warpath*, THE HINDU, May 29, 2007, available at <http://www.hindu.com/2007/03/29/stories/2007032907680500.htm>; A few months later sixty were injured in clashes between baton charging police and stone throwing teachers. See, *60 teachers injured in violence during agitation by teachers*, ORISSA DIARY, Nov. 17, 2007, available at <http://www.orissadiary.com/Shownews.asp?id=4883>

³ *Death deepens para-teacher crisis*, THE TELEGRAPH, Aug. 27, 2007, available at http://www.telegraphindia.com/1070827/asp/jharkhand/story_8242016.asp

⁴ T.K. Rajalakshmi, *Tough Lesson*, FRONTLINE, Sept. 27 – Oct. 10, 2008, available at <http://www.hindu.com/fline/fl2520/stories/20081010252003700.htm>

⁵ *Chattisgarh teachers demand pay hike, 50 arrested*, IANS, June 17, 2008, available at http://www.thaindian.com/newsportal/uncategorized/chhattisgarh-teachers-demand-pay-hike-50-arrested_10060889.html

⁶ *Teachers lathicharged, 3 injured*, THE TRIBUNE, April 21, 2004, available at <http://www.tribuneindia.com/2007/20070422/j&k.htm#2>

⁷ *Cops Cane-charge Teachers*, INDIAN EXPRESS, July 11, 2009, available at <http://www.indianexpress.com/news/cops-canecharge-teachers/487822/>

⁸ Anju Agnihotri Chaba, *Teacher dies of burns, Punjab agrees to demand*, INDIAN EXPRESS Feb 09, 2010 available at <http://www.indianexpress.com/news/Teacher-dies-of-burns--Punjab-agrees-to-demand/577441> In Punjab, dozens of unemployed regular teachers have been arrested in protests demanding an end to the contract teacher system, while scores of contract teachers have been arrested in marches demanding regularization. *Jobless teachers held for disrupting Congress rally*, THE HINDU, Sept. 29, 2004, available at <http://www.hindu.com/2004/09/29/stories/2004092905940300.htm>; *Contractual teachers released on bail*, THE INDIAN EXPRESS, June 21, 2009, available at <http://www.indianexpress.com/news/contractual-teachers-released-on-bail/479376/1>

⁹ *Teachers begin relay hunger strike in Andaman*, UNITED NEWS OF INDIA, July 30, 2009, available at <http://www.newkerala.com/nkfullnews-1-83263.html>; *Contract teachers demand regularization of service*, THE HINDU, Jan 10, 2009, available at <http://www.thehindu.com/2009/01/10/stories/2009011054420300.htm>; *Teachers in Madhya Pradesh Threaten Indefinite Strike*, TEACHER SOLIDARITY, July 25, 2008, available at <http://www.teachersolidarity.com/blog/teachers-in-madhya-pradesh-threaten-indefinite-strike/>

Clearly many contract teachers see the current contract system as broken and unfair. Perhaps inevitably, many have taken their complaints to court, where contract teachers have sought regularization of their contracts, claimed that their contracts were unfairly terminated, pleaded they should be given equal pay as regular teachers, and demanded benefits and seniority they argue were due them after being regularized. This paper examines the Indian judiciary's response to these claims for greater labor protections.

A consideration of the appropriate judicial response to contract teachers is a good window into broader labor policy debates about public employees in India, and the judiciary's response to economic liberalization more generally. Liberalization changed India from a democracy organized around a planned economy to a democracy with an increasingly free-market outlook, even as the Constitution retained a set of socialist-inspired principles. The Supreme Court's challenge has been to determine how much flexibility it would allow the government in crafting more liberalized economic and labor policies while fulfilling its duty to uphold these constitutional imperatives.

Permanent government employees in India have many legislative protections, while contract "workmen" in both the private and public sector were, and continue to be (by statute),¹⁰ highly regulated under such legislation as the Industrial Disputes Act of 1947 and the Contract Labour (Regulation and Abolition) Act of 1970. However, many contract employees fall outside these legislative protections. For example, contract teachers are not considered "workmen" under this legislation because, although it applies to both "skilled and unskilled" labor, the Supreme Court has determined that contract teachers are neither, but instead part of a "noble vocation."¹¹ Contract laborers with any sort of supervisory role are also held to be outside the act if they make more than 500 Rs a month (a bit over \$10).¹² Still, until the 1990s widespread use of public contract employees was not common, with government policy traditionally discouraging hiring employees of this type. In addition, the courts had interpreted the Constitution in a manner that granted a variety of labor protections to public sector employees not covered by these acts, including frequent regularization, which reinforced the government's own broad policy discouraging contract labor.

Even while controversial, the state's liberalization of public sector labor market policies enjoyed substantial support. Service delivery by the government had long been regarded as substandard, and many believed that the relatively rigid labor policy toward public employees contributed to this failure.

During the late 1990s and 2000s, the Court seemed to agree, and largely acceded to the government's widespread and liberal use of contract public employees, tacitly accepting the legitimacy of arguments for contract laborers, even if it rarely gave an explanation as

¹⁰ The Contract Labour (Regulation and Abolition) Act, 1970

¹¹ In *Miss A. Sundarambal vs. Government of Goa, Daman and Diu and Ors.* AIR 1988 SC 1700 the Supreme Court found that while many contract teachers may be exploited in the public and private sector, they are not "workmen" under the Industrial Disputes Act. Instead, the Court merely urged states to ensure there was appropriate legislation to protect contract teachers and to create a mechanism for their complaints.

¹² The Contract Labour (Regulation and Abolition) Act, 1970 Sect. 2(i)(b)

to why it was parting from its past precedent. As a result, contract teachers, and other public contract employees, today have relatively few protections outside of their contract, often placing them in a precarious labor position.

This article begins by surveying the debates surrounding India's increasing reliance on contract teachers, concluding that although the use of contract teachers has played a role in expanding access to education, the evidence on the quality of education that contract teachers provide is limited, generally restricted in scope to short-term effects, and is at best inconclusive. It then analyzes all relevant reported contract teacher labor cases over a 30 year period in the Supreme Court and the High Courts of Kerala, West Bengal, Gujarat, and Bihar. The paper finds that the Supreme Court, while sympathetic to contract teacher claims in the 1980s, began to more frequently deny petitions for regularization, equal pay, and other labor rights starting in the 1990s. Today the Court appears far more likely to deny than accept a petition brought by contract teachers, and to favor the government's power to hire teachers as it desires. The High Courts, though somewhat more sympathetic to contract teacher claims overall, appear to be following a similar, though somewhat delayed, trajectory. The paper argues that this broad shift in judicial philosophy tracks the broader change in the courts' stance towards labor rights. The view taken in this paper is that this doctrinal shift has been extreme, and has prevented the courts from successfully engaging with the government in a dialogue regarding the appropriate use of contract teachers. Finally, the paper explains the judicial politics of this shift in judicial reasoning, and sets the movement in contract teacher jurisprudence against the backdrop of labor rulings in India more generally. The paper argues that Indian courts should use a combination of bright line rules and dialogic orders to reengage the government concerning its contract teacher policy.

The courts – with their ability to draw upon a wide range of values embodied in the Constitution – are uniquely positioned to make sure that the government is not infringing contract teachers' labor rights. They can also challenge the government to show under which circumstances, if any, using contract teachers has educational benefits. Such a dialogue between the courts and the rest of government is likely to not only help minimize the violation of labor rights of teachers by the government, but also help improve educational outcomes. This strategy could also be used by courts to prudently check the government's contract labor and liberalization policies more generally.

A note on terminology: In India contract teachers are also referred to as “para-teachers”, “ad hoc teachers”, “temporary teachers”, “guest teachers”, as well as a number of names designated by state programs. These teachers might be appointed for different reasons, but the common thread is that they do similar work to other teachers, i.e. “regular” teachers, but are retained on contracts that are for limited duration, or can be easily terminated, and generally receive far less pay and other benefits.

The Policy Debate over Contract Teachers in India

Case law provides a useful record of the growth of the contract teacher system. Cases dealing with contract teachers appointed in the first decades of the Indian Republic are

rare, and the practice during this time seems to have been mostly ad hoc and isolated. Director of Basic Education, U.P. and Ors. Vs. Raghunandan and Ors. (1996)9SCC623, for example, dealt with a group of teachers appointed as untrained temporary assistant teachers in Uttar Pradesh starting in 1959. Another Supreme Court case concerns an ad hoc teacher appointed in Rajasthan in 1970.¹³

The 1980s saw an increase in the use of contract teachers in informal education for both adults and child drop outs.¹⁴ Due to a shortage of qualified teachers in remote areas, states also began introducing programs that recruited contract teachers, mostly local residents, with a short training and monthly honorarium. The Shiksha Karmi project in the state of Rajasthan in the 1980s, which was funded in part by the Swedish International Development Agency, was an example of such an early effort.¹⁵ State programs that relied on contract teachers also appeared in Himachal Pradesh, Haryana, and Punjab during this period.

Throughout the 1990s and into the 2000s, the Indian government increasingly relied on contract workers, including in education. In the 1990s the use of contract teachers was popularized throughout more states in the country through the central government's District Primary Education Programme (DPEP) and implemented with the help of international assistance.¹⁶ The National Committee of State Education Ministers in a 1999 report outlined its support for the use of para-teachers not just in remote areas, but wherever there was a need for a low cost solution to teacher shortages.¹⁷

By the end of the 1990s, contract teachers had been used to attempt to meet a variety of challenges from providing education in remote areas, to improving student-to-pupil ratios, to ensuring more than one teacher was at a school, to simply replacing normal teachers. Sometimes, contract teacher programs were primarily employment generation schemes.¹⁸

These teachers were almost always remunerated less than regular teachers. For example, in West Bengal, contract teachers are reportedly paid only 16% the salary of regular

13 State of Rajasthan vs. Dinesh Kumar Bharti, AIR 1997 SC 976

14 See, for example Bhagwan Dass and Ors. Vs. State of Haryana and Ors. AIR 1987 SC 2049 where supervisors at adult and non-formal education centres are given same pay as other government employees who do the same work. Similarly, in Jaipal and Ors. Vs. State of Haryana and Ors. AIR 1988 SC 1504 Adult and non-formal instructors given "equal pay for equal work" as squad teachers doing similar work.

15 The case law also provides a record of this program. In Ram Sukh and Ors. Vs. State of Rajasthan and Ors. AIR 1990 SC 592 ad hoc teachers had been appointed under panchayat samities in Rajasthan in 1983. These teachers were then dismissed and replaced with better trained teachers. The Supreme Court found that it was not obligatory and against the interests of students for the government to retain these lesser trained contract teachers.

16 Saroj Pandey, *Para-Teacher Scheme and Quality Education for All in India: Policy Perspectives and Challenges for School Effectiveness*, 32 J. ED. FOR TEACHING 3, 322 (Aug. 2006); R. Govinda and Y. Josephine, *PARA-TEACHERS IN INDIA: A REVIEW* p. 14 (Oct. 2004)

17 Y. Duthilleul, *LESSONS LEARNT IN THE USE OF "CONTRACT" TEACHERS: SYNTHESIS REPORT* (Paris, International Institute for Educational Planning, UNESCO, 2005)

18 Pandey, *supra* note 16 at 328; Alec Fyfe, *THE USE OF CONTRACT TEACHERS IN DEVELOPING COUNTRIES: TRENDS AND IMPACT* (ILO 2007)

teachers.¹⁹ In addition, contract teachers frequently were not given equivalent benefits and had little to no job security.

The rise in the use of contract teachers also coincided with a decentralization movement which culminated in 1993 in a Constitutional amendment coming into force giving greater power to local governments, namely *panchayats*. These newly empowered panchayats have often played an active role in recruiting and managing both regular and contract teachers.²⁰

Decentralization efforts whether to empower states or panchayats, have often coincided with a greater reliance on contract teachers. At the very least, it has led to a greater variation in the labor conditions of teachers throughout the country. While states like Kerala have traditionally depended little on contract teachers, in Madhya Pradesh the government reportedly stopped hiring regular teachers and for a period only hired contract teachers.²¹

The decentralization of teacher labor policies to panchayats has also arguably had the effect of decreasing litigation resulting from the spread of para-teachers. As the National Committee of State Education Ministers observed, “This [local appointment] has been done to avoid possibilities of litigation for pay scale at a future date. The appointment of para teachers on a lump sum emolument is sometimes agitated as an infringement of the principle of ‘equal pay for equal work’ and there are court matters in this regard in many states.”²² As Govinda and Josephine write discussing the situation in Uttar Pradesh:

Some of the Administrators [in Uttar Pradesh] interviewed admitted that this transfer of authority [to local communities] for appointment of teachers also helps in avoiding legal complications. In fact, it was explained that the para teachers have to give an undertaking to the effect that they are joining the service only as volunteers to serve the community and will not aspire for full time position.²³

Recruitment of contract teachers has increased further since states were allowed to use central government grants for such teachers in 2002.²⁴ Indeed, the decentralization of education was accompanied with new central mandates and funding. Article 45 of the (judicially unenforceable) Directive Principles states that state shall endeavor to provide free compulsory education to all children to the age of 14 within ten years of the adoption of the Constitution. In two landmark judgments in the 1990s the Supreme Court read the right to education into the right to life, a fundamental (and therefore judicially

¹⁹ Geeta Gandhi Kingdon and Vandana Siphahimalani-Rao, *Para-Teachers in India: Status of and Impact on Elementary Education* 12 (Oct. 2008)

²⁰ See, Govinda and Josephine, *supra* note 16 at p. 7-8

²¹ Pandey, *supra* note 16 at 323

²² Govinda and Josephine, *supra* note 16 at 13, “Generally, the practice of employing teachers on contract basis is associated with the implementation of DPEP and the Education Guarantee Scheme of Madhya Pradesh towards the latter part of 1990s. However, it was in vogue in Himachal Pradesh much earlier since 1984 under the banner of ‘Himachal Pradesh Volunteer Teacher Scheme’.

²³ Govinda and Josephine, *supra* note 16 at 33

²⁴ UNESCO, *EDUCATION FOR ALL MONITORING REPORT*, p. 174 (2009)

enforceable) right in the Indian Constitution.²⁵ Building on this judicial effort as well as a larger political movement, in 2002, the Indian Constitution was amended to add Article 21A, which guaranteed free and compulsory education from ages 6 to 14, to the (judicially enforceable) Fundamental Rights section of the Constitution.²⁶ The Court's judicial activism around the right to education, the later addition of a fundamental right to education, and the government's stated goal of providing basic education to all meant more teachers were needed to reach even the remotest children. States increasingly turned to contract teachers to universalize their education system, without putting too much strain on their budgets.

By the 2000s the contract labor movement was in full-swing, and continuing to grow, as the chart below illustrates. This phenomenon has been skewed towards rural areas with over 90% of contract teachers currently employed in these areas:

Year	Number of Contract Teachers in India
2002-03	213,699
2003-04	259,099
2004-05	379,385
2005-06	498,944 ²⁷
2006-07	475,859 ²⁸
2007-2008	583,807 ²⁹

In hiring contract teachers on a wide scale, states were in many ways imitating the practice of Indian private schools, which are frequently perceived to provide superior education more cost-effectively (because their teachers are paid less). Private schools in India enroll a large share of the Indian population, especially in urban areas: in Uttar Pradesh, Tamil Nadu, Maharashtra, Kerala, and Uttaranchal more than 60% of urban students attend private recognized (aided or unaided) schools. In turning to contract teachers, state schools modeled themselves after the private schools, hoping to gain educational benefits for students while saving money.

The arguments regarding the use of contract teachers in India has largely tracked the policy debate about their use in developing countries more broadly. The claim that schools in developing countries should use contract teachers, instead of tenured civil servant teachers, address three educational concerns: access, quality, and service delivery incentives (which are, arguably, the reason for observed differences in performance and

25 Mohini Jain v. State of Karnataka AIR 1992 SC 1858 and Unni Krishnan J.P. v. State of Andhra Pradesh AIR 1993 SC 2178

26 For more information on the cases and events leading up to the ninety-third amendment, see Vijayashri Sripati and Arun Thiruvengadam, *Constitutional amendment making the right to education a Fundamental Right*, 2(1) INT J CONSTITUTIONAL LAW 148-58 (2004)

27 Arun C. Mehta Analytical Report 2006, Elementary Education in India, National Institute of Educational Planning and Administration p. 210 (2006)

28 Arun C. Mehta Analytical Report 2007, Elementary Education in India, National Institute of Educational Planning and Administration p. 208 (2007)

29 Arun C. Mehta Analytical Report 2008, Elementary Education in India, National Institute of Educational Planning and Administration (2008)

quality). Contract teachers can facilitate rapid expansions in school access because they are less expensive than tenured teachers and because, in some circumstances, they can be hired more quickly. In Cambodia, following the civil war and the violence of the Khmer Rouge regime, a period during which schools were largely closed, the government recruited literate volunteers, gave them a short course of in-service training, provided equivalency degrees in provincial centers, and sharply increased coverage. When teacher shortages emerged in the late 1990s, as a result of increased demand for primary schooling as well as supply-side constraints designed to guarantee teacher quality³⁰ the government reintroduced the direct appointment of contract teachers, particularly in rural areas, where teaching shortages were most acute.³¹ Similarly, India's goal of universal primary education, encapsulated in programs such as the District Primary Education Program, and the Education for all Campaign (Sarva Shiksha Abhiyan), has employed locally appointed "para-teachers" in difficult-to-reach areas.

Some recent studies that allocated students to contract or civil service teachers on a random basis have bolstered the argument that contract teachers enhance the quality of education. Karthik Muralidharan and Venkatesh Sundararaman studied the effects of adding a contract teacher to a randomly chosen subset of primary schools in Andhra Pradesh to supplement the regular teaching staff. They found that students (especially students in first grade and students in remote areas) performed better when this contract teacher was added, although the effect was mediated, at least in part, by the reduction in class size made possible by the extra contract teacher.³² Similarly, in a randomized experiment in Kenya, Duflo et al (2007) found that students assigned to contract teachers scored higher on achievement tests and were more likely to attend school than students assigned to civil service teachers.³³

Several studies make the argument that contract teachers are likely to provide higher quality education because they are given superior incentives. Muralidharan and Sundararaman, in the experimental study cited above, found that contract teachers were significantly less likely to be absent from schools, and more likely to be engaged in teaching activity when observed during unannounced visits to schools. Duflo et al (2009) found that contract teachers were more likely to be found to be engaged in teaching activities, at the time of an inspection, than civil service teachers. The core argument, though sometimes not explicit, is that regular teachers often have little incentive to perform well as they have permanent appointments and pay is not performance related.

Other studies seem to support this general theme, even if their findings are more difficult to apply to the debate directly. Kremer et al found that contract teacher attendance in India is comparable to that of regular teachers in public schools despite being paid much

³⁰ A mandatory retirement age and a requirement of 11 years of education to become a teacher

³¹ Y. Duthilleul, LESSONS LEARNT IN THE USE OF "CONTRACT" TEACHERS: SYNTHESIS REPORT (Paris, International Institute for Educational Planning, UNESCO, 2005)

³² Karthik Muralidharan and Venkatesh Sundararaman, "Contract Teachers: Experimental Evidence from India" Sept. 12, 2008

³³ Esther Duflo, Pascaline Dupas, and Michael Kremer; Additional Resources versus Organizational Changes in Education: Experimental Evidence from Kenya, May 9, 2009, at <http://econ-www.mit.edu/files/4286>

less. However, teacher absence, instead of being tied to job security and pay, was instead more positively correlated with whether a school had been inspected recently, had better infrastructure, or was closer to a paved road.³⁴ Meanwhile, data analyzed by Geeta Kingdon and Francis Teal show that teachers who are unionized are paid more, but their students perform less well than those of non-unionized teachers.³⁵

The arguments against increasing the use of contract teachers focus on three principal concerns: long-term incentives amidst poor or uncertain working conditions, politicization and corruption, and inferior qualifications and training. Critics note that the long-term incentives of contract teachers may be distinct from short-term incentives. Although contract teachers are observed to exert more effort in experiments lasting a year or two, remaining without job security for a long period of time, and at a pay level much lower than their civil service counterparts, could reduce incentives for contract teachers to improve their skills, and could lead them to work less hard because they do not feel fairly treated. For instance, a study of cognitive psychological attitudes in Israel found that temporary teaching contracts were correlated with adverse work attitudes – lower commitment, inferior perceptions of organization support, stronger intentions to quit, and more resistance to change.³⁶ A longitudinal study in Sweden found that job insecurity seemed to cause lower levels of well-being and mental health. This in turn affected organizational goals.³⁷

In addition, the superior incentives that contract teachers face may be predicated on the expectation of an eventual permanent civil service contract – it may be the temporary nature of contract teaching status that drives them to work harder in the experimental interventions, rather than annual renewal of contracts per se. Pandey writes, “The aspiration to be ‘regularized’ some day appears to be the chief motivating factor for these teachers . . .”³⁸

There are also concerns related to politicization and corruption in teacher appointments. In Cambodia, for instance, concerns regarding corruption in the appointment of contract teachers contributed to a policy reversal and a decline in the use of contract teachers starting around 2002. Tara Beteille finds that membership in a political party and candidacy for office are more closely correlated with teacher absenteeism than union membership, which suggests that it is the political environment, rather than, or at least in addition to, labor market conditions, that are weakening performance incentives for teachers in India. In her account, teachers frequently informally campaign for politicians and their control of voting booths allows them to potentially manipulate elections. Meanwhile, politicians are able to protect teachers from punishment who are frequently

34 Michael Kremer et. Al., *Teacher Absence in India: a Snapshot*, (2004)

35 Geeta Kingdon and Francis Teal, *TEACHER UNIONS, TEACHER PAY, AND STUDENT PERFORMANCE IN INDIA: A PUPIL FIXED EFFECTS APPROACH*, CESifo Working Paper No. 2428, Oct. 2008

36 Zehava Rosenblatt and Ayalla Ruvio, *Journal of Organization Behavior* 17 587-605 (1996)

37 Johnny Hellgren and Magnus Sverke, *Does job insecurity lead to impaired well-being or vice versa? Estimation of cross-lagged effects using latent variable modeling*, *JOURNAL OF ORGANIZATIONAL BEHAVIOR* 24 215-236 (2003)

38 Pandey, *supra* note 16 at 331

absent and transfer teachers to more desirable schools and posts.³⁹ Although comparable data are not currently available to show if regularization of contract teachers in India follows similar clientelist models, several have suggested that that such regularization is at times politically motivated.

Finally, contract teachers, at least in India, generally have received less formal education and training than regular teachers. The 2010 PROBE Revisited report indicates that 28% of permanent teachers in the Indian states they surveyed had post-graduate degrees, while only 16% of contract teachers did. 34% of contract teachers reported having no training compared to 9% of permanent, while only 11% of contract teachers had degree training (B Ed) compared to 27% of regular teachers. 18% of contract teachers had a diploma in education compared to 56% of permanent. Still, fewer contract teachers (3%) had reached only a class 10 education than regular teachers (15%), but this difference is likely because in the states surveyed 62% of contract teachers were under 30, while only 10% of permanent teachers were, meaning many regular teachers were educated in a time when many more Indians did not reach class 10. Contract teachers in the states surveyed were young and educated, but generally not as educated as the regular teachers, nor did they necessarily have a background in education. The PROBE report finds “. . . by and large, contract teachers are underpaid and unprepared for fulfilling the expectations of teaching children, particularly first generation learners from remote, poor and disadvantaged communities.”⁴⁰

Overall, the available evidence to date suggests that the use of contract teachers can enhance access to education in some settings, and that contract teachers may have incentives to work harder than civil service teachers, at least in the short-term. But there is no evidence that the widespread and sustained use of contract teachers is likely to improve educational outcomes. Indeed, evidence from organizational psychology, experimental economics, and microeconomics suggest that individuals want to be treated fairly and generally seek to create a reliable and secure life plan for themselves, in the absence of which they become less committed to their work. Individuals treat others reliably if they feel their own lives are reliable.⁴¹ As a result, the policy challenge is to motivate contract teachers with the prospect of a career – and not just the loss of a job – in the way that lawyers, doctors, and other professionals are motivated with a variety of professional opportunities. One summary assessment finds: “In the case of contract teachers, the absence of opportunities for career development in some countries resulted in increased turnover and loss of the most competent contract teachers. Those countries that defined contract teacher positions within the teaching profession and clearly

³⁹ Tara Beteille, Absenteeism, Transfers and Patronage: The Political Economy of Teacher Labor Markets in India, Executive Summary at [http://blogs.worldbank.org/files/african/beteilleexecsummary\(1\).pdf](http://blogs.worldbank.org/files/african/beteilleexecsummary(1).pdf)

⁴⁰ CORD India, PROBE Revisited 2010

⁴¹ See, for instance, Kahneman, Daniel, Jack L. Knetsch, and Richard H. Thaler. 1986. “Fairness and the Assumptions of Economics.” In: *Rational choice: The contrast between economics and psychology*. Chicago and London: University of Chicago Press 1986, pp. 101-16; Rabin, Matthew. 2003. “Incorporating Fairness into Game Theory and Economics” *American Economic Review* 83(5), pp. 1281-1302; and Fehr, Ernst, G. Kirchsteiger, and A. Riedl. 1993. “Does Fairness Prevent Market Clearing? An Experimental Investigation,” *Quarterly Journal of Economics*, 108, 437-460.

specified the opportunities for career growth appear to have better results in terms of teacher retention and professional development.”⁴²

There is a role for the courts in this process. India, like many countries, now extensively employs and relies on contract teachers to obtain educational objectives. In this environment, the traditional understanding of labor rights for service employees – civil service tenure, homogenous pay scales, uniform benefits – no longer apply. That does not mean, however, that the principles underlying labor rights – the notion that workers deserve protections and that workplace unreliability undermines professional performance – no longer apply. It remains the task of the Indian judiciary to help articulate new ways to develop and protect the labor rights of contract teachers. In doing so, it will have to navigate the broader educational justifications for having these teachers (educational access, possibly superior short-term incentives, cost-effectiveness, etc) with the principles of fair employment. The Indian courts have abandoned one rights cluster equilibrium (where it was assumed permanent teachers with a well-defined and rigid labor status was best for both teachers and students), and now have to find a new rights cluster equilibrium to adapt to the government’s radically different education policy.

Results of Survey of Case Law

Limitations in Methodology

This study used the case law database of Manupatra– a leading Indian legal search engine – to search for relevant contract teacher cases in the Supreme Court, as well as those in the High Courts of Kerala, Gujarat, Bihar, and West Bengal. We performed three searches in the case law database of each of these courts, using the keyword “teacher*” combined with “ad hoc”, “contract”, and “regulari*” (with * searching all variations in the ending of a word, such as “regularization”, “regularization”, or “regularized”). We then compiled and classified the relevant cases found among these results.

This search not only drew cases concerning contract teachers and labor disputes from the primary or secondary school level, but also contract teachers, lecturers, and professors that taught at colleges or universities. It also found cases regarding contract teachers in informal education (for adults or children who drop out of school). Because of the similar approach the Court took towards these other types of contract teachers, these cases were also included amongst the results although categorized separately.

There are limitations to the study’s methodology. First, not all decisions of these courts are recorded. In 2008, the Supreme Court of India disposed of 67,459 matters, yet Manupatra only lists 1,790 judgments (about 2.7%). However, most of these disposals were admission matters (61,219). Since admission matters generally result in either a decision to reject the matter (which happens in over 80% of cases) or to accept it for regular hearing, then the appropriate ratio to track is reported judgments to disposed of regular hearing matters. In 2008, the Supreme Court disposed of 6,249 regular hearing

⁴² Y. Duthilleul: *Lessons learnt in the use of “contract” teachers: Synthesis report* (Paris, International Institute for Educational Planning, UNESCO, 2005), p. 59.

matters, meaning that the 1,790 judgments available on Manupatra represent about 29% of this overall number.⁴³ The ratio for 2008 is higher than in past years. In 1990, for example, the Court disposed of 4,348 regular hearing matters (20,890 admission), but only 769 judgments were listed on Manupatra, or 17.7%.⁴⁴ Still, a larger per cent of the regular hearing disposed of cases are actually captured in the judgments listed on Manupatra than these numbers imply. Many judgments are often a set of related petitions that are combined into one case for hearing and judgment. Therefore, four related petitions may be heard together resulting in the disposal of four cases, but only one judgment. It is difficult to determine how much this discrepancy accounts for the gap between reported judgments and the number of disposals each year. Regardless, the number of cases that do not result in a reported judgment that can be tracked on Manupatra or other databases is significant.

The chart below shows the reporting rate in 2008 of the High Courts that were examined in this study based on searches of Manupatra. As in the Supreme Court, reporting rates have gotten better across High Courts in recent years, meaning that during most of the years searched the reporting rate was actually less than for 2008. Unfortunately, information was not available demarcating how many cases disposed of in each high court were regular hearing matters and how many were admission matters. Still, looking at this ratio - the total number of matters disposed of divided by reported judgments – does seem to show that fewer cases are reported in the High Courts than at the Supreme Court. There is also marked variation in reporting amongst High Courts (the Gujarat High Court has a reporting rate of almost three times the Bihar High Court based on these numbers).

2008	Disposed of cases	Reported cases on Manupatra	% of total disposed cases (admission and regular) reported
Kerala	84,213	459	.55%
Gujarat	66,382	915	1.4%
Bihar	91,230	444	.49%
West Bengal	74,228	616	.83%

To sum up, in both the Supreme Court and the High Courts, reported decisions only represent a fraction of cases actually decided in any given year. Many of these unreported cases undoubtedly concerned contract teachers. In some instances in this study, no record of the High Court case that produced a relevant Supreme Court appeal and judgment could be found. In other instances, High Court cases indicated they had been heard earlier by the Supreme Court, but those Supreme Court judgments could not

43 The Judgment Information System (<http://www.judis.nic.in/>) lists 2695 or about 43%, but Judis only gives better numbers in the last couple years, presumably because it has begun putting up unreported judgments as well.

44 JUDIS lists significantly fewer cases (405)

be located through a search of reported cases.⁴⁵ Further, the search terms we used, although capturing the vast majority of relevant cases, may have missed other reported cases that were pertinent.

Despite these drawbacks, a study this type offers several advantages. Perhaps most compellingly, it is one of the few ways to create a data set of not only court cases, but of labor disputes, concerning contract teachers. It is difficult to find detailed information about the development of contract teacher systems in different states, and certainly of teacher struggles or resistance to these contract systems. Court records provide one of the best ways of examining what contract teachers' complaints are both at the primary/high school and college level. These court records, however imperfect, are often the only public record available.

Finally, there is no reason to think there is any systematic bias in the inclusion or exclusion of cases in the Manupatra database. The trends identified in our sample are likely representative of the broader trends in Indian jurisprudence. Even if not capturing every contract teacher case, this data should provide relatively accurate information about trends in litigation of labor disputes involving contract teachers. Cases that were controversial, concerned multiple parties, or involved a relatively novel point of law might have been reported more often. Still, these potential biases should have stayed constant through the years surveyed. In this way, these cases provide a good snapshot of what is happening over a period of years both at the Supreme Court and in the examined High Courts.

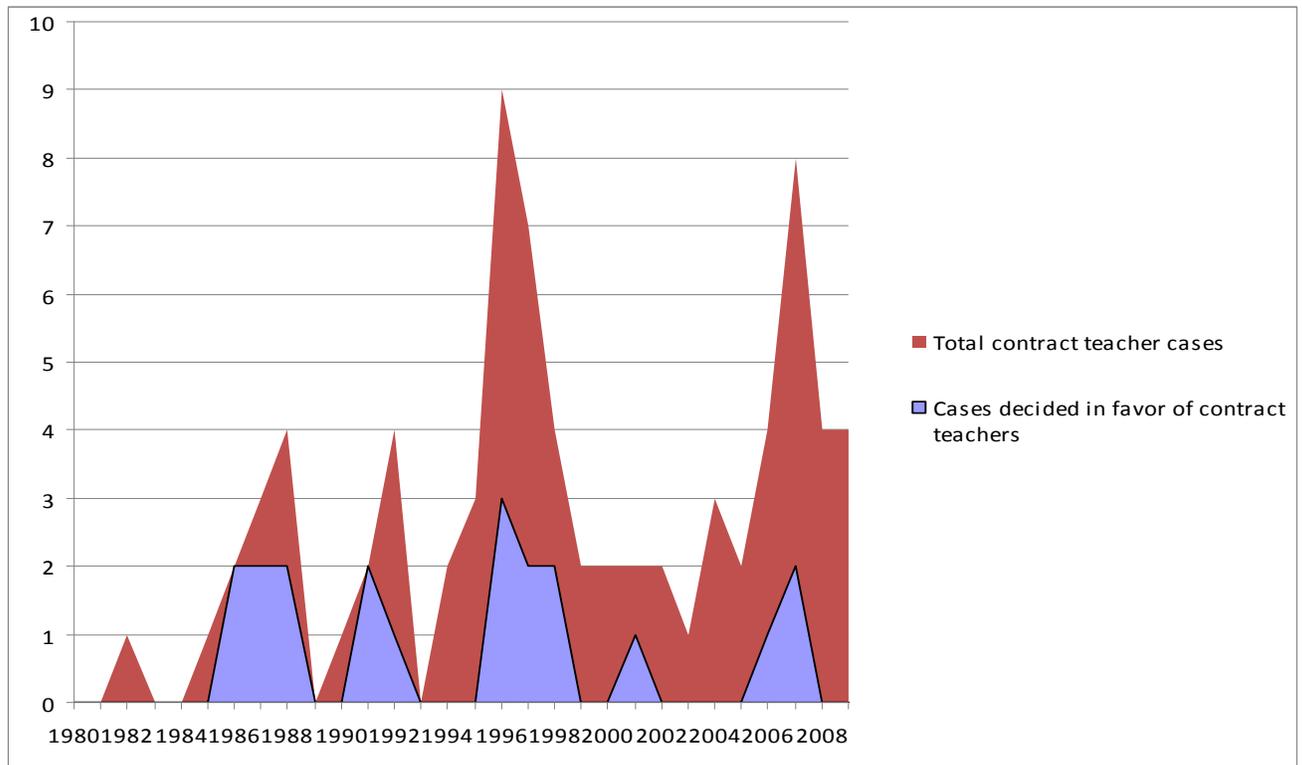
Supreme Court Results

Our survey of the case law found the major types of cases brought by contract teachers concerned claims related to:

- Regularization. Contract teachers argued they should have their status regularized after working a lengthy period. These cases also concerned disputes over the reach of state regularization legislation (which was particularly common in suits brought by college lecturers).
- Termination. Contract teachers claimed they were unfairly terminated or should not have been terminated either during their contract or after its completion.
- Equal pay. Contract teachers claimed that they should be given equal pay as regular teachers because they did equal work.
- Benefits. After being regularized, former contract teachers argued they should be given benefits and seniority due to them from the date they started as a contract teacher, not the date they began as a regular teacher.
- Other

⁴⁵ Also, some news articles indicated the Supreme Court and High Courts had decided cases pertinent to the study, but no recorded judgment could be found. For example, *SC sets aside HC order on HP para teachers*, THE TRIBUNE, Jan. 29, 2006, available at <http://www.tribuneindia.com/2006/20060129/nation.htm#3> (discussing Supreme Court setting aside High Court order that had invalidated criteria of appointment for contract teachers in Himachal Pradesh)

There has been a clear trend of the Supreme Court to increasingly decide cases against the claims of contract teachers. During the 1980s, for example, of the 10 relevant cases identified in this study, 6 were decided for contract teachers and 4 against. Out of the 3 cases in this period that involved contract teachers at the primary or high school level 2 were decided for contract teachers, while 1 was decided against. In the 1990s, 10 cases were decided for contract teachers, while 21 were decided against them (restricting the sample to the primary and high school levels, contract teachers won 3 of 11 cases). From 2000-2009, contract teachers won 4 cases and lost 25 (3 of 18 cases at the primary and high school levels).



Supreme Court Judgments For or Against Contract Teachers Claims

In some categories the trend towards deciding against contract teachers' claims was even more pronounced. For example, of the 9 equal pay for equal work claims made by contract primary/high school or college teachers the first three recorded in this study were decided in their favor (the last positive decision being in 1993). Teachers making similar claims lost the next 6 cases. Similarly, of the 16 cases in which contract teachers prayed for the Court to stop their termination 4 were successful, but there was no successful plea in the 7 cases since 1998.

Turning to the substantive basis of the Court's reasoning, when the judiciary decided in favor of contract teachers claims in the 1980s and 1990s they justified their decisions on a variety of grounds. The Court often supported its orders with reference to the Fundamental Rights of equality before the law (Article 14), equality of opportunity

(Article 16), and the right to life, which had been interpreted to include both a right to education and to work (Article 21). It also critiqued the labor policy of using contract teachers, stating it should act as a “model employer”. In *Rattan Lal and Ors. Vs. State of Haryana and Ors.* AIR1987SC478, the Supreme Court commented:

. . . These [ad-hoc] teachers who constitute the bulk of the educated unemployed are compelled to accept these jobs on an ad-hoc basis with miserable conditions of service. The government appears to be exploiting this situation. This is not a sound personnel policy. It is bound to have serious repercussions on the educational institutions and the children studying there. The policy of 'ad-hocism' followed by the State Government for a long period has led to the breach of Article 14 and Article [16](#) of the Constitution. Such a situation cannot be permitted to last any longer. It is needless to say that the State Government is expected to function as a *model employer*. (para. 1) [italics added]

The Court rarely invoked the right to education to argue against the perceived vices of contract teachers, and when it did so, the arguments consisted of a general assertion that the appointment of teachers in an ad hoc manner was contrary to the country’s educational objectives. In *Sri Rabinarayan Mohapartra vs. State of Orissa and others* AIR1991SC1286 three judges found:

. . . In spite of repeated depreciation by this Court the practice [of using contract teachers] continues to be followed by various State Governments in the country. Under the Constitution the State is committed to secure right to education for all citizens. Bulk of our population is yet illiterate. Till the time illiteracy is effaced from the country the resolution enshrined in the Preamble cannot be fulfilled. Education is the dire need of the country. There are neither enough schools nor teachers to teach. Insecurity is writ-large on the face of the teaching-community because of nebulous and unsatisfactory conditions of service. In order to make the existing educational set-up effective and efficient it is necessary to do away with ad-hocism in teaching appointments. An appointment on 89 day basis with one day break which deprives a teacher of his salary for the period of summer-vacation and other service benefits, is wholly arbitrary and suffers from the vice of discrimination. (para 6)

During these decades, the Court would intervene to regularize teachers;⁴⁶ prevented the firing of contract teachers unless they were replaced by a regular teacher; granted contract teachers equal pay as regular teachers; and after they were regularized ordered that their time as a contract teacher be counted in their seniority. In general, the Court saw itself as leveling the playing field of negotiation and ensuring the government treated the teachers fairly.

46 For example, in *All Manipur Regular Posts Vacancies Substitute Teachers’ Association vs. State of Manipur* AIR 1991 SC 2088, the Court held that all ad hoc teachers who had been employed longer than five years must be regularized

Perhaps the most representative case of this period was the three judge bench decision in *State of Haryana v. Piara Singh* AIR1992SC2130. In *Piara Singh* the Court did not agree to contract teachers' prayer to be regularized, since it found the state already regularized such teachers on a periodic basis, but the three judge panel did hold that contract teachers were entitled to equal pay:

Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. . . . The main concern of the court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a *model employer*. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. (para 10) [italics added]

Justice Reddy, speaking for the bench, then laid down guidelines for ad hoc employees in government service (including contract teachers) that the government must observe. Among the most important of these guidelines the Court found:

1. Regular appointments should be the norm and when temporary appointments must be made they should be replaced by regular appointments made through normal procedures as soon as possible.
2. An ad hoc employee should not be replaced by another ad hoc employee; he must be replaced only by a regularly selected employee.
3. When possible, when appointing an ad hoc employee, they should be drawn from the employment exchange, and otherwise notice should be given for the position which all can reply to and be considered fairly for.
4. If an ad hoc employee continues "for a fairly long spell", the authorities must consider him for regularization provided he is eligible and qualified
5. Each state should prepare a scheme for regularization of such employees consistent with its reservation policy. If and when such person is regularized he should be placed immediately below the last regularly appointed employee in that category, class or service, as the case may be. (para 25)

The guidelines laid down in this case represented the culmination of a line of reasoning and precedent found in cases from the 1970s, 1980s, and early 1990s. The Court during this period actively regulated the state's use of contract teachers, acceding that contract teachers are sometimes required as a stop-gap measure, but they should only be used as a last resort and should be given basic labor protections.

By the late 1990s and 2000s, however, the Court was increasingly deciding against contract teachers claims, and the guidelines laid out in *Piara Singh* were rarely invoked. The five-judge decision in *State of Karnataka vs. Uma Devi* in 2006 concerning contract

tax collectors in many ways marked a clear solidification of the Court's shift against contract laborers traditional claims in the public sector. The Court in Uma Devi ordered the end to judge ordered regularization, arguing it was back-door regularization and unfair to other potential applicants to these positions. Further, it claimed it promoted nepotism and inefficiency. After 2006, in contract teacher cases the judiciary would frequently cite Uma Devi when denying regularization.⁴⁷

By the 2000s the Court rarely discussed the role of the state as a "model employer", or what was "fair" for teachers, and instead often commented that teachers should have known what to expect when they signed their contract. *Vidyavardhaka Sangha and Anr. Vs. Y.D. Deshpande and Ors.* 2006(9)SCALE641, a case in which teachers at a government aided school had requested regularization after continuing working after the expiration of their contract, is typical in its unequivocal nature:

In the instant case as noticed above, the respective respondents have accepted the appointment including the terms and conditions stipulated in the appointment orders and joined the posts in question and continued on the said post for some years. The respondents having accepted the terms and conditions stipulated in the appointment order and allowed the period for which they were appointed to have been elapsed by efflux of time, they are not now permitted to turn their back and say that their appointments could not be terminated on the basis of their appointment letters nor they could be treated as temporary employee or on contract basis.

In many ways, the Court's change in jurisprudence was acquiescence to the states' growing use of contract teachers, and contract labor more broadly, in the late 1990s and the 2000s, but there were exceptions. In *Veer Kunwar Singh University Ad hoc Teachers Association and Ors. vs. The Bihar State University (C.C.) Service Commission and Ors.* 2007(8)SCALE211, a two-judge bench continued to lament the use of contract lecturers in universities even if it no longer intervened forcefully to protect their interests:

The practice to appoint ad hoc teachers must be deprecated. If a Government of a State or a University which is also a State within the meaning of Article 12 of the Constitution of India, despite the repeated observations of the superior courts of the country, continue to do so, such a practice must be condemned. [para 38]

In *Gurbachan Lal Vs. Regional Engineering College, Kurukshetra and Ors.* 2007(4)SCALE1, Justice Chatterjee ruled that a contract lecturer could not be regularized relying on the precedent of Uma Devi. He questioned though whether Uma Devi had considered all parts of relevant previous Supreme Court judgments when coming to its decision. Amongst his arguments, he wrote that the Court in Uma Devi did not consider how production will suffer if a worker is not regularized since they will then not feel like they belong to the endeavor, how employers were in a position to exploit workers in light

47 See, for example, *Nagar Mahapalika, Kanpur Vs. Smt. Vibha Shukla and Ors.* AIR 2007 SC 2291 and *Govt. of A.P. and Ors. Vs. K. Brahmanandam and Ors.* AIR 2008 SC 3170

of the country's large labor surplus, and that judicial intervention to regularize workers in some instances is in line with spirit and philosophy of the Constitution.⁴⁸

In January 2010 Justice Ganguly lamented in a retrenchment case that the Supreme Court in recent years seemed to be diluting the Constitution to promote the "so-called trends of globalization."⁴⁹ Such criticism of the Supreme Court's labor policy from its own bench may indicate that the Court may in the future take a more sympathetic view to contract worker's claims, or at least be preparing to rework its labor jurisprudence.

Thirty of the 43 (70 %) Supreme Court cases dealing with primary, high school, or non-formal education contract teachers were brought by multiple parties, while 18 out of 34 (53%) contract teacher cases at the college level were brought by multiple parties. Whether the cases studied had multiple parties or was brought by a single party seemed to have no measurable impact on the outcome of a case. The involvement of unions in the cases was rarely explicitly mentioned.

High Courts and the Supreme Court

The Supreme Court on average overturned the High Court when dealing with a matter involving contract teachers 59% of the time at the primary or high school level (17 overturns to 12 confirms). Meanwhile, the Supreme Court was more likely than not to confirm a High Court decision that dealt with contract college lecturers or professors (11 overturns to 16 confirms). This discrepancy may result from the Court overturning cases decided in favor of primary or high school teachers at a much higher rate than for college teachers, especially post-2000. Rates for confirming cases decided in the High Court against both these types of teachers were similar. In combination, these trends may indicate that High Courts may be more sympathetic to claims of contract teachers at the primary or high school level, while the Supreme Court is more antagonistic towards these claims. This trend may also be an indication that the government may feel it has more at stake in cases involving contract primary or high school teachers and so are more likely to appeal them to attempt to get them overturned.

The highest number of Supreme Court appeals came from Uttar Pradesh and a handful of other states as can be seen by the chart below. Some states like Madhya Pradesh, Chattisgarh, and Jharkhand have no recorded appeals to the Supreme Court despite these states widespread use of contract teachers. A search of the recorded judgments of the Madhya Pradesh and Chattisgarh High Courts revealed only a handful of cases that dealt with contract teachers. Jharkhand produces more such recorded judgments in its High Court and the absence of appeals from this state, along with Chattisgarh, in the Supreme Court may be explained by the new nature of the states. The absence of reported cases in Madhya Pradesh, though, is mysterious: contract teachers have been widespread there for some time, and there is an active political movement opposing their use in the state.

⁴⁸ Gurbachan Lal Vs. Regional Engineering College, Kurukshetra and Ors. 2007(4)SCALE1 para 30-32

⁴⁹ Krishnadas Rajagopal, *Globalization blinds us to aam aadmi plight: SC*, INDIAN EXPRESS, Jan. 28, 2010, available at <http://www.indianexpress.com/news/globalisation-blinds-us-to-aam-aadmi-plaint-sc/572348/>

	Appeals to Supreme Court	Primary/High School	College	Other	Overtur n	Confirm	NA
Uttar Pradesh	22	8	14		5	15	2
Punjab and Haryana	12	4	2	5	3	3	6
Karnataka	7	4	3		4	3	
Bombay	6	3	3		5	1	
Bihar	5	2	3		2	1	2
Orissa	5	3	2		4		1
Rajasthan	4	3	1		2	2	
Guwahati	3	2	1		1	2	
West Bengal	3	2		1	3		
Andhra	2	2			2		
New Delhi	2	1	1		1		1
Himachal Pradesh	1		1		1		
Tamil Nadu	3	2	1		1	1	1
Uttaranchal	1		1				1
Unknown	1		1			1	
Chattisgarh							
Madhya Pradesh							
Gujarat							
Kerala							
Jharkhand							
Kashmir							
	74	33	34	6	34	27	13

High Courts

The High Courts examined in this study have to some extent tracked the Supreme Court's shift in jurisprudence against contract teachers' labor claims, but their initial starting points were generally different. High Courts have traditionally been more sympathetic to contract teachers' claims. There are also clear differences between the sympathies and approaches of different high courts. Of the four High Courts studied, Gujarat, a traditionally more pro-market and wealthier state, has had a decision rate towards contract teachers most comparable to the Supreme Court (four of eleven total cases from 1990-2009 were in favor of contract teachers). The West Bengal High Court initially was more sympathetic to contract teachers' claims. In the last few years, it has decided more against contract teacher claims, perhaps because the Supreme Court recently overturned a case in which it had sided with contract teachers. In total the West Bengal Court has ruled for contract teachers in seven of fifteen cases. Meanwhile, the Bihar High Court has traditionally favored labor claims made by contract teachers, and according to this analysis this has changed little despite the Supreme Court's shift: it has ruled with contract teachers in ten out of thirteen cases. The Kerala High Court decided in favor of teachers' claims in four of its five recorded decisions, but since there are so few contract teachers in the state, and only a handful of related judgments have been produced, it is

difficult to make many generalizations. In general, the High Courts produce far fewer relevant (and reported) judgments than the Supreme Court, which makes conclusions about trends found in the case law more tenuous.

Explaining These Trends: The Fate of Labor Rights in India

The trajectory of contract teacher judgments seems to follow the general shift in Indian jurisprudence on labor rights, which in turn has followed a broader movement in the political climate. At independence, India's founders took the helm of a country with widespread poverty and high unemployment. In confronting these daunting challenges they would adopt a planned economy to transform the nation. The rights of workers were central to this vision.

The Constitution's Directive Principles, which is a judicially unenforceable guide to state policy, speaks frequently of this commitment to labor. Article 41 of the Directive Principles finds that, "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, . . ." Article 42 directs the state to secure "humane" working conditions for India's workers, while Article 43 fills out the state's labor policy further by declaring:

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

In the original preamble to the Indian Constitution the country was described as a "Sovereign Democratic Republic." In 1976, this description was amended during the Emergency by the government of Indira Gandhi to read "Sovereign Socialist Secular Democratic Republic" to further solidify her efforts to give India a strong planned economy and its people robust welfare protections.

In the country's first years, Parliament passed three major pieces of labor legislation: the Industrial Disputes Act of 1947, the Factories Act of 1948 and the Minimum Wages Act of 1948. The Industrial Disputes Act regulated the relationship between industry and their employees, guaranteeing among other things that temporary workers of industry would be regularized if they worked for more than 240 days. In 1970, the Contract Labor (Regulation and Abolition) Act was passed under Prime Minister Indira Gandhi to regulate and register contract labor in establishments with 20 or more temporary laborers, and in some instances abolish the use of contract labor. All of these acts were the product of the government's policy to modernize the country through a planned economy that heavily relied on large-scale industry.

In the wake of the Emergency from 1975-1977, the Supreme Court took on a more populist role in part out of a desire to regain lost legitimacy (the Court had largely failed to stand up to the government's worst abuses during this period). Led by a few proactive judges the Court reshaped its jurisprudence, most notably by developing public interest litigation that eased standing requirements and enabled the Court to intervene in a host of matters affecting the poor and socially marginalized.

The Court similarly adopted a stance towards labor legislation and rights that was more sympathetic towards workers claims. In *Bangalore Water Supply vs. A. Rajappa* (1978), Justice Iyer, one of the best-known judicial advocates of expanding labor protections for workers, laid down an expansive definition of "industry" in the majority opinion of a seven-judge bench of the Supreme Court. In so doing, the Court increased the number of establishments, including many government-run entities, which would qualify as industries under the Industrial Disputes Act and so have to meet its more stringent labor requirements.⁵⁰

In the early 1990s, in the face of mounting government debt and underwhelming economic growth, the Indian government undertook a series of steps to liberalize its economy. India privatized many formerly government-run industries, lifted tariff barriers on foreign imports, and deregulated sectors of the economy like television and telecommunications. Central, state, and local governments also began relying more heavily on contract labor for service delivery from providing health care, to education, to cleaning streets. They did so to save money, retain flexibility in its labor pool (as regular government employees are almost impossible to fire), and increase worker productivity, since many argued contract laborers were as or more productive than regular employees.

The Supreme Court's labor jurisprudence did not immediately shift with the government's change in labor policies. However, by the late 1990s and early 2000s there was a clear trend on the Court away from upholding labor protections that were perceived to promote labor rigidity, such as regularization, unionization, or the doctrine of equal pay for equal work. Arguably, the Court's change in jurisprudence tracked the mood of the Indian public, or more specifically middle class opinion.

The Court certainly did not abandon protections for workers during this time period altogether. It continued to support and expand restrictions or bans on child labor, gender discrimination, and forced labor. It even made important contributions to helping make a right to work more tangible through its orders in the Right to Food case, which helped bring about the National Rural Employment Guarantee Act. These efforts, despite having labor implications, were generally seen more as social welfare measures largely targeted at the poor. The Court also continued to uphold India's often very rigid and protective labor legislation, albeit through judicial interpretations that were not as favorable to workers' claims as previously.

⁵⁰ Justice Iyer laid out a dominant nature test to determine whether an establishment should be considered an industry or not under the act. He did provide an exception for "sovereign functions" of the state, but did not exempt "the welfare activities or economic adventures undertaken by the government or statutory bodies" *Bangalore Water Supply & Sewerage Board vs. A. Rajappa & Ors.*, 1978 (2) SCC 213, Para. 143

This narrowing of the Supreme Court's reading of labor rights did not seem to be born out of any broader hesitancy to interfere in government policy. Arguably the Court intervened far more widely in policy realms in the 1990s and early 2000s than previously, whether in developing environmental or food security policy. However, the Court now ceded more authority to the government in defining labor policy. This seemed to be part of a larger hands-off posture adapted by the Court towards economic liberalization,⁵¹ which the Court either tacitly agreed with or at least expended little political capital to fight.

Given the Indian Supreme Court's size, panel structure, and the relatively short terms of its judges, it can be misleading to talk about "the opinion" of the Supreme Court at any given point in time. Still, it is certainly possible to identify trends and junctures at key cases. The Supreme Court's shift away from strong labor protections for contract workers took time. There was a period during the late 1990s and early 2000s where the Court seemed more divided on the issue.

For example, some cases like *Air India Statutory Corporation v. United Labour Union*, (1997) 9 SCC 377, still read like it was written by the Court of the 1980s. In *Air India*, a three judge-bench speaking through Justice Ramaswamy interpreted the Contract Labour (Regulation and Abolition) Act, 1970, to require the automatic absorption of contract labor when their position is abolished by notification from the appropriate government. Justice Ramaswamy found that the right to life, a Fundamental Right that is judicially enforceable, included the right to work, which contained relevant protections for contract laborers:

The workmen have a fundamental right to life. Meaningful right to life springs from continued work to earn their livelihood. The right to employment, therefore, is an integral facet of right to life. When they were engaged as contract labour and were continuously working in the establishments of the appellant, to make their right to social and economic justice meaningful and effective, they required to be continuously engaged as contract labour so long as the work is available in the establishment. (para. 7)

He goes on in characteristic language:

In a delivered development society like ours, steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with

⁵¹ See *BALCO Employees Union v. Union of India* (2002) 2 SCC 333 (Finding that privatizations by the government are constitutional.)

which the poor, the workmen etc. are languishing and to secure dignity of their person. (Para. 43)

However, by the 2000s cases that were sympathetic to a more expansive interpretation of labor protections were generally marginalized as precedent. In fact, just four years after being decided *Air India* itself was overturned by a five-judge bench in *Steel Authority of India Ltd. v. National Union Waterfront Workers* (2001) 7 SCC 1.⁵²

The power and rights of unions also came under increased pressure during this period. For example, *TK Rangarajan v. Government of Tamil Nadu and others* (2003) 6 SCC 581, involved the legality of the strike of thousands of Tamil Nadu government employees. The Supreme Court, in a tendentious judgment, found that not only was there no statutory or constitutional right to strike, but made clear that there was no moral right for public employees to strike either.

Over the decades, both the Supreme Court and High Courts had frequently regularized contract public employees, who often had been working for years on contract with a never-kept implicit or explicit promise of regularization just around the corner. In *Secretary, State of Karnataka v. Umadevi* (2006) 4 SCC 1, in which contract tax collectors had plead for regularization, a five-judge bench of the Supreme Court tried to put an end to this practice, or at least seriously curtail it. The Court found that recruitment should only be by regular procedure and the judiciary should no longer participate in ad hoc regularizations no matter the perceived injustice:

It is time that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. (para. 3)

The Court found that regularization of contract employees by the judiciary was unfair to workers who complied with normal procedures and promoted nepotism.

By the end of the first decade of the 2000s, the Court was consistently constricting labor protections found in either legislation or the constitution that were perceived to prevent labor liquidity (i.e. regularization, union rights, equal pay for equal work, etc.). This is not to say some of these decisions did not meet with disagreement even within the

⁵² Deciding that there is no right for contract labourers to be automatically absorbed after the government issues a notification prohibiting contract labour in an establishment no matter how long contract labourers had worked at there previously.

judiciary,⁵³ but there was a marked shift in the Court's jurisprudence to allow employers, especially the government, a freer hand in its labor contracts.

Conclusion: The Path Ahead

India's contract teacher policy is adrift. Many states hire contract teachers on a large scale to save money and add more teachers quickly to address rapidly growing educational demands. Contract teachers join because they often have few other options, and in the hopes that they will one day be regularized. Political connections seem to affect regularization. Adequate supervision systems are not in place to allow contract teachers to be rewarded promotions or other benefits based on performance, undercutting one of the supposed motivations of a contract system. Anger at contract teachers' working conditions has resulted in demoralization of both contract and regular teachers alike. Meanwhile, there is a lack of convincing evidence that contract teachers outperform regular teachers, and reason to be concerned about their long-term negative impact.

The Supreme Court's jurisprudence, although often lagging behind government policy, has shifted to accept widespread adoption of contract teachers. As a result, despite bringing more cases, contract teachers have found the Supreme Court increasingly unreceptive towards their claims. The recent, often violent, conflicts between police and contract teachers across the country have many causes, including contract teachers simply being used on a far greater scale than ever before. However, the Court's less hospitable view of contract teachers' claims may mean that many teachers see the street as being the only place they can get their grievances heard, and potentially remedied. In relatively quickly and uncritically acceding to the government's liberal use of contract teachers, and contract labor more generally, the Court has not engaged the government in a dialogue during this labor and educational policy shift.

Yet, the Indian courts are no strangers to intervening in the realm of public policy. They already have been deeply involved in education policy, whether initially articulating and promoting the right to education, which was solidified into a constitutional amendment in 2002, or requiring mid-day meals in every primary school in India, or arbitrating scheduled caste/other backward caste quotas in universities.⁵⁴ Indeed, although in a decision like *Uma Devi* the Court seems to have abandoned its function of monitoring executive branch labor policies, the courts had taken interventionist steps in earlier contract teacher cases. For example, in *Mukundbhai Haribhai Patel vs. State of Gujarat MANU/GJ/0760/1999* public college lecturers had been working over a decade on contract with poor pay. The Gujarat High Court held that they had no right to these posts. However, finding the widespread use of contract lecturers encouraged corruption, created

⁵³ In *Gurbachan Lal Vs. Regional Engineering College, Kurukshetra and Ors.* 2007(4)SCALE1, for example, a two judge bench questioned whether the larger bench in *Uma Devi* had properly considered all the relevant precedent before reaching its decision, but denied the petitioners request for regularization finding that *Uma Devi* was for now the law.

⁵⁴ *People's Union for Civil Liberties vs. Union of India* (Writ Petition [Civil] No. 196 of 2000)

instability in the profession, and led to poorer quality teaching, it ordered the state to not appoint any more ad hoc lecturers without the permission of the Court.

As previously discussed, in *Piara Singh* the Supreme Court found regular appointments should be the norm for public employees and laid out ground rules for regularizing ad hoc employees. A judgment like *Piara Singh*, which has been largely abandoned, was designed to keep the government more accountable. At the same time though, it was also deferential, noting that the role of courts is to question the “validity” and not the “wisdom” of executive actions. It laid out a framework for the application of constitutional principles to contract labor, noting that these principles were not “immutable,” and encouraged an executive-judicial dialogue. Perhaps the time has come for the courts to return to the *Piara Singh* approach, or a contemporary analogue.

Such an approach is especially relevant for the case of contract teachers, where courts are faced with uncertainty about how to best protect both labor and educational rights. It is not immediately clear if a teacher’s labor rights are better protected in a system where her job is secure for life and she receives a livable salary or in a system where her job is on contract, she is awarded comparable or higher salaries to regular teachers, and dismissal is based on well-reasoned criteria with adequate notice. Similarly, the evidence is not clear whether contract or regular teachers are better at teaching students. It is difficult for anyone, including the Court, to make an absolutist case that labor or educational rights can only be fulfilled through one type of policy. What is clear is that a system where contract teachers have a low salary and are arbitrarily dismissed or regularized is not only unfair and exploitative to the teachers, but also decreases their effectiveness and infringes the educational rights of students. In other words, the Court can still clearly say when rights are being violated, even if multiple prescriptions to remedy this violation are possible.

The Court in recent years has retreated from earlier precedent and adopted a largely hands-off approach to state governments’ widespread use of contract teachers. To begin to reengage with the government’s contract teacher policy, the Court could identify the principles that need to be protected in these cases. For example, quality educational outcomes are an integral part of a right to education and so any teacher labor policy should be designed to promote quality education, based on the best available evidence. Similarly, worker dignity is an important principle under the Indian Constitution. Such a principle would include adequate pay, a stable work environment, and fair treatment. Once the Court has identified these principles it can use a combination of bright line rules and dialogic or experimentalist orders to shape policy in line with these values.

Granted the right combination of bright line rules or dialogic orders is a difficult balance. Sabel and Simon describe how under a dialogic, or experimental approach, “The judge’s role changes from that of directly determining the merits to facilitating a process of deliberation and negotiation among the stakeholders.” In India, the Court has frequently appointed commissioners in public interest litigation to help it gather information from all relevant stakeholders and make recommendations for Court orders. These orders, even when setting bright line rules, often do so in a dialogical manner. For example, the Court

lay out a new set of mandatory contract labor guidelines in *Piara Singh*, while in *Vishaka vs. State of Rajasthan* AIR 1997 SC 3011, it laid down a set of sexual harassment rules for the workplace. In both of these cases, though, Parliament could later change the judicial produced rules through legislation.

The correct balance between bright line rules and dialogical orders is difficult. Bright line rules are rigid; increasing the chance that the Court will make ill advised rules that none of the parties can easily change without further Court intervention. Meanwhile, dialogic orders bring different stakeholders into a process, but do not always result in clear rules. For example, in South Africa there have been complaints that when the judiciary orders the government to have a plan to fulfill a social and economic right this does little to actually change policy and secure these rights.⁵⁵ It's simply too soft a remedy. In the case of contract teachers, we believe the correct balance comes in using dialogic orders to bring stakeholders and the Court into a conversation with the government – upsetting the status quo – and then if necessary having the Court set certain basic bright line rules to ensure certain baseline labor standards are met.

Such a dialogic approach combined with the prudent use of bright line rules allows the Court to draw on its own past precedent and constitutional values, while addressing concerns about the fairness and effectiveness of the government's contract teacher policies. It is a model that can also potentially be used for other contract public employees as well, helping spark a national debate about the role of contract labor in the public sector. After the large-scale restructuring of the Indian labor market in the last two decades, labor jurisprudence needs both a rethink and a reengagement by the courts.

⁵⁵ Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-form versus weak-form judicial review revisited*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 2007 5(3): 391-418