

THE UNIVERSITY OF CHICAGO

MISSING THE WOOD FOR THE TREES: A CRITICAL EXPLORATION OF THE  
SUPREME COURT OF INDIA'S CHRONIC STRUGGLE WITH ITS DOCKET

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RISHAD AHMED CHOWDHURY

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*For my Parents*

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SUPERVISORS:

ROSALIND DIXON, TOM GINSBURG & WILLIAM H.J. HUBBARD

**ABSTRACT**

In this J.S.D. dissertation, I undertake a critical exploration of the causes and consequences of the Indian Supreme Court's docket crisis. My effort is to articulate an explanation for the manner in which the Court's docket has continued to expand over time, stretching the Court's capacity to a breaking point. While acknowledging that many complex and interconnected factors are at play, I argue in Chapter I that one overarching factor is the willingness of Supreme Court judges to play - at least sporadically - an error-correction role that is not doctrinally mandated. I argue further that the Court's conception of its own capacity is not only expansive, but unrealistically so. While often understandable in the particular historical circumstances of the Court, this routine error-correction role has nonetheless been profoundly counter-productive.

In Chapter II, I examine the question through a comparative lens, by undertaking an examination of the US Supreme Court and considering why that Court approaches its discretionary docket so very differently. I conclude that the very different institutional culture in the two Courts is a driving factor for their divergent approaches to their respective dockets.

In Chapter III, I approach the question in light of broader trends - which I describe as interventionism and *ad hocism* - within India's polity (and, more specifically, the higher judiciary). In this backdrop, I undertake an analysis of doctrinal inconsistency across varied areas of the law within the Indian Supreme Court's jurisprudence, and also explore how such inconsistency has ripple effects across the higher judiciary.

In light of the nature and dynamics of the docket crisis facing the Indian Supreme Court, the concluding section of the dissertation critically evaluates varied proposals for structural and institutional reform. I conclude that radical structural reform - in particular, the creation of an intermediate Court of Appeal between the High Courts and the Supreme Court - is likely to only exacerbate the underlying causes of the docket crisis. In spite of the serious and chronic nature of the problem, therefore, incremental reform presents the best path forward. I conclude by advancing a proposal that has been made at different points in the past - that of division of the Court into constitutional and appellate wings - and explaining why this is likely to meaningfully address the most serious problems identified in this thesis.



## INTRODUCTION

The starting point for this J.S.D. dissertation is the widely-acknowledged crisis of a severely over-burdened docket confronting the Indian Supreme Court today. While the problem is well-known, I argue in this thesis that its underlying causes and broader impact are significantly misunderstood. My effort is to articulate an explanation for the manner in which the docket of the Court has, seemingly counter-intuitively, continued to expand over time, stretching the Court's capacity to a breaking point. I acknowledge that many complex factors are at play here: the varied functions mandated to be performed by the Court, the ideological predilections and incentives of its judges, the often abysmal failure of other institutions in the Indian polity,<sup>1</sup> the societal expectations anchored to the Court, the very structure of the Court itself,<sup>2</sup> and a sometimes profound and self-perpetuating inconsistency in the law.<sup>3</sup> While keeping all this in view, I advance a new account of why the Supreme Court is severely over-burdened today, one which has sometimes been hinted at but never articulated in precisely this form.

To appreciate the context of this project, a brief overview of the Supreme Court of India is essential.<sup>4</sup> The Supreme Court is situated at the top of a unified judicial structure in India, and its docket is composed of a wide range of cases. It exercises original jurisdiction in

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<sup>1</sup> See, for e.g., Fali S. Nariman, 'Judicial Independence in India' in Venkat Iyer (ed), *Democracy, Human Rights and the Rule of Law: Essays in Honour of Nani Palkhivala* (Butterworths India 2000) 32. See also Chapter III, Part I.

<sup>2</sup> See Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61(1) *American Journal of Comparative Law* 173.

<sup>3</sup> For a detailed analysis of doctrinal inconsistency in the Supreme Court, see *infra* Chapter III, Part II.

<sup>4</sup> The information in this thesis about the Supreme Court of India, and other matters dealt with, may be assumed to be accurate as on 1 May 2016 (although certain references have been accessed on a later date).

certain limited and special classes of cases, including disputes amongst the States and between the States and the Union Government, and also under Article 32 of the Constitution in the case of the violation of fundamental rights.<sup>5</sup> It also exercises advisory jurisdiction in certain special circumstances,<sup>6</sup> and appellate jurisdiction in limited circumstances enumerated in the Constitution as also in terms of legislation passed by Parliament.<sup>7</sup> Most important of all, the Court exercises discretionary jurisdiction under Article 136 of the Constitution, and enjoys plenary powers to intervene with respect to any decision of a lower court or tribunal.<sup>8</sup>

In terms of structure, the Court today is composed of as many as thirty-one justices (including the Chief Justice),<sup>9</sup> largely appointed from amongst the senior-most judges of the various High Courts.<sup>10</sup> Today, it routinely sit in panels (or benches) of two or three judges, with as many as twelve or thirteen benches being constituted on the average Court day. Benches of five or more justices are constituted less often; and generally to consider significant questions of constitutional law of first impression.<sup>11</sup> The strength of the Court has

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<sup>5</sup> See The Constitution of India, 1950, Article 32 and Article 131.

<sup>6</sup> Id, Article 143.

<sup>7</sup> Id, Article 133, Article 134 and Article 138.

<sup>8</sup> Id, Article 136:

*“(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”*

<sup>9</sup> See The Constitution of India, Article 124(1). See also Supreme Court (Number of Judges) Amendment Act, 2008.

<sup>10</sup> See Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014).

<sup>11</sup> See The Constitution of India, Article 145(3).

been increased by Parliamentary legislation, at intermittent intervals, in response to the rapid increase in filings before the Court.<sup>12</sup>

It is well-documented that the Supreme Court's docket today is enormously overburdened.<sup>13</sup> It is also well-documented that this docket crisis has led to the Court's constitutional docket being undermined, with the unceasing flow of fresh matters assuming priority.<sup>14</sup> Much (though not all) of this case pendency comes from the Court's discretionary docket under Article 136 of the Constitution, where the Court - as a matter of black letter law at least - enjoys wide discretion with respect to entertaining matters. Equally important is the fact that the Court itself appears to be cognizant that it is impossibly over-stretched, yet seemingly unwilling or unable to resist accepting cases in the very high volumes it does. The central puzzle this dissertation grapples with relates to the dynamics that have brought about this situation, in the particular (and contingent) historical, institutional and structural context of the Indian Supreme Court.

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<sup>12</sup> See Supreme Court (Number of Judges) Act, 1956; Supreme Court (Number of Judges) Amendment Act, 1960; Supreme Court (Number of Judges) Amendment Act, 1977; Supreme Court (Number of Judges) Amendment Act, 1986; Supreme Court (Number of Judges) Amendment Act, 2008. Through these statutes, the sanctioned strength of judges for the Supreme Court was effectively increased from 8 to 11 in 1956, to 14 in 1960, to 18 in 1977, to 26 in 1986, and to 31 in 2008.

<sup>13</sup> A word of explanation with respect to terminology is in order. The term 'docket' is not commonly employed in India. Delayed disposal of cases is generally described as 'case arrears' or 'arrears', or sometimes 'pendency'. Since this thesis engages with comparative literature where these terms are not used, I have chosen to employ the term 'docket crisis' along with the other terminology more commonly used in the Indian literature. See generally Law Commission of India, 'Report No. 245, Arrears and Backlog: Creating Additional Judicial (wo)manpower' (2014) 3 (explaining that defining terms like delay or arrears requires fixation of a standard of what "normal" case processing timelines should be). The Commission further defines pendency as "[a]ll cases instituted but not disposed of, regardless of when the case was instituted", delay as "[a] case that has been in the Court/judicial system for longer than the normal time that it should take for a case of that type to be disposed of", arrears as "[t]hose cases that show unwarranted delay..." and backlog as "the accumulation of cases in the system due to the system's inability to dispose of as many cases as are being filed".

<sup>14</sup> See Nick Robinson *et al*, 'Interpreting the Constitution: Indian Supreme Court Constitution Benches since Independence' (2011) XLVI(9) Economic and Political Weekly 27.

Not surprisingly, the Court's docket crisis has attracted some attention from scholars and legal practitioners in recent years.<sup>15</sup> Decades ago, Rajeev Dhavan's work on the (already) steadily increasing docket of the Court made a significant scholarly contribution in this area.<sup>16</sup> Dhavan outlined what he described as a Marxist critique of the judicial system, while undertaking detailed empirical case studies of a prominent High Court and the Supreme Court.<sup>17</sup> He argued that the crisis in the Indian judicial system was related to the inherent stresses and contradictions of the capitalist order.<sup>18</sup> But he also identified more tangible bottlenecks in the system, and particularly drew attention to infrastructural and procedural deficiencies in the courts he studied.<sup>19</sup> Significantly, he also drew attention to collective action problems in decision-making, in the context of High Courts having a very large number of judges.<sup>20</sup> This is a theme of some importance, to which I shall return in later parts of this thesis.

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<sup>15</sup> See generally K.K. Venugopal, 'Towards a Holistic Restructuring of the Supreme Court of India' (R.K. Jain Memorial Lecture, 30 January 2010) <[http://www.thehindu.com/multimedia/archive/00112/R\\_K\\_Jain\\_Memorial\\_\\_112842a.pdf](http://www.thehindu.com/multimedia/archive/00112/R_K_Jain_Memorial__112842a.pdf)> accessed 30 April 2016; T.R. Andhyarujina, 'Restoring the Supreme Court's Exclusivity' *The Hindu* (28 February 2014) <<http://www.thehindu.com/opinion/lead/restoring-the-supreme-courts-exclusivity/article5076293.ece>> accessed 1 May 2016; T.R. Andhyarujina, 'Restoring the Character and Stature of the Supreme Court of India' (2013) 9 SCC J-43; T.R. Andhyarujina, 'Improving the Working of the Supreme Court' (2005) 2 SCC J-41; Nick Robinson, 'Too Many Cases' *Frontline* (3-16 January 2009) <<http://www.frontline.in/static/html/fl2601/stories/20090116260108100.htm>> accessed 30 April 2016; Uddyan Mukherjee, 'Special Leave Petitions: A Critical Study of the Practice and Procedure – The Way Ahead' (LL.M. Dissertation, The National University of Juridical Sciences, Kolkata, India 2011) (on file with the author).

<sup>16</sup> Rajeev Dhavan, *Litigation Explosion in India* (N.M. Tripathi Pvt. Ltd 1986). See also Rajeev Dhavan, *The Supreme Court under Strain: The Challenge of Arrears* (N.M. Tripathi Private Ltd 1978); Rajeev Dhavan, *Justice on Trial: The Supreme Court Today* (Wheeler Publishing 1980).

<sup>17</sup> Dhavan, *Litigation Explosion*, id at ch 6.

<sup>18</sup> Id.

<sup>19</sup> Id at chs 3 and 4.

<sup>20</sup> Id at 125-126.

At different points over the years, the Law Commission of India has also addressed the problem of excessive case arrears in the Indian judicial system, both generally and with particular reference to the Supreme Court.<sup>21</sup> The Law Commission's approach to the docket crisis in the Supreme Court has varied over the years, presumably at least in part on account of variations in the views and ideological predilections of the members constituting the Commission at different points.<sup>22</sup>

The One Hundred Twenty Fifth Report of the Commission, in 1988, described the Supreme Court as '*crisis-laden*' and noted that past efforts at reform had the '*dubious distinction of adding to the malaise*'.<sup>23</sup> It noted the divergence of views on the desirability of increase in the size of the Court and, specifically, the concern that an increase in the Court's strength would increase the likelihood of conflicting decisions (thereby adversely impacting the quality of adjudication).<sup>24</sup> However, it took the view that the desirability of speedily filling existing vacancies on the Court could not be questioned, and deplored the trend of several vacancies existing at any given point of time.<sup>25</sup> The Commission further recommended the creation of

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<sup>21</sup> On the Supreme Court, *see* Law Commission of India, 'Report No. 229: Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai' (2009); Law Commission of India, 'One Hundred Twenty Fifth Report on the Supreme Court – A Fresh Look' (1988); Law Commission of India, 'Ninety Fifth Report on Constitutional Division within the Supreme Court – A Proposal for' (1984); Law Commission of India, 'Forty-Fourth Report on the Appellate Jurisdiction of the Supreme Court in Civil Matters' (1971). On the High Courts, *see* Law Commission of India, 'Fifty Eighth Report on Structure and Jurisdiction of the Higher Judiciary' (1974); Law Commission of India, 'Seventy-Ninth Report on Delay and Arrears in High Courts and other Appellate Courts' (1979); Law Commission of India, 'One Hundred Twenty-Fourth Report on the High Court Arrears – A Fresh Look' (1988).

<sup>22</sup> It is important to note that, while the Law Commission is generally composed of persons of a certain seniority and eminence in the field, its recommendations are purely advisory in nature and the degree to which they are taken seriously varies significantly. Different Law Commissions may attract different levels of responsiveness from the Government, depending on several factors including the identity of the Chairperson of the Commission.

<sup>23</sup> Law Commission of India, 'One Hundred Twenty Fifth Report', *supra* note 21 at 1.

<sup>24</sup> *Id* at 15.

<sup>25</sup> *Id* at 19-21.

additional *ad hoc* benches of the Court (comprising retired justices of the Court), and extension of Court hours to enable these benches to function effectively.<sup>26</sup> Further, and of more far-reaching character, the Commission reiterated an earlier recommendation regarding the division of the Supreme Court into a constitutional and appellate wing.<sup>27</sup>

In 2009, the Law Commission chaired by Justice (retd.) A.R. Lakshmanan recommended that the Supreme Court be divided into a Constitution Bench at New Delhi and four appellate benches (termed ‘Cassation Benches’ by the Law Commission) in four regions of the country.<sup>28</sup> The Commission noted that the proposal to establish regional benches of the Court had been forwarded by the concerned Parliamentary Standing Committee on several occasions, and consistently rejected by the Supreme Court itself.<sup>29</sup> While referencing previous recommendations of the Law Commission in this connection, the Commission stressed both the unmanageable burden on the Supreme Court as well as the burden on individual litigants required to travel to Delhi from distant places, as important reasons for its recommendation.<sup>30</sup> As a prelude to what I say subsequently, the analysis and recommendations of the Commission are not only regrettably cryptic in nature (particularly given the significant nature of the recommendations made) but suffer from obvious lacunae and logical fallacies. In light of my analysis of the nature of the docket crisis in this thesis, I return in the concluding section to a discussion of why such structural reform will only magnify the underlying causes of the malaise the Court is struggling with today.

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<sup>26</sup> Id at 21-22.

<sup>27</sup> Id at 23.

<sup>28</sup> Law Commission of India, ‘Report No. 229’, *supra* note 21.

<sup>29</sup> Id at 18-19.

<sup>30</sup> Id at 10-11.

While the splitting of the Supreme Court into regional benches is one prominent proposal for structural reform, the significant alternate proposal - forwarded by Senior Counsel K.K. Venugopal<sup>31</sup> - is the establishment of a Court of Appeal as an intermediate Court between the High Courts and the Supreme Court, thereby intending to reserve the Supreme Court for important constitutional matters and the like. The unifying theme is the recognition that the docket is unmanageably large (in terms of the existing backlog as well as fresh filings), that the Court is unable to manage even with the significant increase in its strength over the years, and that this is causing significant delays in the disposal of existing cases while adversely impacting the quality of the Court's work. In his proposal, Venugopal argues that the Court's existing Article 136 docket can effectively be transferred to the benches of this newly-established Court of Appeal, while reserving the Supreme Court for resolving differences of opinion on matters of law, advisory opinions under Article 143 of the Constitution, disputes between the Central and State governments, and such matters.<sup>32</sup>

More recent scholarship on the Supreme Court - most significantly by Nick Robinson but by others too - also addresses the Court's docket and related issues.<sup>33</sup> Robinson's scholarship is valuable in directly addressing the significance of structural and institutional factors - generally ignored in Indian legal scholarship - to the docket crisis.<sup>34</sup> Most recently, the Vidhi Centre for Law and Policy has published a Consultation Paper outlining the problem of excessive pendency before the Supreme Court, offering a limited comparative

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<sup>31</sup> See Venugopal, *supra* note 15.

<sup>32</sup> *Id* at 5.

<sup>33</sup> See Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10(3) *Journal of Empirical Legal Studies* 570; Robinson, *supra* note 15.

<sup>34</sup> Nick Robinson, 'India's Judicial Architecture' in Sujit Choudhry *et al* (eds), *Oxford Handbook of Indian Constitutional Law* (Oxford University Press 2016); Robinson, *supra* note 2.

perspective on the issue, and pointing towards possible avenues for future research.<sup>35</sup> In a follow-up Report published subsequent to further consultations, Vidhi sets out certain proposals for reform while sounding a note of caution with respect to the proposal regarding establishment of a Court of Appeal.<sup>36</sup> In my view, Mr. Venugopal's proposal as well as Vidhi's recent work recognizes, yet misdiagnoses the essential character of, the crisis confronting the Supreme Court. I therefore take these as fundamental points of reference for my analysis in subsequent sections of the thesis.

In spite of the scholarship highlighted above, the topic this dissertation seeks to address remains significantly under-explored. One reason, which I elaborate upon in Chapter I, is that the crisis of case arrears running through the length and breadth of the Indian judiciary has had the unfortunate (though perhaps understandable) effect of conflating what are very diverse issues.<sup>37</sup> Thus, the crisis in the Supreme Court comes to be seen as merely another facet of the critically over-crowded state of dockets in courts throughout the country, ignoring the many critical doctrinal, institutional, cultural and normative differences between a constitutional court (such as the Supreme Court) and (say) an ordinary civil or criminal court of first instance. The docket crisis, then, comes to be seen primarily (or even

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<sup>35</sup> Alok Prasanna Kumar *et al*, 'Consultation Paper: The Supreme Court of India's Burgeoning Backlog Problem and Regional Disparities in Access to the Supreme Court, Vidhi Centre for Legal Policy' (Vidhi Centre for Legal Policy 2015) <[http://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/560cf7d4e4b092010fff89b1/1443690452706/29092015\\_Consultation+Paper+on+the+Supreme+Court%27s+Burgeoning+Backlog+Problem.pdf](http://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/560cf7d4e4b092010fff89b1/1443690452706/29092015_Consultation+Paper+on+the+Supreme+Court%27s+Burgeoning+Backlog+Problem.pdf)> accessed 1 May 2016.

<sup>36</sup> Alok Prasanna Kumar *et al*, 'Towards an Efficient and Effective Supreme Court: Assessing Issues of Backlog and Regional Disparities in Access' (Vidhi Centre for Legal Policy 2015) <<http://vidhilegalpolicy.in/reports-1/2016/2/8/towards-an-efficient-and-effective-supreme-court>> accessed 1 May 2016.

<sup>37</sup> Dhavan's work, for example, examines both the Supreme Court and the Allahabad High Court. While it is to be commended for its attention to both institutional and cultural factors, it perhaps pays inadequate attention to the important differences between a High Court and the Supreme Court. *See*, Dhavan, *Litigation Explosion*, *supra* note 16.



exclusively) as an exogenous ‘resource’ problem, rather than one which is the product of conscious choices on the part of the Court itself.<sup>38</sup>

The significant increase in the Court’s strength over the past few decades, in response to the docket crisis, demonstrates how this assumption has dominated policy-makers’ attitudes regarding this issue.<sup>39</sup> Parliament has enacted legislation, at intervals over the years, increasing the strength of the Court from a maximum permissible number of eight judges (including the Chief Justice) when the Court came into existence in 1950 to a Court of thirty-one judges today.<sup>40</sup>

The number of cases filed in the Court, and the arrears before the Court, have increased steadily alongside the increase in the strength of the Court. Correlation, of course, doesn’t necessarily equate to causation. But it is instructive that, with the continued (and very significant) increase in the judicial strength of the Court, the problem of arrears has only escalated.<sup>41</sup> The ‘induced litigation’ hypothesis helps explain this trend to an extent, and I

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<sup>38</sup> I elaborate upon this argument in Chapter I.

<sup>39</sup> See, for e.g., Statement of Objects and Reasons, The Supreme Court (Number of Judges) Amendment Bill, 2008: “*The pendency of cases in the Supreme Court of India has constantly been on the rise largely due to higher rate of institution of cases. As on the 31st day of March, 2007, 41,581 cases were pending in the Supreme Court. The Chief Justice of India has intimated that the Judges in the Supreme Court feel over-burdened and have been working under acute work pressure. It has also not been possible for the Chief Justice of India to constitute a five Judge Bench on a regular basis to hear cases involving interpretation of constitutional law as doing that would result in constitution of less number of Division Benches which in turn will result in delay in hearing of other civil and criminal matters.*

2. *Suitable steps are, therefore, required to be taken to augment the strength of the Judges in the Supreme Court so that it can function more efficiently and effectively towards attaining the ultimate goal of rendering speedy justice to the litigant public.*”

See also Dhavan, *Litigation Explosion*, *supra* note 16 at 53-56.

<sup>40</sup> See *supra* note 12.

<sup>41</sup> Moreover, given the fact that the increase in the strength of the Court has (broadly) translated into additional benches hearing cases, it has lead to the availability of greater judicial ‘resources’ in the Apex Court.

elaborate upon this explanation in later sections. Briefly summarized, there is legal scholarship suggesting that an increase in judicial resources can compound the problem of judicial arrears, by inducing more potential litigants to actually approach Court.<sup>42</sup> This builds on the ‘Induced Traffic’ literature in the field of Economics, arguing that an increase in the network of roads can actually increase the overall density of traffic, by inducing more people to alter their life choices and utilize those roads.<sup>43</sup> For our purposes, a commonplace but telling analogy is the oft-quoted example of the medieval-age doctor drawing blood from an ailing patient. Seeing the patient’s condition worsen, the doctor, convinced the treatment is inadequate, increases the blood-letting and the patient obviously deteriorates further.<sup>44</sup>

Critically, even if it is true that the increase in the number of judges has created more litigation for the Supreme Court, this doesn’t answer the question of whether such ‘induced litigation’ is, normatively, a desirable thing. This has salience in the context of the Indian Supreme Court’s docket, where the narrative of the Court as the ‘People’s Court’ has taken strong hold, and it is believed (or assumed) that the Court’s intervention in a vast number of cases is desirable, even inevitable. In Chapter I, I critically question this assumption from a variety of perspectives.<sup>45</sup>

In the backdrop of the Court’s docket crisis, certain scholars and legal practitioners have advanced proposals for reform. These include (relatively) modest ideas relating to improved court management, limiting time for oral hearings, disallowing frequent adjournments at the request of lawyers, and the like. Others are somewhat more challenging,

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<sup>42</sup> Tracey E. George and Chris Guthrie, ‘Induced Litigation’ (2003-2004) 98 *Northwestern University Law Review* 545.

<sup>43</sup> *See id*; Peter J. Mackie, ‘Induced Traffic and Economic Appraisal’ (1996) 23(1) *Transportation* 103.

<sup>44</sup> *See, for e.g.*, Paul Krugman, ‘Ending Greece’s Bleeding’ *The New York Times* (5 July 2015) <[http://www.nytimes.com/2015/07/06/opinion/paul-krugman-ending-greeces-bleeding.html?\\_r=0](http://www.nytimes.com/2015/07/06/opinion/paul-krugman-ending-greeces-bleeding.html?_r=0)> accessed 1 May 2016.

<sup>45</sup> *See infra* Chapter I, Part III.

such as Senior Counsel Fali Nariman's proposal that only Three-Judge Benches of the Court should be regarded as having precedential value,<sup>46</sup> or even that the Court should sit solely in Three-Judge Benches.<sup>47</sup> Other proposals are yet more radical, such as the establishment of regional benches of the Supreme Court in different regions of the country or, alternatively, the establishment of an intermediate Court of Appeal between the Supreme Court and the High Courts (reserving the Supreme Court for truly 'constitutional' matters).<sup>48</sup> A less drastic measure proposed by Rajeev Dhavan as far back as 1979 is that the Supreme Court be constituted into either two separate courts or, at the minimum, into two divisions (constitutional and appellate).<sup>49</sup> This proposal has been seconded by the Law Commission at different points of time,<sup>50</sup> although no executive action in support of such a move is really visible.

It is often said, sometimes in laudatory and sometimes in purely descriptive terms, that the Indian Supreme Court is a 'People's Court' and this helps explain the explosion in

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<sup>46</sup> Nariman's proposal could invite comparison to the practice of US federal courts to not publish a majority of their judicial opinions, and the reasons underlying the same. *See generally* Stephen L. Wasby, 'Publication (or not) of Appellate Rulings: An evaluation of Guidelines' (2005-06) 2 Seton Hall Circuit Review 41; Scott E. Gant, 'Missing the Forest for a Tree, Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1' (2005-06) 47(4) Boston College Law Review 705.

<sup>47</sup> *See* Maneesh Chhibber, Interview with Fali Nariman, *The Indian Express* (6 April 2014) <<http://indianexpress.com/article/india/india-others/i-am-apprehensive-about-modi-this-problem-of-trying-to-become-too-hinduised/99/>> accessed 30 April 2016: "Arun S: But due to the huge backlog of cases, the court hardly hears major constitutional matters.

*Fali S. Nariman: That is exactly the point —benches of two and three stray into the Constitution, if you like my saying so, and they welcome arguments on the Constitution which strictly speaking may not be valid under Article 145. No one can say that a bench of two interpreting a provision of the Constitution is unconstitutional or wrong; nobody has tried till now. That's why I said I don't like benches of two. There should be benches of three or more to decide a question."*

<sup>48</sup> *See* Venugopal, *supra* note 15.

<sup>49</sup> Dhavan, *The Supreme Court under Strain*, *supra* note 16 at 97-98. *See also*, Dhavan, *Litigation Explosion*, *supra* note 16 at 38-41 (discussion regarding the proposal for creation of a constitutional court, and the backlash from the Bar).

<sup>50</sup> *See* Law Commission of India, 'One Hundred Twenty Fifth Report', *supra* note 21 at 23.

the Court's docket.<sup>51</sup> In the simplest sense, this is obviously true at multiple levels. Much of the Court's docket comprises relatively mundane disputes, often of concern to only the litigants themselves (and without broader significance for the law). As I argue in Chapter I, what is critical is not only that the Court does sporadically entertain such disputes, but that it is now expected to do so, even at the cost of its constitutional docket. But this explanation understates the resistance within the Court itself to this role, and its recognition of how this trend is ultimately unsustainable.<sup>52</sup> As far back as 1982, Justice Mathew described as 'good populist propaganda' but 'unsound' the argument that since frequent resort to the Apex Court was a mark of confidence of the common citizen in the Court, they should not be discouraged from so approaching it, and stressed that this would defeat the 'great purpose' for which the Court had been established.<sup>53</sup> As recently as 2015, Justice Gogoi has made a habit of ironically asking appearing Counsel whether their case rightly belongs within the 7 percent (implicitly referencing a recent study indicating that only 7 percent of cases brought

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<sup>51</sup> I am grateful to Richard Albert for a discussion of this issue, during my presentation of a draft version of Chapter II of this thesis, on 17 April 2015, at the 4<sup>th</sup> Annual YCC Conference in Tallahassee, Florida, USA. See also *Bandhua Mukti Morcha v. Union of India and Ors* (1984) 3 SCC 161.

<sup>52</sup> See, for e.g., Justice Mathew's comments in 1982. K.K. Mathew, 'Regional Seminar on Restructuring Higher Judiciary' (1982) 3 SCC J-1: "*It is impossible for any court of last resort to adjudicate all cases which the litigants wish to bring before it. The argument that since the public have confidence in the Supreme Court they flock to it, and they should not be discouraged from doing so, and therefore, the number of judges should be raised, appears to me to be unsound. As the finality of the verdict of the Supreme Court is not founded on its infallibility, I would like to ask where would a litigant who suffers from an injustice occasioned by a decision of the Supreme Court go? If the argument is pressed further, we have to set up a super Supreme Court to satisfy the litigant. No litigant who can afford the means will rest satisfied until he has fought his cause up to the last resort. To say that no litigant should be turned out of the Supreme Court so long as he has a grievance may be good populist propaganda but the consequence of accepting such a demand would surely defeat the great purpose for which the Court was established under our constitutional system. It is high time we recognise the need for the Supreme Court to entertain under Article 136 only those cases which measure up to the significance of national or public importance. The effort, then, must therefore be to voluntarily cut the coat of jurisdiction according to the cloth of importance of the question and not to expand the same with a view to satisfy every litigant who has the means to pursue his cause.*"

<sup>53</sup> Id.

before the Supreme Court involve any constitutional issue).<sup>54</sup> And Rajeev Dhavan has noted that while a great portion of the Court's time is indeed occupied in miscellaneous hearings, this is in spite of the fact that the Court rejects a majority of these petitions.<sup>55</sup>

Concerns similar to these were presumably involved in the decision by a Two-Judge Bench of the Court, in *Mathai*, to refer to a Constitution Bench the question of the framing of more robust guidelines for the entertainment of special leave petitions by the Court.<sup>56</sup> While the Constitution Bench's summary dismissal of this petition (and the expression of concern and request for clarity by the Two-Judge Bench in the referring order) seemed counter-intuitive and puzzling,<sup>57</sup> recent issuance of notice by the Supreme Court in a Writ Petition calling for the establishment of a Court of Appeal as an intermediate Court between the High Courts and the Supreme Court confirms that the docket crisis remains a matter of serious concern for the Court.<sup>58</sup>

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<sup>54</sup> See Utkarsh Anand, 'Is your case in the 93% or the remaining 7%' *The Indian Express* (17 February 2015) <<http://indianexpress.com/article/india/india-others/is-your-case-in-the-93-or-the-remaining-7/>> accessed 1 May 2016. See also Kian Ganz, 'SC lacks capacity to deliver proper jurisprudence: only 7% of apex judgments really had anything to do with the constitution in 2014, reveals research' (*Legally India*, 5 February 2015) <<http://www.legallyindia.com/Bar-Bench-Litigation/sc-lacks-capacity-to-deliver-proper-jurisprudence-only-7-of-apex-judgments-really-had-anything-to-do-with-the-constitution-in-2014-reveals-researchs>> accessed 1 May 2016.

<sup>55</sup> Dhavan, *Litigation Explosion*, *supra* note 16 at 84-85. While much time has passed since Dhavan wrote this book, little has changed on this count. See *infra* Chapter I, Part II.A.

<sup>56</sup> See *Mathai @ Joby v. George & Anr*, SLP (C) No. 7105 of 2010, Order dated 19 March 2010 <<http://courtnic.nic.in/supremecourt/temp/7105201011932010p.txt>> accessed 10 May 2016.

<sup>57</sup> See *Mathai @ Joby v. George & Anr* 2016 (2) SCALE 102. See also Rishad Chowdhury, 'The Indian Supreme Court Declines to Revisit its Docket Crisis: The Most Important Recent Order That You've Never Heard of' *I-CONnect* (27 January 2016) <<http://www.iconnectblog.com/2016/01/the-indian-supreme-court-declines-to-revisit-its-docket-crisis-the-most-important-recent-order-that-youve-never-heard-of>> accessed 1 May 2016.

<sup>58</sup> See *V. Vasanthakumar v. H.C. Bhatia & Ors* WP (C) No. 36 of 2016, Orders dated 26 February 2016 (issuing notice to the Union of India, appointing Mr. K.K. Venugopal and Mr.

The critical nature of the commentary above, and the stark realities of the Court's functioning today, may lead observers to wonder if the mission (so to speak) is doomed, and if the Court is at a point of no return. But therein lies the paradox, and the resilience, of the Court. As with the fable of the Blind Men and the Elephant,<sup>59</sup> the Court has many facets.<sup>60</sup> The same Court that is (rightly) criticized for being a Senior Counsel's Court commands respect and a broad degree of legitimacy across wide sections of the polity. The Court that has relegated its constitutional docket to the backburner has nevertheless, in the past decade, rendered significant judgments on varied constitutional matters including affirmative action, civil liberties, and the separation of powers. The 'Monday, Friday' Court<sup>61</sup> of two-minute hearings and unreasoned *in limine* dismissals of Petitions is also the Court of unhurried hearings in Constitution Bench matters that stretch over weeks, if not months.<sup>62</sup> The Court that has done much which could be seen as adverse to the other branches of government is

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Salman Khurshid as *amicus curiae*, and requesting the assistance of the Attorney General for India) and 15 March 2016 (directing the Petition to be listed before a Three-Judge Bench).

<sup>59</sup> See John Godfrey Saxe, 'The Blind Men and the Elephant', in Martin Gardner (ed), *Best Remembered Poems* (Dover Publications, Inc. 1992).

<sup>60</sup> Law Commission of India, 'One Hundred Twenty Fifth Report', *supra* note 21 at 25: "*The Law Commission is fully conscious of the fact that (sic) all the difficulties, troubles and tribulations which the Supreme Court is facing, it has still a place in the heart of the common men of the country. They look upon it with reverence. Undoubtedly, the credibility is taking a nose dive on the only ground of its inability to render justice within a reasonably short time. But this situation, it is hoped, can be repaired and considerably improved if the recommendations made in this report are implemented in letter and spirit. If unfortunately, as the past experience shows, some further indifference is shown to the recommendations, the Law Commission would not be failing in its duty to suggest radical measures of a surgical nature.*"

<sup>61</sup> I use the term 'Monday, Friday' Court as a convenient short form for the Court's style of functioning while hearing miscellaneous cases, which is ordinarily (though not exclusively) on Mondays and Fridays. I should note that this apparently casual term carries a wealth of meaning for practitioners and others familiar with the functioning of the Court, some of which I try to communicate in this thesis.

<sup>62</sup> See, for example, the hearing before the Constitution Bench with respect to the constitutionality of the National Judicial Appointments Commission. While not before Constitution Benches, the appeals in the *Naz Foundation* matter, or with respect to the death sentence awarded to the sole surviving terrorist in the 26 November 2008 Mumbai attacks, are other good examples of extended hearings afforded in 'final hearing' matters.

treated respectfully by these institutions, and open defiance of its orders is practically unknown.

My analysis in later portions of the thesis offers a partial explanation of this apparently paradoxical situation. I consider Ran Hirschl and Tom Ginsburg's work on judicial independence,<sup>63</sup> and discuss how it is relevant in the Indian context but in a slightly different sense. While Ginsburg analyses judicial independence primarily as a 'shield', in the Indian context it can equally be thought of as a 'sword', which enables critiques, attacks and counter-blasts to political (or other) adversaries in a variety of situations and contexts.<sup>64</sup> The Indian Supreme Court - particularly the multi-pronged, poly-vocal *avatar* that the Court has assumed today - has something to offer to each stakeholder in the Indian polity, thereby retaining both relevance and strength. From whatever mix of factors and causes this may have emerged, the reputation, strengths, and accomplishments of the Indian Supreme Court are far from negligible.<sup>65</sup> Nonetheless, the situation it finds itself in today is unsustainable in many ways. In this backdrop, this dissertation critically analyses the docket crisis, and concludes by exploring possible avenues for reform.

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<sup>63</sup> See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003). See also Ran Hirschl, *Towards Juristocracy - The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

<sup>64</sup> With respect to incentives to encourage or acquiesce in judicial intervention, Dhavan has noted: "*But, whatever the formal interest of the government, politicians as a whole have much to lose if the overall mischief making function of the courts was diminished. When in opposition, most politicians have used the power of the courts to fight and embarrass government. The Courts are thus in a contradictory embarrassment to government. On the other hand, they have become such an important arena for intra-elite political and economic in-fighting that no one really wants to prune their powers.*" See Dhavan, *Litigation Explosion*, *supra* note 16 at 155.

<sup>65</sup> I return to the importance of judicial reputation in later sections of the thesis. See generally Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

The dissertation comprises three Chapters, apart from the present Introduction and a concluding section. The first offers a bird's eye view of the docket crisis, and attempts to analyse it from both a positive and normative perspective. Positively, it is argued that the docket crisis arises as a result of particular, contingent choices made by judges of the Supreme Court over a period of time.<sup>66</sup> These choices, while often understandable in the institutional and judicial climate of the Court, over a period of time created a chronically over-burdened Court. Moreover, and critically, the path-dependent nature of the problem means that easy reversals are not feasible. The Court cannot, therefore, reverse the docket crisis by merely *choosing* to do so.

In the second Chapter, I examine the docket crisis in the Court through a comparative lens.<sup>67</sup> I consider the differences in the structural and institutional character of the US and Indian Supreme Courts, and explore what might help explain, despite several significant similarities, the very different paths taken by the two Courts with respect to docket control. I point out in this Chapter that the two Courts are more similar than is often realized, in terms of the black letter doctrine governing their treatment of their discretionary docket. The principles governing the exercise of 'cert' jurisdiction in respect of the US Supreme Court make it clear that grant of review is not a matter of right but of judicial discretion, and that amongst the factors relevant (for grant of cert) is the existence of conflict within the lower courts on important questions of federal law. In the case of the Indian Supreme Court, while it does exercise mandatory appellate jurisdiction in certain contexts, it is clearly the case that the bulk of the Court's docket is composed of discretionary special leave petitions under

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<sup>66</sup> An earlier version of this Chapter was published as Rishad Ahmed Chowdhury, 'Missing the Wood for the Trees: The Unseen Crisis in the Supreme Court' (2012) 5 NUJS Law Review 351.

<sup>67</sup> An earlier version of this Chapter was presented as a paper titled 'Apples and Oranges? Docket Control in the Indian Supreme Court & Learning from the US Experience' at the 4<sup>th</sup> Annual YCC Conference at Tallahassee, Florida, 17 April 2015.



Article 136 of the Constitution. Nevertheless, the treatment of the discretionary docket by the two Courts is starkly different. The US Supreme Court accepts (for merits hearings) less than a hundred cases a year, and almost exclusively those where there is a clear ‘split’ between the courts below on significant questions of federal law. Given that black letter legal doctrine does not explain the stark difference in judicial behaviour, we must look for alternative explanations.<sup>68</sup> I argue that differences in institutional culture, amplified by structural and institutional characteristics of the Court, have contributed to the Indian Supreme Court’s starkly different approach to its docket. Further, while these historical, path-dependent choices have aggravated the docket crisis, deeply-entrenched structural and institutional characteristics make any course-correction difficult.

In the third Chapter, I take a broader look at what I characterize as the dual sins of interventionism and *ad hocism* throughout India’s higher judiciary. The premise is that the problems of the Indian Supreme Court, while arising in its own particular circumstances, are not unique to that Court. Rather, these are representative of a trend pervasive in the most vital institutions of Indian public life, though perhaps accentuated in the case of the Apex Court. After setting out this background, I examine varied areas of legal doctrine to substantiate the case that the Supreme Court is not merely inconsistent, but endemically so. At the core of the analysis is the tendency to deviate from predictable legal norms in its adjudicatory functions. Thus, while inconsistency may be an inevitable by-product, to an extent, of the structural and

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<sup>68</sup> An obvious objection to my comparison is that India has a unified judiciary, where the regular courts (with the Supreme Court at the top of this hierarchy) are responsible for adjudicating cases irrespective of whether they arise from statutes passed by the Parliament or the State legislatures. Therefore, it is illogical to compare the docket burden on the Indian Supreme Court with the US Supreme Court, since the sources for the flow of work in India are far broader than in the US. The reason this objection is without substance is that the significant difference is not so much in volumes of filings (although India does see a much higher number of filings), but the underlying approach of the two Courts and the rate of intervention. Put differently, considering only the class of cases arising out of federal legislation in India, the Court’s rate of intervention remains very high (and far from confined to the types of cases that invite the attention of the US Supreme Court).

institutional character of the Court (as elaborated in Chapter I), this is only intensified by the interventionist tendencies of the Court.<sup>69</sup> While Chapter I focused on the Supreme Court in isolation, this Chapter examines the Court (as it must) in the larger context of other public institutions in India, and particularly the High Courts. Chapter III helps give concrete shape to the underlying intuition that the docket crisis, being driven by broader interventionist tendencies, cannot be rectified through surgical reform that leaves the underlying ailment untreated. This sets the stage for the concluding section of the thesis.

In the concluding section, I examine possible avenues for reform, given the nature and underlying dynamics of the docket crisis. While concluding that deep-rooted structural or institutional reform appears infeasible in the case of the Supreme Court today, I nonetheless proceed to examine certain oft-forwarded proposals for such reform.<sup>70</sup> In terms of structural reform, I specifically highlight three possible structural solutions - *one*, the division of the Supreme Court into regional benches, *two*, the creation of an intermediate Court of Appeal between the Supreme Court and the High Courts, and *three*, the creation of a Constitutional Court (distinct from and independent of the Supreme Court).

Given the underlying causes of the docket crisis, I conclude that any of these far-reaching structural changes (even if assumed to be implementable) would only aggravate the Court's struggle with its docket, while arguably also having additional (unintended) adverse

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<sup>69</sup> See generally Dhavan, *Litigation Explosion*, *supra* note 16 at 155: “*The institutional dissipation of the courts is not out of character with the institutional dissipation of the rest of the State. The rest of the Indian State has also suffered a similar entropy and lost institutional viability.*”

<sup>70</sup> The recent issuance of notice to the Union Government by the Supreme Court in *V. Vasanthakumar v. H.C. Bhatia & Ors* WP (C) No. 36 of 2016 might suggest that this assumption of political infeasibility is incorrect. Clearly, developments in this case merit close scrutiny in the coming days. I explain in later portions of the thesis why radical structural reform remains politically infeasible in my view, despite what superficial observation of these developments might suggest. If I am wrong in this assumption, though, the concerns I express about these proposals only take on a greater degree of urgency.

consequences. Therefore, and again perhaps counter-intuitively, inspite of the serious and chronic nature of the docket crisis, the solutions forwarded are of an incremental nature.

Concretely, I propose that the Court adopt the suggestion, made at different points over the years, of division into constitutional and appellate wings. Such division will, I suggest, have the immediate benefit of more judicial resources being made available for the adjudication of important constitutional matters, while also credibly signalling to the Bar and other stakeholders that the ‘Monday, Friday’ docket will be subordinated to the Court’s constitutional docket. This proposal is incremental and minimally-risky in nature, and fits comfortably within the larger structure of India’s higher judiciary. Yet, it carries the potential of substantially negating the underlying causes of the docket crisis. As I explain in subsequent sections of the thesis, the most meaningful reform the Supreme Court can undertake today is taking ‘baby steps’ towards becoming a constitutional court once more.

# CHAPTER I

## A CRITICAL ANALYSIS OF THE CAUSES AND CONSEQUENCES OF THE SUPREME COURT'S DOCKET CRISIS

### I. INTRODUCTION

India gained independence from British colonial rule in 1947, and the Constitution came into force in 1950. Prior to this time, the British had succeeded, gradually and incrementally, in setting up a fairly robust system of Courts which administered justice applying either English law or the customary law of different Indian communities.<sup>1</sup> Chartered High Courts were set up in different parts of the country, which exercised both appellate and original jurisdiction in different contexts. The High Courts of Bombay, Calcutta and Madras grew to be exceedingly powerful institutions, which attracted both English and Indian legal practitioners, and at different times had both English and Indian judges.

A new Court called the Federal Court was established in 1937, pursuant to the Government of India Act, 1935, which functioned till the establishment of the Supreme Court of India in 1950. In view of its short period of existence, its influence was somewhat limited. Nonetheless, it was a precursor to the present-day Supreme Court, both on account of its responsibility for resolving disputes between the Central Government and the provinces, and in view of its jurisdiction to hear appeals concerning the interpretation of the 1935 Act. In addition, it also retained advisory jurisdiction with respect to the interpretation of the 1935 Act. All these functions mirror fundamental constitutional responsibilities of the Indian Supreme Court.

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<sup>1</sup> For a scholarly overview of the evolution of the modern Indian legal system, see M.P. Jain, *Outlines of Indian Legal and Constitutional History* (7<sup>th</sup> edn, LexisNexis 2014).

It hardly requires emphasis that the long evolution and history of these Courts has had an extremely significant impact on the structure and functioning of the Indian legal system, which persisted well past independence and continues to be felt today. These influences range from the trivial to the most substantive, ranging from the mode of address used in legal arguments before the superior Courts today, to the continuing importance of English common law, to the practices and procedures of these Courts.

#### ***I.A. Structure and Functioning of the Court:***

Before proceeding to a critical analysis of the causes of the present crisis in the Court's docket, it is necessary to have a bird's-eye-view of the structure and functioning of the Court. The Indian Constitution originally contemplated a Supreme Court consisting of a Chief Justice and a maximum of seven other justices, but also stipulates that the number of judges can be increased by Parliamentary enactment.<sup>2</sup> This number has increased significantly over the years. Most recently, in 2009, it was increased to thirty, in addition to the Chief Justice of India.<sup>3</sup> This radical transformation of the Supreme Court since its

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<sup>2</sup> The Constitution of India, 1950, Article 124(1):

*"There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges."*

<sup>3</sup> See Supreme Court (Number of Judges) Amendment Act, 2008. See also Supreme Court (Number of Judges) Act, 1956; Supreme Court (Number of Judges) Amendment Act, 1960; Supreme Court (Number of Judges) Amendment Act, 1977 and Supreme Court (Number of Judges) Amendment Act, 1986. Through these statutes, the sanctioned strength of Judges, including the Chief Justice, for the Supreme Court was effectively increased from 8 to 11 in 1956, to 14 in 1960, to 18 in 1977, to 26 in 1986, and to 31 in 2008.

inception in 1950 is perhaps the most visible mark of the struggle with the problem of an ever-expanding Supreme Court docket.<sup>4</sup>

Being such a large Court, it is not surprising that it never sits *en banc*.<sup>5</sup> Ordinarily, the Court sits in panels (or ‘benches’) of two or three judges.<sup>6</sup> At present, it is normal for twelve or thirteen benches to be constituted on an average working day. Two-Judge Benches are considered the norm, and it is often the case that there are only one or two Three-Judge Benches on a given day and sometimes none at all. The Chief Justice occasionally also constitutes larger benches of five or more judges, known as ‘Constitution Benches’. One significant constitutional mandate with respect to the constitution of benches is enshrined in Article 145(3) of the Constitution, which stipulates that any case involving a “*substantial question of law as to the interpretation of this Constitution*” shall be decided by a minimum of five judges.<sup>7</sup>

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<sup>4</sup> Of course, my underlying theme is that increasing the strength of the Court was not necessarily the right antidote for this complex problem. I argue that there are good reasons to believe this might have been unhelpful, and even counter-productive. A similar argument is advanced by Nick Robinson. See Nick Robinson, ‘Too Many Cases’ *Frontline* (3-16 January 2009) <<http://www.frontline.in/static/html/fl2601/stories/20090116260108100.htm>> accessed 30 April 2016.

<sup>5</sup> This was not the case in the earliest years of the Supreme Court, when the Court used to sit *en banc* for the purposes of judicial business.

<sup>6</sup> Per the mandate of the Supreme Court Rules, 2013 (and corresponding provisions in the now-repealed Supreme Court Rules, 1966), most matters are required to be heard by a bench comprising at least two judges. Some relatively simple procedural matters can be adjudicated by a single judge of the Court. See The Supreme Court Rules, 2013, Order VI.

<sup>7</sup> See The Constitution of India, Article 145(3):

*“The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:*

*Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than Article 132 consists of less than five judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for*

On account of the developments highlighted above, today's Supreme Court is not, in many senses, one Court. It is a polyvocal institution,<sup>8</sup> at almost any given moment of time dealing with - and speaking about - myriad disputes and issues; those with wide-ranging significance and those important only to the litigants themselves, constitutional or otherwise, factual questions and legal ones, discretionary Petitions and mandatory appeals, summary dispositions as also incredibly time-consuming 'merits' hearings, 'generalist' as well as 'specialist' judging. Not infrequently, the Apex Court is 'speaking' on all this - on any given day.

### ***I.B. Nature of the Docket Crisis - An Overview:***

The contemporary debate about the backlog of cases in India largely treats the judicial system as one whole. This can be understood in terms of the fact that severely over-stretched dockets are a familiar feature throughout the hierarchy of the Indian judiciary and that the problem is most acute at the lowest levels. Startling as the figures on case-pendency are in the context of the Supreme Court, they are dwarfed by the staggeringly high volumes of arrears in the civil and criminal courts of first instance, as also in the appellate courts.<sup>9</sup> The ubiquitous nature of the problem has had the unfortunate effect of conflating these very

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*opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion."*

<sup>8</sup> See Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61(1) American Journal of Comparative Law 173 at 184: "Speaking of the Indian Supreme Court is in many ways a misnomer. There is no one Court that speaks with a single voice in the way one might think of the U.S. Supreme Court. Instead, the separate panels of the court usually number no more than two or three judges. It is a polyvocal court."

<sup>9</sup> At the end of 2010, over 30 million cases were pending adjudication in India's lower Courts and High Courts. See Supreme Court of India, 'Summary: Types of Matters in Supreme Court of India' <<http://www.sci.nic.in/outtoday/summary.pdf>> accessed 8 May 2016.

different issues. This is certainly the case with respect to public-perception, where the arrears faced by the Supreme Court appear to merely be a part of the larger story of the institutional inadequacy of the judicial branch. But it also holds true with regard to institutional and academic responses to the docket crisis.

The natural consequence is that suggested reforms do not account for the Court's particular responsibilities, strengths and weaknesses as the apex constitutional court. Supreme Court arrears are perceived to lie outside the domain of constitutional law, and to pertain to narrower considerations of efficiency and resource-allocation. It is precisely this unstated assumption that this Chapter attempts to identify, flesh out and ultimately challenge.

Outside the domain of academic scholarship, the primary State-initiated reform that has been effected in the last decade is the increase, yet again, in the maximum permissible strength of judges on the Supreme Court. This measure, passed without a great deal of attention, appears to be regarded by the establishment as an almost self-evidently commonsensical response to the problem of the over-loaded docket. My reaction, developed in later portions of this Chapter, is very different. Anticipating my more detailed account below: the increase in the strength of the Court is: (all at the same time) an ineffective palliative, an unwelcome distraction and a magnifier of the underlying malady.

A core claim of this Chapter is that the burden being faced by the Supreme Court is, in significant part, the consequence of deliberate choices made by judges over a considerable length of time. To the extent that one can isolate a conscious judicial '*choice*', it is the willingness of judges to perform - at least sporadically - a routine error-correction role that does not appear to be doctrinally mandated. This claim requires a discussion of the types of



jurisdiction conferred on the Supreme Court, and the relative burdens imposed thereby,<sup>10</sup> which is addressed in Part II of this Chapter. The best summary of the role envisaged for the Supreme Court in the Constitution might be to say that it is expected to discharge many distinct, qualitatively diverse roles. It functions as an appellate court in certain circumstances, and Parliament can and does expand the Court's mandatory docket by ordinary legislation.<sup>11</sup> In addition, Article 32 grants it original jurisdiction over matters pertaining to the violation of the fundamental rights enshrined in Part III of the Constitution. Also, the President of India may request the Court for advisory opinions on important questions of 'law or fact' under Article 143.

In spite of the almost bewildering variety of roles assumed by the Supreme Court in varied contexts, it is a simple empirical reality that the bulk of the docket consists of cases filed under the Court's discretionary 'special leave' jurisdiction under Article 136 of the Constitution.<sup>12</sup> The Court has repeatedly asserted that Article 136 confers no right of appeal,

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<sup>10</sup> The claim could potentially be falsified if it transpired that the time of the Court was substantially consumed by matters which constituted part of its mandatory docket. Of course, there might still remain important questions with respect to efficiency and even the prioritization of different types of cases, but the question of whether the Court could have chosen to adjudicate fewer cases would then appear to be irrelevant.

<sup>11</sup> The Supreme Court's Annual Report for 2014 lists twenty one statutes which provide for an appeal to the Supreme Court. *See* Supreme Court of India, 'Supreme Court of India Annual Report 2014' <<http://sci.nic.in/annualreport/annualreport2014-15.pdf>> accessed 2 April 2016. These statutes cover a range of subjects including consumer protection law, taxation law and specialized regulatory areas such as telecom law and competition law.

<sup>12</sup> The Constitution of India, Article 136:

*"(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India..."*

It is clear that the vast majority of cases filed in the Supreme Court are either civil or criminal special leave petitions under Article 136. *See* Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10(3) *Journal of Empirical Legal Studies* 570 at 576. *See also* Annual Report 2014, *id.*, and Supreme Court of India, 'The Supreme Court of India Annual Report 2008-2009'

and is instead a reservoir of extraordinary constitutional discretion.<sup>13</sup> Illustratively, in *Bihar Legal Support Society v. Chief Justice of India*,<sup>14</sup> the Supreme Court observed as follows:

*“It may, however, be pointed out that this Court was never intended to be a regular court of appeal against orders made by the High Court or the sessions court or the magistrates. It was created as an apex court for the purpose of laying down the law for the entire country and extraordinary jurisdiction for granting special leave was conferred upon it under Article 136 of the Constitution so that it could interfere whenever it found that law was not correctly enunciated by the lower courts or tribunals and it was necessary to pronounce the correct law on the subject. This extraordinary jurisdiction could also be availed by the apex court for the purpose of correcting grave miscarriage of justice, but such cases would be exceptional by their very nature. It is not every case where the apex court finds that some injustice has been done that it would grant special leave and interfere. That would be converting the apex court into a regular court of appeal and moreover, by so doing, the apex court would soon be reduced to a position where it will find itself unable to remedy*

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<<http://www.supremecourtfindia.nic.in/annualreport/annualreport2008-09.pdf>> accessed 2 April 2016 (both Reports contain a discussion of the different types of jurisdiction exercised by the Supreme Court, and the observation that Article 136 is the provision most often resorted to). For reasons that have not been made clear, the Court did not publish such Annual Reports in the intervening years.

<sup>13</sup> See, for e.g., *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* (2004) 3 SCC 214 at para 33:

*“It is well settled that Article 136 of the Constitution does not confer a right to appeal on any party; it confers a discretionary power on the Supreme Court to interfere in suitable cases...[T]his Court would not under Article 136 constitute itself into a tribunal or court just settling disputes and reduce itself to a mere court of error. The power under Article 136 is an extraordinary power to be exercised in rare and exceptional cases and on well-known principles.”*

See also *Arunachalam v. P.S. Sadhanantham* (1979) 2 SCC 297; *Durga Shankar Mehta v. Thakur Raghuraj Singh & Ors* (1955) 1 SCR 267; *Kunhayammed v. State of Kerala* (2000) 6 SCC 359.

<sup>14</sup> (1986) 4 SCC 767.

*any injustice at all, on account of the tremendous backlog of cases which is bound to accumulate. We must realize that in the vast majority of cases the High Courts must become final even if they are wrong.*”<sup>15</sup>

The Chapter focuses, then, on how and why the Supreme Court has chosen to exercise its constitutional discretion in the expansive manner that it has. The effort is to construct a theory that explains the Court’s behaviour generally, while focusing on its discretionary jurisdiction. The present reality of a chronically over-burdened Court is, as I suggest, neither a historical inevitability nor primarily a resource-centric problem. It is, rather, the product of choices on the part of the judges of the Supreme Court; choices that were shaped and limited in significant ways by certain other factors (acknowledged elsewhere in this thesis), but nonetheless remained *conscious* choices. The overarching choice is an expansive and ambitious conception of its own mandate and capacity in a range of circumstances and contexts.<sup>16</sup>

Normatively, Part III of this Chapter argues that this conception of the Supreme Court, of its own role and capacity, is not only expansive but overly so, and not merely ambitious but unrealistically so. This overly ambitious role-conception, while in some ways natural or at least understandable, has nonetheless been profoundly counter-productive. Much of the expansion in the Court’s docket is not doctrinally compelled. If anything, it has

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<sup>15</sup> Id at para 3.

<sup>16</sup> I recognize that it might appear problematic to speak of one overarching ‘choice’ in the case of a Court comprising twelve or thirteen benches, and over a period of decades. This is undoubtedly something of a simplification, and I acknowledge these limitations at other points in the thesis. I analyse, for example, how the ambitious role-conception of the Court is often in tension with a rather different strain of common law incrementalism and modesty that is also to be found within India’s legal tradition.

developed in some tension to the black letter of the law.<sup>17</sup> Much of it has, I suggest, occurred without regard to the question of the Court's comparative advantage relative to other judicial institutions - or lack thereof - in addressing the issue at hand. Even assuming some degree of advantage, the actions of the Court have nonetheless prioritized run-of-the-mill decision-making over its core constitutional functions. Lastly, and critically, the gradual, almost imperceptible nature of this trend has effectively changed the manner in which the Court is viewed, from within as well as by the polity at large. The crisis of the over-burdened docket, then, comes to be accepted as an exogenous problem that the Court is valiantly struggling with, rather than being viewed as a product (at least in part) of conscious decisions and choices on the part of the Court itself.

Why do I assert that the Court's behaviour betrays a lack of consideration of the questions of constitutional priorities, as well as comparative advantage? The most basic answer is almost axiomatically true: because the primary responsibility of a constitutional court is to discharge 'constitutional' functions. The true picture is more complicated than that, of course, and some part of the latter half of this Chapter is devoted to an exploration of this issue. It is important, though, to note and separate the two distinct claims that I am making. *First*, the Court is devoting a considerable portion of its resources to the resolution of relatively mundane disputes, and there is reason to strongly doubt whether the Court has any degree of advantage, over the subordinate judiciary or the High Courts, in tackling these questions. *Second*, and even more crucially, even if it were true that the Court were marginally or significantly better (in any objective sense) in undertaking these judicial tasks, it would still be necessary to reckon with the significant *opportunity cost*. For a number of

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<sup>17</sup> See, for e.g., *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* (2004) 3 SCC 214 at para 33. See also *Bihar Legal Support Society v. Chief Justice of India* (1986) 4 SCC 767.

reasons that I elaborate upon below, the costs of the Court's excessive intervention are not being accurately perceived, acknowledged or accounted for.

Before proceeding further, however, it is worth noting two significant points in relation to that broader project. *One*, the fact that I have highlighted *conscious choices* on the part of judges as having contributed to the present, difficult situation should not lead to the somewhat facile assumption that the problem can necessarily be remedied by merely choosing to do so. For one thing, as I noted above, these judicial trends did not occur in a vacuum, but in the context of a mix of interests, incentives and ideologies. Also, the trend so far may very plausibly have created unique path-dependence problems<sup>18</sup> which tend to militate against any easy fix. Therefore, the exploration of possible remedies cannot be restricted to mere censure of these *choices*, but must encompass an evaluation of the institutional context within which such *choices* are made. Hence the need to, at least, consider the case for radical, institutional reform.

*Second*, the possibility of radical institutional reform has been raised before, although often in a less-than-considered manner. The Supreme Court itself advocated the creation of a separate Court of Appeals at one point,<sup>19</sup> although the suggestion did not gain traction, and it

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<sup>18</sup> See, for e.g., Stan J. Liebowitz and Stephen E. Margolis, 'Path Dependence' in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics, Volume I: The History and Methodology of Law and Economics*, <<http://encyclo.findlaw.com/0770book.pdf>> accessed 30 April 2016.

<sup>19</sup> See *Bihar Legal Support Society v. Chief Justice of India* (1986) 4 SCC 767. The Supreme Court held at para 3:

*"We think it would be desirable to set up a National Court of Appeal which would be in a position to entertain appeals by special leave from the decisions of the High Courts and the Tribunals in the country in civil, criminal, revenue and labour cases and so far as the present apex court is concerned, it should concern itself only with entertaining cases, involving questions of constitutional law and public law. But until any such policy decision is endorsed by the government, the apex court must interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by the apex court for the entire country or where*

is far from clear that it commanded the whole-hearted support of the Court itself. An alternative proposal advanced by Senior Counsel Mr. K.K. Venugopal envisages the splitting-up of the Supreme Court itself, with a bench at Delhi for constitutional matters, and regional benches in other cities for regular appeals.<sup>20</sup> Once again, this proposal too appears to assume that the *status quo* with respect to the Court's docket will largely persist in the future, and advocates such major structural reform as a means of '*managing*' the problem. As far back as in 1988, the Law Commission also cautioned that while incremental reform might be a safer and more desirable option, the rapidly increasing caseload would soon foreclose all but the most radical options for reform.<sup>21</sup> This warning appears prophetic today, and constitutes the broader context for this thesis.

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*there is grave, blatant and atrocious miscarriage of justice. Sometimes, we judges feel that when a case comes before us and we find that injustice has been done, how can we shut our eyes to it. But the answer to this anguished query is that the judges of the apex court may not shut their eyes to injustice but they must equally not keep their eyes too wide open, otherwise the apex court would not be able to perform the high and noble role which it was intended to perform according to the faith of the Constitution makers."*

<sup>20</sup> K.K. Venugopal, 'Towards a Holistic Restructuring of the Supreme Court of India' (R.K. Jain Memorial Lecture, 30 January 2010) <[http://www.thehindu.com/multimedia/archive/00112/R\\_K\\_Jain\\_Memorial\\_\\_112842a.pdf](http://www.thehindu.com/multimedia/archive/00112/R_K_Jain_Memorial__112842a.pdf)> accessed 30 April 2016.

<sup>21</sup> Law Commission of India, 'One Hundred Twenty Fifth Report on Supreme Court - A Fresh Look' (1988).

## II. A CRITICAL ANALYSIS OF THE COURT'S DOCKET CRISIS

*“It will not do to exalt an individual claim to particular justice over all other problems that adjudication may have to solve and over all other consequences that it entails. It is not justice for the Court to take unto itself, ad hoc, a function that it cannot, over the run of causes, perform with more benefit than harm to society.”*

– Alexander Bickel<sup>22</sup>

*“Sometimes, we judges feel that when a case comes before us and we find that injustice has been done, how can we shut our eyes to it. But the answer to this anguished query is that the judges of the apex court may not shut their eyes to injustice but they must equally not keep their eyes too wide open, otherwise the apex court would not be able to perform the high and noble role which it was intended to perform according to the faith of the Constitution makers.”*

– P.N. Bhagwati, C.J.<sup>23</sup>

### II.A. An Empirical Overview of the Docket Crisis:

The numbers speak for themselves in many ways. As on 1 March 2015, there were a total of 61,300 matters pending adjudication before the Supreme Court.<sup>24</sup> Of these, 33,182

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<sup>22</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> edn, Yale University Press 1986).

<sup>23</sup> *Bihar Legal Support Society v. Chief Justice of India* (1986) 4 SCC 767 at para 3.

<sup>24</sup> See Supreme Court of India, ‘Monthly Pending Cases’ (as on 1 March 2015) <[http://www.sci.nic.in/p\\_stat/pm01032015.pdf](http://www.sci.nic.in/p_stat/pm01032015.pdf)> accessed 7 May 2016.

matters were at some stage of preliminary hearing, while 28,118 cases awaited merits hearings (classified in the Court's terminology as 'miscellaneous' and 'regular hearing' matters, respectively).<sup>25</sup> The position with respect to arrears seems largely stagnant over the last couple of years, without a significant shift one way or the other.<sup>26</sup>

In 2010-11, a staggering 79,150 new cases were instituted in the Supreme Court.<sup>27</sup> An equally astonishing 79,621 cases were finally disposed off by the Court, leaving the backlog of pending cases largely untouched.<sup>28</sup> Nick Robinson demonstrates in his empirical work on the Court that the Registry's somewhat illogical method of compiling these statistics results in a peculiar form of double-counting, which implies that this number is higher than the actual reality.<sup>29</sup> Nonetheless, the position of a *status quo* with very high arrears, and the Court apparently barely keeping pace with freshly instituted matters, appears to be an accurate description of the position.

It has been calculated that the percentage of admission matters that are special leave petitions has ranged from the slightly lower level of 78-82 percent in the 1990s to 83-86 percent from 2005-2011.<sup>30</sup> The percentage of newly instituted matters which are appeals has dropped from about 3-8 percent in the 1990s to about 2-3 percent in the time period from

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<sup>25</sup> Id.

<sup>26</sup> As on 1 September 2012, there were a total of 63,749 cases pending adjudication in the Supreme Court. It is important to note that the effective number is significantly lower (though still very high) if 'connected' matters are counted as a single case. If connected matters are excluded, the figure of 63,749 stands reduced to 36,036. Of this figure of 63,749, 35,607 cases were at some stage of preliminary hearing, while about 28,142 cases awaited merits hearings. *See supra* note 9.

<sup>27</sup> *See* Supreme Court of India, The monthly statement of Pending Cases for the month of November, 2011 (on file with the author).

<sup>28</sup> Id.

<sup>29</sup> Robinson, *supra* note 12 at 576.

<sup>30</sup> Id at 583.



2005-2011.<sup>31</sup> Transfer, review and contempt petitions also constitute a small percentage of the docket at any point of time.<sup>32</sup>

As noted earlier, the Court dismisses the majority of the petitions filed under Article 136 of the Constitution *in limine*.<sup>33</sup> While the publicly available data (and the Registry's method of categorizing and storing the same) is not tailored to obtaining a precise understanding of this percentage, it has been estimated by Robinson that the Court accepts between fifteen percent and twenty-six percent of admission matters for regular hearing.<sup>34</sup> In recent work, the Vidhi Centre for Legal Policy [Vidhi] has estimated the percentage of such cases to be significantly higher,<sup>35</sup> but I believe Robinson's estimate presents the more accurate picture. While nothing in this thesis turns on a precise figure (for the Court's rate of intervention), I state at several points that the Court intervenes in routine special leave petitions sporadically, but sufficiently to alter its fundamental character - in what I describe as a critical mass of cases. My account - and my own broader understanding of the Court - fits more comfortably with Robinson's account of the manner and extent of intervention on the part of the Court. Therefore, I explore this issue in slightly greater detail in the next few paragraphs.

Vidhi's methodology, while representing an understandable and innovative effort to extrapolate data from the limited data publicly shared by the Supreme Court, is flawed in significant ways. Vidhi's methodology involved downloading the data available on the

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<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> See Alok Prasanna Kumar *et al*, 'Towards an Efficient and Effective Supreme Court: Assessing Issues of Backlog and Regional Disparities in Access' (Vidhi Centre for Legal Policy 2015) <<http://vidhilegalpolicy.in/reports-1/2016/2/8/towards-an-efficient-and-effective-supreme-court>> accessed 1 May 2016.

Court's website, by case number, and counting the number of cases in which two Advocates-on-Record are displayed in the online system.<sup>36</sup> However, as Vidhi acknowledges, this does not necessarily imply that the Petition or Appeal has been accepted for regular hearing (i.e. grant of leave in the case of petitions or admission of appeals in the case of statutory appeals). Rather, it simply means that at least one Respondent has entered appearance before the Court.<sup>37</sup> In this connection, Vidhi explains that it is fair to regard this matter as 'interference' on the part of the Supreme Court, since it implies that both sides are called upon to present their version of events, there is likely to be a certain amount of back-and-forth and the Court's time is significantly consumed in the process.<sup>38</sup>

In terms of the manner in which the Court handles its 'Monday, Friday' docket, this is not entirely unwarranted. As I argue below, for all the Court's interventionist tendencies, there is a marked reluctance to interfere in matters of a routine nature without glaring errors in the judgments of the Courts below. Issuance of notice, therefore, is strongly indicative of the Court's inclination to interfere in the matter, and likely implies that the Court will eventually grant leave or admit the appeal, as the case may be. That apart, the intuition also is that regardless of whether the Court formally admits matters for regular hearing, it is applying its mind to the dispute and may even, in the odd case, tweak the judgment of the lower court while otherwise declining to interfere. Nonetheless, the fact remains that Vidhi's estimate includes a (potentially very large) percentage of cases where

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<sup>36</sup> Id. The rationale is that, in cases dismissed *ex parte*, there would be no occasion for a second Advocate to have entered appearance before the Supreme Court (the filing Advocate's name would invariably be displayed in any filed matter). The presence of two Advocates would correspond to notice having been issued to one or more of the Respondents in the matter (and Counsel representing such Respondents having entered appearance before the Court).

<sup>37</sup> Id. As I explain below, it does not even necessarily imply that notice has been issued to the Respondents in the matter, since such Respondents might have filed caveats as a precautionary matter. *See infra* note 40.

<sup>38</sup> Id.

the Court has issued notice, but thereafter dismissed the Petition or Appeal without admitting the same for a regular hearing. To that extent, the estimate is not of, and should not be confused for, acceptance of matters for final hearing. Naturally, these numbers are higher than the estimates provided by Robinson.

But aside from the legal technicalities, it appears highly improbable that even minimal interference with lower court judgments (defining such minimal interference to mean anything besides a dismissal *simpliciter*) approaches fifty percent for any class of cases.<sup>39</sup> I believe Vidhi's data is likely to contain at least a certain number of 'false positives', being cases where caveats have been filed in the Supreme Court (in advance of the first hearing of the matter and without the issuance of notice).<sup>40</sup>

While the time consumed in adjudicating statutory appeals and other cases is not insignificant, it is evident that the substantial majority of the Court's docket is composed of special leave petitions (in both civil and criminal cases).<sup>41</sup> It is important to remember that, in terms of the practice of the Court, all fresh cases including special leave petitions are

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<sup>39</sup> Concerned that my own impressions of this matter might be blinkered, I interviewed several Advocates-on-Record at the Supreme Court of India with respect to this specific question. While not purporting to be able to identify a precise percentage, these Advocates were uniformly disbelieving of the assertion that the Court entertains anywhere close to fifty percent of special leave petitions. Fairly consistently, the perspective I received was that the Court dismisses far more Petitions than it accepts, but this number of acceptances is not an insignificant number. Two Advocates who hazarded a guess pointed to the range of 20-25 percent, fairly in tune with Robinson's empirical work (*supra* note 12). *See* Transcripts of Interviews with the concerned four Advocates in February-March 2016 (on file with the author).

<sup>40</sup> The authors of the Report believe that this set of matters is not likely to constitute a very large number, since the filing of caveats involves contacting a New Delhi-based Advocate-on-Record and may only be executed in high-stakes commercial cases. I believe the true picture is likely somewhat different, and the percentage of cases in which notice is issued is therefore significantly lower than the figures suggested by Vidhi. *See* Email correspondence with Mr. Alok Prasanna Kumar, Email dated 21 February 2016 (on file with the author).

<sup>41</sup> *See* Robinson, *supra* note 12 at 571-572.

considered in open Court, with an oral hearing provided to Counsel. Review Petitions and Curative Petitions are considered in chambers, unless otherwise directed by the Court.<sup>42</sup>

The analysis that follows is founded on this stark reality of present day practice in the Supreme Court. More broadly, much of this thesis is devoted to understanding the dynamics that have led to this paradoxical situation, with the Court obviously conscious that it cannot discharge an ‘error correction’ role of this nature, yet seemingly unable or unwilling to avoid accepting more cases of a relatively mundane character.

## ***II.B. Positive Analysis of the Court’s Over-burdened Docket:***

I now turn to the core of this Chapter: how and why has the docket of the Supreme Court continued to expand over the years, stretching the Court’s capacity to a breaking point? The analysis here is positive in nature, but interacts with - and sets the ground for - the normative argument that follows.

It is worth noting preliminarily that any generalization about a trend in the behaviour of the Court is inherently problematic, in view of the Court’s structural characteristics. A Court that routinely has twelve or thirteen benches operating at the same moment simply cannot be described with the same linearity as might be possible in the case of a constitutional court that sits *en banc*. The first hurdle, of course, is the sheer volume of cases that would have to be assessed to stake a claim to a comprehensive survey of the trend of the

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<sup>42</sup> The Supreme Court Rules, 2013, Order XLVII, Rule 3:

*“Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.”*

Court. But the difficulties are more far-reaching than that. Conceptually, it appears difficult to construct any measure of a ‘trend’ that is accurate and yet objective in some meaningful sense.<sup>43</sup> This difficulty is not unique to the present thesis though, and perhaps cannot be fully circumvented. For the present, I therefore bracket such objections and proceed to describe and analyse a trend that is hard to dispute.

In analysing and understanding the mix of factors that has resulted in the over-extended docket, no class of cases is more important than the discretionary ‘special leave’ docket of the Court. As seen above, special leave petitions constitute a vast majority of the total sum of cases filed in the Supreme Court each year.<sup>44</sup>

‘Special leave’ is a familiar concept in many common law jurisdictions.<sup>45</sup> Significantly, the essential concept is not dissimilar to the treatment of cert petitions in the US Supreme Court.<sup>46</sup> The jurisdiction is discretionary in nature and confers no right of appeal on the litigant.<sup>47</sup> The discretion to accept such cases for hearing on the merits is generally sparingly exercised, most often because the case raises a substantial question of law that

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<sup>43</sup> For a cautionary note about the perils of over-broad generalization (without a robust empirical basis) in legal and policy arguments, see Lee Epstein and Gary King, ‘The Rules of Inference’ (2002) 69(1) *The University of Chicago Law Review* 1.

<sup>44</sup> See Robinson, *supra* note 12 at 576. See also Annual Report 2014, *supra* note 11, and Annual Report 2008-2009, *supra* note 12 (as noted above, both Reports contain a discussion of the different types of jurisdiction exercised by the Supreme Court, and note that Article 136 is the provision most frequently resorted to).

<sup>45</sup> See generally Joshua Pringle, ‘Leave to Appeal and the Proposed Supreme Court of New Zealand’ (2003) *New Zealand Law Review* 71 (examining ‘leave to appeal’ provisions in the context of the highest courts in four different jurisdictions, and thereafter evaluating the provision suggested for the proposed Supreme Court of New Zealand).

<sup>46</sup> I expand upon this intuition in Chapter II, exploring reasons why the US Supreme Court’s treatment of its discretionary docket is so different from that of the Indian Supreme Court. See *infra* Chapter II, Part II.

<sup>47</sup> See Pringle, *supra* note 45.

courts below have diverged on.<sup>48</sup> In other words, the decision regarding the grant or denial of special leave is ordinarily premised on something other than, or at least in addition to, any legal wrong or injustice that might have ensued to the individual litigant in question.

In terms of black letter legal doctrine, India is not so very different.<sup>49</sup> Quite frequently, the oral observations of Supreme Court Justices make it clear that they are acutely conscious of the discretionary nature of the remedy, and disinclined to intervene to correct technical errors on the part of Courts below. Phrases such as ‘*We are not inclined to intervene under Article 136, Counsel*’ (or more tersely, ‘*Not under 136, Counsel*’) are frequently heard when special leave petitions come up for oral hearing for the first time. The obvious implication (sometimes spelt out explicitly, but more often left unsaid) is that the Supreme Court is not obligated to, and certainly does not, correct every technical or run-of-the-mill error on the part of courts below. But as I explain below, the Court entertains enough of these Petitions - what I characterize as a *critical mass* - that the nature and character of the Court is fundamentally impacted. I now turn to a more detailed analysis of the manner in which such Petitions affect not only the docket, but the broader character of the Court itself.

The high number of special leave petitions entertained by the Supreme Court is obviously a function of both the number of petitions filed, and the willingness of the Court, on average, to entertain any given petition. Given the variations in the types of petitions filed and considered under the Court’s special leave jurisdiction, it is necessary to understand the broad categories of cases involved.<sup>50</sup> One is what one might consider the *archetypal example*

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<sup>48</sup> See *id.*

<sup>49</sup> See *supra* notes 12 and 13.

<sup>50</sup> I do not assert that this typology is necessarily a very precise one. However, it is useful in understanding the very different types of cases entertained by the Supreme Court of India, all under the broad umbrella of its discretionary ‘special leave’ jurisdiction. These categories

of a special leave petition: a case genuinely raising ‘*substantial questions of law of general public importance*’. The subject matter of these petitions might range from conventional issues of constitutional law, to questions of statutory interpretation of first impression.<sup>51</sup>

The *second type* of special leave petition is one that is important from an instrumental perspective. This category evidently overlaps with the category of cases which raise significant questions of law, as well as the one which encompasses run-of-the-mill cases. Many constitutional challenges do have important socio-economic consequences, although there is another class of such cases whose impact might be only symbolic. Regardless of the practical importance, however, one would think that important constitutional issues should generally be resolved by the highest Court, unless there were powerful, principled reasons for ‘avoidance’.<sup>52</sup> It is the second subset that presents more interesting questions in the Indian context: cases that do not raise novel legal questions, but nonetheless have important societal consequences. Examples could range from a challenge to a criminal conviction (or acquittal) in the case of a particularly heinous or well-publicized crime, or factual disputes pertaining to environmental clearances granted to huge industrial projects. Often, these will not involve (even on the version of the litigants concerned) new or difficult questions of law, but will have significant societal consequences. The Supreme Court, in its present-day *avatar*, will face enormous pressure to intervene, and will often do so.

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will also be helpful in appreciating the analysis of doctrinal inconsistency undertaken in Chapter III. *See infra* Chapter III, Part II.

<sup>51</sup> Illustratively, any challenge to the constitutionality of legislation heard by a Division Bench of a High Court would ordinarily come to the Supreme Court by way of a special leave petition. It is true that such matters could also be brought in terms of a certification by the High Court that the matter involves a substantial question of law, but this practice has become almost extinct with the passage of time. *See* The Constitution of India, Article 132.

<sup>52</sup> *See generally* Bickel, *supra* note 22.

The *third type* of special leave petition is that which involves neither substantial questions of law nor disproportionately significant societal consequences. This class of cases is dominated by ordinary civil or criminal special leave petitions. A typical criminal petition would involve an attempt to seek review of concurrent findings of guilt by two courts below, or even of the denial of bail. A not-too-unusual civil petition might involve a challenge to what is claimed to be inadequate compensation for acquisition of property, or a dispute regarding seniority or the calculation of benefits with respect to public employment.

It is for this reason that it is challenging to accurately portray the Supreme Court's philosophy with respect to its discretionary jurisdiction. It is simply inaccurate, as an empirical matter, to assert that the Supreme Court routinely performs an 'error correction' function.<sup>53</sup> All the same, it does perform such an appellate function far more frequently, in absolute as well as in percentage terms, than is the case with other apex courts such as the US Supreme Court.<sup>54</sup> Even more importantly, it appears to perform the role of an appellate court frequently enough to fundamentally impact the manner in which it is perceived by the legal community as well as the public at large. Put differently, there is some critical mass of error correction that, once attained, changes the way in which the Court is viewed. This change in perception, as argued below, can be self-perpetuating in significant though intangible ways.

It is certainly true that the Court appears to grant considerable deference to the decisions and judgment of courts below. The Court often highlights (publicly, in the course of hearings) the discretionary nature of its jurisdiction under Article 136, and the fact that the litigant before it has no right of appeal. This deferential approach appears to be magnified when there are other legal principles (including evidentiary considerations) that warrant

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<sup>53</sup> See Robinson, *supra* note 12.

<sup>54</sup> Id.



deference to the outcome arrived at by the lower court. Illustratively, there is a general principle in Indian criminal law that an appellate court will be especially reluctant to overturn an acquittal, and that such a judgment will be upheld if it is ‘plausible’ even if the appellate court might independently have arrived at another view.<sup>55</sup> To take another example, the grant of bail is accepted to fall within the broad discretionary domain of a trial judge, and appellate courts afford a measure of deference to these decisions.<sup>56</sup> In all these cases, not surprisingly, the Supreme Court appears to be especially reluctant to play an ‘error correction’ role.

It is obviously hard to assess the extent to which this is an outcome of the ordinary deference which any appellate judge would apply, as opposed to being the effect of the discretionary nature of Article 136. I believe, however, that both factors operate conjointly, and significantly reinforce each other. That is certainly the case if one takes the observations of the judges themselves at face value. As noted above, judges are often heard to react along the lines of - “*Not in this kind of case, Counsel, and much less under Article 136*”.

Even in this category of cases (with respect to which the Court is most restrained), it is instructive to note how far the Court has wandered from the classical conception of special leave jurisdiction. Deferential review, after all, is still a species of review. The purpose of such review is still to correct errors on the part of the Court below, and the calibration of the degree of deference often an attempt to account for the likelihood that the lower court has an advantage with respect to some aspect of the adjudicatory process. Again, the common law instincts of the judges, quite apart from considerations of prudence and manageability, are probably at play here. It is unremarkable for judges to apply different standards of review (and correspondingly, different degrees of deference) to appeals brought forward from courts

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<sup>55</sup> See, e.g., *Darshan Singh v. State of Punjab & Anr* (2010) 2 SCC 333; *Tota Singh v. State of Punjab* (1987) 2 SCC 529.

<sup>56</sup> See, e.g., *State of Maharashtra v. Anand Chintaman Dighe* (1990) 1 SCC 397.

below. Quite apart from the constitutional context, procedural laws make clear distinctions between different types of jurisdiction that might be invoked by a higher court. Revisions and Appeals are treated very differently, for instance. Such an understanding of the Court's actions is aided by the fact that the Court does interfere in such cases, although infrequently so.

### ***II.C. Impact of such exercise of Discretionary Jurisdiction:***

As noted above, it is an empirical reality that the Supreme Court rejects a majority of these types of petitions. Nonetheless, the Court accepts enough - what this Chapter characterizes as a critical mass - that the perception of the Court and its functions is fundamentally affected. What are the considerations at play?

If error correction motivated interventions by the Supreme Court are infrequent but not unprecedented, turning to the Supreme Court is often worth the while of the desperate litigant. This is what H.M. Seervai meant when he observed that the Supreme Court's Article 136 jurisprudence encourages litigants to 'take a chance'.<sup>57</sup> This is particularly the case since approaching the Supreme Court, at least as far as Court fees are concerned, is not particularly expensive.<sup>58</sup> Legal fees would often be a greater financial burden, but even here, Advocates' fees vary widely and the Court runs a fairly effective Legal Aid program.

Another causative factor contributing to the high degree of filing of such cases is that motivations other than an expectation of outright legal success might be at play. Delaying the

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<sup>57</sup> See H.M. Seervai, *Constitutional Law of India*, vol 3 (4<sup>th</sup> edn, Universal Book Traders 1996) 2964-2965.

<sup>58</sup> Court fees in certain categories of cases have increased in terms of the recently-enforced 2013 Rules. The impact this has in the medium-term and long-term remains to be seen. See The Supreme Court Rules, 2013, Order VIII, Rule 8 read with Third Schedule.

inevitable is one such motivation: pendency may well delay the execution of an adverse judgment. Cognitive biases and irrational expectations might be further contributors.<sup>59</sup> Another important factor is a form of agency cost: the desire to safeguard the individual decision-maker within the larger entity from allegations that she failed to safeguard the larger institutional interest. This is especially potent in the context of Government-initiated litigation, which constitutes a huge chunk of the total volume of litigation in the Supreme Court and has often been highlighted as a substantial contributor to frivolous litigation. Anecdotal evidence suggests that much Government-initiated litigation is on account of such considerations. The Ministry of Law and Justice, Government of India has acknowledged this to be a significant problem, and has formulated a National Litigation Policy to try and address the same.<sup>60</sup>

Moreover, litigants are not the only ones whose expectations are shaped by the Court's behaviour. Civil society at large also keeps track of the Court's interventions, and expectations about the likelihood of future intervention are formed. This implies that when the Court declines to accept any matter which is of importance to a particular interest group or societal actor, it is taken as a reflection of the Court's approval of the decision of the Court below or, at the very least, of the Court's judgment that no egregious miscarriage of justice has ensued. The Court's own functioning is at least partly responsible for this state of affairs.

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<sup>59</sup> There is an extensive body of literature in Behavioural Economics documenting how individuals tend to be predictably over-confident about the correctness of their views and predictions in a variety of contexts. *See, for e.g.*, Cass R. Sunstein, 'Behavioural Analysis of Law' (1997) 64 University of Chicago Law Review 1175 at 1182: "*People's judgments about fairness are self-serving; people tend to be both unrealistically optimistic and overconfident about their judgments.*" (citation omitted).

<sup>60</sup> *See* Ministry of Law and Justice, Government of India, 'National Litigation Policy' <lawmin.nic.in/la/nlp.doc> accessed 8 May 2016.

Another facet of the Court's changing character is what might be described as partial modifications of the judgment of the court below. This happens in varied circumstances, but certain underlying characteristics remain the same. The Court upholds the bulk of the judgment of the court below, but alters or tweaks some aspect. To take a typical example, in a Petition filed against the denial of bail, the Supreme Court might uphold the denial of bail but direct that the trial be completed in a time-bound manner. This illustrative case is revealing. *Firstly*, it tells us something about the dynamics of oral argument. I said previously that special leave jurisdiction has more in common with 'cert' than often presumed; this is one of the ways in which it is different. Article 136 petitions are argued in open Court. 'Argued' is almost an overstatement; many are disposed of in short order, with the Counsel not being given the opportunity of uttering more than a couple of sentences. Nonetheless, in cases not entirely devoid of merit, an interesting dynamic plays out between the skilled Counsel and the over-worked judge. The lawyer's duty, of course, is to his client's legal interest, and not to the Court's docket as a whole. In cases that raise at least a plausible claim of legal error on the part of the Court below, the Counsel will understandably press hard. In some instances, the Court will succumb and 'issue notice' or 'grant leave'. Where it refuses to do so, however, a persistent Counsel might press for an alternative, lesser relief. The circularity involved in the process is worth highlighting; this is where the notion of critical mass of error correction becomes relevant. Once the Supreme Court has commenced (even if sporadically) a practice of correcting legal errors and rectifying the more egregious injustices that come before it, it is harder to keep the door shut. Like every persuasive lawyer, the Counsel in question is saying (in the most tactful way possible): '*Why not my client too?*'. The grant of partial relief is one outcome of this dynamic.

*Secondly*, this illustration demonstrates how the just resolution of the particular case has come to the forefront, inspite of the lack of any substantial question of law. This is

reflected in the fact that the Supreme Court is modulating the judgment of the Court below without really adjudicating the matter on the merits.

*Thirdly*, it exemplifies a potential problem with this manner of case-by-case justice-driven adjudication on the part of the highest Court. As the Court itself observed in the landmark *Uma Devi* judgment, the important question is: equity for whom, the individual litigant, or society at large?<sup>61</sup> This can be seen most clearly in cases where the Court, with the best of intentions, fast-tracks the criminal trial or civil litigation of the particular litigant before it. It has been highlighted that, given the reality of the over-burdened court system in India, this fast-tracking necessarily comes at the cost of some other litigant (unrepresented before the Court). In other words, the actions of the Court, even if well-intentioned, are unjust in their practical consequence.

Additionally, even if one omits consideration of the perverse injustice in the anonymous litigant being pushed further down the queue, it should still be clear that this is a peculiarly *ad hoc* response to larger systemic ills. It is, in other words, precisely the sort of response that is not expected of a constitutional court. It tells us much about the conflicting aims and objectives by which the Supreme Court is torn on a continuing basis, and which form a primary reason for the over-burdened docket.

In many of these cases, the Supreme Court is performing a fairly routine ‘error correction’ function. In a majority, there is not even an assertion on the part of the Court that it is resolving a previously unsettled question of law or adding clarity to an earlier muddy standard. Even with respect to the attitude of the litigant, there is often a sense that it is futile, perhaps even insulting, to suggest to the Court that there is a serious question of law to be

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<sup>61</sup> *State of Karnataka v. Uma Devi* (3) (2006) 4 SCC 1. I return to this important case in Chapter III, as part of my analysis of doctrinal inconsistency in the Supreme Court. *See infra* Chapter III, Part II.E.

resolved. The focus shifts instead to arguing how egregious the error on the part of the lower court is, which of necessity involves emphasizing how clear the legal standard is. The mirror-image contrast with a court like the US Supreme Court, which genuinely rejects any notion of being an ‘error correction’ Court, is striking.<sup>62</sup> As a US attorney with experience pleading and arguing before the Supreme Court once observed, the very worst way of drafting a ‘cert’ Petition before the US Supreme Court is to harp on the fact that the lower Court ‘erred’, for clear error perhaps implies that the legal question is not all that interesting to begin with!<sup>63</sup>

Let us assume that both factors - a prudential awareness of the limitations of the Court, and a policy preference that would require interference with the decision of the lower court - have some weight in the mind of a particular bench of the Court. It is plausible that a collective action problem<sup>64</sup> is responsible for the bench paying inadequate attention to the first factor. In the very nature of things, any bench is aware that independent action on its part will have little or no impact on the scale of the problem. Therefore, in the absence of any effective mechanism of coordinating their responses, it would be tempting for judges to under-value their concern about the docket, and over-value their subjective policy preferences.<sup>65</sup> In addition, given that these decisions are of a judicial nature, and in view of the formalistic orientation of the Indian legal profession, it is difficult (if not ethically problematic) for judges to coordinate their behaviour in any precise manner.

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<sup>62</sup> This telling contrast is explored in greater detail in Chapter II.

<sup>63</sup> This observation was made by Michael Scodro, the (then) Solicitor General of the State of Illinois, in his course on Supreme Court Litigation offered at the University of Chicago Law School (2010-11 Winter Quarter).

<sup>64</sup> See, for e.g., Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965).

<sup>65</sup> This is arguably a version of a ‘Tragedy of the Commons’ problem. See Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) *Science* 1243.

## ***II.D. A ‘Court of Justice’:***

The temptation, and tendency, for the Apex Court to at least sporadically play an ‘error-correction’ role is only magnified on account of its perceived role as a ‘Court of Justice’. Article 142(1) states that the Supreme Court “*may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it*”. What might this mean? What is the scope and ambit of Article 142(1)?<sup>66</sup> This question has an important bearing, for reasons elaborated below, on our understanding of the Supreme Court and its functioning.

In cases where the Court is weighing the possibility of intervening, there is another consideration that it takes seriously: the equities of the matter. The doctrine of the Court has been clear on the point that since special leave jurisdiction is an extraordinary, discretionary constitutional remedy; the equities of the case are of the utmost relevance. For this reason, the Court will ordinarily decline to grant leave to appeal in cases where the petitioner is technically right but morally culpable.

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<sup>66</sup> The Supreme Court has held that Article 142(1) of the Constitution grants it wide powers to mould the relief appropriately in matters before it, so as to ensure that ‘complete justice’ is rendered to litigants. *See Supreme Court Bar Association v. Union of India* (1998) 4 SCC 409 at para 47:

*“The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. ... It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to “supplant” substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly....”*

Insofar as drawing implications for the Supreme Court docket is concerned, this is another glass half-full/half-empty scenario. On the one hand, it might be thought that the imposition of another criterion - that of manifest injustice - to legal error could only help restrict over-liberal addition to the docket. On the other hand, justice and injustice become, once again, a function of the peculiar facts of the case at hand and a reflection of the reality that the Court is indeed discharging an error-correction function, even if it is one hedged with significant self-imposed qualifications. To take the point further, in the context of the US Supreme Court, while the nature of the plaintiff's case might sometimes be a factor in determining whether to 'grant cert' or not, it is more often entirely irrelevant. Other considerations, such as the existence of a Circuit-split, are overwhelmingly more important. In contrast, in India, the self-professed willingness of the Court to intervene to correct 'injustice' only furthers the dynamic analysed above.

The Supreme Court's jurisprudence with respect to public interest litigation has only accentuated this trend.<sup>67</sup> However, the manner in which public interest litigation contributes to the problem of the docket is less direct and more subtle than is generally thought. It is through the changing perception of the Court as an institution that is able to - and hence expected to - deliver individualized justice to aggrieved litigants. Thus, when the Supreme Court liberalized *locus standi* requirements for socially and economically disadvantaged sections of society approaching it under Article 32, it interpreted this provision in light of the substantive barriers to justice in a highly unequal society. However, it also signalled the Court's general willingness to take a proactive role in remedying individual grievances. This

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<sup>67</sup> On the Supreme Court's public interest jurisprudence, *see generally* Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4(1) Third World Legal Studies 107; Ashok H. Desai and S. Muralidhar, 'Public Interest Litigation: Potential and Problems' in B.N. Kirpal *et al* (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000).



approach has not been, and perhaps cannot be, confined to a particular jurisdictional provision, but generally permeates the Court's attitude towards a range of judicial problems.

### ***II.E. The Slippery Slope:***

The explosion in the docket of the Court does not end with statutory appeals and special leave petitions. Final judgments of the Court are not the end of the story. Litigants take liberal recourse to the right to have the Court review final judgments, in spite of very indifferent rates of success.

Article 137 of the Constitution provides that “[s]ubject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it”.<sup>68</sup> The Supreme Court only rarely exercises the power of review to set aside its own judgment. The legal position is also well-settled: A review petition cannot be an appeal in disguise, and should ordinarily be allowed only in the event of an ‘error apparent on the face of the record’, the violation of principles of natural justice or for some other such reason of an exceptional character.<sup>69</sup>

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<sup>68</sup> See also The Supreme Court Rules, 2013, Order XLVII, Rule 1:

*“The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule I of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.*

*The application for review shall be accompanied by a certificate of the Advocate on Record certifying that it is the first application for review and is based on the grounds admissible under the Rules.”*

<sup>69</sup> Id. See also Code of Civil Procedure, 1908, Order XLVII, Rule 1.

The practice of the Court is that review petitions - unlike special leave petitions or other classes of appeals - are considered through circulation in the chambers of the judges.<sup>70</sup> In addition, review petitions are invariably listed before the same judges who delivered the judgment sought to be re-opened, unless those judges are unavailable for some reason.<sup>71</sup> From a realist perspective, this is probably another reason which contributes to the low rates of success in review petitions.

In spite of the reluctance of the Supreme Court to interfere in exercise of review jurisdiction, review petitions are routinely filed. This poses the question of why litigants choose to pursue legal remedies that rarely yield favourable results. It may well be that the manner in which incentives for litigants play out at this point of time, are not significantly different from the reasons for a proliferation of special leave petitions in the first place. Costs in terms of court fees are very low, and it is rare for the Supreme Court to impose punitive costs when rejecting such petitions. For this reason, the average self-interested litigant finds it worthwhile to ‘*take a chance*’ with a review petition.

Until recently, a review petition before the Supreme Court was the last step a losing litigant could adopt, in an attempt to overturn an adverse judgment of the Court. That is no longer the case. In *Ashok Hurra*,<sup>72</sup> the Supreme Court revisited the question of whether it was constitutionally permissible to revisit the correctness of a judgment at the instance of the aggrieved litigant even after, and in spite of, the dismissal of a Review Petition in cases involving a ‘grave miscarriage of justice’. The Supreme Court weighed what it candidly acknowledged to be the competing considerations of the public policy interest in favour of

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<sup>70</sup> The Supreme Court Rules, 2013, Order XLVII, Rule 3, *supra* note 42.

<sup>71</sup> *Id.*

<sup>72</sup> *Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 SCC 388.

finality and certainty in litigation and the quest for justice.<sup>73</sup> In the end, a Constitution Bench of the Court held that the dismissal of a Review Petition cannot be an absolute bar to the Supreme Court granting relief in the ‘rarest of the rare’ case where grave and manifest injustice has ensued.<sup>74</sup>

Undoubtedly conscious of the slippery slope, particularly given the already overburdened docket, the Court laid down stringent guidelines respecting the conditions under which such petitions could lie.<sup>75</sup> The Court stipulated that such a petition, which it designated a ‘Curative Petition’, could be instituted solely on the ground of breach of fundamental principles of natural justice.<sup>76</sup> While pointedly refusing to be exhaustive in this regard, the Court did highlight two situations that would entitle a litigant to invoke the Court’s ‘curative’ jurisdiction.<sup>77</sup> These were breach of the two most widely-accepted facets of natural justice: the principles of *audi alteram partem* and that no man shall be a judge in his own cause.<sup>78</sup>

In the same breath, the Supreme Court also outlined significant procedural barriers to the invocation of the remedy. For a Curative Petition to be maintainable, or even accepted by the Registry of the Court in the first place, such a petition must be accompanied by a

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<sup>73</sup> Id at para 42.

<sup>74</sup> Id.

<sup>75</sup> Id at paras 52-53. While these binding limitations on resort to curative jurisdiction were laid down in *Ashok Hurra*, they have now been incorporated into the 2013 Rules. See The Supreme Court Rules, 2013, Order XLVIII.

<sup>76</sup> Id at para 51.

<sup>77</sup> Id.

<sup>78</sup> Id. To be clear, the breach contemplated is in the context of the Supreme Court’s own procedure while hearing the case in question. In other words, an aggrieved litigant is entitled to file a Curative Petition in case the allegation is that the Supreme Court violated a fundamental norm of procedural fairness, either by neglecting to hear an affected party or on account of bias rising to the level of a legal wrong.

Certificate authored by a Senior Advocate, affirming that the case falls within the parameters of *Ashok Hurra* and is a fit one for consideration under the Court's curative jurisdiction.<sup>79</sup>

In the decade since the Supreme Court first pronounced this new 'jurisdiction', it has apparently been successfully employed in only a couple of instances.<sup>80</sup> Evidently, therefore, it is not the cause (in any direct or tangible way) of the fast-expanding docket of the Court. Nonetheless, the very fact of creation of such an entirely new jurisdiction gives us important insights into the character of the Court, in the same way as the Court's approach towards special leave cases or review petitions helps us understand the institution.

*First*, the Court's focus on justice in an individual-centric sense, merits attention. In spite of the self-imposed limitations on the exercise of the jurisdiction, the fact remains that its use is contemplated in the rare cases in which grave and manifest injustice has ensued to the litigant in question. Of course, it remains possible that the invocation of curative jurisdiction will be coloured by considerations of societal welfare too. The Curative Petition in the matter of the Bhopal Gas tragedy, disposed of by the Supreme Court in 2011, is an excellent example.<sup>81</sup> The limited relief granted by the Court (while otherwise dismissing the petition) was probably influenced by the massive social suffering that ensued as a result of the accident, as also the abysmal failure of the Indian legal system in redressing the same. Nonetheless, the fact remains that the injustice contemplated in the Court's creation of this new jurisdiction is that suffered by the litigant in question; hence the focus on procedural unfairness. In that sense, it is fundamentally distinct from the normal manner in which constitutional courts correct perceived mistakes, which is to overturn past precedent.

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<sup>79</sup> Id at para 52. *See* The Supreme Court Rules, 2013, Order XLVIII, Rule 2(2).

<sup>80</sup> One example is *State of M.P. v. Sugar Singh & Ors* (2010) 15 SCC 96.

<sup>81</sup> *CBI & Ors v. Keshub Mahindra etc* (2011) 6 SCC 216.

*Second*, the very fact that the Court felt compelled to delineate new grounds for challenge of its own judgments, indicates perhaps that all is not well with the functioning of the Court. It is somewhat startling that such glaring violations of norms of procedural fairness could occur in the nation's highest Court, which is envisaged as a model of careful, deliberative reasoning and principled decision-making. This is as revealing, in its own way, as Mr. K.K. Venugopal's careful - and devastating - description of Supreme Court practice today.<sup>82</sup>

*Third*, it is instructive that the judicial response to the existence, or at least the foreseeability, of such grave departures from procedurally fair adjudication is the creation of yet another *ad hoc* layer of review. This point anticipates the more normative approach adopted subsequently in the Chapter,<sup>83</sup> but is worth noting here. The argument is that the insertion of yet another layer of review is a palliative, rather than a lasting cure, for a much deeper and more widespread malaise. It is ineffective at best, and quite arguably counter-productive. It plays a part in the wider narrative of the Supreme Court struggling valiantly with a massive case-load, and nonetheless going to extreme lengths to render justice in every case. As described earlier, the burden on Supreme Court justices is very real today.<sup>84</sup> The reason the narrative is questionable is because it views this burden as an immutable reality rather than something within the legitimate sphere of control of the Court itself.

*Fourth*, given the reality of the Court's over-burdened docket and the unsatisfactory quality of decision-making, the dynamic relationship between this and the possible further expansion of such additional layers of review merits consideration. After all, if these pressures have created this additional layer of review, however ineffectual it might be, there

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<sup>82</sup> See text accompanying *infra* note 101.

<sup>83</sup> See *infra* Part III.

<sup>84</sup> See *supra* Part II.A.

is no reason to assume that there now exists a stable equilibrium. This is particularly the case since the criteria delineated in *Ashok Hurra*<sup>85</sup> are explicitly clarified not to be exhaustive. If the *status quo* persists, there will remain alive a pressure to create and extend such *ad hoc* remedies. To the extent that this alleviates the pressure for broader and more sustainable institutional reform, as it appears to do, it is normatively undesirable.<sup>86</sup>

### III. NORMATIVE EVALUATION OF THE COURT'S EXPANDING DOCKET

In this section, I advance a normative analysis of the trend of the expanding docket. The argument is exploratory in nature, and much undoubtedly remains unsaid. The section proceeds along three distinct lines. *First*, I analyse the impact of the poly-vocal nature of the Court on the performance of its constitutional functions. *Second*, I argue that, even assuming the Supreme Court is likely to perform these judicial functions better than the Courts below, this phenomenon has resulted in a perverse and ultimately unsustainable situation, where important constitutional functions are subordinated to ordinary dispute-resolution functions. This is normatively troubling because the abdication of constitutional functions has larger, adverse systemic and political consequences than a scaling back on dispute-resolution functions would not involve. *Last*, I argue that there are strong reasons to doubt that the Supreme Court is likely to perform the error correction role it has assumed, better, or even differently, from the courts below. In fact, there are reasons to believe that, with respect to at least a subset of these functions, the Court's interventions do more harm than good.

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<sup>85</sup> *Ashok Hurra*, *supra* note 72 at para 50.

<sup>86</sup> Some of these concerns parallel arguments I make in the concluding section of this thesis, while evaluating proposals for reform such as the creation of an intermediate Court of Appeal between the Supreme Court and the High Courts. *See infra* Conclusion.

### ***III.A. Interventionism, Delays & the Counter-Majoritarian Problem:***

Leaving aside the general disquiet with the high volume of arrears and resultant delays, what impact does the high rate of intervention by the Supreme Court have on its reputational capital and hence its capacities and strengths more generally? Again, it is very difficult to consider the counter-factual situation of a less pro-active Supreme Court and speculate about how powerful an institution it might have been.

But the starting point has to be an acknowledgment that the Supreme Court, whatever its other shortcomings, has been extremely adept at countering what Bickel describes as the counter-majoritarian problem.<sup>87</sup> There is broad agreement about the fact that the Supreme Court enjoys a degree of credibility that is matched by few other institutions in the country.<sup>88</sup> Nor is it the case that it has failed to assert its independence or confront the government of the day in important ways. It is possible to assert that the Supreme Court's reinvention of itself as the 'good governance' Court has boosted its reputational capital. Arguably, this stock of reputational capital permits it to take more unpopular (or counter-majoritarian) stances when it feels compelled to do so.<sup>89</sup> Much of what the Supreme Court does in exercise of its discretionary jurisdiction - aided by resort to Article 142 of the Constitution - fosters its reputation as a 'Court of Justice', above the fray of partisan politics.

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<sup>87</sup> For Bickel's account of the counter-majoritarian problem, *see* Bickel, *supra* note 22.

<sup>88</sup> *See, for e.g.,* Kirpal *et al*, *supra* note 67. The contributors to the book constituted a veritable "who's-who" of the Indian Supreme Court bar and legal academia. As might be expected, the topics for the essays varied widely, covering almost the full spectrum of issues and controversies that the Apex Court had engaged with over the past 50 years. While the scholarship is by no means timid, and is often robustly critical in nature, it is fair to describe the overall tenor of the work as profoundly optimistic.

<sup>89</sup> There is a considerable body of literature on strategic judicial behavior by judges to maximize the reputation of the Court in question. *See, for e.g.,* Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12(1) *Chicago Journal of International Law* 115.

Part of the explanation is also that the Court retains great control over its docket, in spite of the fact that a superficial glance would indicate it has abandoned the discretionary nature of decision-making that is important for successful constitutional courts. The Chief Justice of India retains considerable discretion with respect to the listing of matters. Since judges are not required to give reasons for the adjournment of cases, it is difficult to definitely conclude that particular matters have been adjourned in the service of ‘passive virtues’.<sup>90</sup> Nonetheless, there are reasons to strongly believe that this is at least sometimes the case. An example is the long-pending challenge with respect to reservations (or quotas) in certain States exceeding the Supreme Court-mandated fifty percent limit. Arguably, this broad power is a safety valve that permits the Court to postpone (or mould) constitutional litigation that is potentially destructive.

With respect to the counter-majoritarian problem, therefore, I conclude on a relatively agnostic note. While the heavy burden of cases on the Court is troubling for a variety of reasons, it is hard to dispute that (whether because of or in spite of this heavy burden), the Court has adroitly walked the tightrope all constitutional courts confront in one or another form.

### ***III.B. Failure to Discharge ‘Constitutional’ Functions:***

I turn now to the second prong of the analysis, namely, that the prioritization of these dispute resolution functions has inhibited the Court’s performance of more important, constitutional functions. The most rudimentary version of this argument is almost axiomatically true, and an extension of widely shared beliefs about the important functions of

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<sup>90</sup> See generally Bickel, *supra* note 22.



a constitutional court: a constitutional court must interpret, enforce and otherwise act as the guardian of the constitutional text.

In terms of the mandate enshrined in Article 145(3), substantial questions of law as to the interpretation of the Constitution require adjudication by a bench comprising of at least five judges. Recent empirical research concerning the constitution of such benches gives important insights into the Court. *First*, many important issues of constitutional significance remain un-adjudicated for many years.<sup>91</sup> For instance, the Court's judgment in respect of the challenge to the constitutionality of the interrogation technique of narco-analysis, a challenge ultimately upheld by the Supreme Court, was delivered more than two years after the conclusion of oral arguments in the case.<sup>92</sup> Other constitutional cases of great importance have been delayed even longer. The issue of the basic structure challenge to the inclusion of legislation in the 9<sup>th</sup> Schedule to the Constitution - which was finally addressed in the *Coelho* judgment in 2007 - had been referred to a larger bench of the Court more than seven years earlier.<sup>93</sup> These examples demonstrate that the delays occasioned by the Court's overburdened docket are very real, and that they have a bearing not only on routine cases but on those involving issues of constitutional importance too.

There is another important aspect to the relative subordination of the Court's constitutional docket: The question of what issues are deemed to qualify as '*substantial questions*' relating to the interpretation of the Constitution. As shown below, there is little doubt that there has been a definitive, discernable trend against classifying questions as such. Admittedly, what constitutes '*a substantial question of law as to the interpretation of this*

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<sup>91</sup> See Nick Robinson *et al*, 'Interpreting the Constitution: Indian Supreme Court Constitution Benches since Independence' (2011) XLVI(9) Economic and Political Weekly 27.

<sup>92</sup> *Smt. Selvi & Ors v. State of Karnataka* (2010) 7 SCC 263.

<sup>93</sup> *I.R. Coelho v. State of Tamil Nadu & Ors* (2007) 2 SCC 1.

*Constitution*’ is not self-defining. As with the interpretation of any other provision of the Constitution, the meaning and ambit of this term itself requires consideration. Nonetheless, there are at least some examples in recent times of self-evidently novel constitutional issues that have been decided by smaller benches. A prominent example is the judgment delivered by Justice Katju, on the legality of euthanasia, which is very much an issue of first impression, but which was nevertheless decided by a bench of two judges.<sup>94</sup> Another example is the decision concerning the constitutionality of a State-sponsored militia being entrusted with counter-insurgency responsibilities in the state of Chhattisgarh.<sup>95</sup>

In a sense, it is difficult to fault judges for choosing to delve into an important and controversial issue, rather than relegating it to a Constitution Bench that might not be able to resolve it for several years. But again, notice the implicit assumptions at play here. The workload of the Court is somehow treated as a given, and what has to be modulated or adjusted is the manner in which the Court discharges its primary function of constitutional interpretation. What is surprising is how little attention this has attracted. In fact, the total pendency before the Supreme Court has made headlines to a greater extent, although much of this is speculative litigation devoid of any great merit. In other words, the character of the Court has changed to such an extent that its failure to discharge its constitutional functions has hardly attracted notice. More than anything else, perhaps, this ought to sound warning bells.

Normatively, this trend is troubling for several reasons. *First*, the Court has an unequivocal constitutional mandate, in the form of the procedure envisioned in Article

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<sup>94</sup> *Aruna Ramchandra Shanbaug v. Union of India* (2011) 4 SCC 454.

<sup>95</sup> *Nandini Sundar v. State of Chhattisgarh* (2011) 7 SCC 547.

145(3). It is arguable that judgments on important constitutional questions that do not conform to that procedure are void, or at the very least of dubious precedential value.

*Second*, there are important public policy considerations underlying the constitutional requirement. One is the simple fact that, on a Condorcet-type theory, it is plausible that a larger bench is more likely to get a decision ‘right’.<sup>96</sup> Given that the types of questions typically adjudicated by Constitution Benches are often of great importance - not merely from a constitutional perspective, but also in terms of their broader societal ramifications - the stakes involved in obtaining the ‘right’ result are likely to be very high. As such, it is necessary, and worthwhile, to impose such a constitutional requirement.

*Furthermore*, even if one abandons the (oftentimes unrealistic) assumptions necessary for Condorcet-type justifications to be valid,<sup>97</sup> the case for larger benches is, arguably, only fortified. Judging is often a deliberative exercise, and the opinions and views of fellow judges permeate the judicial philosophy of a judge in complex ways. It is at least plausible that the deliberative nature of constitutional adjudication, when a requirement akin to Article 145(3) is enforced, improves the quality of such adjudication. From an ideological or ‘attitudinal model’ perspective, it is likely that the presence of diverse viewpoints on a panel plays a role in moderating the ultimate decision of the Court.<sup>98</sup> To the extent that ‘extreme’ decisions are avoided, this could have the effect of mitigating backlash or ideological polarization.

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<sup>96</sup> For a basic summary of Condorcet’s Jury Theorem, see ‘Condorcet Jury Theorem’ in *Encyclopaedia of Mathematics* <[http://www.encyclopediaofmath.org/index.php/Condorcet\\_jury\\_theorem](http://www.encyclopediaofmath.org/index.php/Condorcet_jury_theorem)> accessed 8 May 2016.

<sup>97</sup> See *id.*

<sup>98</sup> The attitudinal model of judicial behaviour argues that judicial decisions are determined largely by the personal preferences of judges with respect to public policy issues. See Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993).

It has been argued here that the increasing tendency of the Apex Court to liberally exercise its discretionary jurisdiction has had the consequence of prioritizing run-of-the-mill dispute resolution over constitutional adjudication. To the extent that constitutional adjudication is simply delayed, the argument might appear strong. But insofar as the actual conduct of the average Constitution Bench case before the Supreme Court, the average observer (especially one acquainted with other constitutional courts) would scarcely consider the respective Counsel to be pressed for time. Important constitutional cases are routinely argued for days on end, and strict time limitations being imposed by judges relatively rare.

The entire approach of the Indian Supreme Court - rather a traditional common law Court in many ways - to the adjudication of constitutional questions is radically different from many other constitutional courts, including the US Supreme Court. Even in the context of important constitutional questions, judges may at the outset have little more than a vague idea of the legal issues at play, and are extremely unlikely to have actively researched applicable precedent.<sup>99</sup> Clearly, therefore, comparing the time taken during oral hearings by the Supreme Court to the practice of other courts is not a very meaningful exercise. And for the same reason, it would be wrong to conclude, merely from the rather leisurely pace of hearing of these matters, that the manner of adjudication is qualitatively satisfactory.<sup>100</sup>

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<sup>99</sup> In fact, judicial tradition at one time actively discouraged judges from reading the case papers prior to the hearing of the matter, on the theory that they were more likely to pre-judge the issues, without due regard to the arguments advanced during the oral hearing. In the contemporary context, it is the high burden imposed by routine Article 136 matters, which likely prevents judges from preparing better, in advance, for oral arguments in important final hearings. (There is obviously a vicious circle in operation here.)

<sup>100</sup> Thus, I have set aside the actual time spent by the Supreme Court on discrete matters, and considered instead, more holistically, how it approaches its adjudicatory functions.

For all of the above reasons, the prioritization of routine dispute resolution functions over the resolution of difficult constitutional questions is one of the most troubling consequences of the present state of affairs in the Court.

### ***III.C. Quality of Judging in the Court:***

It would be surprising if the heavy burden of arrears left the functioning of the Court and the quality of adjudication unaffected. And that is not the case. There is far-reaching agreement about the existence of an inverse correlation between the exploding docket and the ability of the Court to function normally. Mr. K.K. Venugopal, a distinguished Senior Counsel practicing in the Supreme Court, offers a vivid, first-hand description of the reality of contemporary Supreme Court practice in these terms:

*“We have, however, to sympathize with the judges. They are struggling with an unbearable burden. The judges spend late nights trying to read briefs for a Monday or a Friday. When each of the 13 Divisions or Benches has to dispose of about 60 cases in a day, the functioning of the Supreme Court of India is a far cry from what should be the desiderata for disposal of cases in a calm and detached atmosphere. The judges rarely have the leisure to ponder over the arguments addressed to the court and finally to deliver a path-breaking, outstanding and classic judgment. All this is impossible of attainment to a Court oppressed by the burden of a huge backlog of cases. The constant pressure by counsel and the clients for an early date of hearing and a need to adjourn final hearings which are listed, perforce, on a miscellaneous day i.e. Monday or a Friday, where the Court finds that it has no time to deal with*

*those cases, not only puts a strain on the Court, but also a huge financial burden on the litigant.*”<sup>101</sup>

This account of the Court, and many others, make clear that the over-burdened docket is in fact placing an unsustainable degree of pressure on judges, entrenching qualitative deficiencies.

*Secondly*, perhaps the most important consequence, in a functional sense, of the Court’s overburdened docket is that the constitution of a smaller number of benches is not considered a realistic possibility in the foreseeable future. A primary implication of the existence of a large number of benches is that the law is declared in multiple, diverse ways. This plausibly has the effect of lessening the signalling effect of judgments of the Court, and thereby causing increased uncertainty in the law. As I note elsewhere, collective action problems might also lead judges to take more cases than they might otherwise be inclined to.

In addition, it stands to reason that the scrutiny attracted by individual judgments is comparatively less, at least as far as the legal community is concerned. Less rigorous scrutiny implies that the fear of adverse reputational consequences in the event of sloppy judicial craftsmanship counts for much less than it might otherwise. It is commonly agreed in professional legal circles that long judgments in particular are often imperfectly edited.<sup>102</sup> Worse still, many instances of unattributed copying from previous judgments or other sources have come to light.<sup>103</sup> It is also unclear how much time judges are able to devote to

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<sup>101</sup> See Venugopal, *supra* note 20.

<sup>102</sup> See, for e.g., ‘The Indian Judiciary and Plagiarism’ (*Indian Constitutional Law and Philosophy*, 9 December 2015) <<https://indconlawphil.wordpress.com/2015/12/09/the-indian-judiciary-and-plagiarism>> accessed 3 May 2016.

<sup>103</sup> *Id.*

conferences with fellow judges, even while adjudicating significant cases.<sup>104</sup> Lack of clarity and lack of consistency with past precedent are inevitable side effects of this state of affairs. This is certainly related, to an extent at least, to the sheer work pressure faced by judges, and the fact that much of their time is devoted to resolving more mundane disputes.

What impact does the Court's assumption of what I characterize as an 'error-correction' role have on the broader legal system? To start with, it seems intuitively implausible that the Supreme Court would discharge its duties fundamentally differently from the courts below, given how similar the background and experience of the two classes of judges is. The Supreme Court bench is drawn almost-exclusively from the senior-most judges of the High Court.<sup>105</sup> In terms of professional or life experience, therefore, there is little reason to assume that some of these judges are likely to perform very differently from others, merely by virtue of the (near)-accident of having been elevated to the Supreme Court.

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<sup>104</sup> Over the years, there have often been complaints by judges regarding the lack of an opportunity to deliberate adequately with their colleagues. *See, for e.g., Medical Council of India v. Christian Medical College Vellore* (2016) 4 SCC 342 at para 10: "*Suffice it is (sic) to mention that the majority view has not taken into consideration some binding precedents and more particularly, we find that there was no discussion among the members of the Bench before pronouncement of the judgment.*" These observations were in the context of setting aside an extremely significant judgment passed by a Three-Judge Bench of the Court, which had invalidated the decision of the Medical Council of India to hold a common medical entrance examination for undergraduate medical education in India. While setting aside this judgment in review, the Court upheld the legality of this examination. Given the immense popularity of medical education in India, it is hard to emphasize enough the societal significance of such a decision (one way or the other). The larger point is that the lack of consultation, or deliberation, is not confined to relatively minor cases, but extends to such momentous matters too. The follow-up point is that if such procedural deficiencies arise, even if only occasionally, in significant matters, it may be presumed that these arise with at least the same frequency in less-scrutinized cases.

<sup>105</sup> For an excellent discussion of the historical trend relating to appointments to the Supreme Court, *see* Abhinav Chandrachud, 'An Empirical Study of the Supreme Court's Composition' (2011) 46(1) Economic and Political Weekly 71.

The rejoinder to this objection would be a reminder that the Court intervenes in only a minority of Petitions for relief, and rejects the vast majority.<sup>106</sup> Is it not equally consistent with the evidence, then, that the Court is actually undertaking a sophisticated ‘sorting’, and intervening only in the minority of cases that reveal egregious error? *First*, even if it is correct that a number of such cases of ‘clear error’ are identified through this process, the costs of this approach are far from negligible. For example, the very volume of intervention implies that each, discrete intervention attracts less attention. To the extent that we believe one of the primary functions of an Apex Court is to exercise some manner of supervisory control over lower courts, the ‘signalling’ impact of such intervention is greatly diluted. *Second*, the Court normally considers a large number of cases before finally deciding which ones fall within the narrow parameters that justify interference. The delay and uncertainty caused with respect to that larger class of cases, pending the Court’s final decision, is a significant cost that tends to pass unnoticed.

*Second*, the work pressure on the Court - a direct outcome of the trend described above - should induce some scepticism about the ability of the Court to perform even the limited task described above. Elsewhere in this Chapter, I have described the stark reality of the average Monday or Friday in the Supreme Court today.<sup>107</sup> It seems improbable that, burdened with around fifty to sixty complicated cases on any given day, the Court can perform the difficult balancing act it appears to be attempting.

*Third*, these doubts about the Court’s capacity (relative to the courts’ below) are only magnified when one considers the fact that lower courts are likely to have an ‘information advantage’ (often of an intangible nature), as well as a degree of specialization, in

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<sup>106</sup> See Robinson, *supra* note 12.

<sup>107</sup> See *supra* note 101.



adjudicating localized issues. In light of the fact that India has a single, unified judiciary; this consideration does not attract much attention. However, this may well be a more significant factor than is generally acknowledged.

An important factor weighing on the other side of this argument is that local judges might be felt to be more susceptible to interest group inducements or pressures of a narrow or parochial kind. Hence, the Supreme Court - with the benefit of distance and insularity - is likely to be in a position to render better, more-considered judgments. In the very nature of things, the magnitude of such a problem is hard to ascertain or weigh with any degree of accuracy. Nevertheless, there are reasons to believe both that this is a significant problem in certain High Court Bars, and that the Supreme Court views it as such.<sup>108</sup> Even so, it is difficult to conclude that a greatly enhanced rate of intervention under Article 136 is an appropriate response. *For one thing*, there are other responses - of a systemic or institutional nature - that are arguably more effective.<sup>109</sup> *Second*, even assuming that some percentage of decisions appealed against are motivated by considerations considered illegitimate, one would have to consider the Supreme Court's ability to accurately identify these cases. *Third*, the very volume of interventions makes the tool rather ineffective (in terms of correcting the lower court, or deterring it from such a course of action in the future). Put differently, if the Court's error-correction function was infrequently exercised, and then only as a form of severe judicial rebuke where *mala fides* is suspected; the remedy might have greater efficacy. As things stand, this simply does not seem to be the case.

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<sup>108</sup> In recent years, for example, the Supreme Court collegium (which is effectively responsible for all appointments to the higher judiciary) has followed a strict policy of appointing Chief Justices of the various High Courts from amongst the senior judges of other High Courts, and not the High Court in question. Since this requires these senior judges to relocate themselves at some personal cost, it is obviously considered important enough to justify such personal inconvenience.

<sup>109</sup> See, for e.g., id.

#### **IV. CONCLUSION**

In this Chapter, I have argued that the present crisis in the Supreme Court's docket is neither a historical inevitability nor primarily a resource-centric problem. Rather, it is very much a product of conscious choices on the part of the Court and its judges: choices that were shaped and constrained in significant ways by external circumstances, but which nonetheless remained conscious choices. Moreover, the path adopted by the Court is neither doctrinally compelled nor obviously beneficial in any instrumental sense. While the Court has retained its place as one of the few institutions in the Indian polity which commands a high degree of credibility and trust, the consequences of the uncontrolled expansion in its docket are deeply troubling. It is in this backdrop that there is an urgent need to explore and debate mechanisms of remedying this trend; and possible models for reform. That task is one that positively cries out for attention, and constitutes the broader context for the remainder of this thesis.

## CHAPTER II

### APPLES AND ORANGES? DOCKET CONTROL IN THE INDIAN SUPREME COURT AND LEARNING FROM THE US EXPERIENCE

#### I. INTRODUCTION

Comparative constitutional law scholarship has, in recent years, devoted a greater degree of attention to structural and institutional factors, and the interrelationship between such factors and the legal or doctrinal functioning of constitutional courts.<sup>1</sup> More particularly, scholarship has also analyzed the modes of docket control of constitutional courts in comparative perspective. In certain contexts, the possibility of structural reform has been suggested to counter perceived problems in the concerned court, and in light of broader international experience.

In Chapter I, I have analysed the crisis of arrears facing the Indian Supreme Court, and argued that the problem is not a historical inevitability or a resource-centric problem, but the product of conscious choices made by the justices of the Court, choices shaped and constrained by a host of important factors.<sup>2</sup> Why has the Indian Supreme Court's docket evolved and expanded as it has, and how might things have been different?

In a causal story that involves so many moving parts, a definitive understanding is hard to establish with any degree of certainty. In this Chapter, therefore, I approach the matter from a somewhat different perspective, and through a comparative lens. I look at a Court - the

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<sup>1</sup> See, for e.g., Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing Limited 2011) chs 15, 16 and 33.

<sup>2</sup> See *supra* Chapter I, Part II. For an earlier version of the argument, see Rishad Ahmed Chowdhury, 'Missing the Wood for the Trees: The Unseen Crisis in the Supreme Court' (2012) 5 NUJS Law Review 351.

Supreme Court of the United States - where the state of affairs is indeed different, markedly so. And I then ask what is similar and what is different, and also what has changed over time. Should we compare the structure and functioning of the Supreme Courts of India and the United States, though? Is it meaningful to do so, or are the Courts so fundamentally different as to render such a comparison unhelpful?<sup>3</sup>

The appellate jurisdiction exercised by the US Supreme Court is entirely discretionary in nature, with a minor exception which is of little practical consequence. Rule 10 of the US Supreme Court Rules makes it clear that review ‘is not a matter of right, but of judicial discretion’ and that a petition ‘will be granted only for compelling reasons’.<sup>4</sup> The Rule further

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<sup>3</sup> See, for e.g., Vicki Jackson, ‘Methodological Challenges in Comparative Constitutional Law’ (2010) 28 Penn State International Law Review 319; Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 American Journal of Comparative Law 125. The somewhat different approaches taken by Mark Tushnet and Ran Hirschl with respect to the methodology of selecting cases for comparison are instructive. See Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006). One key takeaway is that ‘difference’ is just as plausible a criterion as ‘similarity’ for selecting a case study for the purposes of comparison. This is so, of course, if the ‘difference’ is of a nature that helps shed light on the jurisdictions being studied. In other words, if it has explanatory power.

<sup>4</sup> Rule 10 of the Rules of the Supreme Court of the United States, 2013 reads as below:

*“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:*

*(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;*

*(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;*

*(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

states that the character of reasons capable of persuading the Court to grant cert include a conflict in decisions of courts of appeal or state courts of last resort on important questions of federal law. Lastly, and critically, it is stated that a petition is ‘rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law’.<sup>5</sup>

In contrast, the Indian Supreme Court does exercise mandatory appellate jurisdiction in a variety of circumstances, and in a fairly large number of cases. It is a simple empirical reality, however, that the bulk of the Court’s docket comprises petitions filed under its discretionary ‘special leave’ jurisdiction.<sup>6</sup> Moreover, the Court has emphasized that it does not view its special leave jurisdiction as serving an ‘error correction’ function. There must be something more, the Court has proclaimed time and again - the High Court must, ordinarily, serve as the final court of appeal. Thus, while an exact parallel cannot be drawn, the two Courts do operate similarly in this respect, particularly in a pragmatic functional sense.

The question that arises is: if the bulk of the docket in each of these two Courts arises from the discretionary jurisdiction, why are they so very different? Why is one struggling mightily with arrears, yet seemingly unwilling or unable to stem the tide of cases? Why is the other seemingly content to take fewer cases than it could comfortably adjudicate? The most obvious answers, and the most conventional explanations of judicial behaviour, fail to make sense of this seemingly counter-intuitive pattern. This is the core question, or puzzle, that motivates the present Chapter.

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*A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”*

<sup>5</sup> Id.

<sup>6</sup> See The Constitution of India, 1950, Article 136. See also Nick Robinson, ‘A Quantitative Analysis of the Indian Supreme Court’s Workload’ (2013) 10(3) Journal of Empirical Legal Studies 570.

The Chapter is divided into five parts, inclusive of this Introduction. Part II summarizes the very different scenarios with respect to current case arrears in the US and Indian Supreme Courts, and the trend that has led to this situation. Part III undertakes an analysis of various dimensions (or factors) on which the two Courts can be compared, and which go towards explaining the very different situation with respect to docket control in the two jurisdictions. In the first section, I highlight five structural or institutional factors: the structure of the Court and nature of jurisdiction exercised, the appointment process for judges, the procedures governing the adjudication of cases, costs and court fees and the nature of the legal profession. The second section of Part III pivots directly to the overriding factor at play - the institutional culture in the two jurisdictions and the manner in which these structural and other factors interact with, and affect, the prevalent institutional culture and the broader docket control process. Part IV sounds a cautionary note, setting out certain methodological as well as substantive limitations - reasons why it is not clear that it is easy for India to learn from the US experience. A short concluding Part follows.

## **II. CONTRASTING TALES - DOCKET CONTROL IN INDIA AND THE US**

As I have written in Chapter I, the explosion in the Indian Supreme Court's docket is both staggering and counter-intuitive.<sup>7</sup> Received theories as to the reasons for the rapid increase in the docket - and consequential corrective measures taken - appear to be incorrect. The almost four-fold increase in the number of judges on the Court from its inception in 1950<sup>8</sup> went hand in hand with a steady increase in arrears. The relegation of the Court's

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<sup>7</sup> See also Chowdhury, *supra* note 2.

<sup>8</sup> See The Constitution of India, Article 124(1). See also Supreme Court (Number of Judges) Amendment Act, 2008.

constitutional docket to a distant second priority has not helped matters much.<sup>9</sup> As I conclude in Chapter I, this is not, then, a resource-centric problem and merely augmenting ‘judicial resources’ without anything further is likely to be counter-productive.<sup>10</sup>

The two Courts are undeniably different in certain important respects. One has nine justices, with this number having stayed constant for a very long time. The other has as many as thirty-one, with the number of justices having increased, in spurts, from eight in 1950.<sup>11</sup> One sits *en banc* for all oral arguments; the other never *en banc*, and ordinarily in benches of two (or three) justices, with five or more justices sitting together only for matters of unusual importance.<sup>12</sup> One has had a total of 112 justices over the two-and-a-quarter centuries that it has existed; the other has had more than that number in just over six decades.<sup>13</sup> One selects (through a non-public voting process) less than a hundred cases a year for hearing on the merits, from the about ten thousand petitions filed - despite this relatively small number of hearings, rules governing all aspects of the hearings including time limits are clearly

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<sup>9</sup> With respect to the Supreme Court’s constitutional docket, see Nick Robinson *et al*, ‘Interpreting the Constitution: Indian Supreme Court Constitution Benches since Independence’ (2011) XLVI(9) Economic and Political Weekly 27.

<sup>10</sup> See also Chowdhury, *supra* note 2.

<sup>11</sup> It should be noted that while the maximum strength of the Indian Supreme Court is thirty-one (including the Chief Justice), the Court generally functions at less than full strength. At the present moment, for example, the Court comprises twenty-five judges. See, ‘Hon’ble The Chief Justice of India & Hon’ble Judges’ <<http://sci.nic.in/judges/judges.htm>> accessed 30 April 2016.

<sup>12</sup> For a general description of the Court’s practices and procedures, see Chowdhury, *supra* note 2. See also Raju Ramachandran and Gaurav Agarwal (eds), *B.R. Agarwala’s Supreme Court Practice and Procedure* (6<sup>th</sup> edn, Eastern Book Company 2002).

<sup>13</sup> The names of the former justices, and the forty-two former Chief Justices, of the Indian Supreme Court are available on the Court’s website. See ‘Retired Hon’ble Judges’ <<http://sci.nic.in/judges/fjud.htm>> and ‘Retired Hon’ble The Chief Justices’ of India’ <<http://sci.nic.in/judges/rcji.htm>> accessed 30 April 2016.

delineated and rigorously enforced.<sup>14</sup> The other hears all appeals and special leave petitions in court (even if very briefly), and admits thousands of these to be heard on the merits.<sup>15</sup>

Nonetheless, there are ways in which the two Courts have been in the past, and to an extent continue to be even today, fundamentally similar in many significant ways. Both judicial systems have their origins in the English common law, though their respective jurisprudence has evolved in the years since they gained independence from British rule.<sup>16</sup> Both Courts are, and are widely recognized as being, exceedingly influential in the political and social life of their respective polities.<sup>17</sup> Both are relatively strong institutions that appear to command a high degree of confidence among the citizenry of their nations.<sup>18</sup> Both exercise – and this is exceedingly important – jurisdiction that is largely discretionary (that is, to a great extent, the two Courts ‘choose’ which cases they wish to adjudicate).<sup>19</sup> Significantly, also, while the Indian Supreme Court today looks rather different from the US Supreme Court from a structural perspective, these differences are in themselves largely the product of time. The 1950s’ version of the Indian Supreme Court, with a maximum strength of eight justices, was not dissimilar to the US Supreme Court (then and now).

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<sup>14</sup> See Lawrence Baum, *The Supreme Court* (11<sup>th</sup> edn, CQ Press 2012).

<sup>15</sup> See *supra* Chapter I, Part I.

<sup>16</sup> In the Indian context, see K.G. Balakrishnan, Chief Justice of India, An Overview of the Indian Justice Delivery Mechanism, International Conference of the Presidents of the Supreme Courts of the World, Abu Dhabi, 23-24 March 2008 <[http://www.supremecourtfindia.nic.in/speeches/speeches\\_2008/abu\\_dhabi\\_\\_as\\_delivered.pdf](http://www.supremecourtfindia.nic.in/speeches/speeches_2008/abu_dhabi__as_delivered.pdf)> accessed 30 April 2016.

<sup>17</sup> For the Indian Supreme Court, see B.N. Kirpal *et al* (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000). In the US context, see Baum, *supra* note 14.

<sup>18</sup> *Id.*

<sup>19</sup> In the US context, see *supra* note 4. With respect to India, see The Constitution of India, Article 136. See also Chowdhury, *supra* note 2.



Turning to the US, there is a considerable body of literature about how and why the Supreme Court exercises ‘cert’ jurisdiction in the manner that it does.<sup>20</sup> The Court - for a while now - has been accepting less than a hundred cases a year for hearing on the merits, from the many thousands of petitions filed. Various institutional factors have been highlighted as contributing towards the Court’s low rate of grant of ‘cert’, inspite of the decreasing workload over the years.<sup>21</sup> Explanations point to strategic behaviour of judges to avoid difficult cases, or substantive outcomes that might be unpalatable to the justices from an ideological perspective. Certain scholarship that blends a descriptive and normative approach argues that the act of ‘not deciding’ is sometimes critical to a constitutional court, and helps the Court in avoiding open confrontation with the political branches of government without sacrificing the rule of law.<sup>22</sup> The role of judicial clerks is also highlighted, and the fact that risk-averse clerks are likely to reflexively recommend denial of cert.<sup>23</sup> The (almost-complete) abolition of mandatory appellate jurisdiction for the Supreme Court, over a period of time, is also pointed to.<sup>24</sup>

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<sup>20</sup> See generally H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press 1994); Arthur D. Hellman, ‘The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket’ (1983) 44 *University of Pittsburgh Law Review* 521; Arthur D. Hellman, ‘Error Correction, Law Making, and the Supreme Court’s Exercise of Discretionary Review’ (1983) 44 *University of Pittsburgh Law Review* 795; William T. Coleman, Jr., ‘The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes’ (1983) 52 *Fordham Law Review* 1; Arthur D. Hellman, ‘The Shrunk Docket of the Rehnquist Court’ (1996) *Supreme Court Review* 403; Margaret Meriwether Cordray and Richard Cordray, ‘The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection’ (2004) 82 *Washington University Law Quarterly* 389.

<sup>21</sup> See Perry, *id.*

<sup>22</sup> See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> edn, Yale University Press 1986).

<sup>23</sup> David R. Stras, ‘The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process’ (2007) 85 *Texas Law Review* 947.

<sup>24</sup> See Hellman, ‘Selection of Cases for the Plenary Docket’ and Hellman, ‘Error Correction’, *supra* note 20.

It has been argued that the types, and number, of cases entertained by the US Supreme Court is heavily affected by strategic considerations and structural and institutional factors, and less by the Court's ability to handle the numbers in some mechanical sense.<sup>25</sup> At the same time, a number of observers and scholars have expressed puzzlement at the Court's relatively small docket<sup>26</sup> and argued that more robust review of lower court decisions would be normatively desirable.<sup>27</sup> It has been argued that the US Supreme Court takes fewer than the optimal number of cases, in a sense abdicating its responsibility to lay down the law clearly for the courts below. The shrinking docket of the Court, some argue, is also unnecessary in that the Court seemed able to cope with a larger number of cases a few years previously. From a different perspective, it has been argued that - if the Supreme Court is indeed handicapped by constraints of time and resources from hearing a higher number of cases - the solution is perhaps to permit the Court to sit in panels, instead of *en banc*, as is presently the case.<sup>28</sup>

Assuming, though, that the size of the Court and its sitting *en banc* are both set in stone (which from a realistic perspective is probably the case), it is still undeniable that the Court could hear a greater number of petitions on the merits. For some reason or the other,

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<sup>25</sup> See Perry, *supra* note 20.

<sup>26</sup> At his Senate confirmation hearing for the position of Chief Justice of the United States Supreme Court, then Judge Roberts (cautiously) expressed the view that the Court could consider taking more cases than it did. As a matter of fact, since he assumed the office of Chief Justice, that has not happened. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing before the Committee on the Judiciary, United States Senate, One Hundred Ninth Congress, First Session, 12–15 September 2005 <<https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>> accessed 30 April 2016, 309 and 337.

<sup>27</sup> For an argument that the Court's certiorari procedures are not, in fact, objective and neutral but systemically discriminate against claims brought by Indian tribes, see Matthew L.M. Fletcher, 'Factbound and Splitless' (2009) 51 Arizona Law Review 933.

<sup>28</sup> See Tracey E. George and Chris Guthrie, 'Remaking the United States Supreme Court in the Courts of Appeals' Image' (2009) 58 Duke Law Journal 1438; Tracey E. George and Chris Guthrie, "'The Threes': Re-Imagining Supreme Court Decision-Making' (2008) 61 Vanderbilt Law Review 1861.

this is not happening. How and why this *status quo* persists in the US, while the dynamics in India are so very different, is one of the questions later sections of the Chapter seek to grapple with.

The fact is that a very large number of petitions are filed before the US Supreme Court, and a very small fraction (less than one percent) accepted. Therefore, in searching for an explanation, our focus must return to the behaviour of the justices, and all the things it is influenced by. To start with, it should be remembered that it requires four votes to grant ‘cert’ on a Petition. From a strategic perspective, however, it seems logical that the four justices who thought that a lower court decision was wrong and should be reversed would nonetheless refrain from voting to grant ‘cert’, if they thought the rest of the Court was firmly aligned against them (and thus the principle enunciated by the lower court would likely be elevated to the level of binding Supreme Court precedent, were the case to be accepted).

What of the rest of the Court, then? Various factors would influence their decision, of course, and it must be borne in mind that individual preferences might not always prevail, in light of the perceived choices of other justices and the need to strategize accordingly.<sup>29</sup> Even the five justices who happen to agree with the lower court’s disposition of the matter might vote to hear the matter, but only if they were confident in the views of their fellow justices, and the case was a priority for them. Particularly in cases where the range of opinion (or perceived opinion) among the justices runs across a wide gamut, it is plausible that risk-averse justices might vote to deny cert. It bears emphasis that this account should not be understood as neglecting the importance of norms and practices governing the grant or denial of cert. One way of looking at this might be that the prevalent, institutionally accepted principles (broadly enshrined in Rule 10) help to significantly narrow the set of cases where

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<sup>29</sup> See Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998).

the grant of cert is a plausible possibility, and it is then that the more strategic considerations come into play at all.

There is literature arguing that judges respond to the same incentives as other working persons; hard work (at least beyond a point) is a disincentive,<sup>30</sup> and this may help explain the reluctance to expand the Court's docket.<sup>31</sup> I think prioritization of judicial time is a somewhat more nuanced (and intuitively correct) way of viewing the matter. Hard working or not, there are a finite number of hours in the day, and judges have different ways in which they can employ their time. In the Indian context, there is little doubt that the quality of judicial opinions suffers on account of the enormous pressure under which judges work.<sup>32</sup> As I write elsewhere in this Chapter, in some intangible but definitive manner, the Court's responsibilities as a constitutional court appear to have been subordinated to the day-to-day pressures, to what Indian Supreme Court legal practitioners refer to as the 'Monday, Friday' culture. In the US, I believe, the general institutional culture of the Court has prioritized different aspects of the judicial decision-making process. The reduced docket, then, if not an

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<sup>30</sup> See Richard A. Posner, 'What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) 3 Supreme Court Economic Review 1; Lee Epstein *et al*, *The Behaviour of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press 2013).

<sup>31</sup> I must confess to approaching this proposition with some scepticism. Certainly in the world of Supreme Court Justices (whether in the US or India), laziness does not seem to be an attribute you would associate with most persons who have risen to occupy the office. A similar point is made by Rene Cohn Jubeliler. See Rene Cohn Jubeliler, 'The Behavior of Federal Judges: The "Careerist" in Robes' (2013) 97(2) *Judicature* 98 <[http://law.duke.edu/sites/default/files/centers/judicialstudies/Judicature\\_Article\\_CohnJubeliler.pdf](http://law.duke.edu/sites/default/files/centers/judicialstudies/Judicature_Article_CohnJubeliler.pdf)> accessed 30 April 2016.

<sup>32</sup> Many observers have highlighted the challenges in maintaining a consistent quality in judicial decision-making while coping with the burden of arrears faced by the Indian Supreme Court. See K.K. Venugopal, 'Towards a Holistic Restructuring of the Supreme Court of India' (R.K. Jain Memorial Lecture, 30 January 2010) <[http://www.thehindu.com/multimedia/archive/00112/R\\_K\\_Jain\\_Memorial\\_\\_112842a.pdf](http://www.thehindu.com/multimedia/archive/00112/R_K_Jain_Memorial__112842a.pdf)> accessed 30 April 2016.

imperative, is at least a comfortable equilibrium for the Court and its justices, with no apparent pressing need for change.

Vicki Jackson has perceptively observed that, given the complexity of correctly discerning causation in comparative constitutional law, it may be easier to draw negative conclusions from the experience in other jurisdictions than positive ones.<sup>33</sup> Put differently, comparative constitutional law scholarship might well have a hard time prognosticating whether a particular measure would work, if introduced in a particular jurisdiction, given the varied and complicated social and cultural factors at play. It might, however, be at least somewhat easier to forecast that a particular step will create difficulties, on account of past experiences in other countries.<sup>34</sup> This insight appears relevant in the present context. Whatever else the Indian experience does or does not establish, it certainly suggests that the phenomenon of increasing arrears in a constitutional court is but an aspect of a larger and complex dynamic, and cannot easily be controlled merely by modulating the size of the Court in question.

Understanding the dynamics at play cannot be complete without attention to the procedural aspects of decision-making, and it is to this that I now turn. If one single factor is to be highlighted for why the two Courts function as very different institutions, this would probably be the number of judges on the Court, nine versus a maximum possible of thirty-one.<sup>35</sup> The size of a Court has some obvious, and many more uncertain, ramifications for the

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<sup>33</sup> See Jackson, *supra* note 3 at 321.

<sup>34</sup> I share Jackson's intuition though, as she acknowledges herself, it is not obvious why this should necessarily be the case. One possibility is that this is not particular to comparative constitutional law, but relatable to a broader epistemic point. That it is easier, in other words, to confidently (and with good reason) predict that some innovation or initiative will fail than to predict the opposite.

<sup>35</sup> In the context of the US Supreme Court, we might recall the historical sequence of events relating to President Roosevelt's strong disagreement with decisions of the Court and his subsequent effort to increase the Court's size. It is generally agreed that President Roosevelt's

functioning of the Court, and for the jurisprudence it develops. Intuitively, the more the number of judges on a Court, the less, it would seem, is the significance or influence exerted by each individual judge. Much also depends on the procedural norms governing the constitution of benches and the hearing of cases, but it might seem that this inverse relationship would hold true in most scenarios. Take a case where two constitutional courts both sit *en banc*, but one has a larger number of judges. (One could compare the US Supreme Court and the South African Constitutional Court, for example.) This would seem to be the easiest case to conclude that the ‘marginal’ influence of each judge is relatively less. For one thing, the larger the composition of a Court, the lower the likelihood that an individual judge will tilt the balance between two conflicting viewpoints or judicial ideologies. Crude numerical permutations and combinations apart, other things being equal, an individual judge is less likely to be able to influence colleagues during oral arguments or internal discussions in a larger group.

Now consider a situation where judges ordinarily sit in panels (or benches). The influence exerted by each individual judge on a two-judge or three-judge panel would be high, but since the panel considers only a fraction of the total matters coming before the Court, and the relative influence of each judge is therefore lower. The phenomenon is of

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efforts to increase the size of the Court to include sympathetic justices proved extremely costly for him from a political standpoint. The consequence of this, or at least the consequence relevant for my present purpose, is that the strength of the Supreme Court is set in stone. It is politically unthinkable for any American President to propose an increase in the strength of the Court. While I note that recent developments following the death of Justice Scalia would suggest that it is feasible for the Senate to refuse to confirm a President’s nominee (thereby not allowing the Court to regain its full strength), the actions of the Republican Senate majority have been subject to significant criticism. It also appears to be the position of the Republican Senate majority that the next President (from whichever party) should nominate a candidate for the vacancy, who will then be considered. The size of the Court, therefore, appears to be fixed - and the present eight-member Court is something of an aberration.

course likely to have other consequences too, such as a potential rise in inconsistency, and I will return to that at a later point.

When we compare the US and India, matters are still more complicated, since the Courts diverge on both counts. The Indian Supreme Court has more than three times the number of judges, but sits (mostly) in benches of two judges. Each judge of the Indian Supreme Court, therefore, has a significant say in the matters before him or her, but these would be a small fraction of the docket of the Court. In the US Supreme Court, in sharp contrast, each judge would have a role in every matter heard on merits, but less chance of swinging the operative decision of the Court. In the Indian case, this aspect (the limited influence of each judge) is only magnified when it is kept in mind that the tenure of the average Supreme Court judge in India is a fraction of the tenure of a US Supreme Court justice. Again, the significance and potential contribution of each individual judge might seem to pale somewhat.<sup>36</sup>

But is that really the right way to look at the institution? If the ideological make-up of the persons making up the Court is homogenous, then this superficial impression is perhaps misleading. This understanding, while logically possible, is significantly incomplete without a consideration of important intangible factors, particularly the cultural context and the ideology (real and perceived) of the respective Courts. I write more about ideology below, but briefly summarize the argument here. The US Supreme Court is an ideologically polarized and closely-divided Court.<sup>37</sup> This reality, while a historical contingency, does for the present magnify the significance of every judge of the Supreme Court (and therefore

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<sup>36</sup> A similar argument is put forward by Abhinav Chandrachud. See Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014) 162-163.

<sup>37</sup> See, for e.g., Richard Posner, 'Foreword: A Political Court' (2005) 119 Harvard Law Review 32, 39.

every judicial nomination to that Court). The Indian Supreme Court is different. While probably just as ideological in its own way, the form of binary ideological division that characterizes the US Supreme Court is absent today. It is likely that this factor, too, works in the same direction – the influence of each individual judge of the US Supreme Court, at least in an instrumental sense, is greater than is the case for their Indian counterpart. This was not always the case. The Indian Supreme Court was, for a time, polarized in a fashion that could be quite-closely analogized to the US Court today, though the issues in question were of course very different.<sup>38</sup>

Path dependency, and the self-fulfilling nature of certain courses of action, is important in this context. Strategic behaviour on the part of repeat players leads to cases not being brought before the US Supreme Court when the time is not right, and to avoid an adverse decision that might hold the field for decades. It was too soon, for example, held conventional wisdom amongst liberals, for the same-sex marriage question to be litigated before the Court – hence the criticism for the two prominent litigators who decided to take the risk.<sup>39</sup> In the Indian context, given the diverse types of jurisdiction exercised by the Court (including original jurisdiction to safeguard fundamental rights),<sup>40</sup> it is relatively harder to coordinate strategically in order to avoid approaching the Court at an inopportune time.

In the following section of the Chapter, I highlight certain dimensions, or factors, through which the two Courts can be analysed. These factors, working in tandem, help

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<sup>38</sup> See generally H.M. Seervai, *Constitutional Law of India*, vol 2 (4<sup>th</sup> edn, Universal Book Traders 1996) ch XVII; T.R. Andhyarujina, *The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* (Universal Law Publishing Company 2011); P. Jagamohan Reddy, *The Judiciary I Served* (Orient Blackswan Private Limited 2014).

<sup>39</sup> See Mary Ziegler, ‘The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle’ (2012) 39(2) Florida State University Law Review 467.

<sup>40</sup> See The Constitution of India, Article 32 and Part V, Chapter IV.



establish a distinctive and unique institutional culture for each of these Courts. It is, in the final analysis, this institutional culture which helps illuminate how the underlying dynamics with respect to docket control work so differently.

### **III. THE TWO COURTS COMPARED - INSTITUTIONAL CULTURE AND THE DOCKET CONTROL PROCESS**

The comparative analysis undertaken in this section attempts to demonstrate that conventional explanations of the dynamics affecting the respective dockets have limited explanatory value, and the less-explored version forwarded by me in the context of India, has greater salience. The factors along which the two Courts are analysed are: the structure of the Court and the nature of jurisdiction exercised, the appointment process for judges, the procedure governing the adjudication of cases, costs and court fees, and the nature of the legal profession.

Evidently, these factors are not, and cannot be, exclusive of one another in any meaningful sense. Nor do I claim that each of them is equally important, in general or to the particular questions I seek to explore. What I do assert is that each contributes, in smaller or larger part, to that intangible, ever-so-important overarching factor - the 'institutional culture' prevalent in the two Courts. For that reason, my analysis of what I describe as the institutional culture in the two Courts - with a focus on the docket control process - concludes this section of the Chapter.

### **III.A. Structural and Institutional Factors:**

#### **i. Structure of the Court and nature of jurisdiction exercised:**

Article III of the US Constitution establishes the Supreme Court.<sup>41</sup> Section 2 of Article III states that the judicial power shall extend to cases and controversies arising under the US Constitution, federal law, treaties, and in certain other enumerated cases.<sup>42</sup> The original jurisdiction of the Supreme Court comes into play in extremely few cases, and the Court's docket is primarily that of an appellate court.<sup>43</sup> The nature of cases entertained by the US Supreme Court has changed significantly over the years. To a large extent, this is on account of the elimination, in stages, of the mandatory appellate jurisdiction of the Court - the Court now has mandatory appellate jurisdiction in only a single area of the law, and this

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<sup>41</sup> The Constitution of the United States of America, 1789, Article III, Section 1:

*"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."*

<sup>42</sup> Id, Article III, Section 2:

*"The judicial Power shall extend to all Cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime jurisdiction; to Controversies to which the United States will be a party; to controversies between two or more States; - between a State and Citizens of another State; - between citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."*

<sup>43</sup> Id, Article III, Section 2:

*"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make."*

contributes negligibly to its docket.<sup>44</sup> The overwhelming portion of the docket comprises discretionary ‘cert’ petitions, where a minimum of four justices have to vote to have the petition heard on the merits.<sup>45</sup>

The appellate docket of the US Supreme Court is entirely discretionary, with an insignificant exception. The present *status quo* has come about as a result of several legislative changes over the decades, which gradually restricted the mandatory appellate docket of the Court.<sup>46</sup> Therefore, the time of the Court is primarily occupied in dealing with discretionary ‘cert’ Petitions. As discussed in Part II above, Rule 10 of the US Supreme Court Rules details the factors relevant to considering whether to grant ‘cert’ or not, and four votes are required for the Court to hear the Petition on the merits.

In India, the Supreme Court exercises mandatory appellate jurisdiction with respect to a certain set of cases, which evidently contributes to the docket to some extent. Further, the mandatory appellate docket of the Court has expanded to an extent over the years, with Parliament having provided for statutory appeals to the Supreme Court in varied circumstances.<sup>47</sup> A deeper analysis, however, reveals that the mandatory nature of the docket cannot, at least directly, be regarded as the primary cause for the over-burdened docket. As I point out elsewhere, it is a simple statistical reality that the bulk of the pendency in the Indian

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<sup>44</sup> The category of cases in which the Supreme Court was required to hear appeals was reduced by the Judiciary Act, 1891 and the Judiciary Act, 1925. For a discussion of this historical trend, see John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (Little, Brown and Company 2011) ch 1.

<sup>45</sup> For a general discussion of the ‘rule of four’, see John Paul Stevens, ‘The Life Span of a Judge-Made Rule’ (1983) 58 New York University Law Review 1.

<sup>46</sup> See The Judiciary Act, 1891 and The Judiciary Act, 1925.

<sup>47</sup> See, for e.g., The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, s 2; The Competition Act, 2002, s 53T; The Electricity Act, 2003, s 125.

Supreme Court comprises discretionary special leave petitions, where the petitioner has no right to appeal and the judges are - theoretically - free to dismiss the petitions *in limine*.<sup>48</sup>

Does the US Supreme Court engage in what may be described as routine error-correction? The answer is that it may sometimes do so, but infrequently, and certainly not enough to affect what I characterize as the ‘centre of gravity’ of the Court.<sup>49</sup> Summary reversals of the decisions of lower courts are perhaps the best example of this. But again, and most significantly, this is newsworthy in the US mostly because it is so rare.

In and of itself, therefore, the nature of the jurisdiction exercised cannot explain the significant differences in the approach of these two constitutional courts to their respective dockets. In one sense, this is self-evident. Since the jurisdiction exercised is discretionary, judges are relatively free to make their own determinations in this connection, and how they exercise these choices is likely dependent on other factors. I explore some of these other significant characteristics of the two Courts in succeeding paragraphs.

## ***ii. The Appointment Process:***

The process for appointment of federal judges in the US is both rigorous and public. The US Constitution gives the President the power to appoint federal judges, but also requires the consent of the Senate, and judges so appointed then enjoy life tenure.<sup>50</sup> In recent years,

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<sup>48</sup> See Chowdhury, *supra* note 2.

<sup>49</sup> See, for e.g., Posner, *supra* note 37 at 37. (“*The Court has long emphasized that it is not in the business of correcting the errors of lower courts; cases that come to it have already had at least one tier of appellate review, which should be enough to reduce the error rate to a tolerable level. It is plain from the statistics...that the Court is indeed out of the error-correction business, and this is a clue to how far it has departed from the conventional model of appellate jurisdiction, and should prepare us to accept its basically legislative character.*”)

<sup>50</sup> See The US Constitution, Article II, Section 2.

the process has become both longer and more controversial, particularly for appointments to the Supreme Court.<sup>51</sup> The failed nomination of Robert Bork for the position of Associate Justice on the US Supreme Court is often said to have marked the advent of a new, and significantly more politicized, appointment process.<sup>52</sup> Numerous Court of Appeal nominees regarded in professional circles as well-qualified, have failed to pass the process, often because they are perceived to be either too ‘liberal’ or ‘conservative’, as the case may be.<sup>53</sup> The degree of scrutiny, unsurprisingly, only increases when it comes to the Supreme Court. The four newest appointees to the Supreme Court – two by a Republican President and two by his Democratic successor – were all confirmed by relatively narrow (and partisan) majorities in the Senate, though each of them was highly regarded in their respective professional circles.<sup>54</sup> Given that the Court has only nine justices, who enjoy life tenure, vacancies in the Court, naturally, arise infrequently (Presidents Clinton, George W. Bush and Obama – all two-term Presidents – have each appointed two judges to the Court). The politicized nature of the appointment process has perhaps only been accentuated on account of the fact that the Court is today narrowly divided on many of the most contentious issues that arise for consideration, with Justice Kennedy often being regarded as the ‘swing’ vote.<sup>55</sup>

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<sup>51</sup> Considerable information about the judicial nomination and confirmation process is available on the Judicial Nominations webpage of the American Constitution Society. See <[www.judicialnominations.org](http://www.judicialnominations.org)> accessed 30 April 2016.

<sup>52</sup> See generally Norman Vieira and Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* (Southern Illinois University Press 1998).

<sup>53</sup> See Dahlia Lithwick, ‘Extraordinary Hypocrisy: How Republican Senators justified their decision to kill the nomination of Goodwin Liu’ (*Slate*, 19 May 2011) <[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/05/extraordinary\\_hypocrisy.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/extraordinary_hypocrisy.single.html)> accessed 30 April 2016.

<sup>54</sup> See Geoffrey R. Stone, ‘Understanding Supreme Court Confirmations’ (2010) *Supreme Court Review* 381.

<sup>55</sup> See, for e.g., Geoffrey R. Stone, ‘The Behavior of Supreme Court Justices when their Behavior Counts the Most’ (American Constitution Society for Law & Policy: Issue Brief

The Indian Constitution stipulates that judges of the Supreme Court are to be appointed by the President of India (and so, effectively by the political executive) after consultation with the Chief Justice of India and such other judges as he may deem necessary.<sup>56</sup> As a result of a line of Supreme Court judgments in the 1990s, the procedure followed has undergone a significant change.<sup>57</sup> Judges of the Supreme Court as well as the High Courts are presently appointed on the recommendation of a collegium of senior judges of the Supreme Court. While the political executive can return a recommendation for reconsideration, in the event of the collegium reiterating its recommendation, the executive is bound by that decision.<sup>58</sup> The collegium system of appointment has been controversial, both for how it came into being and for how it has worked in practice.<sup>59</sup> After a few years when the political executive seemed to acquiesce in the existence of the collegium system,<sup>60</sup> a serious attempt was made to replace the collegium system with a National Judicial Appointments Commission [NJAC], with the relevant Constitutional Amendment attracting

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September 2013) <[http://www.acslaw.org/sites/default/files/Stone\\_-\\_Behavior\\_of\\_Justices.pdf](http://www.acslaw.org/sites/default/files/Stone_-_Behavior_of_Justices.pdf)> accessed 1 May 2016.

<sup>56</sup> The Constitution of India, Article 124(2).

<sup>57</sup> See *Supreme Court Advocates-on-Record Association & Ors v. Union of India* (1993) 4 SCC 441; *In Re Special Reference* (1998) 7 SCC 739.

<sup>58</sup> *Id.*

<sup>59</sup> See Lord Cooke of Thorndon, 'Where Angels Fear to Tread' in Kirpal *et al*, *supra* note 17.

<sup>60</sup> See *In Re Special Reference* (1998) 7 SCC 739, para 11: "We record at the outset the statement of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."

wide support across political lines.<sup>61</sup> However, with the decisive invalidation of the NJAC by a Constitution Bench of the Supreme Court in 2015, the collegium system stands revived.<sup>62</sup>

The process governing appointments is relatively non-transparent. While the seniority criterion is certainly significant, there are other factors at play too. One author, after an empirical analysis of the appointments made to the Court, has argued that there are essentially three factors governing appointment to the Supreme Court - age, seniority and diversity.<sup>63</sup> Even if these informal, unwritten criteria are taken to be correctly identified, there is much that remains unknown about the decisions taken by the collegium, and the reasons underlying the same.<sup>64</sup>

Many factors arguably combine to help explain why the appointment of judges in the Indian Supreme Court is much less public than is the case in the US Supreme Court. One, the very fact that the vacancies that arise in any given year are greater than in the case of the US Supreme Court is likely to diminish interest in such appointments.<sup>65</sup> Second, the fact that the collegium-driven process is relatively closed naturally reduces the information available to the news media, and consequently the level of reporting of such appointments. While the normative implications of this would be significant (though not necessarily easy to discern),

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<sup>61</sup> See The Constitution (Ninety-Ninth Amendment) Act, 2014 and The National Judicial Appointments Commission Act, 2014. See also The Constitution of India, Article 368.

<sup>62</sup> See *Supreme Court Advocates-on-Record Association & Anr v. Union of India* 2015 SCC OnLine SC 964.

<sup>63</sup> See Chandrachud, *supra* note 36 at 263-264.

<sup>64</sup> Well-reputed Judges are sometimes not elevated to the Supreme Court, though they have seniority on their side. Judges have sometimes been elevated without having been Chief Justice of a High Court, and it is not known what special considerations were in play.

<sup>65</sup> For example, 2014 saw more retirements than the entire strength of the US Supreme Court, with perhaps a tenth of the public attention a confirmation hearing before the US Senate commands. See Harish V. Nair, 'Supreme Court set for a retirement squeeze: Ten of the 15 senior-most judges set to retire this year' *India Today* (16 February 2014) <<http://indiatoday.intoday.in/story/most-of-the-senior-most-sc-judges-set-to-retire-this-year/1/343758.html>> accessed 30 April 2016.

there are consequences for our particular enquiry too. The most significant aspect, in my view, is the rapid turnover in the strength of the Court, and the relatively short tenure for all judges. This, along with the large number of benches of the Court, implies that the ability of any one judge (even the Chief Justice) to bring about meaningful change is severely limited.

**iii. *Procedures governing the adjudication of cases:***

Procedures governing oral arguments and the hearing of cases vary widely in the Indian and US Supreme Courts. In the US Supreme Court, all merits hearings are by the Court sitting *en banc*, and the calendar for merits hearings is circulated much in advance. Time limits are strictly enforced, and each litigant's Counsel ordinarily afforded half-an-hour to argue their case. This half-hour time is further limited by the fact that the justices question the Counsel relentlessly, often not allowing Counsel to develop their rehearsed arguments to any significant extent. It is theorized, and certain justices have candidly conceded, that oral questioning is often intended for fellow justices more than the Counsel to whom it is actually addressed.<sup>66</sup> Questioning, it is said, is a way of signalling to their brethren their thoughts about the case, arguments that might be attractive and possible ways of ruling.<sup>67</sup>

In the Indian case, it is necessary to remind ourselves that we are speaking of what is - from a functional perspective - almost two different institutions. The Supreme Court, while hearing appeals and petitions on admission days, functions very differently from when it hears final appeals. On admission days, anywhere between fifty-sixty matters are routinely

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<sup>66</sup> See, for e.g., Stephen L. Wasby *et al*, 'The functions of Oral Argument in the U.S. Supreme Court' (1976) 62 Quarterly Journal of Speech 410.

<sup>67</sup> Id at 418.



listed before each bench of the Court.<sup>68</sup> Not surprisingly, the hearing afforded to Counsel is exceedingly limited, with lawyers often getting only a couple of minutes to present their case (and more significantly, to respond to queries posed by the bench).<sup>69</sup> While schedules for hearings (causelists) are circulated in advance, a strict time schedule is not prescribed and it is uncertain as to precisely when a given case will reach for hearing.<sup>70</sup>

Matters listed include both *ex parte* and ‘after notice’ matters. *Ex parte* matters are those coming before the Court for the very first time – a majority of these are summarily dismissed. ‘After notice’ matters are those where notice has been issued to the Respondent in the matter, and the case is now listed for further hearing. Ordinarily, this is when the Court will take a final call on whether the matter is worthy of being admitted, to be heard on the merits. If the Court determines that the case should be admitted, it will admit the appeal or ‘grant leave’ in the special leave petition, as the case might be. In the ordinary course of events, the matter is then likely to be pushed back indefinitely, to the back of the queue, with a merits hearing several years away. Like any appellate court in the common law world, the Indian Supreme Court can of course pass interim orders to govern the subject matter of the case in the interregnum, and can vary these if the need arises. Nonetheless, the fact remains that final resolution, for an aggrieved litigant, remains far away.

The dynamics of decision-making in the two Courts are, inevitably, significantly influenced by the manner in which cases are set down for final hearing. In the US Supreme Court, it is exceedingly rare for cases not to be decided finally within the Term in which cert is granted. Also, as we know, changes to the composition of the Court are infrequent. This

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<sup>68</sup> For a general overview of Supreme Court procedures, see Ramachandran and Agarwal, *supra* note 12.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

means that, for the most part, a justice on the Court voting to hear (or not hear) a case will be part of the final decision-making Court, and will know the likely composition of the rest of the Court too. In contrast, in the Indian Supreme Court, the arrears in the Court - and the queue for final hearing that is a natural consequence - along with the rapid turnover of judges of the Court, implies that judges would often not finally hear the matters which they are assigned for admission hearings. The dynamics, consequently, are entirely different. A number of consequences might follow.

One - in the Indian context - might be an attempt to fast-track issues in which the justices are particularly interested. The practice and procedure of the Court offers judges the opportunity of doing so, since the queue is only a default mechanism, capable of being modified either by orders of the Chief Justice in his administrative capacity or the concerned bench by way of a judicial order. The second consequence, again in the context of the Indian Supreme Court, is that the grant (or denial) of interim relief becomes extremely significant, even all-important.<sup>71</sup> For sophisticated litigants, this evidently provides clear rent-seeking opportunities, if favourable interim orders can be procured. This contributes a great deal to the change in the nature of the institution. As highlighted elsewhere, a number of Senior Counsel are popularly identified as ‘Monday, Friday’ Counsel (those particularly skilled in obtaining interim orders on admission days).<sup>72</sup> While Counsel fees may be somewhat lower for admission day hearings than final arguments, the difference is not as great as might be expected.<sup>73</sup> The point is that Counsel are remunerated handsomely for appearances that will

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<sup>71</sup> A similar point is made by Marc Galanter and Nick Robinson. *See* Marc Galanter and Nick Robinson, ‘India’s Grand Advocates: A Legal Elite Flourishing in the Era of Globalization’ (2013) 20(3) *International Journal of the Legal Profession* 241.

<sup>72</sup> *See generally* id.

<sup>73</sup> Id. In fact, Galanter and Robinson go so far as to suggest that there is little difference between fees charged for admission hearings and final arguments. My own experience, based on interacting with (and briefing) Senior Counsel in Delhi over several years, is that final hearing fees are generally somewhat higher. But the larger point remains.

last only a couple of minutes, because of the stakes involved, and the fact that final adjudication of the matter will be at some distant point in the future.<sup>74</sup>

In contrast, in the case of the US Supreme Court, while it makes determinations on requests for interim relief (and these determinations might sometimes be very consequential), the fact that cases accepted for hearing will invariably be finally decided in the Term in which they are argued, implies that the battle for interim relief will not overshadow the contest on the merits. The contrast with the Indian Supreme Court is telling, and this has an important bearing on the difference in institutional culture in the two Courts.

#### *iv. Costs and Court Fees:*

In India, the costs of filing a special leave petition (at least in terms of court fees) have been close to negligible for decades, and have only recently been raised with the coming into force of the Supreme Court Rules, 2013. This increase has itself become the object of serious controversy, and the Bar Association (of Supreme Court lawyers) is fervently pressing for a roll-back of the increase.<sup>75</sup> Court fees are calculated in terms of a convoluted formula. Under the old regime, all told, these fees (for filing a special leave petition) would generally be less than two thousand rupees (about \$32).<sup>76</sup> This is particularly interesting when contrasted with the court fees payable when approaching a court of first instance, such as a civil court in a property dispute. Court fees in such cases are on an *ad valorem* basis, normally at around one

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<sup>74</sup> Id.

<sup>75</sup> See, for e.g., Supreme Court Bar Association, Circular No. SCBA/CJI.9/2014 dated 6 August 2014 (on file with the author); Supreme Court Bar Association, Circular No. SCBA/EC.81/2014 dated 13 August 2014 (on file with the author).

<sup>76</sup> See Third Schedule to the (now-repealed) Supreme Court Rules, 1966. The basic court fees fixed for filing a special leave petition were Rupees 1500, and there are additional fees (again, minimal) for documents or applications filed along with a petition.

percent of the value of the relief claimed.<sup>77</sup> Evidently, this is not necessarily a small amount. In cases, where a large monetary claim is made, court fees could stretch to significant amounts, and would certainly be a consideration while deciding whether to institute a case.

It is not entirely clear why court fees were not significantly revised for a long period of time, and why even the modest increase brought about in the 2013 Rules has attracted criticism from the Bar. This appears broadly consistent, however, with a trend in the Supreme Court where the procedural norms governing the Court's jurisdiction have remained untouched for a long period, even as the ground realities have shifted dramatically. Inertia may well be a significant part of the answer, but it is also plausible that the narrative of the Supreme Court as a people's court, accessible to prince and pauper alike, has a significant part to play.<sup>78</sup>

While court fees are one part of the picture, court-imposed costs are the other. Imposition of costs on unsuccessful litigants is a deterrent on litigation that is unlikely to succeed. While India notionally adheres to the concept that costs follow the litigation,<sup>79</sup> the practical impact of this is negated by the fact that costs are quantified at an (unrealistically) low level. In the Supreme Court, costs are in the discretion of the Court.<sup>80</sup> Further, the Court

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<sup>77</sup> See The Court Fees Act, 1870, s 6 (read with Schedule I and II).

<sup>78</sup> See, for e.g., *Bidi Supply Co. v. Union of India* AIR 1956 SC 479 at para 23 (per Justice Vivian Bose) (“...I am clear that the Constitution is not for the exclusive benefit of Governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the “butcher, the baker and the candlestick-maker”.”)

<sup>79</sup> See, for e.g., *Kali Prasad Singh v. Ram Prasad Singh* (1974) 1 SCC 182 at para 7 (“It is unfortunate that this litigation which has stood an exhausting length of 17 years with alternating fortunes finds the parties out of pocket to considerably more than perhaps the value of the properties themselves, but this sad note on litigation in India cannot deflect us from the rule that costs must follow the event. The appeal is allowed with costs.”)

<sup>80</sup> Order XLI of the (now-repealed) Supreme Court Rules, 1966. Rule 1 stated:

“Subject to the provisions of any statute or of these rules, the costs of and incidental to all proceedings, shall be in the discretion of the Court. Unless the Court otherwise

rules provide for the taxation of costs by an officer of the Registry.<sup>81</sup> Costs are, however, quantified at an unrealistically low level, and the entire system of taxation of costs appears to have fallen into disuse.<sup>82</sup>

Despite the regime of taxation of costs having fallen into disuse, it is still not uncommon for judges to refrain from imposing costs altogether, passing orders along the lines of ‘*Parties shall bear their own costs*’ or ‘*There shall be no order as to costs*’.<sup>83</sup> The other side of the coin is when judges depart from the prescribed schedule of costs, and ‘assess’ costs at a particular figure.<sup>84</sup> This is generally significantly higher than the illusory amount a litigant would be entitled to in terms of the prescribed schedule of costs, but lower than the actual cost of litigation (particularly in fiercely-contested matters, where Senior

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*orders an intervener shall not be entitled to costs.” Rule 3 stated: “Where in any proceeding, costs are awarded to any party, the Court may direct the payment of a sum in gross in lieu of taxed costs and may further direct by and to whom the said sum shall be paid.”*

<sup>81</sup> See The Supreme Court Rules, 2013, Order L.

<sup>82</sup> A prominent senior advocate of the Supreme Court (who commenced practice in the year 1976) recalled that, even in his early years of practice, the system of taxation of costs was resorted to only infrequently, and generally when a client insisted. He also recalled that clients would often be reluctant to press for the taxation of costs, since lawyers appearing would often charge on a per-appearance basis even for appearing before the relevant Taxing Officer, and these legal costs would far exceed anything a client could hope to recover by way of costs. See Transcript of Interview with the concerned Senior Advocate in June 2014 (on file with the author).

<sup>83</sup> It is not clear why the Supreme Court continues to pass directions along these lines, given that the regime of taxation of costs is hardly used today. A likely answer is that it is a matter of habit, of language familiar from India’s common law heritage. Another possible explanation is that, regardless of the practical impact (or lack thereof) of such clarificatory directions, it is a way for Judges to signal their opinion about the matter, the conduct of the litigants, or both.

<sup>84</sup> The Supreme Court sometimes states in its judgments (as do the High Courts) that costs will be quantified at a particular amount, say Rupees twenty five thousand (about \$420).

Counsel are engaged). Rarer still is awarding of costs in terms of the actual amount expended, though it is not unknown.<sup>85</sup>

As in the case of court fees, it is hard to assess the reasons for the failure to revise the schedule of costs in the Supreme Court to keep in line with inflation. It appears, again, that inertia is a big part of the story.<sup>86</sup> It might appear counter-intuitive, even baffling, that in a Court inundated with cases (a significant majority of which continue to be dismissed *in limine*), the revision of court fees would not even be a part of the conversation. This, yet again, tells us something important about how the ‘centre of gravity’ of the Court has fundamentally shifted, such that shutting the door (even ever so slightly) on this flood of cases comes to be thought of as inconceivable. This facet of the Court’s identity has become non-negotiable, and - since something has to give way, it is its functioning as a constitutional Court.

I have devoted some attention to the question of court fees and costs in the Indian context because, as I write above, it would seem to be an important element in any debate about reforms in India’s higher judiciary. The situation with respect to court fees in the US Supreme Court is simple, and similar to India - court fees are minimal. The relevant statutory provision stipulates that the Court may fix the fees to be charged by its clerk.<sup>87</sup> The Court Rules provide that the court fees for docketing a case on a Petition for certiorari is \$300.<sup>88</sup> Evidently, this is not a very significant amount, particularly in light of the professional legal fees a party would incur in most cases. Further, indigent parties are permitted to apply to

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<sup>85</sup> While little empirical work on these trends appears to have been done, this is considerable anecdotal evidence available. *See supra* note 82.

<sup>86</sup> *See supra* note 82. The same Senior Counsel also opined that the Court simply has not applied its mind to the issue for a long time.

<sup>87</sup> 28 U.S. Code § 1911.

<sup>88</sup> Rules of the Supreme Court of the United States, Rule 38.

proceed *in forma pauperis*, without the payment of court fees.<sup>89</sup> Court fees, then, may not be a driving factor for differences in the docket control process in the two jurisdictions.<sup>90</sup>

**v. *The Legal Profession:***

The Indian Bar, for the most part, comprises individual lawyers practicing independently.<sup>91</sup> This spans the entire spectrum of the profession, from struggling lawyers in small towns and villages to the most successful Senior Counsel practicing in the Supreme Court.<sup>92</sup> These Senior Counsel, incidentally, are remunerated at levels which exceed those almost anywhere in the world.<sup>93</sup> While they often retain a number of young Advocates (known as ‘Juniors’) in their chambers to assist them, it is almost unknown for such Counsel to collaborate with others.<sup>94</sup> Specialization is rare, though a broad separation of civil and criminal practice is fairly common, with taxation being regarded as another area of specialized practice, and Intellectual Property as an emerging area of specialization.<sup>95</sup> Filings in the Supreme Court can only be executed by Advocates-on-Record; lawyers who have qualified a specialized examination conducted by the Supreme Court or otherwise satisfy certain strict norms satisfying the requirements of the Court.

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<sup>89</sup> Id, Rule 39.

<sup>90</sup> However, this does not imply that an increase in court fees or the imposition of costs in appropriate cases, are not possible reforms to be considered in the Indian context. While the docket crisis in India might be driven by other factors, the awarding of costs or increased court fees would nevertheless be a deterrent against frivolous litigation and could be considered in conjunction with other reforms.

<sup>91</sup> Galanter and Robinson, *supra* note 71.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id at 22.

As the nature of the Court has changed, slowly but surely, so has the nature of a Counsel's work. In the frenetic pace of the average Monday or Friday, clear error has to be shown in the judgment of the Court below. Two or three pages of the paperbook are highlighted; the most glaring omissions in the judgment of the court below are kept ready for the brief, two-minute argument. The success rate, understandably, is low. Within the Supreme Court Bar itself, certain Counsel tend to become known as 'Monday, Friday' Counsel, with a reputation for getting results in admission hearings. Some others are reputed to be more accomplished at final hearings, where detailed oral arguments are generally permitted (and often welcomed).

The legal profession in the US is very different. For one thing, legal practitioners must be licensed in the particular State in which they wish to practice. This naturally contributes to a certain degree of specialization in the legal profession. Secondly, and significantly, success-based (or contingency) professional fees are common in the US, while such fee arrangements are prohibited in India.<sup>96</sup> More specific to the Supreme Court, it is generally acknowledged that the Supreme Court Bar is becoming increasingly specialized. There are a number of Counsel - generally heading or partners in the Appellate Court Practice Group of the best-reputed law firms - who appear often before the Supreme Court. Often is, of course, a relative term. Given that the US Supreme Court hears less than a hundred oral arguments each Term, and that each of these is a full-fledged merits hearing, a dozen Supreme Court appearances would be noteworthy indeed.<sup>97</sup>

While differences in the respective legal profession may not be at the heart of the difference in the functioning of the two Courts in this specific context, it is plausible to

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<sup>96</sup> See Standards of Professional Conduct and Etiquette, Rules framed under Section 49 (1)(c) of the Advocates Act, 1961, Rule 20.

<sup>97</sup> Illustratively, Laurence Tribe, the famed constitutional law scholar, has argued thirty-six times before the Court.



speculate that the individual-based nature of legal practice in India, along with the wide variations in quality in the profession, reduce concerns about reputational capital and incentivize short-term thinking, all of which contributes to higher levels of filings in the Supreme Court.

To return to a point I make above, my claim is not that any of these factors can directly explain the very different approaches of the two Courts to exercise of their discretionary jurisdiction. Black letter legal doctrine and the prevalent regime of courts fees and costs are broadly aligned in the two Courts, and so cannot explain these differences. There are important differences in the process of appointment of judges, and in the legal professions in the two jurisdictions. Most significant of all, the procedures governing the admission and adjudication of cases are starkly different in the two Courts. These differences have contributed significantly to the difference in their approach to their respective dockets. But the claim is not that any of these, in isolation, has caused the Indian Supreme Court to function so very differently from its US counterpart. In the very nature of things, these factors operate cumulatively and in the larger context of the two institutions. More than anything else, the differences explored above have contributed to very different institutional cultures in the two Courts. It is to a further elucidation of these differences in institutional culture that I now turn.

### ***III.B. Institutional Culture of the Indian Supreme Court:***

The core of my argument pertains to the institutional culture of the Indian Supreme Court, and how an error-correction role has over the years come to be thought of as necessary, even inevitable. For this, we must understand the decision-making process of the justices of the Indian Supreme Court while adjudicating its discretionary docket, and all that

this is influenced by M.C. Chagla - one of India's most celebrated jurists - was at different points in his career both judge and lawyer, and therefore in some way brought to bear a unique perspective on the matter. Speaking about his practice before the Supreme Court as a Senior Counsel, he wrote - as far back as 1973:

*“I have often been shocked when in the Supreme Court I am told in a Special Leave Petition that the rent is only Rs. 50 and the Supreme Court cannot be troubled with such trivial matters. But then it is just the sort of tenant who pays Rs. 30 or Rs. 40 that needs the protection of the Supreme Court. If he is thrown out, he may have nowhere to sleep but the pavement. A man who pays Rs. 500 or Rs. 1,000 can afford to get other premises or even to buy a new flat, but a poor man living in a hovel faces a grim prospect indeed.”*<sup>98</sup>

This sentiment is revealing at many levels. It is the perspective of one who, more than anybody, would be aware of the institutional and doctrinal limitations of a Court like the Indian Supreme Court.<sup>99</sup> Nonetheless, at least while wearing his Counsel hat, he is unable to resist the sentiment that the Supreme Court should do more, not less. Combine this with the significant failure of governance in India (and the consequential distrust of governmental institutions), and it is easy to see how the Court might get tempted into doing more, even as it sees the consequences of these interventions on a long-term basis.

Even leaving to one side the particular challenges with respect to the short tenure of justices of the Court, it remains difficult for them to act in unison. Given both the size of the Court as well as judicial norms pertaining to independent decision-making, it would be challenging for judges to coordinate their approach to the challenges of mounting arrears in

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<sup>98</sup> M.C. Chagla, *Roses in December* (Bharatiya Vidya Bhavan 1974) 130-131.

<sup>99</sup> M.C. Chagla served as Chief Justice of the Bombay High Court and later practiced as a Senior Counsel before the Supreme Court.

the Indian Supreme Court. In this situation, it is easy to observe a version of a ‘collective action’ problem impeding efforts to discourage frivolous special leave petitions (or other cases unworthy of the Court’s attention). This collective action problem only intensifies when one considers the role of the Bar. While the Supreme Court Bar certainly has self-interested reasons to desire an expansion of the Court’s docket, I do not assume that their motives are that narrow. Rather, I believe that professional instincts combine with the structural characteristics of the Court (and the possibility of gaining relief) to create an ideological culture that views an interventionist Supreme Court as necessary, even inevitable. We see this attitude also in the disquiet with respect to the revised court fees enshrined in the Supreme Court Rules, 2013.

Again, in a judicial system that, at least as an ideal, is committed to consistency and predictability - *ad hocism* breeds *ad hocism*, intervention in the one instance creates immense pressure to intervene similarly in the next, sympathetic case. Slowly but surely, the exception becomes the norm.

Lest this seem overly abstract (or simply unconvincing), consider some concrete ways - based on the differences in the two Courts noted earlier - in which the dynamics relating to treatment of the discretionary docket might play out. In India, cases are filed and propelled forward by Advocates-on-Record, and Senior Counsel appear in Court when the stakes are high enough. The process of oral argument, as well as the error-correction role sporadically played by the Court, incentivizes jockeying for the admission of matters and, equally significantly, efforts to obtain interim relief. Interim relief is rendered even more important by the well-known reality that cases will rarely be disposed of in the year in which they are filed (more often, they will remain in limbo for several years). On account of this, the admission of matters and the grant (or denial) of interim relief takes precedence - on a day-to-day basis and in the Court’s culture more generally - over its role as a constitutional court.

The uncertainties inherent in this process are significantly magnified by the structural characteristics of the Court (most particularly, by the large number of benches and the relatively short tenure enjoyed by judges). Life tenure for justices and the fact that the Court sits *en banc*, makes the US Supreme Court very different. Ideological majorities on that Court certainly have the ability to act strategically and mould the law in a desired direction. But the very fact that this manner of well-considered, strategic evolution in important areas of the law is open to the US Supreme Court, probably renders a routine error-correction role less inviting. The dynamics in the Indian Supreme Court are very different.

#### IV. LEARNING FROM THE US SUPREME COURT – A CAUTIONARY NOTE

I have said elsewhere that the problems faced by the Indian Supreme Court today cannot be solved merely by ‘choosing to do so’.<sup>100</sup> Perhaps one needs to go further though, and say that the problems cannot be solved in the Court as it exists today. As Mark Tushnet observes:<sup>101</sup>

*“The question is the extent to which the constraints imposed by a nation’s legal institutions and arrangements, the constraints imposed by its doctrinal history, the constraints imposed by its legal culture, and so on down the list of constraining factors, intersect in a way that reduces the set of choices (be they institutional, doctrinal, or whatever) to one – that is, to the one that is actually in place. I doubt that this question can be answered in the abstract, or generally. I believe, though, that the comparative inquiry must be sensitive to all the contexts to which contextualism directs our attention.”*

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<sup>100</sup> See Chowdhury, *supra* note 2.

<sup>101</sup> See Tushnet, *supra* note 3 at 81.

In this section of the Chapter, I outline difficulties with respect to the possibility of the Indian Supreme Court learning (or borrowing) from the US experience. Broadly, the caveats set out below are of two kinds – methodological and institutional. I write about each of these in turn.

#### ***IV.A. Methodological Limitations:***

From a methodological (and epistemic) perspective, there are reasons to approach the suggestions in this Chapter, and even the broader project of comparing the US and Indian Supreme Courts, with a degree of modesty. I discuss some of these challenges in this subsection.

The task of describing or evaluating the ideological leanings and motivations of a court like the US Supreme Court is not an easy one. Far from it. The relative importance of different decisions is inherently subjective, and the motivations of judges equally difficult to discern.<sup>102</sup> While proponents of the attitudinal model have made a significant effort to bring a degree of objectivity to the project, the difficulties remain formidable.<sup>103</sup>

But the hurdles in the Indian context are many times greater. The ideology of a court like the Supreme Court of India cannot be described in the same binary fashion as is the case with courts that sit *en banc* (such as the US Supreme Court).<sup>104</sup> One significant factor to be kept in mind is that the attitudinal model, at least in the manner in which it has been tested in the context of the US courts, is significantly contingent on the relative ideological

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<sup>102</sup> See, for e.g., Posner, *supra* note 37.

<sup>103</sup> See Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); Epstein and Knight, *supra* note 29.

<sup>104</sup> See Chowdhury, *supra* note 2.

homogeneity (and exclusivity) of the US' two primary political parties.<sup>105</sup> It would be significantly more difficult to employ in a country such as India, where political ideology appears to be more amorphous, and there are less defining distinctions between different political parties. Another difficulty altogether, of course, is that the appointing authority for judges of the High Courts and the Supreme Court is not the political executive.<sup>106</sup>

To take this point further, in the context of the US, given the fixed nature of the Court (at any given point of time), it is at least somewhat meaningful to assert that the Roberts Court is more 'conservative' on the question of campaign finance, for example, than the Court two decades previously.<sup>107</sup> In India, on the other hand, the 'polyvocal nature'<sup>108</sup> of the Court makes it exceedingly difficult to assert, in any objective fashion, what the ideology of the Court is on any given topic of constitutional importance. That apart, it is likely that the Indian Supreme Court is less ideological with respect to the substantial subset of its docket which deals with relatively routine civil and criminal appeals. It is acknowledged, even by proponents of the attitudinal model, that the ideological leanings of judges are less likely to come into play in certain types of routine cases, where the correct decision might be relatively straight-forward as a matter of law.<sup>109</sup>

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<sup>105</sup> See Segal and Spaeth, *supra* note 103. See also Carl Grafton and Anne Permaloff, *The Behavioral Study of Political Ideology and Public Policy Formation* (University Press of America 2005).

<sup>106</sup> See *supra* Part IIIA.

<sup>107</sup> See, for e.g., David Earley and Avram Billig, 'The Pro-Money Court: How the Roberts Supreme Court Dismantled Campaign Finance Law' (Brennan Center for Justice at New York University School of Law, 2 April 2014) <<http://www.brennancenter.org/analysis/pro-money-supreme-court>> accessed 30 April 2016.

<sup>108</sup> See Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61(1) *American Journal of Comparative Law* 173.

<sup>109</sup> See Epstein *et al*, *supra* note 30.

Even if we believe that the Indian Supreme Court is ‘ideological’, in one sense or the other, in most or all of the cases that come before it, that ‘ideology’ is more idiosyncratic, and less polarizing, than was the case with the Court in the 1960s and soon thereafter. There no longer appear to be a few, overarching jurisprudential issues which define the ideological identity of Indian Supreme Court judges. ‘Basic Structure’ is now settled constitutional law doctrine, not a contested theory often seen as a proxy for the individual’s true vision of the Constitution. In some senses, the biggest ideological battles of the Supreme Court have been fought to a close: in some cases, there was a clear victory, in others, the issue simply dissipated or circumstances changed.

These difficulties illustrate the limitations (or risks) of seeking to learn or borrow from the US experience. From a methodological perspective, it is hard to discern the motivations or incentives of the judges of the Indian Supreme Court, and therefore hard to predict or explain judicial behaviour in any rigorous fashion. Substantively, the institutional character of the Court itself poses significant barriers to change. It is this second, substantive aspect that I turn to now.

#### ***IV.B. Institutional Barriers to Change:***

For the US as well as Indian Supreme Courts, it is easy to see how the dynamics with respect to docket control are hard to disrupt. In the case of the US Supreme Court, it is likely that the *status quo* is only strengthened by the fact that justices of the Court have life tenure and tend to serve for a relatively long period. Practices and habits get ingrained over time, therefore, and change comes slowly to the highest court of the land.<sup>110</sup> The contrast with the

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<sup>110</sup> Justice Stevens opines that the Supreme Court is defined, at any point, by the dynamics and balance that prevails, taking into account all of its nine members. For that reason, he

Indian context, where Supreme Court justices retire at the age of sixty-five and where the tenure of justices has only decreased in recent years, is instructive.<sup>111</sup> It is true that long tenures enable ideological majorities on the US Supreme Court to evolve the law in their preferred direction; in that sense the Court can and does change over time. In this context, I have in mind procedural and institutional characteristics of the Court that would not be regarded as overtly ideological, and that have come to be identified with the Court. Possible illustrations range from the manner of argument (including time limits and related matters), to the relationships and interactions between the judges (consider the rather quaint importance attached to seniority in certain contexts), to the procedural norms pertaining to the filing and listing of matters.

Change also comes slowly to the Indian Supreme Court, albeit for rather different reasons. The relatively short tenure of justices, and the even shorter tenure of the average Chief Justice - with several occupants of that office in recent decades having tenure of only a few months or less - leaves those in charge of affairs at the Court with little time to effect substantive changes.<sup>112</sup> To some extent, this is simply a path-dependent problem, a perhaps largely unforeseen outcome of the backlash to the supersession of justices in the 1970s by Prime Minister Indira Gandhi.

The very nature of the problem contains also the impediments to reform. From the moment of elevation to the Supreme Court, justices know whether or not they will occupy the

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says, the present Court can best be understood as the ‘Kagan’ Court. While the point is well-taken, the fact remains that, even on this understanding, the Court has enjoyed long periods of stability interspersed with occasional bouts of change. *See* Stevens, *supra* note 44 at 7.

<sup>111</sup> For a rigorous empirical demonstration of this trend, *see* Chandrachud, *supra* note 36.

<sup>112</sup> In the case of the Indian Supreme Court, I assert that change is difficult to implement, even if desired. With respect to the US Supreme Court, I argue that long tenures probably enable change on substantive questions, but there is simply little appetite for change in procedural matters.



office of Chief Justice some years down the line. At any given point of time, it is inevitable that several puisne judges of the Court are scheduled, so to speak, to ascend to that office. In this context, it is not hard to see that reform in this regard is likely to meet with significant opposition from within the institution itself.<sup>113</sup> It should also be remembered that seniority as a norm for advancement is well-ingrained in the structure and institutional ethos of the Indian government and it is perhaps not surprising that the judiciary has not remained immune to the same. Thus seniority is the most significant consideration governing promotion to higher ranks in the Indian civil service, although merit also comes into play as civil servants graduate to higher ranks.<sup>114</sup> Thus, the problem afflicting the judiciary in this regard is, in a sense, only a subset of a larger problem that has affected different wings of the Indian government to a significant degree.

What of the political executive, though? What view does it take of the rapid turnover of Chief Justices? One significant factor, understandably, is the desire to stay far away from the political controversies of the 1970s. That apart, on an adversarial view of relations between the political executive and the judiciary, it could be argued that rapid turnover in the office of the Chief Justice, to the extent that it prevents a consolidation of judicial power, is likely to

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<sup>113</sup> See Maneesh Chhibber, Interview with Fali Nariman, *The Indian Express* (6 April 2014) <<http://indianexpress.com/article/india/india-others/i-am-apprehensive-about-modi-this-problem-of-trying-to-become-too-hinduised/99/>> accessed 30 April 2016 (“Maneesh Chhibber: We are going to have a new Chief Justice of India (CJI) in less than a month. What are your views on this?”)

*Fali Nariman: I think the present CJI has done remarkably well in the last nine months and has scored 90 runs already. He is very polite, very good. And he has taken a liberal view on most things. The next man (Justice R M Lodha), unfortunately, has very little time, though he is an excellent judge. This is the problem with our judiciary. We should have a minimum tenure for chief justices. The problem is they don't know where to start. If you start now, number two will say you did this to exclude me. But perhaps giving them 67 or 68 as retirement age is the best thing. That's the trend the world over.”)*

<sup>114</sup> It is only in recent years that problems similar to those in the judiciary have been sought to be addressed by guaranteeing a minimum tenure of service (generally of two years) to individuals occupying key positions, such as the Cabinet Secretary and the Home Secretary.

be convenient for any incumbent government.<sup>115</sup> Viewed somewhat differently, it could be argued that, at the very least, the state of the higher judiciary (with rapid turnover in justices and, even more so, Chief Justices) is a form of insurance for all stake-holders, a version of a low-risk, low-reward *status quo*. A Chief Justice of an ‘activist’ bent of mind will not be in position forever, though neither will one more favourably inclined to the Government. This explanation for the relative ambivalence of different stakeholders to the problem of short tenures may hold even if a somewhat more altruistic motive is ascribed to the political executive and the judiciary. The viewpoint, then, might be that – given the generally acknowledged variations in the quality of justices of the Supreme Court<sup>116</sup> - the relatively short tenure is insurance against any one incumbent rendering too much damage to the institution.

The *status quo* in India, then, is difficult to alter. Over the years, the Supreme Court has evolved - almost imperceptibly - into a very different creature. From within and outside, it has come to be regarded as a Court which must, and does, cope with a flood of cases filed under its discretionary docket. Management, and containment, of this docket takes centre-stage, and the Court’s responsibilities as a constitutional court appear to have given way.

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<sup>115</sup> A somewhat similar point is made by Chandrachud. See Chandrachud, *supra* note 36, ch 3.

<sup>116</sup> See, for e.g., Seervai, *supra* note 38, Preface to the Second Volume at v. (“*This fall in the conduct and character of judges is reflected in the falling standard of their judgments. It is submitted that apart from cases of bribery and corruption, of repaying debts of gratitude which judges owed to their seniors or friends at the Bar, and apart from settling old scores with some Counsel, whom the Judges disliked at the Bar, another factor has emerged which has not been generally noticed. It is that in cases involving the Union or the State Governments on matters to which those Governments attach great importance, consciously or unconsciously, judges have allowed their judgments to be deflected by the thought that their chances of promotion in the High Courts and their chances of elevation to the Supreme Court would be prejudiced if their judgments went against the Union or the State.*”)

## V. CONCLUSION

Most things are matters of degree, not absolutes. The Indian Supreme Court functions, undoubtedly, as a deliberative, constitutional court – eliminating differences of judicial opinion between the High Courts and laying down the law of the land. It functions also as a constitutional court in a negative sense, often steering clear of complicated questions of fact and rejecting routine error correction petitions. The US Supreme Court, on its part, performs an error correction role, though only sporadically. It departs from its usual, deliberative model of merits hearings on occasion and appears to employ summary reversals as a signalling tactic when lower courts are perceived to have stepped way out of line, but only once in a while.<sup>117</sup>

The real question is not whether this happens, but how often. The real question, the one I return to throughout the course of this Chapter, is where the ‘centre of gravity’ of each of these Courts lies. The answer is partly one of perception, relating to how the Court is viewed by various stakeholders. This perception undoubtedly has important and self-perpetuating consequences for the docket-control process. Even more significant is the Court’s own understanding of its role. External perceptions of course matter - how stakeholders look upon a Court affects which types of matters are brought before it, and how frequently. The Court’s own view of its role, though, matters even more.

In conclusion, the analysis must return to how little choice there really is - or was - for the Indian Supreme Court. Choices made in particular, contingent circumstances combined with historical developments and structural characteristics of the Court to create a vicious cycle truly difficult to reverse. In the spirit of caution that characterizes Part IV of this

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<sup>117</sup> See William Baude, ‘Foreword: The Supreme Court’s Shadow Docket’ (2015) 9(1) New York University Journal of Law & Liberty 1.

Chapter, I steer clear of the radical, structural reforms often suggested in Indian legal policy debates.<sup>118</sup> Instead, I outline below certain incremental reforms that actually go to the root of the problem, and yet are politically feasible too. *Firstly*, a rigorous commitment on the part of the Court to resolving substantial questions of constitutional interpretation only through Constitution (Five-Judge) Benches and in a time-bound manner, ignoring the strain this will inevitably place on the discretionary docket. *Relatedly*, one or two (perhaps even three) Constitution Benches being established permanently, with the justices constituting these benches either fixed or alternating (depending perhaps on the perception of the Chief Justice regarding the aptitude and interest of the judges in question).<sup>119</sup> *Secondly*, a commitment to hearing important matters in Three-Judge Benches to the extent possible, as suggested by some.<sup>120</sup> *Thirdly*, coming down heavily on litigation engaging in rent-seeking through the procurement of interim orders (at least when this exceeds the bounds of legal gamesmanship). *Fourthly*, taking systemic steps to reform - and rigorously enforce - the procedures governing the imposition of costs on frivolous litigation. *Fifthly*, communicating. Any casual observer of proceedings in the Indian Supreme Court can discern that the justices are troubled by what the Court is enduring in terms of the over-loaded docket; and they are often heard to say so. A clearer, considered statement from the head of the Judiciary - the Chief Justice of India - might go some way towards mitigating the collective action problem the Chapter adverts to earlier.

If there is a single assertion that emerges through the preceding portions of this Chapter, it is this - there are no quick-fix solutions in sight. Incremental changes - baby steps

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<sup>118</sup> See, for e.g., Venugopal, *supra* note 32.

<sup>119</sup> I develop this idea further in the concluding section of the thesis. See *infra* Conclusion, Part III.

<sup>120</sup> See Chhibber, *supra* note 113.

towards becoming a constitutional court once more - may truly be the most radical reform possible for the Indian Supreme Court today.

## CHAPTER III

### THAT SILVER BULLET: INTERVENTIONISM AND *AD HOCISM* IN INDIA'S HIGHER JUDICIARY

#### I. INTRODUCTION

Indian political life in recent years has been dominated by the search for a silver bullet, the person or institution that will be able to almost magically overcome varied, complex and deeply-rooted societal challenges. Not surprisingly, perhaps, the search for this miracle cure has seen many disappointments. Within the executive government, the figure of hope has oscillated wildly - the Chief Vigilance Commissioner, the Election Commission, the Comptroller & Auditor General. More recently, the *Lok Pal*. Institutions that are either genuinely well-functioning or are perceived as being so, have been expected to, and often have, taken on responsibilities and expectations entirely disproportionate to their mandate, capabilities or resources.<sup>1</sup>

The question of a national *Lok Pal* (Public Ombudsman) came to dominate Parliament, and the national discourse more generally, in the latter half of the UPA

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<sup>1</sup> See Devesh Kapur and Pratap Bhanu Mehta, 'Introduction' in Devesh Kapur and Pratap Bhanu Mehta (eds), *Public Institutions in India* (Oxford University Press 2005) 10: "Observers of public bureaucracies have long recognized that multiplicity of missions impairs bureaucratic incentives and erodes institutional autonomy. In particular, for institutions of restraint such as the judiciary or statutory bodies like the Election Commission, which are designed to check behaviour that may have short-term payoffs but high long-term costs, their effectiveness has been critically dependent on an adherence to norms of self-restraint themselves. An expansionist agenda erodes self-restraint and resulting bureaucratic propensities tend to drive the institutions towards policy prescriptions designed to give themselves greater prominence, while undermining their effectiveness in their core functions."

government's second term in office.<sup>2</sup> A widespread belief had taken root that the incumbent government (and the various institutions of political life more generally) were thoroughly corrupt and functioning contrary to public interest.<sup>3</sup> A well-respected *Gandhian* social activist, Anna Hazare, launched a non-violent protest demanding enactment of a legislation establishing a national *Lok Pal*, with wide-ranging powers to investigate and initiate prosecution of instances of public corruption.<sup>4</sup> This protest came to be centred in Delhi, and Anna Hazare eventually launched an indefinite hunger strike to pressure Parliament into enacting such a law.<sup>5</sup> Even among intellectuals and activists weary of high levels of corruption within government, there were several voices of caution.<sup>6</sup> Nonetheless, under extreme pressure from this well-organized and motivated group of social activists and under the glare of media coverage, Parliament came to introduce and debate a version of the proposed legislation. While this was not enacted into law immediately, it was successfully passed subsequently.<sup>7</sup> Ironically, no *Lok Pal* has yet been appointed and the attention afforded to the issue seems to have dwindled rapidly.<sup>8</sup>

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<sup>2</sup> See generally Sriram Panchu, 'Lokpal: Where do we stand now, and how we got here' (2011) XLVI(41) Economic and Political Weekly 21; Sriram Panchu, 'Repairing the Lokpal Bill' (2012) XLVII(3) Economic and Political Weekly 10.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Some argued that it was unfair and illegitimate to coerce Parliament in this manner, by essentially raising the threat of the death of Anna Hazare. Others had substantive differences with the draft law being forwarded, arguing *inter alia* that the extremely powerful figure being proposed, with few checks and balances, would itself be a potential source of corruption and abuse of governmental power.

<sup>7</sup> The Lokpal and Lokayuktas Act, 2013 (the Act received the assent of the President of India on 1 January 2014).

<sup>8</sup> See Santwana Bhattacharya, 'No timeframe for Lokpal Appointment' *The New Indian Express* (28 November 2014) <<http://www.newindianexpress.com/nation/2014/11/28/No-Timeframe-for-Lokpal-Appointment/article2544520.ece>> accessed 11 April 2016.

In the last few decades, a similar pattern seems to have played out with respect to rising (and likely unrealistic) expectations for other public offices too. At one time, for example, a particular Chief Election Commissioner – the constitutional office holder chairing the Election Commission - took a number of polarizing decisions, stating that these were essential to tackle corruption in the electoral process.<sup>9</sup> Many aggrieved by these decisions alleged that he had exceeded his legal powers, and the Supreme Court accepted at least an aspect of the legal challenges posed.<sup>10</sup> Apart from the specific merits of the actions taken by the individual, it is clear that the elevated expectations with respect to what might be accomplished by him were entirely unrealistic.<sup>11</sup>

The Central Bureau of Investigation [CBI] - in a loose sense India's equivalent of a federal investigative agency such as the Federal Bureau of Investigation - has seen similar pressures progressively placed on it over a period of time. The Supreme Court itself, in a landmark order passed in *Vineet Narain & Ors v. Union of India & Anr*,<sup>12</sup> directed the implementation of several measures stated to be towards the objective of safeguarding the independence of the CBI in the discharge of its functions.<sup>13</sup> Alongside that, the CBI has over

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<sup>9</sup> See generally Yubaraj Ghimire, 'Election Commission: Seshan wields the stick' *India Today* (15 December 1993) <<http://indiatoday.intoday.in/story/t.n.-seshan-passes-most-crucial-test-of-his-term-as-chief-election-commissioner/1/303533.html>> accessed 11 April 2016; G.C. Shekhar, 'Autumn of Al-Seshan: Lest we forget how bad it was till he cleaned it up' *The Telegraph* (7 April 2014) <[http://www.telegraphindia.com/1140407/jsp/nation/story\\_18163764.jsp#.VwuSk\\_197IU](http://www.telegraphindia.com/1140407/jsp/nation/story_18163764.jsp#.VwuSk_197IU)> accessed 11 April 2016; V. Venkatesan, 'The CEC's new groove' *Frontline* (7-20 July 2001) <<http://www.frontline.in/static/html/fl1814/18140320.htm>> accessed 11 April 2016.

<sup>10</sup> See *T.N. Seshan, Chief Election Commissioner of India v. Union of India & Ors* (1995) 4 SCC 611.

<sup>11</sup> At their highest, the powers ascribed to him would extend to rigorous and comprehensive oversight of the entire electoral process. While this would undoubtedly be salutary for the democratic process, it is certainly illusory to imagine that such reforms could, in and of themselves, dramatically improve standards of governance in India. But such, it appeared, were the hopes placed on Mr. Seshan.

<sup>12</sup> (1998) 1 SCC 226.

<sup>13</sup> *Id.*



the past two decades been entrusted with a large number of politically sensitive criminal cases for investigation. While a detailed analysis of the CBI's performance is beyond the scope of this Chapter, it is well-documented that the agency is significantly over-burdened today.<sup>14</sup> The position of law is that matters within any State's domain fall within the CBI's jurisdiction only in one of two ways, *one*, if the State Government consents to the same and, *two*, if the superior courts direct it to so investigate under Article 32 or 226 of the Constitution.<sup>15</sup> Despite these legal limitations, a very large number of cases have been referred to the CBI in the course of the past two decades. So far as matters referred by the superior Courts are concerned, this is evidently reflective of a deficit of trust with respect to the abilities of the State police force. Regarding matters referred by the State governments, this could in some cases be the result of a genuine desire for an effective investigation. It is also plausible, however, that the act of referring matters to the CBI signals how seriously the State is taking the matter (irrespective of whether the investigation is likely to be a better one, or the State believes that to be the case) and this could have political benefits for the government in question.<sup>16</sup> Whatever the motives of the Courts or the various State governments, it is clear that the CBI lacks the ability to effectively conduct the very large number of investigations being assigned to it.<sup>17</sup> Furthermore, serious allegations of

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<sup>14</sup> See R.K. Raghavan, 'Vyapan Will be Quite a Challenge for an Overburdened CBI' (*The Quint*, 9 July 2015) <<http://www.thequint.com/opinion/2015/07/09/vyapam-will-be-quite-a-challenge-for-an-overburdened-cbi>> accessed 11 April 2016; Samudra Gupta Kashyap, 'Hand over all chit fund fraud cases to CBI; Gauhati HC tells Assam government' *The Indian Express* (8 January 2015) <<http://indianexpress.com/article/india/india-others/hand-over-all-chit-fund-fraud-cases-to-cbi-gauhati-hc-tells-assam-government/>> accessed 11 April 2016 (describing how the High Court directed the State of Assam to hand over all cases relating to chit fund fraud to the CBI, despite the Counsel for the CBI protesting that the agency was already heavily overburdened).

<sup>15</sup> *State of West Bengal & Ors v. Committee for Protection of Democratic Rights, West Bengal & Ors* (2010) 3 SCC 571.

<sup>16</sup> See Raghavan, *supra* note 14.

<sup>17</sup> See *id*: "The CBI is heavily overburdened with a large number of investigations, some of which are court-monitored. It suffers from an acute manpower shortage which cannot be

impropriety and collusion being levied on the agency in recent years bring home the point that unchecked independence, without well-designed procedural safeguards, can be a double-edged sword.<sup>18</sup>

While examples could be multiplied, the discussion above may be sufficient for the purposes of this Chapter. Across political regimes and institutions, we see a pervasive trend of various public institutions, particularly those with a core of institutional strength, being flooded with work far beyond the capacities of these institutions. Where an institution does not exist (as in the case of the *Lokpal*), it is sought to be created, but again with unrealistic mandates and expectations. A conventional public choice account would be broadly consistent with this rapid expansion of powers of different governmental agencies,<sup>19</sup> although there are certainly peculiarities in the Indian context.

A similar pattern - of the expansion of powers in a relatively *ad hoc* manner - has played out in India's higher judiciary; and nowhere more so than in the Supreme Court. In the context of the exercise of the appellate judicial function, it is true that this hyper-interventionist mode is often premised on an accurate assessment that the lower limbs of the organization are unable or unwilling to perform their designated tasks. Nonetheless, this

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*made good in a short time. Under pressure from the high court or the Supreme Court it can be forced to accept the Vyapam investigation. But to expect that it will produce quick results is unrealistic."*

<sup>18</sup> See generally Ritu Sarin, 'Ex-Cabinet minister to coal scam accused, CM to 2G "beneficiary": CBI chief's guests' *The Indian Express* (4 September 2014) <<http://indianexpress.com/article/india/india-others/ex-cabinet-minister-to-coal-scam-accused-cm-to-2g-beneficiary-cbi-chiefs-guests/>> accessed 11 April 2016; Utkarsh Anand, 'Probe Ranjit Sinha's meetings with coal scam accused, rules Supreme Court' *The Indian Express* (15 May 2015) <<http://indianexpress.com/article/india/former-cbi-director-ranjit-sinhas-private-meetings-with-coal-scam-accused-must-be-investigated-rules-supreme-court/>> accessed 11 April 2016.

<sup>19</sup> See, for e.g., Saul Levmore, 'Irreversibility and the Law: The Size of Firms and Other Organizations' (1993) 18 *Journal of Corporation Law* 333 (arguing that there is asymmetry and irreversibility in the evolution of a firm such that it is easier for the organization to expand than to reverse such prior expansions).

raises immediate questions about the capacity of the higher judiciary to discharge a role for which it was not designed, and about the opportunity cost of such intervention.<sup>20</sup> I have written extensively in Chapter I about a peculiar dynamic that plays out in the specific context of the Supreme Court, where the Court appears cognizant of the limitations of its appellate role, but nevertheless unable to resist taking on a larger mandate than it can realistically handle.<sup>21</sup>

In this Chapter, I build upon the logic of my previous work to argue that - in a variety of contexts in India's higher judiciary - there is a marked tendency to short-circuit processes and institutions in an effort to deliver 'justice'. Again, there are factors limiting and countering this trend too, not least of which is the caution and incrementalism ingrained in India's common law judicial tradition. Nonetheless, the balance of what was originally intended to operate as a pyramid-like justice-delivery mechanism is tilting towards a top-heavy, *ad hoc* version of that structure, which is both unsustainable and deeply troubling from a normative perspective.<sup>22</sup>

The Chapter draws on illustrations from various courts and areas of the law to support the underlying argument. Part II provides five specific doctrinal examples from the Supreme Court's jurisprudence, and analyses the dynamics at play in the highest court of the land. The

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<sup>20</sup> See Kapur and Mehta, *supra* note 1. In the context of the US Supreme Court, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> edn, Yale University Press 1986): "It will not do to exalt an individual claim to particular justice over all other problems that adjudication may have to solve and over all other consequences that it entails. It is not justice for the Court to take unto itself, *ad hoc*, a function that it cannot, over the run of causes, perform with more benefit than harm to society."

<sup>21</sup> See *supra* Chapter I, Part II.

<sup>22</sup> For a broad overview of India's judiciary, and an analysis of how it is top-heavy, see Nick Robinson, 'India's Judicial Architecture' in Sujit Choudhry *et al* (eds), *Oxford Handbook of Indian Constitutional Law* (Oxford University Press 2016). For an analysis of normative difficulties with over-extended public institutions, see Kapur and Mehta, *supra* note 1.

largely discretionary nature of the Court's docket, the interests of various stake-holders and the circularity of the expectations that have now come to be placed on the Court, all these factors converge in the case of the Supreme Court. Concrete examples abound, and the Chapter will analyse areas as diverse as matrimonial law (granting of divorce even in the absence of relevant statutory grounds), rent control law (doctrines governing the adjudication of eviction suits between landlords and tenants) and employment law (regularizing past irregular appointments on compassionate grounds) to substantiate the argument. Part III examines the institutions of the higher judiciary itself, and identifies an (internal) *ad hocism* that only exacerbates the trend analysed earlier. This includes the relatively opaque judicial appointment process, the large number of benches of the Supreme Court, the short tenure for judges of that Court, the even shorter tenure for Chief Justices, and the over-stretched infrastructure and inconsistent procedures governing the Supreme Court's docket. A fourth section examines two areas of legal doctrine of particular importance for the High Courts, and the manner in which they interact with not only the Supreme Court itself, but also the subordinate courts within the judicial hierarchy. These areas of doctrine are, *one*, the Supreme Court's attempt to clarify and enforce the conceptual distinction between the High Courts' writ jurisdiction under Article 226 and supervisory jurisdiction under Article 227 and, *two*, the Court's effort to discipline the High Courts' exercise of appellate jurisdiction under Section 100 of the Code of Civil Procedure, 1908 [CPC].

The common thread running through the different sections of this Chapter - and indeed, the thesis as a whole - is distrust (oftentimes with sound reason) of underlying institutional outcomes, an attempt to rework these outcomes on an *ad hoc*, experimental basis, and the consequences flowing from the same. What is also common is the path-dependent and self-reinforcing nature of this trend. The Chapter, therefore, is an attempt to weave a larger narrative that focuses on this core theme. While I paint with a broad brush, my

primary objective is somewhat more modest than a whole-sale indictment of the Court's jurisprudence as 'inconsistent'. Rather, I focus on particular aspects of the Court's doctrine where such inconsistency is most directly related to the problems of interventionism and *ad hocism* the Chapter concerns itself with. Further, I address not only the manner in which these inconsistencies affect the Supreme Court's docket *per se*, but also the direct effect these have on the working of the judicial system more broadly.

## II. INTERVENTIONISM AND *AD HOCISM* IN THE SUPREME COURT

In one of the more influential books written about the Court - *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* - Rajeev Dhavan broadly indicts the Court for what he describes as its "*technically unpredictable*" jurisprudence.<sup>23</sup> Similar criticisms with respect to inconsistency in the Court's jurisprudence have also been made by H.M. Seervai,<sup>24</sup> although Seervai's identification of ideology as the primary factor responsible for such inconsistency may not be shared by Dhavan.<sup>25</sup>

In this section of the Chapter, I select five areas of legal doctrine for closer scrutiny: the death penalty, the Court's transfer jurisdiction, matrimonial litigation, tenancy law, and public employment. These areas of doctrine cover a wide spectrum of the Supreme Court's 'error correction' docket today, and therefore offer important insights into the Court's manner of handling its docket.

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<sup>23</sup> Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* (N.M. Tripathi Pvt. Ltd 1977).

<sup>24</sup> See H.M. Seervai, *Constitutional Law of India*, vol 3 (4<sup>th</sup> edn, Universal Book Traders 1996) 2964-2965.

<sup>25</sup> See Rajeev Dhavan, *Litigation Explosion in India* (N.M. Tripathi Pvt. Ltd 1986) 165-169.

## **II.A. The Death Penalty:**

Selection of areas of legal doctrine for examination, for evaluation of consistency or any other reason, are obviously subject to the charge of cherry-picking or selective reliance on favourable data.<sup>26</sup> The reason the death penalty is an obvious choice is that it is one area of the law where predictability and certainty is, and is acknowledged by the courts to be, a moral imperative.<sup>27</sup> In that context, if it is seen that the judiciary (in this case, the Supreme Court) is failing miserably to achieve consistency in sentencing results, it would at least raise reasonable doubts about the level of consistency being achieved in other areas of the law, not subject to the same level of scrutiny as cases involving capital punishment.

There is in fact good reason to conclude that the Supreme Court is not merely inconsistent in its jurisprudence with respect to capital punishment, but systemically so. An empirical study of the trends with respect to awarding of the death sentence by two judges of the Apex Court (heading the respective benches in question) - S.B. Sinha and Arijit Pasayat - revealed stark differences in their approach to the imposition of capital punishment.<sup>28</sup> In a recent Report recommending the abolition of capital punishment in India, the Law Commission has highlighted the extreme inconsistency and unpredictability that has

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<sup>26</sup> See generally Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69(1) The University of Chicago Law Review 1.

<sup>27</sup> See, for e.g., *Swamy Shraddhananda (2) v. State of Karnataka* (2008) 13 SCC 767, para 55: "*The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court.*"

<sup>28</sup> While Justice Pasayat imposed capital punishment in a majority of the cases heard by him (73 percent), Justice Sinha did not uphold the death sentence in any of the cases before him. See Amnesty International India & People's Union for Civil Liberties (Tamil Nadu & Puducherry), 'Lethal Lottery: The Death Penalty in India' (May 2008); Yug Mohit Chaudhry, 'Uneven Balance' *Frontline* (25 August-7 September 2012) <<http://www.frontline.in/static/html/fl2917/stories/20120907291702500.htm>> accessed 1 May 2016.

characterized the imposition of capital punishment in India in recent years.<sup>29</sup> The Commission has brought to light sharp divergences, over a prolonged period of time, on a number of doctrinal questions pertaining to capital punishment, including the treatment of convictions based on circumstantial evidence, and the relevance of disagreement amongst judges on the question of guilt or the imposition of the death sentence.<sup>30</sup> Closer to the present time, (recently retired) Chief Justice Dattu has also drawn attention for the high rate of confirmation of death sentences in matters coming up before him.<sup>31</sup>

Given the random (or, at the least, semi-random) procedure for the allocation of cases to different benches, it is hard to explain this dichotomy on the basis of anything other than ideological predilections.<sup>32</sup> This degree of inconsistency has been acknowledged by the Court itself. In *Swamy Shraddhananda (2) v. State of Karnataka*<sup>33</sup>, the Supreme Court noted that “*the question of death penalty is not free from the subjective element*” and “*depends a good deal on the personal predilection of the Judges constituting the Bench*”.<sup>34</sup>

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<sup>29</sup> Law Commission of India, ‘Report No. 262, The Death Penalty’ (2015).

<sup>30</sup> Id at 133-139.

<sup>31</sup> See Kian Ganz, ‘Executioner-in-Chief?, The SC’s ever-changing dance with death under HL Dattu and other justices’ (*Legally India*, 19 June 2015) <<http://www.legallyindia.com/Bar-Bench-Litigation/apex-court-dance-with-death-under-dattu-and-other-justices>> accessed 2 January 2016.

<sup>32</sup> By this, I mean that there is no reason to believe that cases involving especially heinous crimes are being specifically assigned to a particular bench, which might explain that what appears to be inconsistency is really the outcome of the particular facts of the cases in question. As the Law Commission explains, there are a large number of cases involving great brutality (often involving the rape and murder of young children, for example) where the facts pertaining to the nature of the crime are reprehensible indeed. In respect of these cases, it is a stretch to try and explain away differences in sentencing results on the basis of minor differences in fact situations. The much more plausible explanatory factor is the ideological orientation of the bench in question. See Law Commission of India, *supra* note 29 at 133-139.

<sup>33</sup> (2008) 13 SCC 767, para 51.

<sup>34</sup> Id.

Inspite of this obvious level of inconsistency in Supreme Court decisions in capital punishment matters, it might be questioned whether broader conclusions about inconsistency in the Court's jurisprudence more broadly are justified. Consistency in sentencing in death penalty cases has proven elusive in many jurisdictions in the world, after all, including ones with very different judicial structures than those in India.<sup>35</sup> But there is another kind of inconsistency prevalent in the Court's approach to capital punishment cases - procedural inconsistency.

Under Indian law, capital punishment matters would entail an appeal (as of right) to the Supreme Court only in those cases where the conviction was not a concurrent one by the two courts below.<sup>36</sup> Thus, where the Trial Court and the High Court both convicted the accused person, a convict's recourse is only under the Court's special leave jurisdiction. Inspite of this, death is - and is seen to be - different. The Supreme Court grants leave to appeal almost mechanically in such cases, irrespective of the merits of the matter.<sup>37</sup> Nonetheless, and in a glaring illustration of procedural inconsistency on a matter of great importance, there are deviations from this course of conduct. Recently retired Chief Justice H.L. Dattu attracted adverse comment for dismissing several death sentence petitions *in*

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<sup>35</sup> In the United States, for example, capital punishment was effectively suspended by the Supreme Court in *Furman v. Georgia* 408 US 238 (1972), holding that the arbitrary and inconsistent imposition of capital punishment violated the Eighth and Fourteenth Amendments to the US Constitution. However, most States passed statutes seeking to bring about consistency in death penalty sentencing, and these statutes were upheld by the Supreme Court in *Gregg v. Georgia* 428 US 153 (1976). Nearly 40 years later, there continues to be fierce debate about whether the existing procedures governing the imposition of capital punishment meet constitutional standards. See *Richard E. Glossip et al v. Kevin J. Gross et al* 576 US \_\_\_\_ (2015) (dissenting opinion of Justice Breyer).

<sup>36</sup> The Constitution of India, 1950, Article 134.

<sup>37</sup> See, for e.g., *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra* (2012) 9 SCC 1, para 5: "We may also state here that since it is a case of death sentence, we intend to examine the materials on record first hand, in accordance with the time-honoured practice of this Court, and come to our own conclusions on all issues of facts and law, unbound by the findings of the trial court and the High Court."



*limine*.<sup>38</sup> What makes this even more incongruous is the recent Constitution Bench judgment of the Court in *Mohd. Arif v. Registrar, Supreme Court of India & Ors*,<sup>39</sup> where the Court has read the Supreme Court Rules to imply a right to oral hearing, in review petitions, in death sentence cases.<sup>40</sup> Thus, where a bench dismisses a death sentence Petition *in limine*, it essentially creates a situation where the Review Petition against such dismissal (maintainable on extremely limited grounds) is likely to get a more patient hearing than the main Petition itself.

In conclusion, the Supreme Court's jurisprudence in capital punishment cases is demonstrative of a troubling trend of *ad hocism* and inconsistency in the Court's doctrine.

## ***II.B. 'Transfer' Jurisdiction:***

At different points in this thesis, I have remarked upon how heterogeneous the work of the Supreme Court is. So it is fitting that from capital punishment (presumably the most consequential decision that any judge might be called upon to make), I move to something very different in magnitude and character which the Court regularly involves itself in - exercise of its 'transfer' jurisdiction.

The Supreme Court has the power to direct transfer of civil and criminal cases pending in any lower court or tribunal to another court in any other part of the country.<sup>41</sup> And

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<sup>38</sup> See Ganz, *supra* note 31.

<sup>39</sup> (2014) 9 SCC 737.

<sup>40</sup> *Id.*

<sup>41</sup> The Constitution of India, Article 139A:

*"Transfer of certain cases.- (1) Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied on its own motion or on an application made by the Attorney-General of India or by a party*

the Court exercises this power liberally - thousands of Transfer Petitions are filed in the Court each year.<sup>42</sup> While this power can be, and occasionally is, exercised in a wide-range of situations, it is most commonly invoked in the context of matrimonial litigation, where matrimonial proceedings (normally divorce or maintenance proceedings) pending in trial courts are requested to be transferred - by one of the litigants - to a more convenient location.<sup>43</sup> In the Indian sociological context, the factual background normally involves a troubled marriage where the wife has moved back to her parental hometown. Then, one or the other of the parties (sometimes both) have initiated matrimonial litigation against the other. Transfer Petitions normally arise in a situation where the parties, now in different cities, each wish for the litigation to be conducted in their place of residence. In this context, women

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*to any such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself:*

*Provided that the Supreme Court may after determining the said questions of law return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment.*

*(2) The Supreme Court may, if it deems it expedient so to do for the ends of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.”*

Code of Civil Procedure, 1908, s 25:

*“Power of Supreme Court to transfer suits, etc*

*(1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State...”*

<sup>42</sup> In 2015, a total of 2,063 Civil Transfer Petitions were registered by the Supreme Court Registry (ascertained by testing the highest Transfer Petition number recognized by the Court’s ‘Case Status’ tool at [www.sci.nic.in](http://www.sci.nic.in)). It must be noted that the actual number of Petitions would be lower, since multiple case numbers would be assigned to a single Transfer Petition in certain scenarios (essentially when there are multiple cases sought to be transferred through a single Petition). However, the actual number is undoubtedly still very high.

<sup>43</sup> See Raju Ramachandran and Gaurav Agarwal (eds), *B.R. Agarwala’s Supreme Court Practice and Procedure* (6<sup>th</sup> edn, Eastern Book Company 2002) 209.

routinely approach the Supreme Court, under its original jurisdiction, requesting transfer of matrimonial litigation initiated by their husbands to their current place of residence.<sup>44</sup> While precise numbers are hard to tabulate, since many of these cases are disposed of summarily and are not published as reported judgments, it is clear that the majority of the transfer petitions initiated by women so-placed are allowed by the Supreme Court, on the ground that the inconvenience will be relatively greater for them than their husbands, if they are compelled to travel long distances to attend court proceedings.<sup>45</sup> It is easy to understand the Court's basic reasoning with respect to relative hardship, though normative views of the desirability of the Courts orders may vary.<sup>46</sup>

But more interesting than the substantive outcome of these Petitions, for the purposes of this thesis, is the very fact that these are adjudicated at all, and also the manner of adjudication. The power to transfer, after all, is a discretionary one, and there is no legal requirement that the Court entertain such cases so liberally.<sup>47</sup> Even the all-important Article 32 (pertaining to the enforcement of fundamental rights, and couched in seemingly mandatory terms) has been exercised by the Supreme Court fairly selectively, and it has been content to leave several matters relating to Public Interest Litigation to be adjudicated by the High Courts under Article 226.<sup>48</sup> In contrast, with respect to these relatively mundane

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<sup>44</sup> See *id.* See however, *Kalpna Devi Prakash Thakar v. Dr. Devi Prakash Thakar* (1996) 11 SCC 96; *Shiv Kumari Devendra Ojha v. Ramesh Shitla Prasad Ojha* (1997) 2 SCC 452.

<sup>45</sup> *Id.*

<sup>46</sup> It is possible to envisage certain schools of feminist scholarship arguing that this is founded on paternalistic assumptions about the capabilities and independence of women which are self-reinforcing in character. The alternative view would be that the barriers the Court takes into consideration are real and substantive ones, and the Court's approach is therefore normatively justified. For an overview of the literature, see 'Feminist Philosophy of Law' in *The Stanford Encyclopaedia of Philosophy* <<http://plato.stanford.edu/entries/feminism-law/>> accessed 10 April 2016.

<sup>47</sup> See, for e.g., *Dr. Subramaniam Swamy v. Ramakrishna Hegde* (1990) 1 SCC 4.

<sup>48</sup> See Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10(3) *Journal of Empirical Legal Studies* 570 at 584.

matrimonial matters, the Supreme Court frequently exercises its powers to direct transfer of cases to the place requested by the wife.<sup>49</sup> This is a classic example of what this Chapter refers to as *interventionism*. Setting aside normative doubts about this practice, it is also an illustration of what I characterize in Chapter I as individual-centric justice.<sup>50</sup>

These orders are also passed, ordinarily, in fairly mechanical fashion. Petitions normally detail the grounds for the substantive matrimonial litigation, while particularly highlighting reasons for seeking transfer. Again, reasons for seeking transfer generally follow a well-worn pattern (inconvenience involved in travelling to a far-away place, particularly with young children, difficulty in engaging counsel and securing adequate legal assistance, and threats to personal safety or well-being). While notice is issued to the Opposite Party (ordinarily the husband in such cases) and he is permitted to file a reply, no detailed evidence is adduced in these matters.<sup>51</sup> In the normal course, the Supreme Court's order does not critically evaluate the specific allegations and counter-allegations levelled by either party against each other, but allows the transfer sought (in summary fashion) on the general ground that the balance of convenience is in favour of the wife.<sup>52</sup>

For a Supreme Court, this is a strikingly *ad hoc* manner of functioning.<sup>53</sup> In aggregate, it undeniably occupies a significant portion of the Court's time, although the time expended

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<sup>49</sup> See Ramachandran and Agarwal, *supra* note 43.

<sup>50</sup> See *supra* Chapter I, Parts II.D. and II. E.

<sup>51</sup> I mean by this that the Court receives pleadings of the respective parties, supported by affidavits, but does not entertain oral testimony, cross-examination or any of the other ordinary processes incidental to fact-finding in trial proceedings.

<sup>52</sup> See Ramachandran and Agarwal, *supra* note 43.

<sup>53</sup> It might be queried whether the Court's intervention in these minor but sympathetic cases is not sound from a strategic perspective, in that it furthers its reputation as a 'People's Court' without the investment of the very significant amounts of time that (for instance) a complicated PIL matter might involve. There might be some truth to this perspective. However, I do not believe that the Court's approach is as strategic as this would suggest. For one thing, while the time invested in accommodating each of these cases may well be trivial,

on each individual Petition may be small. Even more significantly, it contributes to the broader trend of *ad hoc*, individual-centric justice that this Chapter highlights. In the latter portion of the Chapter, I return to the broader ramifications of this trend for the Court's functioning as the country's apex court.

### ***II.C. Matrimonial Litigation:***

While the frequent exercise by the Supreme Court of its power to transfer cases (particularly matrimonial cases) may be somewhat puzzling, it can at least be said that there is a legislative mandate in this context.<sup>54</sup> It could also be thought that the process is relatively mechanical (and therefore less time-consuming), since the merits of these individual cases are largely irrelevant, and the Court is strongly inclined to allow transfers in certain contexts. That is not the case with respect to some of the other interventions analysed in this section of the Chapter. Matrimonial litigation is a prime example, and this is the area of doctrine I now consider.

Indian law at present (excluding Muslim personal law) does not permit unilateral, no-fault divorce, and the grounds for divorce are limited (but include 'cruelty').<sup>55</sup> The Supreme Court has, in a limited number of cases, while considering special leave petitions challenging decisions of the High Courts in matrimonial matters, granted prayers for decrees of divorce

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the impact is also minor (inasmuch as most of these are unlikely to attract much attention from anyone apart from the litigants in question). Therefore, I believe the underlying dynamics relate more to the circularity inherent in the process, and the difficulty of withdrawing or curtailing the liberal exercise of such discretion.

<sup>54</sup> See *supra* note 41.

<sup>55</sup> See, for e.g., The Hindu Marriage Act, 1955, ss 13 and 13B; The Special Marriage Act, 1954, ss 27 and 28; The Divorce Act, 1869, s 10.

even while acknowledging that the statutory grounds for divorce have not been fulfilled.<sup>56</sup> The Court has done this, generally, by referencing its own plenary constitutional powers to pass orders in aid of ‘complete justice’ under Article 142 of the Constitution.<sup>57</sup> In other cases, different benches of the Court have refused to do so, concluding that even the plenary constitutional powers under Article 142 of the Constitution do not permit it to disregard directly applicable statutory law.<sup>58</sup> This matter now stands referred to a larger bench of the Court, which has not thus far been constituted. As discussed in Chapter I, the constitution of Constitution Benches of the Court has clearly taken a back-seat to the Court’s heavy miscellaneous docket.<sup>59</sup>

One obvious inference is that there is prolonged inconsistency, in Supreme Court doctrine, about a not insignificant question of legal doctrine (and one with fairly wide ramifications). But perhaps more significant is the fact that, even in the Court’s *interventionist* version of the doctrine, this is something that can be done only by the Supreme Court. That is, the Court is not laying down legal principles that can even potentially guide the lower courts or the High Courts in adjudicating such cases in the future. It is, rather, reserving to itself the task of adjudicating - on certain special standards - whether the decree of divorce sought (in cases that have travelled up through the ordinary appellate process) is liable to be granted. Thus, the Court’s doctrine (or one strand of the Court’s doctrine) is not only interventionist but also intrinsically *ad hoc*.

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<sup>56</sup> See *A. Jayachandra v. Aneel Kaur* (2005) 2 SCC 22; *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511.

<sup>57</sup> See *id.* See also *Vishnu Dutt Sharma v. Manju Sharma* (2009) 6 SCC 379 [Editorial Note].

<sup>58</sup> *Vishnu Dutt Sharma v. Manju Sharma* (2009) 6 SCC 379.

<sup>59</sup> See *supra* Chapter I, Part III.B. See also Nick Robinson *et al*, ‘Interpreting the Constitution: Indian Supreme Court Constitution Benches since Independence’ (2011) XLVI(9) Economic and Political Weekly 27.

I acknowledge in the introduction to this Chapter that the Court's *ad hocism* is limited by, and in conflict with, a strain of incrementalism ingrained in India's common law legal tradition. In this particular context, this strain of caution and incrementalism is represented by the other branch of the Court's doctrine (emphasizing that even the Apex Court cannot disregard clear-cut statutory law while exercising its judicial functions, despite Article 142). But as we see, a final resolution to even this divergence between interventionist and non-interventionist views, in this context, is yet to emerge. This again points towards the toll exacted by the Court's docket crisis, prolonged inconsistency in its jurisprudence, and the vicious cycle of *ad hoc* interventions and corrections this perpetuates.

#### **II.D. Tenancy Law:**

Like many other countries, India has had a long history of tenancy-protection laws in the various States.<sup>60</sup> The normative desirability of enacting such laws is obviously beyond the scope of this Chapter. But for the purposes of my argument, it is necessary to note the general institutional structure created by these statutes, and the manner in which they operate. These statutes generally provide statutory protection against eviction to tenants, regulate rent, outline limited legal grounds on which tenants can be ousted, and further create an adjudicatory mechanism for landlords seeking such ouster.<sup>61</sup> While different States have

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<sup>60</sup> See, for e.g., The Delhi Rent Control Act, 1958, The West Bengal Premises Tenancy Act, 1997, The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, The East Punjab Rent Restriction Act, 1949. See generally Aditya Alok and Pankti Vora, 'Rent Control in India - Obstacles for Urban Reform' (2011) 4 NUJS Law Review 81.

<sup>61</sup> See generally Satvik Dev, 'Rent Control Laws in India: A Critical Analysis' (CCS Working Paper No. 158, Centre for Civil Society 2006) <[http://www.ccs.in/internship\\_papers/2006/Rent%20Control%20Act%20-%20Satvik.pdf](http://www.ccs.in/internship_papers/2006/Rent%20Control%20Act%20-%20Satvik.pdf)> accessed 2 January 2016.

varied statutory frameworks, certain grounds for eviction are fairly common.<sup>62</sup> Failure to pay rent, denial of the landlord's title and *bona fide* personal requirements are some of these grounds.<sup>63</sup> The adjudicatory mechanism normally comprises an initial 'Rent Controller', and a statutory first appeal to an appellate authority.<sup>64</sup> Thereafter, there is no further statutory appeal but litigants often approach the concerned High Court invoking either its statutory revisional jurisdiction or its supervisory jurisdiction under Article 227 of the Constitution.<sup>65</sup> In law, the High Court's intervention should be limited to jurisdictional or other legal errors and not extend to re-appreciation of facts. But the line between a perverse disregarding of material on record and a permissible (if improbable) appreciation of the evidence produced is necessarily uncertain, and the High Courts do intervene sporadically in these matters. Whatever the final adjudication by the High Court, a litigant could theoretically file a further special leave petition before the Supreme Court.

The incentives of litigants to do so even in cases where there is a low prospect of success, and the relatively low costs involved, have been explored in earlier sections of this thesis.<sup>66</sup> Particularly in cases involving concurrent findings through the three lower courts, the Supreme Court is exceedingly unlikely to intervene.<sup>67</sup> But the other benefits, including prolongation of the entire process and, more importantly, possibly gaining a limited extension of time to vacate, would justify 'taking a chance' with the Supreme Court.<sup>68</sup>

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<sup>62</sup> See *supra* notes 60 and 61.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> For an analysis of the principles governing the exercise of Article 227, and the Court's uncertain jurisprudence in this regard, see Part III of this Chapter.

<sup>66</sup> See *supra* Chapter I, Part II.

<sup>67</sup> Id.

<sup>68</sup> Id.



Even with respect to the substantive legal principles relating to interpretation of these tenancy statutes and the specific statutory grounds for eviction, Supreme Court doctrine has seen both inconsistency and *ad hocism*. One particular doctrinal puzzle which both arises on account of, and contributes to, the institutional malaise in this particular area, is the relevance of subsequent developments to the relief sought in an eviction petition. This arises particularly in a scenario where a petition praying for eviction of a tenant is allowed, whether by the tribunal of first instance or the appellate authority, on the ground of a *bona fide* requirement of the landlord. This would, inevitably, be on account of a complex factual adjudication of the needs of the landlord's family. Many of the cases reaching the Supreme Court in recent years have involved claims with respect to the needs to the landlord's family - particular emphasis is often placed on the needs of growing children.<sup>69</sup>

In a painfully vivid demonstration of the lethargy of India's legal system, the factual scenario evolves over time (during the pendency of the case). These changed circumstances sometimes are (and sometimes are not) taken into account by the adjudicating and appellate authorities, depending on the procedural steps taken by the parties and the decisions of these adjudicators. In any event, in cases which ultimately reach the Supreme Court at the behest of aggrieved tenants, a plea is sometimes raised that the decree of eviction is erroneous since, even assuming a *bona fide* need existed at the time the Petition was filed, with changed circumstances, such need no longer subsists. The Supreme Court's response to pleas of this nature has fluctuated, to put it mildly.

At one point of time, the Court appeared to be fairly sympathetic to defences of this nature. In certain cases, the Supreme Court has in fact 'moulded the relief' taking into account changed circumstances. If the need is entirely gone, the Court has observed, then

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<sup>69</sup> See, for e.g., the narration of facts in *Gaya Prasad v. Pradeep Srivastava* (2001) 2 SCC 604.

granting the original relief sought may be both pointless and unjust. In *Hasmat Rai v. Raghunath Prasad*,<sup>70</sup> the Supreme Court held that the landlord's *bona fide* requirement must subsist through the length of the entire litigation, including the appellate process, and that any other view would defeat the intent of a beneficial legislation enacted for the protection of tenants from arbitrary evictions.<sup>71</sup> At other points of time, the Court has referenced its powers under Article 136 and Article 142 of the Constitution while interfering with decrees of eviction passed in favour of landlords in such circumstances.

To the extent that its judgments in this connection are read as encouragement or liberty, in a doctrinal sense, to take changed circumstances into account, this sends mixed signals to the courts below and plausibly creates further rent-seeking opportunities for litigants. To the extent these judgments are read as being the exclusive prerogative of the Supreme Court (and not declarations of law), these would be seen as further instances of “Do as I say, not as I do” on the part of the Court. While perhaps not as stark as in the instances of matrimonial litigation highlighted above, this again is an area of the law where the Supreme Court has been aggressively interventionist.

There is, however, another side to this. In a large (and increasing) number of cases, the Court appears to have accepted the proposition that the legal rights of the parties are to be tested in terms of the factual position that existed at the time the original case was instituted.

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<sup>70</sup> (1981) 3 SCC 103.

<sup>71</sup> Id at para 14: “If a landlord *bona fide* requires possession of a premises let for residential purpose for his own use, he can sue and obtain possession. He is equally entitled to obtain possession of the premises let for non-residential purposes if he wants to continue or start his business. If he commences the proceedings for eviction on the ground of personal requirement he must be able to allege and show the requirement on the date of initiation of action in the court which would be his cause of action. But that is not sufficient. This requirement must continue throughout the progress of the litigation and must exist on the date of the decree and when we say decree we mean the decree of the final court. Any other view would defeat the beneficial provisions of a welfare legislation like the Rent Restriction Act.”

Parties cannot be faulted for the fact that the legal process stretches for years, even decades, the Court has said. In certain cases, the Court has arrived at a factual finding that, even in the changed circumstances, the landlord's *bona fide* need continues.<sup>72</sup> But even in these judgments, there is an undercurrent of sympathy for landlords in such circumstances, and a clear suggestion that such hard-won legal relief cannot easily be forfeited merely on account of the length of time for which the litigation has lingered.<sup>73</sup>

A plausible case can be made that there has in fact been an ideological shift in the Court's orientation on this issue (with the Court now arguably more deferential to property rights, and more sceptical that the tenant is necessarily the weaker party in the tenancy contract). While this might indeed be true, the picture is still a blurred one. This only makes clearer the point I make elsewhere: The discretionary nature of the Court's docket, the significant pressure of work confronting the Court, the very high number of decisions being handed down annually and the large number of benches, all contribute to a continuing lack of

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<sup>72</sup> See, for e.g., *Vallampati Kalavathi v. Haji Ismail* (2001) 4 SCC 26 (holding that the High Court, in exercise of revisional powers, was not justified in setting aside the concurrent findings of fact of the two courts below with respect to the *bona fide* requirements of the landlord, and was not justified in interfering on account of subsequent developments, when those developments were in fact on record before, and therefore considered by, the courts below).

<sup>73</sup> See, for e.g., *Pratap Rai Tanwani v. Uttam Chand* (2004) 8 SCC 490, para 7:

*"It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch a new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent developments during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to erase the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an applicant just on the eve of his reaching the finale after passing through all the previous levels of the litigation merely on the ground that certain developments occurred pendente lite, because the opposite party succeeded in prolonging the matter for such unduly long period."*

clarity in the Court's jurisprudence, even where there truly is a perceptible shift in the Court's thinking.

### ***II.E. Public Employment:***

In a country like India with widespread poverty and significant levels of unemployment and underemployment among the general public, it is hardly surprising that public employment is as coveted as is the case. While this is of course most of all so with respect to the highly competitive examinations for the central civil services conducted by the Union Public Service Commission, government employment even at lower levels and in clerical capacities is highly valued on account of the security of tenure and relatively high salaries it provides. In the context of such employment, there has been an enormous amount of litigation in the Indian courts generally, and in the Supreme Court in particular. Cases range from complicated disputes over *inter se* seniority between different classes of employees, to the calculation of salaries and other benefits, to pleas for regularization of employment. I focus on this last category because it illustrates starkly both the interventionist and *ad hoc* tendencies within the Court, and also how these are in tension with the Court's own awareness of the slippery slope it confronts.

In *Secretary, State of Karnataka v. Uma Devi*,<sup>74</sup> a Constitution Bench of the Court was constituted to clarify the position of law in light of conflicting judgments of the Court on the question of intervention of the superior courts to direct regularization of employment of temporary governmental employees. The factual background is that, in different States, there was a widespread practice of employing persons on a contractual (ostensibly temporary) basis, without compliance with the rules and regulations governing public employment. Such

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<sup>74</sup> (2006) 4 SCC 1.

contractual employment would often be extended from time to time, and persons would therefore continue in such employment for several years. Frequently, such persons would then approach the various High Courts under Article 226 of the Constitution, claiming regularization of employment. While the legal grounds for claiming such relief might vary, some claimed discrimination *vis-a-vis* other regular employees, arguing that they were performing similar functions as permanent employees but arbitrarily retained on such inferior terms. Equitable considerations and the doctrine of legitimate expectations are also relied upon. In some cases, the High Courts and the Supreme Court accepted such arguments and directed consideration of such persons for appointment to vacant positions.

In *Uma Devi*, the Supreme Court overruled these decisions.<sup>75</sup> Cautioning against the tendency to “*individualise justice to suit a given situation*” which would “*send out confusing signals and usher in judicial chaos*”, the Court remarked that “*equity tends to vary with the Chancellor’s foot*”.<sup>76</sup> The wide powers of the High Court are not intended to be used “*for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment*”.<sup>77</sup>

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<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id at para 4:

*“But, sometimes this process is not adhered to and the constitutional scheme of public employment is bypassed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment*

*Uma Devi* is a revealing decision of the Court, for more than one reason. One, it represents a clear acknowledgement of the dangers of what this Chapter describes as interventionism and *ad hocism*. Furthermore, the judicial *ad hocism* that *Uma Devi* speaks of arises in the context of, and only compounds, a situation where the executive machinery is functioning in a knee-jerk and inefficient manner.<sup>78</sup> In that sense, this parallels other illustrations given elsewhere in this Chapter where the context (and rationale) for the Court's intervention is the failure (even abdication) of the other branches of government. Third, it highlights well one of the concerns this Chapter points towards, that *ad hocism* in the Supreme Court is closely (albeit in complicated ways) linked to *ad hocism* in the various High Courts.<sup>79</sup>

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*being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time, that the 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 emphasised that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten."*

<sup>78</sup> Id (describing how the State governments and the Union Government have, over the years, resorted to irregular appointments in the public services, particularly at the lower levels in the bureaucracy, without compliance with the mandated appointment procedures. The Court further observes that, having gained such a benefit in an *ad hoc* manner, such individuals have often approached the courts for regularisation of their services, and courts have sometimes acceded to these requests.)

<sup>79</sup> For a fuller discussion of this argument, see *infra* Part III of this Chapter.

But the decision is instructive for another reason as well. Even in a case where the Supreme Court carefully considered its own conflicting decisions and came down squarely on one side of the issue, judicial inconsistency did not immediately come to an end. In *UPSEB v. Puran Chandra Pandey*,<sup>80</sup> a Division Bench of the Supreme Court, stating itself to be ‘*distinguishing*’ *Uma Devi*, ordered regularisation of employment in circumstances identical to those in that case.<sup>81</sup> Idiosyncratic ideological factors might have been at play; the author of the judgment has acquired a reputation for strong and unyielding opinions,<sup>82</sup> and, as a specialist in labour law during his time as a practicing lawyer,<sup>83</sup> could plausibly be thought to have particularly strong views on the matter. Nonetheless, the clear disregard of the Constitution Bench judgment by a bench of two judges is telling. Elsewhere in this thesis, I have argued that structural and institutional factors have greatly compounded inconsistency

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<sup>80</sup> (2007) 11 SCC 92.

<sup>81</sup> Id. In *Puran Chandra Pandey*, the Bench observed that *Uma Devi* could not ‘*be applied to a case where regularisation has been sought for in pursuance of Article 14 of the Constitution.*’ (para 11). Essentially, the Court reasoned that the constitutional right to equality of the temporary employees before it would stand violated if they were not given regular employment. *Uma Devi*, the Court said, could not be understood in a manner that would violate the right to equality enshrined in Article 14. But this line of reasoning is palpably absurd. The Court in *Uma Devi*, in a detailed and well-considered judgment, had concluded that the right to equality would have no application in relation to such temporary employees since they had accepted employment with full knowledge of the nature and conditions of such employment. Further, *Uma Devi* adopted a broader view of equality and concluded that the best manner of conforming to the constitutional mandate of equality would be to rigorously follow the regular procedure for appointment to all such posts. As an academic matter, there may be two views possible on the correctness of *Uma Devi*. But to attempt to distinguish the case, by claiming that it did not concern the constitutional right to equality, is plainly disingenuous.

<sup>82</sup> See, for e.g., ‘IITians are selfish, have no genuine love for India, says Markandey Katju’ *Zee News* (20 December 2015) <[http://zeenews.india.com/news/india/iitians-have-no-genuine-love-for-india-says-markandey-katju\\_1836552.html](http://zeenews.india.com/news/india/iitians-have-no-genuine-love-for-india-says-markandey-katju_1836552.html)> accessed 9 January 2016; Vishnu Varma, ‘Justice Markandey Katju’s latest claim: Mahatma Gandhi was a British agent’ *The Indian Express* (10 March 2015) <<http://indianexpress.com/article/india/justice-markandey-katjus-latest-claim-mahatma-gandhi-was-a-british-agent/>> accessed 9 January 2016.

<sup>83</sup> See Profile of Former Judges, Hon’ble Mr. Justice Markandey Katju <[http://supremecourtfindia.nic.in/judges/bio/132\\_mkcatju.htm](http://supremecourtfindia.nic.in/judges/bio/132_mkcatju.htm)> accessed 9 January 2016.

in the Court's jurisprudence.<sup>84</sup> This instance is a vivid illustration of how inconsistency continues to thrive within particular areas of Supreme Court legal doctrine, inspite of efforts to eliminate it.<sup>85</sup>

Perhaps predictably, other benches of the Court were not amused. Stressing the importance of '*predictability and certainty*', a Three-Judge Bench<sup>86</sup> of the Court noted that '*courts at the grass roots will not be able to decide as to which of the judgements lay down the correct law and which one should be followed*'.<sup>87</sup> It also acknowledged that '*breach of discipline...encourages chance litigation*'.<sup>88</sup> This bench clarified, therefore, that the observations of the Division Bench ought not to be treated as binding by the High Courts, and could not be employed to evade the binding effect of *Uma Devi*.<sup>89</sup>

It is worth reminding oneself that this level of inconsistency catches the attention of other benches, and perhaps causes some reputational loss to the concerned judges, mainly

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<sup>84</sup> See *supra* Chapter II, Part III.

<sup>85</sup> I explain below that there has been yet another attempt by the Supreme Court to reiterate the binding nature of *Uma Devi*, and an explicit overruling of *Puran Chandra Pandey*. It might be thought that this demonstrates the resilience of precedent in India, that *Puran Chandra Pandey* was an outlier, and that I am overstating the extent of inconsistency in the Court. I believe this is a classical 'glass half full/half empty' scenario. It is certainly not my case, here or elsewhere in this thesis, that there is no value for precedent in the Indian Supreme Court or the Indian judicial system more generally. But this strain of judicial discipline is in constant tension with the contrary trends this Chapter highlights. The constitution of a Five-Judge Bench in the Supreme Court is, in itself, a time-consuming process. Here we have a case where conflicting decisions of the Court were referred to a Five-Judge Bench, and the Court ultimately rendered a clear and unequivocal opinion. In such circumstances, any degree of non-compliance subsequently is troubling. Further, the difficulty is only aggravated by the volume of decisions emanating from the Court, and related confusion and inconsistency.

<sup>86</sup> *Official Liquidator v. Dayanand & Ors* (2008) 10 SCC 1.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* See also *State of Karnataka & Ors v. G.V. Chandrashekhhar* (2009) 4 SCC 342; *Harinder Kaur & Ors v. Union of India & Ors* (2009) 13 SCC 90; *Mohd. Ashif & Ors v. State of Bihar & Ors* (2010) 5 SCC 475.



because it is a final judgment of the Court on the merits (and the bench purports to be laying down the law in some sense). In the context of the Court's discretionary jurisdiction under Article 136, where a judgment of the High Court plainly at odds with *Uma Devi* is sought to be challenged before the Supreme Court, the Court would be justified in refusing to entertain such Petition on any number of grounds (inspite of clear legal error). Such an *in limine* dismissal is unlikely to attract the attention of other benches of the Court; nor will it (from a doctrinal perspective) be regarded as a case of judicial indiscipline.

But that again brings back the circularity (in the Court's actions and societal expectations) that earlier portions of this thesis deal with. Even though refusal to interfere with a judgment of a High Court does not, in doctrinal terms, imply an approval or acceptance of the law laid down in such judgment, the Court's intervention as an error-correction Court in a significant percentage of cases brought before it, implies that refusal to intervene is often taken by stake-holders as tacit approval of the judgment sought to be impugned.<sup>90</sup> Put differently, the fact of intervention in a critical mass of cases by the Court means that *in limine* dismissal of appeals will be viewed by litigants and the Bar as a determination that the judgment of the Court below is substantively correct. The Supreme Court, aware that this perception of the Bar is not entirely misplaced, is pressured to intervene in a progressively greater proportion of such matters. It is this vicious cycle that appears to be driving the Court's expansive embrace of its discretionary docket.

The several illustrations of doctrinal confusion and inconsistency in this section of the thesis help explain how the docket crisis in the Supreme Court affects not just the Court itself, but has ripple effects throughout the Indian judicial system. In the next section of the

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<sup>90</sup> See *supra* Chapter I, Part II.C.

Chapter, I turn to structural and institutional facets of *ad hocism* in India's higher judiciary, which obviously interact with and compound this doctrinal inconsistency in multiple ways.

### **III. STRUCTURAL AND INSTITUTIONAL *AD HOCISM* IN INDIA'S HIGHER JUDICIARY**

*Ad hocism* in India's higher judiciary manifests itself in many ways. In this section, I focus on the structural and institutional, rather than doctrinal, aspects of this *ad hoc* nature of functioning. I have touched upon some of these issues in earlier portions of the thesis, but analyze these in a more systematic (and cumulative) manner here. I deal with, in turn: the appointment process for judges in the higher judiciary, judicial tenure, Court infrastructure and the Registry (particularly procedures governing the listing and hearing of matters).

#### ***III.A. The Appointment Process for the Higher Judiciary:***

To briefly recapitulate the appointment process for judges in the country's higher judiciary, the Constitution states that judges shall be appointed by the President (and so, effectively, the executive) after consultation with the Chief Justice and “*such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.*”<sup>91</sup> Judges of the Supreme Court hold office till the age of sixty five years.<sup>92</sup> The regime governing appointment of judges, however, underwent a radical transformation with the judge-created collegium (of senior judges) being mandated to recommend

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<sup>91</sup> The Constitution of India, Article 124(2).

<sup>92</sup> *Id.*

appointments to the Supreme Court and the various High Courts, and the executive all-but-bound to accept the decisions of the collegium.<sup>93</sup>

The opaque and unstructured nature of the collegium system is much written about.<sup>94</sup> The National Judicial Appointments Commission [NJAC], which was stayed and ultimately struck down by the Supreme Court in a landmark judgment recently,<sup>95</sup> was heralded by Parliament as an attempt to reform a dysfunctional and undemocratic system. Critics of the collegium system of judicial appointments describe the system as illegitimate, since the constitutional text relating to the appointment of judges by the Executive refers to ‘consultation’ with the Chief Justice of India and other judges, and nothing further.<sup>96</sup> The legitimacy of the collegium system for judicial appointments and the merits of the recent invalidation of the NJAC (and restoration of the collegium system) are obviously beyond the scope of this thesis. What is noteworthy, though, is that the same Constitution Bench which invalidated the effort to replace the collegium system with the NJAC also acknowledged grave deficiencies in the functioning of the collegium system.<sup>97</sup> The Constitution Bench therefore heard further submissions on possible reforms with respect to the functioning of the collegium system, and ultimately directed the Union Government to evolve a fresh Memorandum of Procedure in consultation with the Chief Justice.<sup>98</sup>

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<sup>93</sup> See *Supreme Court Advocates-on-Record Association & Ors v. Union of India* (1993) 4 SCC 441; *In Re Special Reference* (1998) 7 SCC 739.

<sup>94</sup> See, for e.g., Raju Ramachandran, ‘Judicial Supremacy and the Collegium’ (2013) 642 Seminar <[http://india-seminar.com/2013/642/642\\_raju\\_ramachandran.htm](http://india-seminar.com/2013/642/642_raju_ramachandran.htm)> accessed 5 May 2016.

<sup>95</sup> *Supreme Court Advocates-on-Record Association & Anr v. Union of India* 2015 SCC OnLine SC 964.

<sup>96</sup> See, for e.g., Lord Cooke of Thorndon, ‘Where Angels Fear to Tread’ in B.N. Kirpal *et al* (eds), *Supreme but Not Infallible* (Oxford University Press 2000).

<sup>97</sup> Id.

<sup>98</sup> Id.

While the outcome of this reform process remains to be seen, at present, little is known about deliberations within the collegium or the considerations that are at play with respect to the appointment (or non-appointment) of individual judges. One author, after a rigorous survey of past appointments to the Supreme Court, has concluded that three factors are dominant in determining who is elevated to the Apex Court - age, seniority and diversity.<sup>99</sup> Seniority is clearly a dominant factor in determining elevation to the Court, and judges appointed are invariably either Chief Justice in one or the other of the High Courts, or (more rarely) senior judges of such High Courts.<sup>100</sup> Diversity of multiple shades is also important to the Court. Religious and regional diversity is a factor, but the representation of the various High Courts is also a significant consideration.<sup>101</sup>

### ***III.B. Judicial Tenure in the Supreme Court:***

As I note elsewhere in this thesis, judges elevated to the Supreme Court ordinarily have between three to seven years of tenure before they attain the mandatory retirement age of sixty five years. Chief Justices, appointed in terms of an unwritten but powerful norm of seniority, have an even shorter tenure (often of less than a year's time). Given that Chief Justices are invariably appointed in accordance with seniority, and the date of retirement of each Chief Justice is fixed, it is possible to ascertain at the time of appointment of any particular judge(s), which of them will assume the office of Chief Justice some years hence. In a sense, therefore, the short tenure of occupants of the office of Chief Justice is very much within the control of the collegium. This discretion is somewhat, but not entirely, controlled

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<sup>99</sup> Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014).

<sup>100</sup> Id.

<sup>101</sup> Id.

by the norms of seniority governing initial appointments to the Court. A broad survey of the range of options available to the collegium makes clear that there is enough ‘play in the joints’ to enable appointments for significantly longer periods of time, should that be the aim.<sup>102</sup> As suggested in Chapter II, then, short tenures for judges (and Chief Justices) might be a form of risk-aversion,<sup>103</sup> or alternatively the outcome of negotiations and compromise amongst different coalitions within the judiciary.

The short tenure of judges of the Court, and the even shorter tenure for Chief Justices, makes it difficult for judges to bring about meaningful change during their tenures. It is interesting, and somewhat ironical, to note that these relatively short tenures also, inevitably, result in a high rate of turnover with respect to the constitution of the collegium too (the Chief Justice and the other four senior-most justices of the Supreme Court). To the extent that the collegium is the apex administrator in respect of the higher judiciary (the appointment and transfer of judges), it appears inevitable that there will be little meaningful change with respect to policy-making in these vital matters. Given that judges (whether in their judicial

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<sup>102</sup> Multiple illustrations of this point can be made. For example, Justices Misra and Chelameswar were appointed to the Supreme Court on the same date (10 October 2011). Since Justice Misra was sworn in earlier, he is likely to assume the office of Chief Justice on 28 August 2017, and hold the same until 2 October 2018, with a tenure of a little over a year. Justice Chelameswar will retire on 22 June 2018, during the course of Justice Misra’s tenure as Chief Justice. On the other hand, had Justice Chelameswar been afforded seniority, he would have been the seniormost judge on the retirement of Chief Justice Khehar, and would presumably have assumed the office of Chief Justice for about ten months. Justice Misra would still eventually assume the office, but with a very short tenure. [The relevant biographical details of these three Justices are available on the website of the Supreme Court of India <<http://sci.nic.in/judges/judges.htm>> accessed 15 April 2016.]

To give a different illustration, an individual like Justice Chandrachud (elevated to the Bombay High Court at the very young age of 40 years) has already been Chief Justice of the Allahabad High Court since 31 October 2013. Had he been elevated to the Supreme Court (say) a year after assuming this office, he would in the normal course have had a tenure of just over a decade in the Supreme Court, and almost two years as Chief Justice. [The biographical details of Justice Chandrachud are available on the website of the High Court of Judicature at Allahabad <<http://www.allahabadhighcourt.in/service/judgeDetail.jsp?id=203>> accessed 15 April 2016.]

<sup>103</sup> See *supra* Chapter II, Part IV.B.

role or while exercising administrative functions) would develop an understanding of these new functions, and confidence in discharging them, with the passage of time, it is easy to understand why radical shifts in policy in matters of judicial administration have been scarce.

While this might seem to suggest continuity (in a way that undercuts my argument), I suggest that this continuity is itself with respect to an unsatisfactory *status quo*, and of practices which are *ad hoc* in important ways. So continuity is with respect to this unsatisfactory equilibrium, while changes are with respect to relatively minor matters (and generally not implemented in a sustained manner). The larger point is that reform measures (including those intended to mitigate or resolve the problems associated with the backlog of cases in the Supreme Court) have rarely been implemented in a sustained or methodical manner. Furthermore, inconsistencies in the Court's jurisprudence are undoubtedly aggravated by the short tenure of judges, and the opportunities for forum-shopping are obvious.<sup>104</sup>

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<sup>104</sup> Matters are allocated to different benches after filing, and subsequently continue to come up before the same bench in the normal course. Conceptually, the Chief Justice has the administrative prerogative to re-assign cases, but doing so after a matter is already being heard by a particular bench would be unusual. By forum-shopping in this context, then, I imply bench-shopping (i.e. manoeuvring to have a more favourably inclined bench consider the matter). This could be done by seeking adjournments on one pretext or the other, if a judge is close to retirement. Alternatively, the hope would be for the composition of the bench to change, so that at least one of the judges would be different (As a default rule, matters would stay with the senior judge on the bench, were the composition of the bench to change). Requests to have the matter heard by a larger bench, in cases where there is a plausible ground for such request, would be another strategy. Most direct, and least commonly utilized, would be an explicit request for a particular judge to recuse himself or herself, for any stated reason. Norms of professional courtesy and the regard of Advocates for their own long-term interests imply that such applications for recusal are rarely made.

### ***III.C. The Registry and Processes governing the Listing and Hearing of Matters:***

The work of the judges of the Court is aided and facilitated, in large part, by the Court's Registry. The Registry is tasked with the important and none-too-easy responsibility of ensuring that the large number of appeals and petitions filed before the Court every year conform to the requirements of the Court, and are presented in a satisfactory manner. And therefore, the burden of the large number of cases filed every year is felt not only by the judges themselves, but also by the court staff and Registry. On the one hand, the Bar often objects to what it regards as hyper-technical and illogical demands made by the Registry (with respect to formatting and conformity with the Rules). On the other hand, it is clear that the quality of the Petitions finally accepted in Court (and thus presumably after withstanding Registry scrutiny) vary considerably, and a large number are very poorly drafted. Recently, a bench headed by Justice Gogoi passed an order severely reprimanding an Advocate-on-Record for the abysmal quality of the petition and dismissing the petition (only later consenting, on a special 'mentioning' to consider a revised petition on the merits).<sup>105</sup> The Court also noted that poorly drafted Petitions, where it is difficult to even comprehend the case being set up by the Petitioner or Appellant, are becoming increasingly common.<sup>106</sup> From the substantive quality of advocacy before the Court, I turn to a more procedural, but exceedingly important, issue - the procedures governing the listing of matters before the Court.

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<sup>105</sup> Letter bearing Reference Number SCBA/Registry.31/2015 dated 25 August 2015 addressed to the members of the Supreme Court Bar Association by Mr. Dushyant Dave, President, SCBA (on file with the author) (bringing to the notice of the Bar an instance where a bench of Justices Gogoi and Pant dismissed a special leave petition for being very badly drafted and containing very many typographical errors, as also the fact that the Bench pointed out that this was occurring with increasing frequency, making the judicial task far more difficult). *See also* Aditya AK, 'SC Bench blasts Bar for typo-ridden filing; Dave appeals to AORs to avoid mistakes' (*Bar & Bench*, 26 August 2015) <<http://barandbench.com/sc-bench-blasts-bar-for-typo-ridden-filing-dave-appeals-to-aors-to-avoid-mistakes/>> accessed 2 January 2015.

<sup>106</sup> *See id.*

The orderly listing of matters for hearing in the Supreme Court is both a victim of, and a contributor to, the systemic institutional problems this Chapter addresses. As with many other facets of Supreme Court practice discussed in this thesis, the Court's grappling with delays often comes across as *ad hocism* to counter *ad hocism*. Or alternatively, *ad hocism* to counter the many different problems engendered by the Court's chronic struggle with its docket. Take, for instance, the effort to have matters listed out-of-turn. In a situation where the Court determines that an Appeal or Petition deserves to be heard on the merits, it would in the ordinary course grant leave to appeal (in the case of special leave petitions filed under Article 136) or admit the Appeal (in the case of statutory appeals). While the Registry is less than transparent about its listing procedures, what is clear is that this procedure sends matters (not unnaturally) to the end of the queue of similarly-classed matters, thus beginning a waiting period of several years.<sup>107</sup> Ironically, therefore, even an appellant who should otherwise be pleased at the development; may be left distressed once the practical consequences are explained.

This also depends, of course, on the nature of interim relief obtained, if any. Hence the significance of interim orders, and the 'Monday, Friday' hearings where these can be obtained.<sup>108</sup> Nonetheless, the fact remains that it is possible to conceive of many situations where one or the other litigant (and sometimes both) are greatly prejudiced by the invariable delay that will follow upon the decision to hear the matter on the merits. And it is in this situation that parties demand of the Court, and the Court sometimes concedes, *ad hoc*

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<sup>107</sup> It appears that there are certain broad classifications made with respect to prioritization, presumably under the overall supervision of the Chief Justice. Criminal appeals, thus, are heard quicker than civil or taxation appeals. Nonetheless, in the best of circumstances, the determination that a matter is to be heard and determined on the merits signals a waiting period of several years.

<sup>108</sup> Dhavan makes the very important, and frequently overlooked, point that delays do not invariably harm the Petitioner or Appellant and that it is therefore sometimes in the interest of such litigant to acquiesce in or even perpetuate these delays. See Dhavan, *supra* note 25 at 154-55.



accommodations. What are the kinds of accommodations that might enable such litigant to break the queue?

One is a simple, one-sentence direction in the Court's order - to "expedite hearing" of the matter. Lack of transparency and limited data makes it difficult to assess the impact of such a direction on the average length of pendency of the case. What is clear is that a litigant would, nonetheless, have a fairly long wait. Therefore, the alternate escape from such prolonged delay is persuading the Court to fix the matter for final hearing on specified dates (which the Court is, understandably, most reluctant to do), or to list the case as a "miscellaneous matter" for "final disposal".<sup>109</sup>

To state the obvious, holding other factors (the practices of the judges in question, the complexity and importance of the matter, the skill and seniority of the Counsel in question, and the like) constant, a matter is not likely to consume more or less court time depending on how it is formally classified in the Court's system.<sup>110</sup> Therefore, the main consequence of listing such matters for final disposal is that they are significantly prioritized, and stand a fair chance of being finally settled within a year or two. Given the lack of clear standards governing when this significant benefit should be conferred on any particular litigant, it is plausible to assert that the role of Senior Counsel assumes greater importance in this

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<sup>109</sup> In Supreme Court-speak, this essentially implies that the matter is heard and adjudicated at the admission stage itself, without being formally admitted for final hearing (and so, effectively, never being placed in the queue in the first place). The Supreme Court has for several years reserved Friday afternoons for oral hearings in matters of this nature. More recently, and in a move reflective of the increasing desperation of successive Chief Justices to cope with demands for early hearings, this practice has been extended to certain other days of the week as well.

<sup>110</sup> It is true that judges might be somewhat more impatient while hearing such "final disposal" matters, since they have often listed these matters upon being assured by Counsel that these are relatively manageable matters ("on a short point", to employ the popular professional slang). Nonetheless, it may be assumed that this difference would be on the margin, and would not fundamentally change the manner in which the bench treated the matter. On the other hand, if I am wrong in this assumption, and the Court does give such matters short shrift, this is in itself problematic in obvious ways.

context.<sup>111</sup> From a normative perspective, concerns about inequality in accessing the Court are arguably only aggravated by this course of conduct. Further, concerns about the *ad hoc* nature of resort to this mechanism should only be heightened by the fact that these decisions are made by the individual benches hearing the matters in question. Therefore, the inconsistency evident in different areas of the Court's jurisprudence is replicated in this relatively minor procedural matter too.<sup>112</sup>

A particular Chief Justice in the Supreme Court prohibited unlisted court 'mentionings', but his successor promptly reinstated that practice. The predecessor to the current Chief Justice entered into a heated confrontation with the Supreme Court bar over certain changes to listing procedures for pending cases, which he said were necessary to grapple with arrears, but the bar claimed resulted in the arbitrary listing of dormant cases at short notice (and therefore grossly inadequate time to prepare).<sup>113</sup> After an unusually public face-off between the Bench and the Bar, a compromise was arrived at and the controversy defused.<sup>114</sup>

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<sup>111</sup> On the significance of Senior Counsel in the Indian judicial system generally, *see* Marc Galanter and Nick Robinson, 'India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization' (2013) 20(3) *International Journal of the Legal Profession* 241.

<sup>112</sup> If anything, it would appear to be even more difficult to achieve any degree of uniformity in this area, since these decisions are entirely discretionary ones, and not of a type readily amenable to precedent. It is true that the Chief Justice can (and sometimes does) pass directions on the administrative side regulating the listing of such matters, but he cannot regulate judicial orders passed by individual benches in this connection.

<sup>113</sup> *See* Letter bearing Reference Number SCBA/Registry.31/2015 dated 20 February 2015 by the Hony. Secretary, SCBA to the Secretary General, Supreme Court of India (on file with the author) (protesting the new practice of listing 'leave granted' matters for hearing before the Court without listing these in a Terminal List or, at the least, providing seven days clear notice to the concerned Advocates); Circular bearing Reference Number SCBA/GBM.38/2015 dated 26 February 2015 to members of SCBA (on file with the author) (proposing adoption of a resolution by the SCBA deprecating the practice of listing final hearing matters without adequate notice).

<sup>114</sup> *See* Circular bearing Reference Number SCBA/GBM.38/2015 dated 10 March 2015 (on file with the author) (reporting on a meeting held between the Chief Justice of India and the

These illustrations point towards, *firstly*, the many challenges posed by the Court's docket crisis, but *secondly*, also towards the many hurdles that stand in the way of even the most modest efforts towards either short-term mitigation or broader reform.

#### **IV. THE HIGH COURTS - RIPPLE EFFECTS FROM *AD HOCISM* IN THE SUPREME COURT:**

An underlying premise for this thesis is that a Supreme Court (or Constitutional Court) is different, and should be treated as being so. Amongst other reasons is the obvious fact that a Supreme Court sets precedent for the entire judicial system, and mistakes or inconsistencies in its jurisprudence affect not merely the parties before it but have wider ramifications in terms of how cases are adjudicated throughout that system. And so it is in the case of the Supreme Court of India. The Court's docket crisis - and the inconsistency and *ad hocism* this has engendered - has had ripple effects throughout the Indian judiciary, compounding the various challenges already being faced by the lower courts in the judicial hierarchy.

I have written earlier that the large number of decisions handed down by the Supreme Court on any particular point tends to devalue the signalling effect of any one decision. Even in the United States, recent scholarship has suggested that changes to legal doctrine brought about by the higher courts are not always easily adopted by the lower courts.<sup>115</sup> In the Indian context, I would suggest that this effect is only magnified by the large number of judgments of the Court on any issue. This may be on account of actual inconsistencies or divergences in doctrine in different decisions of the Court, which would leave lower courts either genuinely

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President, SCBA to resolve differences, and the fact that the Chief Justice agreed to the request for adequate notice prior to listing of final hearing matters).

<sup>115</sup> See Matthew Tokson, 'Judicial Resistance and Legal Change' (2015) 82 The University of Chicago Law Review 901.

‘confused’ or free to cherry-pick Supreme Court precedent to follow their own ideological predilections. In the first section of this Chapter, I have discussed five different (and very diverse) areas of legal doctrine to highlight the Court’s inconsistency and *ad hocism* in the exercise of its judicial functions. If I am correct that the Court is inconsistent in the manner I describe, then the High Courts in those doctrinal areas are (almost by definition) operating in violation of applicable Supreme Court precedent at one point or the other. The observations of Justice Alam in *Swamy Shraddananda (2) v. State of Karnataka*,<sup>116</sup> and of Justice S.B. Sinha in *Aloke Nath Dutta v. State of West Bengal*,<sup>117</sup> in the context of capital punishment, appear to bear this out. But even where the Court is relatively clear on the standard or doctrine it wishes to impose on the lower courts, the very volume of decisions may cloud the signalling effect of these judgments.

In identifying and analysing these ‘ripple effects’ of the Supreme Court’s docket crisis on the High Courts, I consider two specific areas of legal doctrine. *Firstly*, the Supreme Court’s repeated attempts to clarify the conceptual distinction between the High Courts’ writ jurisdiction under Article 226<sup>118</sup> and supervisory jurisdiction under Article 227<sup>119</sup>, and *secondly*, the Supreme Court’s repeated efforts to limit the High Courts’ exercise of appellate

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<sup>116</sup> (2008) 13 SCC 767.

<sup>117</sup> (2007) 12 SCC 230.

<sup>118</sup> The Constitution of India, Article 226:

“(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose...”

<sup>119</sup> Id, Article 227:

“(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction...”

jurisdiction under Section 100 of the CPC without satisfying the requisite jurisdictional requirements.

Why these two, relatively unglamorous areas of Supreme Court doctrine? For more than one reason. *First*, I consider it appropriate, in this context, to choose examples of legal doctrine which are technical and non-ideological in character. If we see, as I believe we do, significant difficulties for the Supreme Court in effectively enforcing its view of the law in the various High Courts with respect to these technical areas of doctrine, there is reason to be even more sceptical about the likely state of affairs in more ideologically-charged areas of constitutional or legal doctrine. *Second*, both instances concern the relationship between the High Courts and the courts below, and therefore demonstrate how inconsistency in Supreme Court doctrine (particularly in a unified court system such as India's) naturally percolates throughout the judicial system. *Third*, both perfectly exemplify what I describe as the phenomenon of *ad hocism* countering *ad hocism* in India's legal system. *Fourth*, while these areas of doctrine are indeed technical and procedural in nature, both in their own sphere are exceedingly significant. Thus, Section 100 of the CPC is the only mechanism for a litigant to further appeal the decision of an appellate civil court - in some ways, therefore, the gateway to a significant chunk of the civil litigation eventually working its way up to the Supreme Court's docket.<sup>120</sup> Further, Section 100 comes into play (by definition) where the High Court is the third Court scrutinizing the case in question, and the Supreme Court (if a special leave petition were to be filed) would be the fourth.

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<sup>120</sup> The jurisdiction of civil courts varies widely in the various States. The simplest way of describing the reach of Section 100 is that it applies where a subordinate civil court has been further appealed to an appellate court within the subordinate judiciary. It does not come into play where the civil case in question is originally filed before the highest level within the subordinate judiciary, nor (obviously) where the case is filed before the High Court in question, in the case of those High Courts which exercise original jurisdiction.

Articles 226 and 227 of the Constitution contain within themselves the most critical “constitutional” powers of the High Courts. Article 226 gives High Courts the jurisdiction to issue writs in the nature of *certiorari*, prohibition, *quo warranto*, *habeas corpus* and mandamus for the enforcement of the legal rights of the persons approaching it against public authorities,<sup>121</sup> while Article 227 affords High Courts supervisory jurisdiction over the courts and tribunals within its territories.<sup>122</sup> It will be plain that these two provisions of the Constitution provide the various High Courts with wide powers, and are extremely important in the constitutional scheme. The High Courts’ reluctance or inability to enforce the Supreme Court’s interpretation of these two Articles, even if in the slightly technical matter of the conceptual distinction between the two provisions and the proper drafting of pleadings; is therefore significant. With these preliminary words of explanation, I take up each of these provisions in turn.

#### ***IV.A. Enforcement of Supreme Court Precedent on the High Courts’ Supervisory and Writ Jurisdiction:***

Articles 226 and 227 of the Constitution are significant and substantive sources of power for the High Courts, governing (respectively) their relationship over other branches of the government, and lower courts and tribunals within the territory their jurisdiction extends to. Significantly, as is the case with Article 32, these provisions have been held to constitute part of the basic structure of the Constitution, rendering them un-amendable even in exercise of Parliament’s ‘constituent’ powers under Article 368. Article 226 might come into play over matters as diverse as requiring the release of an individual unlawfully detained by the

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<sup>121</sup> See The Constitution of India, Article 226.

<sup>122</sup> See *id.*, Article 227.

Police, considering cancellation of an arbitrarily conducted governmental tender process, or challenging the appointment of an unqualified person to governmental office. It is broader in its scope and ambit than Article 32, inasmuch as it empowers the Court to enforce all ‘legal rights’, not merely fundamental rights under Part III. As I note above, the Supreme Court has indeed retreated from over-zealous invocation of Article 32, advising litigants to instead approach the High Courts under Article 226. Article 227 is concerned with the High Courts exercise of jurisdiction not over the actions of the executive branch of government, but subordinate courts and tribunals within its territories.

While interpreting the powers of the High Courts under Articles 226 and 227, the Supreme Court has signalled its impatience with the widespread practice of filing legal pleadings which vaguely and interchangeably reference these two Articles as the source of jurisdiction for the relief sought by the litigant.<sup>123</sup> Articles 226 and 227, the Supreme Court has emphasized, relate to two very different sources of power for relief sought from a High Court - writ jurisdiction, and supervisory jurisdiction over the lower courts, respectively.<sup>124</sup> Therefore, the Court has clarified, depending upon the nature of relief sought by a particular litigant, Petitions should be filed either under Article 226 or Article 227.<sup>125</sup> Further, the Supreme Court stressed that frequent interference by the High Courts, without a clear appreciation of the relevant doctrinal limitations under the two constitutional provisions, caused significant delay in the disposal of cases in the lower courts.<sup>126</sup>

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<sup>123</sup> *Shalini Shyam Shetty & Anr v. Rajendra Shankar Patil* (2010) 8 SCC 329. See also *Radhey Shyam v. Chhabi Nath* (2009) 5 SCC 616.

<sup>124</sup> *Id.* But see *Surya Dev Rai v. Ram Chander Rai* (2003) 6 SCC 675, *infra* note 128.

<sup>125</sup> *Id.*

<sup>126</sup> See *Shalini Shyam Shetty*, *supra* note 123 at para 67: “As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This

In *Surya Dev Rai v. Ram Chander Rai*,<sup>127</sup> the Court acknowledged that the distinction almost stands obliterated in practice, and noted the consequent tendency of lawyers to label Petitions interchangeably as Article 226/Article 227 Petitions.<sup>128</sup> But the later judgments of *Shalini Shyam Shetty* and *Radhey Shyam* retreated from the slightly agnostic approach in *Surya Devi Rai*, and strongly reiterated the conceptual distinction between the two sources of jurisdiction for the High Courts. Years after the Supreme Court clearly reiterated this view; the Bar in various High Courts across the country has steadfastly refused to implement this direction. In spite of the seemingly low cost of making some minor changes to templates and formats for these pleadings, and the lack of any compelling ideological reasons for resistance, it is intriguing that these changes have not been implemented.

Reasons for such non-compliance could range from a lack of awareness of the Court's judgments, the belief that the position of law is still unclear, the perception that the likely sanction for non-compliance is so low or infrequent that the lawyers are not willing to bear even these low costs of compliance, or the belief that since the local courts are accustomed to a particular manner of functioning (in terms of the drafting of pleadings etc), departure from these established traditions may be risky, regardless of what the Supreme Court has said.

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*Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."*

<sup>127</sup> (2003) 6 SCC 675.

<sup>128</sup> *Id* at para 25:

*"Upon a review of decided cases and a survey of the occasions, wherein the High Courts have exercised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions."*



Most plausibly, some combination of these various factors is at play. Whatever the reasons, though, it is instructive that a fairly clear-cut bit of doctrinal clarification by the Supreme Court has simply not been implemented by several High Courts (and the lawyers practicing there).

Importantly, such doctrinal ambiguity is not without costs. As seen above, Article 226 and 227 are important sources of jurisdiction for the High Courts. It is at least plausible that a more rigorous enforcement of the conceptual distinction between the two provisions would inhibit easy recourse to them. This may be even more the case with the High Court's supervisory jurisdiction under Article 227, which by its very nature is intended to be an exceptional remedy.<sup>129</sup> This certainly seems to be the view of the Supreme Court in *Radhey Shyam* and *Shalini Shyam Shetty*. The tenor of these judgments is not one of the Court chastising lawyers for committing breaches of a purely technical nature. Rather, it is of the Court expressing concern over the lack of conceptual clarity regarding these important jurisdictional provisions, and the proliferation of meritless litigation as a consequence.<sup>130</sup>

#### ***IV.B. Exercise of Appellate Jurisdiction by the High Courts under Section 100 of the CPC:***

Section 100 of the CPC<sup>131</sup> provides a statutory second appeal before the High Court in civil cases decided by a lower appellate court, provided “*the High Court is satisfied that the*

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<sup>129</sup> See *Shalini Shyam Shetty & Anr v. Rajendra Shankar Patil* (2010) 8 SCC 329.

<sup>130</sup> *Id.*

<sup>131</sup> Code of Civil Procedure, 1908, s 100:

“(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

*case involves a substantial question of law*".<sup>132</sup> The Supreme Court, in a very large number of judgments, is seen rebuking High Courts for interference with the judgments of lower appellate courts without sufficient cause (and sometimes without even satisfying the statutory requirement of formulating substantial questions of law).<sup>133</sup>

But the Court's doctrine has itself nudged the door open for the High Courts to entertain such appeals in a liberal fashion. Perverse findings of fact, the Court has held, give rise to a substantial question of law.<sup>134</sup> And it is clear that reasonable judges can, at least

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(2) *An appeal may lie under this section from an appellate decree passed ex parte.*

(3) *In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.*

(4) *Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.*

(5) *The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:*

*Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."*

<sup>132</sup> Id.

<sup>133</sup> See, for e.g., *Louiza D'Souza v. John Claudis Andrews & Ors* (2001) 10 SCC 450:

*"3. The complaint of the learned counsel for the appellant is that the High Court has not formulated any substantial question of law without which no jurisdiction could have been exercised by the High Court. We have also noticed from the impugned judgment that no substantial question has been formulated.*

*4. We are not disposed to enter into the merits of the case, as we propose to leave it to the High Court to dispose of the second appeal afresh after formulating the substantial question of law, if any, found in terms of Section 100 of the Code of Civil Procedure."*

See also, *Thiagarajan v. Venugopalaswamy B. Koil* (2004) 5 SCC 762; *Kanai Lal Garari & Ors v. Murari Ganguly & Ors* (1999) 6 SCC 35; *Rambilas Tapadia v. Shyamala & Ors* (2001) 9 SCC 756.

<sup>134</sup> See, for e.g., *Kulwant Kaur v. Gurdial Singh Mann* (2001) 4 SCC 262, para 34: "[W]hile it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This

sometimes, differ on what is perverse (that is, whether a factual finding by a Court below is merely wrong, or so wrong as to be deemed perverse in a legal sense).<sup>135</sup> At the least, it may be said that supervising the High Courts' enforcement of this doctrine has proven challenging. As I note above, the Court has, time and again in recent years, delivered judgments chastising High Courts for interfering with the decisions of the lower courts in civil matters under Section 100 of the CPC, without satisfying the jurisdictional pre-requisite of the existence of a substantial question of law.<sup>136</sup>

It is unclear what degree of impact these repeated warnings have had, and it certainly cannot be assumed that there has been no salutary effect. But it is clear, from the number of occasions on which challenges in this form have come up and been accepted, that compliance on the part of the various High Courts is far from perfect. To return to a familiar theme, the very large number of judgments rendered by the Court (and the varied factual backgrounds in which these judgments are grounded) only renders the doctrine more malleable, in spite of the Court's repeated attempts to restrain or correct the High Courts.

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*is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication - what is required is a categorical finding on the part of the High Court as to perversity." See also Easwari v. Parvathi & Ors. (2014) 15 SCC 255; Punjab State Civil Supplies Corpn. Ltd v. Sikander Singh (2006) 3 SCC 736.*

<sup>135</sup> As an American judge has observed, reasonable men can sometimes disagree on what is reasonable. See *Northeast Beverage Corpn. v. National Labour Relations Board* 554 F.3d 133 (D.C. Cir. 2009) (dissenting opinion of Judge Garland): "Of course, reasonable minds can differ about what is reasonable, and I certainly understand my colleagues' reservations. But I am unable to conclude that the Board's application of Section 7 to the facts of this case was unreasonable."

<sup>136</sup> See *supra* note 133.

## V. CONCLUSION

In conclusion, certainty and predictability are core features of any legal regime based on the rule of law. In this Chapter, I have analysed a dual trend of interventionism and *ad hocism* that is prevalent throughout the Indian higher judiciary. I have argued that there is a pervasive trend for institutions which have credibility and trust in the Indian polity to be entrusted with responsibilities, and expectations, grossly disproportionate to their capabilities and resources. This suggests that the trend identified in Chapter I is symptomatic of a broader and deeper institutional malaise within India's higher judiciary, which is deeply troubling for India's public law regime and worthy of greater critical attention from the Indian judiciary and academia alike. The Supreme Court has not, and perhaps cannot, remain unaffected by this phenomenon.

This pervasive trend of *ad hocism* within the higher judiciary is being dealt with in relatively short-sighted and unreasoned ways. Collective action problems, in the Supreme Court and within the various High Courts, have aggravated the problem.<sup>137</sup> This is one of the reasons Dhavan advocates some degree of division within the Supreme Court, a theme I shall return to.<sup>138</sup>

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<sup>137</sup> With respect to the Supreme Court as well as the High Courts, Dhavan takes seriously the collective action problems that arise when these Courts become larger. See Dhavan, *supra* note 25 at 125-126: "*It seems strange that no one has really looked for a new structure for India's every (sic) expanding High Courts. As long as courts were relatively small (say 15-25 judges), it was understandable to think of the Court as a whole. The judges seemed a cohesive group. They all knew each other and each other's jurisprudence...Yet the strategy that continues to be employed in the seventies and the eighties is the same as the strategy that has been employed in the the (sic) fifties and sixties. The Court has now become a very big court. It has lost its cohesiveness and its jurisprudential integrity. The filings before the court have increased and arrears are mounting. Is there not a case made out for considering the possibility of breaking the court into smaller units?*"

<sup>138</sup> Dhavan, *supra* note 25 at 91: "*There is also another reason why at least semi-permanent divisions are a good idea. The Court is not just an ensemble of judges deciding individual cases en masse. It is also an institution. One of the complaints against the court is that it has*

For reasons I articulate further in the concluding Chapter, the proposal to establish Cassation Benches of the Court in different regions of the country, the proposal to establish Courts of Appeal (subordinate to the Supreme Court) in four regions, as also the proposal to establish an independent Constitutional Court, each fail to address the deeper, underlying causes of the Court's chronic struggle with its docket. Additionally, each of these proposals is likely to prove counter-productive, exacerbating the crisis in significant ways while diluting the Court's core strengths and past accomplishments. Therefore, I build instead on the possibility of division within the Supreme Court of its constitutional and error-correction roles, which proposal has the merit of caution and incrementalism, while nonetheless directly mitigating the most tangible causes (and adverse effects) of the Court's docket crisis.

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*lost institutional viability. It is not even like a High Court but more like a civil court unable to establish decisive and viable patterns. It has become totally re-active rather than pro-active. One part of the court does not always know what the other part is doing. It is impossible to predict even the jurisprudence of the court leave alone predicting the decisions of the judges."*

## CONCLUDING THOUGHTS: POSSIBILITIES FOR STRUCTURAL AND INSTITUTIONAL REFORM

The Supreme Court's chronic struggle with its docket is attracting some degree of attention from the broader polity today, although only sporadically so. The Court's recent issuance of notice in *V. Vasanthakumar v. H.C. Bhatia & Ors*<sup>1</sup> - seeking the establishment of an intermediate Court of Appeal between the High Courts and the Supreme Court - has naturally created some additional interest in the topic. As I argue in this thesis, though, even where this so draws attention, it generally does so for the wrong reasons and in the wrong ways. In this concluding Chapter, I draw upon my analysis in earlier sections to elaborate upon why this is so, and how proposals for reform are misguided and counter-productive.<sup>2</sup> I argue that, despite recent developments that might suggest otherwise, a closer look confirms that radical institutional or structural reform for the Supreme Court remains politically infeasible. Even setting aside considerations of political feasibility, though, the primary proposals for reform currently in circulation fundamentally misdiagnose the nature of ailment, and therefore propose reform that would compound difficulties within India's higher

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<sup>1</sup> See *V. Vasanthakumar v. H.C. Bhatia & Ors* WP (C) No. 36 of 2016, Orders dated 26 February 2016 (issuing notice to the Union of India, appointing Senior Counsel Mr. K.K. Venugopal and Mr. Salman Khurshid as *amici curiae*, and requesting the assistance of the Attorney General for India) and 15 March 2016 (directing the Petition to be listed before a Three-Judge Bench).

<sup>2</sup> Broadly, my arguments in this concluding section will revolve around the logical fallacy sometimes described as 'politician's logic' (popularised in the 'Yes, Prime Minister' series). See Conversation between two bureaucrats in the BBC television series 'Yes, Prime Minister' (Episode 'Power to the People' 1988) <<https://www.youtube.com/watch?v=vidzkYnaf6Y&list=RDvidzkYnaf6Y&index=1>> accessed 10 May 2016:

*"Sir Arnold: It's the old logical fallacy: All cats have four legs. My dog has four legs.....*

*Sir Humphrey: ...Therefore my dog is a cat.*

*Sir Arnold: He's suffering from politician's logic.*

*Sir Humphrey: Something must be done, this is something, therefore we must do it."*

judiciary, while squandering what is best about the Supreme Court. But first, a brief review of the analysis in earlier Chapters.

## **I. OVERVIEW**

In the three Chapters of this thesis, I have explored different facets of the docket crisis in the Supreme Court today. In Chapter I, I analyse the crisis in the Court's docket from both a positive as well as a normative perspective. Positively, the effort is to develop a theory for what causes the Court's docket to continue to expand to breaking point, inspite of the obviously unsustainable nature of this phenomenon. Normatively, I argue that the rapid expansion in the Court's docket is both unnecessary and deeply troubling.

In Chapter II, the effort is to undertake a similar exercise in a comparative perspective, with the US Supreme Court playing the role of a helpful contrast. The two Apex Courts, so similar in many respects, have starkly contrasting dynamics when it comes to the question of management and operation of their respective dockets. Both are, and are generally regarded as being, exceedingly powerful institutions that enjoy a significant degree of independence from the political executive in their respective countries. Both exert considerable influence over the political and social life of their respective polities. Both operate at the top of judicial pyramids exercising (primarily, in the case of India) discretionary jurisdiction over the courts below. Nonetheless, the two display starkly different trends with respect to their treatment of their discretionary docket. I conclude that while many factors are at play, differences in institutional culture as well as certain structural factors are the primary driving force behind these differences.

Chapter III helps understand that this broader institutional trend - what I characterize as *ad hocism* and interventionism - is not unique to the Indian Supreme Court, but something that permeates and affects a wide range of institutions in the Indian polity. It helps explain that what might appear a somewhat nebulous and amorphous notion, particularly to have the powerful and rather counter-intuitive impact attributed to it, is in fact a potent reality affecting the self-perception and manner of functioning of many of the most important institutions of governance in India.

A wide range of institutions that possess a fair degree of credibility and institutional competence, I posit, are drawn towards playing a broader role than their actual remit, with the natural (and perhaps inevitable) consequence of a compromise with respect to their core institutional functions.<sup>3</sup> None of these institutions, though, attract the sustained attention or expectations that are anchored with the Supreme Court of India. The Court's grappling with such increased, indeed unreasonable, expectations has a long and chequered history. The Court's much-written about, less than exemplary role in the Emergency, and the subsequent cementing of the basic structure doctrine was perhaps the first chapter in the Court's emergence as a powerful, pro-active player in the Indian polity. Subsequently, the emergence of the Public Interest Litigation (PIL) jurisprudence of the Court, liberalization of *locus*

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<sup>3</sup> I discuss some of this in Chapter III, Part I. The debate with respect to the *Lok Pal* and the outsized role it came to occupy (though briefly) in Indian political life. Earlier periods of time when similar hopes and expectations were placed on a wide range of institutions, ranging from the Central Bureau of Investigation, to the Chief Vigilance Commissioner, to the Comptroller and Auditor General. Another telling example is the super-specialized All India Institute of Medical Sciences (AIIMS) - and the increasing pressures and demands on it, and the setting up of a number of AIIMS in response. The proliferation of Indian Institutes of Technology and Indian Institutes of Management, and apprehensions of deterioration in quality. (I thank Himanshu Bhushan for the example of AIIMS, which is an excellent one for my purposes.)



*standi* and its intervention in a broad range of social and economic issues in the exercise of writ jurisdiction gave it an out-sized role in the political realm.<sup>4</sup>

Tom Ginsburg has theorized that political parties in certain East Asian nations might acquiesce in or welcome the evolution of independent judiciaries even when in power, since these could serve as a form of insurance for future scenarios where they are no longer in power.<sup>5</sup> Something broadly analogous might be said in the Indian context, but more in the sense of intervention and pro-active supervision of governmental action. In that sense, the Supreme Court can be not merely a shield but also a sword, in terms of initiating public interest litigation or inviting other forms of judicial scrutiny (whether well-founded or not) to pressurize political opponents or challenge unpopular governmental policies. Several instances come to mind in recent years; the invalidation of significant governmental policies (and contracts) in the telecom spectrum and coal mining sectors - as a consequence of Writ Petitions filed directly before the Supreme Court under Article 32 - are only the most prominent examples.<sup>6</sup>

As I caution in Chapter I, though, it is well-documented that the bulk of the Court's docket has not come from this class of PIL cases (or, more broadly, the Court's interventions in human rights-related and other social issues).<sup>7</sup> As I argue there, the manner in which this

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<sup>4</sup> See generally Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8(1) Washington University Global Studies Law Review 1; B.N. Kirpal *et al* (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000).

<sup>5</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003). See also Ran Hirschl, *Towards Juristocracy - The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

<sup>6</sup> See, for e.g., *Centre for Public Interest Litigation & Ors v. Union of India & Ors* (2012) 3 SCC 1; *Manohar Lal Sharma v. Principal Secretary & Ors* (2014) 9 SCC 516.

<sup>7</sup> See Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10(3) Journal of Empirical Legal Studies 570.

trend has affected the Court's docket is less direct, and more intangible.<sup>8</sup> The Court's intervention in a relatively large number of PIL cases has created the perception, among a range of stake-holders, of an Apex Court that is willing to and capable of (and therefore, expected to) redress individual grievances. This perception is not, and perhaps in the nature of things cannot be, confined to matters falling within a narrow category, and percolates the Court's functioning, processes and jurisprudence more generally.

This, again, helps explain the significant differences between the Indian and US Supreme Courts. Incentives to achieve particular outcomes for litigants or stakeholders are not unique to either of these systems. Particular, one-time litigants would appear to have similar reasons to 'take a chance' in either of the two jurisdictions. With respect to repeat players or sophisticated litigants, again, concerns about the possible adverse impact of negative decisions should be a live concern in both regimes. As explored in Chapter II, though, the differing historical trend in these two judicial systems moulds incentives in interesting ways. And as seen in Chapter I, the very fact that the Indian Court intervenes in a select but non-negligible number of cases implies that it is worthwhile for the individual litigant to 'take a chance' before the Supreme Court, by invoking its discretionary jurisdiction under Article 136. The prominent constitutional scholar, H.M. Seervai, attributes this to the growing inconsistency in, and ideological nature of, adjudication in the Supreme Court.<sup>9</sup> I assert that this critique is significant but incomplete in certain respects. For one thing, as a generation of legal realists have taught us, ideology permeates most judicial reasoning and not just that in cases regarded as overtly political.<sup>10</sup> To that extent, Seervai's characterization

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<sup>8</sup> See *supra* Chapter I, Part II.D.

<sup>9</sup> See H.M. Seervai, *Constitutional Law of India*, vol 3 (4<sup>th</sup> edn, Universal Book Traders 1996) 2964-2965.

<sup>10</sup> See generally L.L. Fuller, 'American Legal Realism' (1934) 82(5) *University of Pennsylvania Law Review* 429.

of ideological inconsistency as the cause for proliferation of litigation before the Supreme Court is somewhat narrow. Inconsistency is important; not only in the major constitutional battles Seervai naturally focuses on, but equally in the run-of-the-mill special leave petitions I characterize as ‘error correction’ petitions in Chapter I.

Secondly, this account arguably overstates the importance of ideology, at least as an exclusive or dominant cause for inconsistency, and consequently for the explosion in the docket. First, inconsistency is compounded by structural factors on which Seervai is silent - perhaps he takes them as a given and finds it unnecessary to comment on them. As we analyse in Chapter II, the US Supreme Court is rarely seen as non-ideological, but historical and structural factors give its ideological orientation a measure of durability unknown to the Indian Court.<sup>11</sup> The predictability of the US Supreme Court’s responses, on the important ideological issues of the day, make it at least conceivable that strategic litigators and repeat players will avoid approaching the Apex Court for fear of an adverse outcome. In the Indian context, not only is such coordination considerably harder, but the risks of an adverse outcome are also arguably lower. Since the Indian Supreme Court is a polyvocal Court, speaking in many different voices at the same time, the risk of a final, negative outcome is in many senses lower than in the case of the US Supreme Court. Second, while inconsistency might be the product of ideological dogma to an extent, it can certainly be caused by, and

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<sup>11</sup> Take, for example, the frenzied political reaction and analysis with respect to the prospect of a significant change in the ideological orientation of the US Supreme Court, following the death of Justice Antonin Scalia in February 2016. *See, for e.g.*, Stephen Collinson, ‘Justice Antonin Scalia’s death quickly sparks political battle’ *CNN* (14 February 2016) <<http://edition.cnn.com/2016/02/13/politics/antonin-scalia-supreme-court-replacement/>> accessed 10 March 2016; Carl Hulse and Mark Landler, ‘After Antonin Scalia’s Death, Fierce Battle Lines Emerge’ *The New York Times* (14 February 2016) <[http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-death-cuts-fierce-battle-lines-in-washington.html?\\_r=0](http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-death-cuts-fierce-battle-lines-in-washington.html?_r=0)> accessed 10 March 2016.

compounded by, work pressure and inadequate time for judges to reflect and craft well-considered decisions.<sup>12</sup>

The other institutional aspect is temporal in nature - the changes brought about in the structure, composition and functioning of the Court over time. As highlighted in Chapter I, perhaps the most striking and counter-intuitive aspect of the Court's docket is how it has increased side-by-side with the significant increase in the number of judges (and benches) of the Court. The 'Induced Litigation' thesis, developed by applying the central insight of the 'Induced Traffic' economic theory to the judicial system, helps understand why increasing the judicial resources available within the Supreme Court has only been counter-productive.<sup>13</sup> Normatively, there are weighty reasons why 'Induced Litigation' is significantly more problematic in the context of a constitutional court such as the Indian Supreme Court, than in the case of courts of first instance.

Given that litigants in the Indian context have strong incentives to approach the Supreme Court, it is necessary to examine the opposite side of the ledger, *viz.*, the costs borne by such litigants. We see in earlier parts of the thesis that, although the Indian legal system theoretically adheres to the default rule of costs following the event, there are important practical reasons why unsuccessful litigants are not forced to internalize the costs of such litigation, and why costs in the present scheme of things are not an effective deterrent against frivolous or rent-seeking litigation.<sup>14</sup>

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<sup>12</sup> See K.K. Venugopal, 'Towards a Holistic Restructuring of the Supreme Court of India' (R.K. Jain Memorial Lecture, 30 January 2010) <[http://www.thehindu.com/multimedia/archive/00112/R\\_K\\_Jain\\_Memorial\\_\\_112842a.pdf](http://www.thehindu.com/multimedia/archive/00112/R_K_Jain_Memorial__112842a.pdf)> accessed 30 April 2016.

<sup>13</sup> Tracey E. George and Chris Guthrie, 'Induced Litigation' (2003-2004) 98 Northwestern University Law Review 545.

<sup>14</sup> See *supra* Chapter II, Part III.A. (iv).

Even more significantly, while it might appear at first glance that this is merely the outcome of inertia, the adverse reaction to recent reforms in the context of the Supreme Court make it clear that this *status quo* is a facet of the intangible, yet all-important, change in the manner in which the Court has come to be perceived, by stakeholders as well as in its own understanding. Thus, the Court has come to be seen as a ‘People’s Court’, and imposition of heavier court fees is inconsistent with this understanding. Of course, the construction of this narrative can quite plausibly be connected to the self-interested motives of the Bar too, and it is easy to see how the cycle is perpetuated indefinitely.

For these reasons amongst others, we find ourselves in an equilibrium from which there is no easy respite. From the perspective of the self-interested litigant, there is reason enough to ‘take a chance’ and approach the Apex Court. There is some prospect, though not necessarily a very high one, of success in even a fairly routine type of case. More importantly, even in cases which might fail ultimately, there is scope for rent-seeking behaviour in certain contexts. I have explored this in detail in Chapter III, in various contexts including that of tenancy litigation.<sup>15</sup>

As I acknowledge above, the Court’s chronic struggle with its docket has attracted a certain amount of attention in recent years, and some concrete proposals for reform have emerged. In light of the analysis of the docket crisis in earlier parts of the thesis, I turn now - in this concluding section - to a consideration of possibilities for structural and institutional reform.

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<sup>15</sup> See *supra* Chapter III, Part II.D.

## II. PROPOSALS FOR STRUCTURAL AND INSTITUTIONAL REFORM

In this thesis, I have argued that the docket crisis in the Court is, in a sense, an unsustainable one. Yet, the fact remains that the Court has been faced with this (seemingly unsustainable) situation for several decades now.<sup>16</sup> As is the case with many other public institutions in India, the Court has exhibited a strange, counter-intuitive resilience.<sup>17</sup>

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<sup>16</sup> See generally, Rajeev Dhavan, *The Supreme Court under Strain: The Challenge of Arrears* (N.M. Tripathi Pvt. Ltd 1978); Rajeev Dhavan, *Litigation Explosion in India* (N.M. Tripathi Pvt. Ltd 1986). For a more recent review of the docket crisis, see Alok Prasanna Kumar *et al*, 'Towards an Efficient and Effective Supreme Court: Assessing Issues of Backlog and Regional Disparities in Access' (Vidhi Centre for Legal Policy 2015) <<http://vidhilegalpolicy.in/reports-1/2016/2/8/towards-an-efficient-and-effective-supreme-court>> accessed 1 May 2016.

<sup>17</sup> See Devesh Kapur, 'Explaining Democratic Durability and Economic Performance: The Role of India's Institutions' in Devesh Kapur and Pratap Bhanu Mehta (eds), *Public Institutions in India* (Oxford University Press 2005) 60: "In recent years India has witnessed a weakening of many of its erstwhile strong institutions and as has been argued this has resulted in increased governmental instability. Concurrently, however, new institutions have appeared while some existing ones have taken on a new life. The result is an emerging Indian political system that represents a weak form of polycentrism... India's multiple institutions assist, thwart, manipulate, and subvert each other, but at the same time appear to have provided a system that undergrids apparent fragmentation and chaos. The very features that make governance more problematic also reduce covariance risk and thereby systemic threats to governability." See also Devesh Kapur and Pratap Bhanu Mehta, 'Introduction' in Devesh Kapur and Pratap Bhanu Mehta (eds), *Public Institutions in India* (Oxford University Press 2005) 12: "Bringing about change in the state is difficult, even when there are considerable populist pressures on the state. But the other side of the coin of the inertia of the Indian state is its systemic stability. Our key theoretical contention is that both features are characteristic of the Indian state and are a function of its complicated design. This does not allow for easy change, but it also prevents sudden reversals; it does not impede deterioration of particular institutions, but it always gives opportunities for self-correction. It makes the state less responsive to democratic pressure than we might expect it to be; on the other hand, it also prevents it from collapsing under the weight of the latest political fancy. Arguably, both the poor performance of the Indian state and its surprising resilience in the face of this poor performance are explained by the same factors: the internal institutional complexities of the state. To put it provocatively, what stands in the way of any ideology – be it socialism, communism, fascism, populism, liberalism – overrunning the Indian state, is the number of file notings that even an ideologue will have to wade through. The Indian state has no centre that can be taken over."

In light of this chronic struggle, it is reasonable to ask whether the Court - and the broader polity - must not consider the need for radical change?<sup>18</sup> After all, if incremental or minor reform has not been successful in addressing the docket crisis, then is it not possible that the only feasible solutions are more radical ones? This section of the thesis examines this question and concludes that - despite the relatively serious, and long-standing, nature of the Court's struggle with its docket - incremental change nonetheless presents the best path forward.<sup>19</sup>

For one thing, radical structural change in the Supreme Court seems politically infeasible today.<sup>20</sup> Chapter II of this thesis explores how the Supreme Courts in the US as well as in India, albeit for very different historical reasons, have evolved in ways that make structural change infeasible. Importantly, what constitutes structural change in the Indian context is, in itself, a construct. So an increase in the strength of the Court, interestingly enough, is not regarded as a dilution of the Court's essential character and attracts no adverse political repercussions, unlike in the case of the US Supreme Court.<sup>21</sup> But the creation of a Constitutional Court or an intermediate appellate court between the Supreme Court and the High Courts would be another matter altogether. Well-known and frequently remarked upon is the fact that the Supreme Court enjoys a strong, perhaps unparalleled, status - in the

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<sup>18</sup> This is the question Chief Justice T.S. Thakur appears to be troubled by, and the probable reason for issuance of notice in *V. Vasanthakumar*, *supra* note 1.

<sup>19</sup> A broadly similar conclusion is reached by the Vidhi Centre for Legal Policy in its recent work. See Kumar *et al*, *supra* note 16. See also Alok Prasanna Kumar *et al*, 'Consultation Paper: The Supreme Court of India's Burgeoning Backlog Problem and Regional Disparities in Access to the Supreme Court, Vidhi Centre for Legal Policy' (Vidhi Centre for Legal Policy 2015) <[http://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/560cf7d4e4b092010fff89b1/1443690452706/29092015\\_Consultation+Paper+on+the+Supreme+Court%27s+Burgeoning+Backlog+Problem.pdf](http://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/560cf7d4e4b092010fff89b1/1443690452706/29092015_Consultation+Paper+on+the+Supreme+Court%27s+Burgeoning+Backlog+Problem.pdf)> accessed 1 May 2016.

<sup>20</sup> I say this inspite of the recent issuance of notice in *V. Vasanthakumar*, *supra* note 1, and explain further below.

<sup>21</sup> See *supra* Chapter II, Part II.

citizenry - amongst India's public institutions. Furthermore, as seen in the recent *Mathai* order, the Court, while often troubled by the docket crisis, is ambivalent and unclear about the underlying causes.<sup>22</sup>

It is true, and indeed noteworthy, that the Supreme Court recently issued notice to the Union of India in *V. Vasanthakumar*, a Writ Petition seeking the creation of an intermediate Court of Appeal (between the High Courts and the Supreme Court) in different regions of the country.<sup>23</sup> In light of this development, my assertion that the radical restructuring of the Supreme Court (or the higher judiciary more generally) is outside the realm of political feasibility, might seem obviously wrong, or at the least over-stated. However, on closer scrutiny, I believe that notwithstanding the recent intervention by the Supreme Court, such radical institutional re-hauling remains infeasible. Firstly, the Court itself does not, evidently, have the authority to direct creation of an independent set of courts, a quintessentially legislative function.<sup>24</sup> In fact, while the creation of subordinate courts under the jurisdiction of the constitutional courts would be a legislative function, the sort of institutions suggested in several proposals for reform, exercising constitutional functions, could only be created by

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<sup>22</sup> See *Mathai @ Joby v. George & Anr* 2016 (2) SCALE 102. See also Rishad Chowdhury, 'The Indian Supreme Court Declines to Revisit its Docket Crisis: The Most Important Recent Order That You've Never Heard of' *I-CONnect* (27 January 2016) <<http://www.iconnectblog.com/2016/01/the-indian-supreme-court-declines-to-revisit-its-docket-crisis-the-most-important-recent-order-that-youve-never-heard-of>> accessed 1 May 2016.

<sup>23</sup> See Krishnadas Rajagopal, 'SC does U-turn, admits plea for Court of Appeal' *The Hindu* (27 February 2016) <<http://www.thehindu.com/news/national/sc-does-uturn-admits-plea-for-court-of-appeal/article8286546.ece>> accessed 4 March 2016); Bhadra Sinha, 'SC admits PIL seeking national court of appeals' *Hindustan Times* (27 February 2016) <<http://www.hindustantimes.com/india/sc-admits-pil-seeking-national-court-of-appeals/story-sr0FVDM3IwBKMzH7WrJhJM.html>> accessed 4 March 2016.

<sup>24</sup> I must note that the Court recognized all of these constraints during the hearing on 15 March 2016. Observing that "*nothing will happen without the Union* (being on board)", the Court indicated that it wished to, at the least, foster informed debate on these issues. See Author's notes of hearing on 15 March 2016 in *V. Vasanthakumar*, *supra* note 1 (on file with the author).



constitutional amendment. Any such constitutional amendment would also be subject to scrutiny by the Supreme Court, for violation of the basic structure of the Constitution.<sup>25</sup> A multitude of complications are foreseeable, which I will analyse below. Secondly, in a scenario where the existing processes are hard-pressed to adequately staff the existing High Courts with competent judicial officers, the creation of an entirely independent set of courts is, at the highest, an aspirational goal in the long-run. The issuance of notice could be for a variety of reasons (ranging from temporary placation of a persistent litigant to a desire to draw attention to the problem without necessarily being intellectually committed to the radical relief being sought). My view is strengthened by the rather unequivocal response of the Attorney General to the Court's queries, where he stated that the creation of a Court of Appeals was '*neither possible nor desirable*'.<sup>26</sup>

Further, given the history of the Court's dialectical struggle with Parliament over its powers and authority, and the consequential emergence of 'independence of the judiciary' as a part of the basic structure of the Constitution, it is clear that the political branches of government cannot proceed without the whole-hearted support of the Supreme Court itself. If this appears overly theoretical, one need only remind oneself of the National Judicial Appointments Commission [NJAC], enacted in the face of widespread criticism of the functioning of the collegium system (and with the judiciary retaining significant control over appointments in the new system). In spite of near-unanimous agreement within Parliament and the Executive on the need to radically restructure the regime of appointments to the

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<sup>25</sup> See *L. Chandra Kumar v. Union of India & Ors* (1997) 3 SCC 261; *Supreme Court Advocates-on-Record Association & Ors v. Union of India* (1993) 4 SCC 441; *Supreme Court Advocates-on-Record Association & Anr v. Union of India* 2015 SCC OnLine SC 964.

<sup>26</sup> See Author's notes of hearing on 15 March 2016 in *V. Vasanthakumar*, *supra* note 1 (on file with the author).

higher judiciary,<sup>27</sup> the Constitution Amendment was decisively invalidated by the Supreme Court.<sup>28</sup>

Nonetheless, let us for the moment set aside concerns of political (or constitutional) feasibility, and imagine a universe where radical structural or institutional change could be brought about for the asking. Normatively, would such radical change be desirable and, if so, what form might it take?<sup>29</sup>

Even in such a universe, considerations of epistemic modesty would counsel against radical restructuring of the existing institutional setup of the Supreme Court.<sup>30</sup> The first consideration is, to borrow from Hippocrates, ‘*to do no harm*’.<sup>31</sup> In the context of the multifaceted and paradoxical institution that the Indian Supreme Court is, there is much that ill-advised restructuring might lose. For all its failings, the Court is one of the few public institutions within India that inspires confidence in varied sections of the citizenry, and varied stakeholders within the polity. It enjoys high reputational capital, which enables it to gain

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<sup>27</sup> The Constitution Amendment was passed unanimously by the *Lok Sabha* (The House of the People). In the *Rajya Sabha* (The Council of States), a single Member - Mr. Ram Jethmalani (a Senior Advocate practicing in the Supreme Court) - dissented.

<sup>28</sup> *Supreme Court Advocates on Record Association v. Union of India* 2015 SCC OnLine SC 964. See generally Arghya Sengupta, ‘Perils of the messiah complex’ *The Hindu* (5 December 2015) <<http://www.thehindu.com/opinion/op-ed/njac-perils-of-the-messiah-complex/article7777565.ece>> accessed 20 February 2016.

<sup>29</sup> It is important to note the distinction between the feasibility of enactment of (any particular) reform, and the consequences that such reform, if implemented, might have. In this section of the thesis, I assume the possibility of structural and institutional reform by ignoring the many factors which make such reform unlikely. But in evaluating the consequences of such reform, I do not (as I obviously cannot) ignore these factors and others, which are likely to impede the realization of the objectives of such reform.

<sup>30</sup> See generally Kumar *et al*, *supra* note 16.

<sup>31</sup> Contrary to popular belief, this principle does not form a part of the Hippocratic Oath. But the essence of the principle can be distilled from Hippocrates’ *The History of Epidemics*. “*And these two things in disease are particularly to be attended to, to do good, and not to do harm.*” See Johns Hopkins Sheridans Libraries & University Museums, ‘Hippocratic Oath’ <<http://guides.library.jhu.edu/c.php?g=202502&p=1335752>> accessed 8 March 2016.

acceptance for even deeply unpopular or counter-majoritarian decisions.<sup>32</sup> In a diverse and pluralistic society, it has often served as a ‘safety valve’ where polarizing or difficult issues have been relegated for adjudication. So the apprehension that the Supreme Court could be left worse off, in any sense, is not an abstract or remote concern, but one that arises directly from the significant role that the Court plays (and is widely acknowledged as playing) in the broader polity. As I survey possible mechanisms for structural reform, I will more concretely analyse both the potential benefits, and risks or drawbacks, of such proposals.

## ***II.A. Regional Benches of the Supreme Court:***

In recent years, the political executive has sometimes pressed for the setting up of benches of the Supreme Court in different parts of the country.<sup>33</sup> This possibility is envisaged in Article 130 of the Constitution, but requires such decision to be taken by the Chief Justice of the Court, with the approval of the President.<sup>34</sup> Effectively, therefore, the provision requires agreement in this regard between the Court itself and the political executive, which is clearly missing today. This was also recommended by the Law Commission of India in 2009, which suggested that a Constitutional Bench be established in Delhi, with four benches

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<sup>32</sup> On the concept of judicial reputation, see Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015).

<sup>33</sup> ‘CJI not in favour of setting up of regional benches of SC’ *The Times of India* (30 January 2010) <<http://timesofindia.indiatimes.com/india/CJI-not-in-favour-of-setting-up-of-regional-benches-of-SC/articleshow/5517080.cms>> accessed 13 March 2016). See also The Constitution of India 1950, Article 130:

“*Seat of Supreme Court.—The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.*”

<sup>34</sup> The Constitution of India, Article 130.

in different regions of the country to deal with ordinary appellate work.<sup>35</sup> The Law Commission, while acknowledging that the steady increase in the strength of the Supreme Court over the years has failed to alleviate the docket crisis, forwarded the mechanism of reserving a Delhi-situated Constitutional Bench for ‘constitutional matters’, while distributing ordinary appellate work among four Cassation Benches (to be situated in the four corners of the nation, and so in Delhi, Mumbai, Chennai or Hyderabad, and Kolkata).<sup>36</sup> The proposal of the Law Commission is summary, even cryptic, in nature and much remains unclear. How would the line between ordinary and constitutional matters be drawn, and by whom? If references are to be made by the Cassation Benches themselves, would these judges not be incentivized to retain interesting and consequential matters, implausibly claiming that these do not involve novel questions of constitutional law? Would it not create opportunities for forum-shopping (of a kind that already exists, in more limited form) in the present-day Supreme Court?<sup>37</sup>

In the context of the present-day Supreme Court, forum-shopping is largely limited to ‘bench-shopping’ within the same Court, in various ways discussed elsewhere in this thesis. But in the context of the various proposals for structural reform in this Chapter, it could extend to choosing between two Courts, which will be significantly more problematic in

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<sup>35</sup> Law Commission of India, ‘Report No. 229: Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai’ (2009). *See generally* J. Venkatesan, ‘Supreme Court again says ‘no’ to regional Benches’ *The Hindu* (20 February 2010) <<http://www.thehindu.com/news/national/supreme-court-again-says-no-to-regional-benches/article110373.ece>> accessed 6 February 2016; ‘Moily rejects call to set up Supreme Court benches’ *The Hindu* (2 February 2010) <<http://www.thehindu.com/news/national/article99404.ece>> accessed 6 February 2016.

<sup>36</sup> Law Commission of India, *id.*

<sup>37</sup> I will employ the term ‘forum-shopping’ at various places in this concluding section of the thesis. While its exact implications vary according to the context, I broadly intend to refer to opportunities for a litigant to steer matters towards a particular Court (or a particular set of judges within a given Court).

obvious ways. In the context of the Law Commission's proposal, the Constitutional Bench in New Delhi comes into the picture where matters involve new questions of constitutional law, or for Writ Petitions under Article 32 of the Constitution. Therefore, the possibility of forum-shopping here would arise in claiming that cases do (or do not) involve such questions, so as to steer these towards a Court believed to be favourably inclined towards such litigant.

But the even more fundamental question is - what is the 'problem' that the Law Commission believes itself to be addressing? The Law Commission speaks of the Court's unsuccessful struggle with its docket, and the significant inconvenience caused to the litigant public by the long distances to be travelled in accessing the Supreme Court.<sup>38</sup> It appears, then, that one primary change intended to be effected is bringing the Court closer, in a physical and logistical sense, to the average litigant. Other things being held constant, it is at least plausible that this might benefit the individual litigant in the limited (utilitarian) sense of less time and money being expended in accessing the Court.

Even this assumes, of course, that the Cassation Benches will be able to provide infrastructure of the same quality as in the Supreme Court today. For all its failings, the Supreme Court has an accumulated store of institutional knowledge, significant physical infrastructure and a (somewhat) specialized Bar. One might be sceptical about whether this is likely to be easily replicated in any other city.

There might be two responses to this concern. One, it might be said that the Cassation Benches are all proposed to be set up in cities where there is an existing High Court, and therefore significant infrastructure (and intellectual capital) already exists. While this is true,

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<sup>38</sup> Law Commission of India, *supra* note 35.

it is also true that the quality of legal adjudication in these High Courts varies widely, and each of them also poses significant challenges.<sup>39</sup>

The second, broader response might be that the very point of setting up Cassation Benches is that the existing institutional framework has failed. The disruption of existing patterns of functioning, and the existing pool of institutional knowledge is, in a sense, the very point of creation of these Cassation Benches in the first place. While this might be true, we still need to ask ourselves whether the ensuing disruption is likely to change the Court for the better or not. As Chapter III explores, the trend of *ad hocism* and interventionism in the Supreme Court today is not unique to the Court and is a manifestation of a broader trend within the Indian polity. The judges of the Supreme Court, after all, are drawn from the various High Courts (and care is taken that the different regions of the country remain well represented on the Court).<sup>40</sup> Given that judges appointed from varied High Courts appear to function in broadly similar fashion when appointed to the Supreme Court, it is at least an open question whether their appointment to a bench of the Court (located in one or the other of four regions of the country) would significantly alter their manner of functioning. So far as concerns the trend of *ad hocism* and interventionism, there is little reason to believe that the same will be significantly altered. If anything, the relatively nascent nature of these benches, and the greater degree of accessibility, would incentivize competitive jockeying for influence and the possibility of forum-shopping in myriad ways.<sup>41</sup>

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<sup>39</sup> The High Court of Madras, for example, is beset with serious problems including caste-based strife affecting peaceful functioning of the Court and relations between different sections of the Bar, apart from relations between the Bar and the Bench. *See, for e.g.*, R. Ramasubramanian, 'Madras High Court: "Never before has it fallen to such low levels," said the CJI' (*Scroll.in*, 29 September 2015) <<http://scroll.in/article/758584/madras-high-court-never-before-has-it-fallen-to-such-low-levels-said-the-cji>> accessed 25 February 2016.

<sup>40</sup> *See* Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press 2014).

<sup>41</sup> *See supra* note 37.

None of this, however, addresses the most critical objection to the proposal, which is that such structural reform will likely aggravate, and not resolve, the underlying dynamics which have created the docket crisis in the first place. We may briefly review the argument made in this thesis. As I write in Chapter I, the Court receives a staggeringly large number of Petitions and Appeals for consideration each year. While it summarily rejects a large number of these (which process in itself occupies a considerable amount of time), it accepts enough - what I describe as a critical mass - that its character over the years has evolved, slowly and almost imperceptibly, so that it is now viewed as an 'error correction' Court. Expectations have changed such that it is now expected to weigh in on the correctness or otherwise of varied decisions of the High Courts, and the failure to do so is seen as a decision in itself. This trend, which took root in peculiar and contingent historical circumstances, is significantly compounded by structural characteristics of the Court and the self-interested behaviour of the Bar.

I conclude in Chapter I that litigants are incentivized, by the Supreme Court's historical record of interventionism and *ad hocism*, to 'take a chance' in approaching the Court, and are not forced to internalize the costs of unsuccessful (even frivolous) litigation. The creation of regional benches of the Court would only accelerate this trend by further easing access to the Court, and would thereby significantly aggravate the underlying problem. As I note elsewhere, inconsistency and unpredictability in the implementation of the Court's jurisprudence is aggravated by geographical and local factors. Further, the quality of adjudication in the various High Courts varies widely. Therefore, inconsistency is only likely to increase when Cassation Benches are assigned appellate or supervisory jurisdiction over the High Courts, given that these regional influences are likely to be stronger in the case of Cassation Benches than with respect to a unified Supreme Court located at New Delhi. Furthermore, amongst the most significant achievements of the Supreme Court has been its

role as a conciliator, persuading rival factions on burning political and social issues to positions of acquiescence (if not tolerance).<sup>42</sup> There seems little doubt that the reputational capital accumulated by the Court with respect to these issues would be at risk, were regional benches of the Court to be established. Issues relating to regional politics and communal, caste-based or linguistic conflicts appear to be precisely the types of questions likely to prove problematic in such a new dispensation.<sup>43</sup>

Is there any other facet of the problem that such creation of Cassation Benches might meaningfully address? There is no reason to believe that the composition or quality of judges of the Court would change to any significant extent. The sources for recruitment would remain the same, and are fairly one-dimensional at that. Judges would presumably be elevated from the various High Courts, and would now be posted at one of the four Cassation

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<sup>42</sup> See generally *Indra Sawhney & Ors v. Union of India* 1992 Supp (3) SCC 210:

*“3. ... we had made an appeal to the entire nation that the matter was being adjudicated by this Court and everybody's rights would be worked out when the matter is heard and nothing shall impede this Court from working out the rights of parties and giving such relief as is ultimately adjudicated to be due.*

*...*

*10. We make it clear that we expect that law and order situation shall immediately improve, both parties shall take our appeal seriously and restore peace so that the hearing of the matter can be taken up by this Court in an appropriate atmosphere.”*

(remarking upon the charged atmosphere in the country in the aftermath of the introduction of quotas for socially and economically backward classes of citizens in government employment, and further urging peace so as to allow orderly adjudication of the constitutional challenge to such quotas).

<sup>43</sup> It might be said that many of these questions would be of a constitutional nature, and therefore would come to the Supreme Court in any event. To this, many responses are possible. One, to the extent that matters have to be, or are, carried to the Supreme Court, the Courts of Appeal constitute yet another layer of Appeal without affecting the ultimate role the Supreme Court is playing. Secondly, there are many types of matters which are sensitive and have wider implications, without necessarily being constitutional in character. Hypothetically, one could imagine the case of a separatist political leader, applying for bail in a criminal matter. Again, in the present dispensation, these appeals would often reach the High Courts at an appellate stage in any case. The reasons why the Supreme Court, with the benefit of distance and a degree of insulation, feels that it can adjudicate such cases better than the High Courts, would apply with equal or greater force in the case of such newly-established Courts.



Benches (or with the Constitutional Bench at Delhi) instead of all being centred at Delhi. Today, criteria for elevation to the Supreme Court are heavily weighted towards seniority, while ensuring representation of the various High Courts and diversity (along multiple lines).<sup>44</sup> Since these unwritten criteria are unlikely to change significantly, the nature of composition of the bench is unlikely to vary significantly either.

Several other potential landmines are discernable. The distribution of judges in different benches could raise serious concerns. Would deference be given to the wishes of the judge in question, with respect to her bench of choice? If so, it is easy to imagine judges from a particular linguistic, regional or cultural background being heavily concentrated in particular Cassation Benches. Many of the advantages the Supreme Court possesses today - of being relatively insulated from the most difficult and controversial disputes - would be at risk in this context. The perception that the regional bench of the Court is not impartial, as well as the perennial wish to 'take a chance' before another forum, would only increase concerns of potential forum-shopping.<sup>45</sup>

Additionally, how would the composition of the Constitutional Bench at Delhi be determined? Arguably, the Constitutional Bench would be seen as the more prestigious assignment, and many judges might vie for it. Would this question be settled at the time of appointment, or would the Chief Justice retain discretion to transfer judges from the Cassation Benches to the Constitutional Bench, and *vice versa*?

In conclusion, the proposal to constitute regional Cassation Benches is likely to aggravate the existing crisis in the 'error correction' docket, by further broadening what is already over-liberal access to the Supreme Court, by aggravating and bringing to the fore

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<sup>44</sup> See Chandrachud, *supra* note 40.

<sup>45</sup> See *supra* note 37.

inconsistencies and tensions between different benches and by merely transferring the burden of the Court to newly-formed regional benches ill-equipped to shoulder the same.

***II.B. Creation of an Independent Court of Appeal (while reserving the Supreme Court for Constitutional Matters):***

In 2010, K.K. Venugopal advocated the establishment of Courts of Appeal in four regions of the country to exercise powers hitherto being exercised by the Supreme Court under Article 136 of the Constitution.<sup>46</sup> The Supreme Court, then, would be reserved for constitutional matters, adjudication of the validity of statutes, adjudication of inter-State disputes under Article 131 of the Constitution, and resolution of differences of opinion (or splits) between the High Courts.

There are some similarities between the Law Commission's recommendation regarding the constitution of Cassation Benches of the Court, and the establishment of Courts of Appeal in different parts of the country. Beyond the semantics, though, there is one critical and overarching distinction. The model suggested by Venugopal, while intended to implement a division of labour between 'constitutional' and 'error correction' functions, also involves a hierarchy between the Courts of Appeal and the Supreme Court. Given the Supreme Court's propensity to intervene aggressively with respect to decisions of the High Courts, and its reluctance to restrict its doctrinal grounds for doing so even under the existing institutional regime, there is a significant risk that the creation of such Courts of Appeal will only aggravate delays in the final disposition of appeals, by creating yet another layer of appeal, without addressing or resolving the underlying causes for the docket crisis in the Supreme Court. As I note in Chapter I, the categories of cases being brought before the

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<sup>46</sup> See Venugopal, *supra* note 12.

Supreme Court already vary widely, and include a large set of cases which have been heard by as many as three judicial forums before reaching the Court. The creation of yet another layer of appeal is, therefore, deeply problematic, unless one has strong reasons to believe that the Court of Appeal will genuinely be the last court in all but extraordinary circumstances. But my analysis, in this thesis, of the underlying factors driving the Supreme Court's docket does not inspire confidence that such limiting principles would in fact significantly restrain the Court's rate of intervention.

Under the institutional structure suggested, the likelihood of long delays and prolonged inconsistency is, if anything, greater than in the case of the horizontal division proposed by the Law Commission. This model envisages the Supreme Court retaining its position at the top of the judicial pyramid, with the possibility of intervening with respect to decisions of the Court of Appeal in the event of clear conflicts between regional benches of that Court, or in matters of constitutional importance. As seen in our exploration of the docket crisis in this thesis, Article 136 - from a black letter and doctrinal perspective - has always been interpreted to require intervention only in extraordinary circumstances and not in all cases where the Courts below have erred as a matter of technical law.<sup>47</sup> If the seemingly onerous requirements of the Court's Article 136 jurisprudence have not kept the docket from continually expanding, it is unclear why the Court would be more restrained in entertaining appeals from the Court of Appeal (even allowing for relatively restricted terms of reference). Since the Supreme Court would be mandated to resolve differences (or splits) amongst the various Courts of Appeal, it is likely to face a large number of requests for intervention. We have seen above, and it is often acknowledged, that the Supreme Court's jurisprudence today

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<sup>47</sup> The Supreme Court's relatively nonchalant reiteration - in its order of 11 January 2016 in *Mathai* - that there is no 'problem' with Article 136 doctrine, is important in this context. See *Mathai*, *supra* note 22. See also Chowdhury, *supra* note 22.

is fairly inconsistent, along a range of issues.<sup>48</sup> If this inconsistency survives the splitting of the Court (and it is difficult to immediately envision why it would not), the structural reform of creating intermediate Courts of Appeal would have the counter-productive effect of introducing yet another layer of appeal, without addressing the underlying causes of arrears in the higher judiciary.

The intuition that the deeper causes of the docket crisis in the Supreme Court are not addressed by the interposition of an intermediate Court of Appeal is only strengthened when we consider the most important factor in any judicial system - the individuals who man it. As we note in earlier parts of this thesis, the persons constituting the various High Courts and the Supreme Court form a fairly homogenous body. The individuals holding judicial office in the various benches of the Court of Appeal would, presumably, be drawn from the pool of relatively senior judges within the various High Courts. If that be the case, it is difficult to imagine why their approach to discretionary Petitions from these High Courts would be significantly different from that of the Supreme Court today. The present-day docket of the Supreme Court, then, would largely stand transferred to these Courts, with the Supreme Court retained as the ultimate appellate authority. Further, as nascent institutions, it is not clear what the normal path of career progression between these various Courts would be, and what the relative prestige of these institutions would be.

### ***II.C. Creation of a Constitutional Court:***

A third option for structural reform, less discussed recently, is the creation of an independent Constitutional Court. South Africa presents perhaps the best point of reference for such a proposal, since - in the new post-apartheid South African Constitution - a

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<sup>48</sup> See *supra* Chapter III, Part II.

Constitutional Court was superimposed upon an existing, fairly mature legal system. The South African Constitutional Court has earned an enviable reputation internationally, and its jurisprudence is much respected in the broader global community of courts.<sup>49</sup>

However, the circumstances surrounding, and leading to, the establishment of the South African Constitutional Court were unique. There, Constitution-makers were faced with the difficult situation of creating a judicial system to interpret and enforce the radically different Constitution being put in place in the post-apartheid regime, while navigating the existing legal system. This existing regime was (naturally) regarded as entirely illegitimate by the vast majority of South Africans, having existed at the time of, and in many ways having propped up, the apartheid regime. Nonetheless, a wholesale reconstitution of the existing judiciary would have been neither feasible nor acceptable to the previous regime and other stakeholders. The creation of a Constitutional Court, then, was a delicate compromise which allowed for a degree of continuity in other wings of the judiciary, while allowing the post-apartheid regime to appoint Justices to a new Constitutional Court.<sup>50</sup>

In India, the underlying dynamics are almost the polar opposite of the scenario which existed in South Africa. It is widely accepted that the Supreme Court enjoys a high degree of credibility, and has considerable reputational capital, particularly relative to other branches of Government. The Court also guards its independence jealously, and has often reiterated that such independence constitutes a facet of the ‘basic structure’ of the Constitution.<sup>51</sup>

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<sup>49</sup> See generally Theunis Roux, *The politics of principle: The first South African Constitutional Court, 1995-2005* (Cambridge University Press 2013).

<sup>50</sup> See Heinz Klug, ‘South Africa’s Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid’ (2008) 3(2) *Journal of Comparative Law* 174; Johann Kriegler, ‘The Constitutional Court of South Africa’ (2003) 36(2) *Cornell International Law Journal* 361.

<sup>51</sup> See *supra* note 25.

The consequence of establishment of an independent Constitutional Court would be that matters of a constitutional nature (often the most controversial and difficult matters the judicial system has to navigate) would fall to such newly-established Constitutional Court. As with the other structural reforms considered above, the underlying rationale is that the existing system requires disruption. Proponents of reform are presumably not pursuing a merely semantic exercise, and therefore we assume that the proposal involves the establishment of the Court as an entity truly independent of the Supreme Court. If the Constitutional Court is indeed established as a body entirely distinct and separate from the Supreme Court, it appears unlikely that it can access or benefit from the reputational capital or institutional knowledge of the Supreme Court. On all other aspects of judicial management, too, the same logic would seem to apply. Indeed, that is precisely the point.

Let us take the thought experiment further. We imagine, therefore, the present-day Supreme Court to remain essentially unchanged, and a Constitutional Court to be superimposed above it in the judicial hierarchy. One obvious rationale for the creation of such a Court is that it would have sufficient time to consider important questions of constitutional law - it is well documented that the Supreme Court today is neglecting unresolved questions of constitutional law, with many references of such questions to Constitution Benches remaining unanswered for years (and sometimes a decade or longer).<sup>52</sup> There could be various ways in which matters fall within the jurisdiction of this Court, but almost all mechanisms would raise serious questions with respect to forum-shopping, as well as conflict between the Supreme Court and the Constitutional Court.<sup>53</sup> Particularly given the

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<sup>52</sup> See Nick Robinson *et al*, 'Interpreting the Constitution: Indian Supreme Court Constitution Benches since Independence' (2011) XLVI(9) Economic and Political Weekly 27.

<sup>53</sup> The potential for forum-shopping is somewhat similar to that with respect to the Law Commission's proposal. In that case, a litigant might manoeuvre between the Cassation Benches and the Constitutional Bench. In this proposed structure, the same litigant could apply to the Constitutional Court or not, depending on the predicted response of that Court.

dual concerns of interventionism and *ad hocism*, identified in Chapter III as being pervasive throughout India's higher judiciary, the possibility of such a struggle between the Supreme Court and the Constitutional Court is a matter of significant concern.

Hewing to the present constitutional provisions, let us imagine that substantial questions of law as to the interpretation of the Constitution, under Article 145(3), are mandated to be referred to the Constitutional Court. As I note in Chapter I, the Supreme Court today is markedly reluctant to recognize questions as falling within the ambit of Article 145(3), even when there is little doubt that such questions are ones of first impression. Would the Supreme Court follow this mandate conscientiously? From one perspective, it might be more open to doing so since the significant constraint on its own resources would no longer be a factor. From a public choice perspective, however, one should be sceptical that an institution like the Supreme Court will so readily part with important constitutional matters. The failure to do so, however, is likely to create significant tension *vis-a-vis* the Constitutional Court.

Another option would be for the Constitutional Court to itself determine which matters to adjudicate, on application by the concerned litigant or *suo moto*. But again, given deeply-embedded characteristics of the Indian judicial system, it is difficult to see how such powers might be exercised in a workable fashion. Would the Constitutional Court review decisions of the Supreme Court, or would it have the authority to bypass the Supreme Court altogether in appropriate cases? A significant number of constitutional matters (including challenges to statute or subordinate legislation) originate before the High Courts under

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The present structure of the higher judiciary seems to increase the possibility of such forum-shopping. Illustratively, a claim with respect to violation of legal rights made before a High Court might either be challenged under Article 136 of the Constitution, or be given a 'constitutional' colour in an attempt to bypass the Supreme Court and approach the Constitutional Court directly.

Article 226 of the Constitution, with the possibility of a discretionary challenge before the Supreme Court thereafter. What would happen to this (extremely significant) class of cases?

Who would man this Court - where would its Justices come from? Constitutional Courts in different jurisdictions are sometimes composed differently from appellate courts, and include non-judges (and occasionally even non-lawyers). But given the Indian experience with past struggles between the judiciary and the executive, it is entirely inconceivable that the judiciary would permit a Court discharging such vital constitutional functions to be staffed by persons from outside the judicial mainstream. One could imagine, then, that a Constitutional Court would look much like the Supreme Court itself, so far as composition goes. The obvious question again is whether it should be expected to operate differently in substantive ways, merely because of formal separation from the Supreme Court.

In terms of composition, the only variations at all conceivable are for eminent jurists (or academics) or members of the Bar, to be appointed to such Court. While the Constitution stipulates that 'eminent jurists' are eligible to be appointed as judges of the Indian Supreme Court, there has been no such appointment till date. Direct appointments from the Bar are rare but not unknown - the present Supreme Court has two Justices directly elevated from the Bar. Were a Constitutional Court to be established, it might be imagined that - since judges of this Court are not mandated with the type of 'error correction' appellate function Supreme Court Justices are - the appointing authority would have a wider spectrum of candidates to consider.

While there might be an element of truth to this, the fact remains that there is a limited pool of candidates available for the purpose, and it is not clear that the creation of a Constitutional Court would significantly alter this. The quality of legal academia in the country varies widely and, with some rare exceptions, it is not apparent that a significant



number of legal academics qualified to sit on such a Court are to be found.<sup>54</sup> With respect to the Bar, there might be a greater pool of talent available. But it is not clear how many Senior Counsel could be persuaded to leave lucrative private practices to serve as judges; this has proven to be one of the primary obstacles to appointing more practitioners directly to the Supreme Court bench, along with resistance from seniority-minded judges.<sup>55</sup> Therefore, it seems clear that the majority of appointees on such a Constitutional Court would be possessed of a similar background and credentials as Supreme Court judges of the day.<sup>56</sup>

The net result of the creation of such a Constitutional Court, then, would be that the Court's constitutional powers are transferred to a new institution, with the uncertainties and risks attendant thereto. So far as the Court's struggle with its routine docket is concerned, there is little reason to think that anything will change for the better.

#### ***II.D. Two 'Minor' Proposals for Institutional Reform:***

I now turn to two relatively 'minor' proposals for institutional reform, and consider whether they provide any likely benefit or relief, in the context of the docket crisis explored in this thesis. *One*, Mr. Nariman's suggestion that the law should be laid down only by Three-Judge Benches of the Court, and not by Division Benches as at present. *Two*, the proposal

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<sup>54</sup> Names like Professors Upendra Baxi, B.S. Chimni and M.P. Singh come to mind, but as is often the case, the exception proves the rule. I should note that a new generation of legal scholars is rising and so, two decades down the line, the answer to this question might be substantially different.

<sup>55</sup> Chief Justice R.M. Lodha has said publicly that he had hoped to appoint as many as five Senior Counsel from the Supreme Court Bar to the Bench during his short tenure as Chief Justice. Ultimately, he was successful in making two appointments (in itself, a not-too-common occurrence), that of Justices Nariman and Lalit.

<sup>56</sup> It is possible that a certain degree of self-selection might take place. Thus, judges more interested in constitutional law, or more academically inclined, might gravitate towards such a Constitutional Court while others would be content to remain on the Supreme Court.

that admission matters be first considered by the concerned bench in chambers, without an oral hearing being afforded.

I consider the proposal with respect to Three-Judge Benches first. The strongest version of this proposal might be that the pronouncements of Division Benches not carry the weight of precedent at all, and only benches comprising three (or more) Justices be considered to have laid down the law on any question. The first thing to be noted is that such a proposal would be in the teeth of Article 141 of the Constitution, and it appears exceedingly unlikely that its constitutionality would be sustained by the Court. It might be said that I am too pessimistic, and that the Court would be willing to revisit orthodox notions of precedent as a pragmatic concession to the docket crisis. Perhaps so. But that would be in a case where the Court recognizes that the problem is not too little ‘precedent’, but too much. The recent prominence afforded, even if speculatively, to the possibilities of a Court of Appeal essentially taking over and successfully managing the Court’s ‘error correction’ docket, should not make one optimistic on this score.

Assume then that the Court accepts (say through amendments to the Supreme Court Rules, 2013) such a regime, and the character of cases reaching the Apex Court otherwise remains unaltered. How would a relatively uninteresting case be treated in this new regime?<sup>57</sup> It would be heard by a Division Bench of two judges, and the final decision would (then) not constitute binding precedent. But how would this preliminary question (of whether or not the case involves new questions of law) be determined? Necessarily, by the Court itself. Therefore, this creates a new layer of decision-making (even if of a relatively minor nature) for the Court itself. If parties are afforded any recourse against the procedural decision made

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<sup>57</sup> Recall the rough-and-ready typology of petitions before the Supreme Court which I introduced in Chapter I, Part II.B. Here, I mean to refer to cases falling within the third category (that is, cases of a relatively mundane character involving neither difficult questions of law nor extremely important societal consequences).

in this connection, this creates further complications of its own. Lastly, given the Court's known reluctance to refer important matters of constitutional law to Five-Judge Benches (as mandated by Article 145(3) of the Constitution), it appears highly plausible that benches will continue to retain matters which should ideally be referred to Three-Judge Benches (for the creation of precedent in areas where the law is unclear). Therefore, while this proposal is intriguing (and welcome) inasmuch as it recognizes that the core problem in the Court today is inconsistency and *ad hocism* caused by too many (and not too few) judicial dispositions, the strongest version of the proposal appears likely to create as many problems as it might seek to resolve.

A weaker version of the proposal might be that references to Three-Judge Benches be encouraged in important matters. There are some signs that this may be a way forward for the Court. Illustratively, it is now mandated that all death sentence cases be considered by a bench of three or more judges.<sup>58</sup> And the weakest version is probably the present legal position (although imperfectly enforced) - that Division Benches of the Supreme Court, when convinced that a coordinate or larger bench has been led into serious error, must not disregard the said decision, but must instead as a matter of judicial discipline refer the matter to a larger bench (to be constituted by the Chief Justice).<sup>59</sup>

I now turn to the second 'minor' proposal. This second proposal is also one which might, in a certain sense, be considered to be in tune with the spirit of this thesis. The suggestion is that admission matters be considered in chambers by the judges (without an oral hearing). This proposal has, in fact, been made at different points in the past. Given the

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<sup>58</sup> The Supreme Court Rules, 2013, Order VI, Rules 3 and 4.

<sup>59</sup> See *Commissioner of Sales Tax, J&K v. Pine Chemicals Ltd & Ors* (1995) 1 SCC 58; *Bharat Petroleum Corpn. Ltd v. Mumbai Shramik Sangha & Ors* (2001) 4 SCC 448.

deeply-ingrained commitment to oral arguments in the Indian legal tradition,<sup>60</sup> the suggestion is extremely unpopular with the legal community. In terms of the likelihood of the implementation of such proposal, it is therefore probably at par with (seemingly) far more radical suggestions such as the creation of a Court of Appeal. As with the other possibilities highlighted in this concluding section, let us disregard the question of feasibility and examine the possibility in un-blinkered fashion.

Questions of workability and design arise immediately. But the central animating concern is the importance accorded to oral arguments in Indian legal culture.<sup>61</sup> Would all matters (appeals and petitions) be treated in this manner, or would there be some exceptions? The obvious example is that of death sentence cases. Given that recent precedent mandates even review petitions in death sentence cases to be heard in open court,<sup>62</sup> inspite of the long-standing practice to the contrary, it would be unreasonable to expect this to extend to such cases (many of which might be by way of special leave petitions). But as recognized elsewhere in this thesis, death is different. Setting this extreme example aside for the moment, how would other matters be treated? Consider statutory appeals in terms of

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<sup>60</sup> See *Gullapalli Nageswara Rao v. APSRTC* AIR 1959 SC 308; *Automotive Tyre Manufacturers Association v. Designated Authority & Ors* (2011) 2 SCC 258; *Lafarge India Ltd v. Competition Commission of India & Anr* Appeal No. 105 of 2012 (Order dated 11 December 2015 passed by the Competition Appellate Tribunal, relying *inter alia* upon *Gullapalli Nageswara Rao* and *Automotive Tyre Manufacturers Association* and setting aside a significant penalty of about Rs. 6,316 crores imposed on various cement companies by the Competition Commission of India. In this case, the Chairperson of the Commission was absent at the time of final, oral arguments but became party to the final order, which was considered to constitute a violation of the principles of natural justice).

<sup>61</sup> *Id.* It is important to note that the centrality of oral arguments in Indian advocacy is a substantive hurdle for this proposal, even if one were to claim (which I do not) that oral arguments are entirely or substantially unhelpful in arriving at better decisions. All that is needed to constitute a valid objection is the fact that various stakeholders sincerely believe this to be the case. An abrupt departure from these norms would then have serious consequences for the credibility of the institution, regardless of the quality of adjudication in an objective sense.

<sup>62</sup> *Mohd. Arif v. Registrar, Supreme Court of India & Ors* (2014) 9 SCC 737.

legislation passed by Parliament (often dealing with important, emerging areas of the law such as competition law or telecom law).<sup>63</sup> These are effectively second appeals against the appellate decisions of specialized tribunals,<sup>64</sup> but often concern areas of the law where there is little clarity and Supreme Court intervention might well be welcomed. Or consider other cases where the law might be well-settled but the Supreme Court provides the first appellate remedy.<sup>65</sup> Certainly in the Indian legal tradition, but even more broadly, it would appear problematic to decide such cases without oral hearing.<sup>66</sup>

Furthermore, even assuming away the question of feasibility (that is, essentially assuming the acquiescence of both the Bar and the Bench), the measure would appear likely to have a significant adverse impact on the Court's reputation and effectiveness. Given the importance of the Court's reputational capital, dealt with elsewhere in the thesis, the measure appears to be an imprudent one.

An important aspect to be noted is that Supreme Court judges are often quite efficient, in their manner of dealing with the 'Monday, Friday' docket. By this I mean that the actual process of oral hearing does not take all that long. Today, it provides some safeguard (in the over-worked and somewhat chaotic scenario of the Court) against the grossest errors. This argument may seem to undercut some of what I have argued earlier, so I hasten to clarify. One, the entire process of managing its 'Monday, Friday' docket has undeniably consumed

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<sup>63</sup> See, for e.g., The Telecom Regulatory Authority of India Act, 1997, s 18; The Competition Act, 2002, s 53T.

<sup>64</sup> Id.

<sup>65</sup> First appeals against orders passed by the National Consumer Disputes Redressal Commission (in exercise of its original jurisdiction) would be a good example. To fall within the jurisdiction of the consumer courts, these would generally have to be relatively simple disputes (not requiring detailed evidence or a full-fledged civil trial). To fall within the original jurisdiction of the National Commission, the amount claimed would necessarily be substantial (Rupees one crore or more). See The Consumer Protection Act, 1986, ss 21(a)(i) and 23.

<sup>66</sup> See *supra* note 60.

the Court. But it must be remembered that much of that time is spent by the judges in reading and preparation prior to the days of oral hearing. In a crude functional sense, the time actually saved by the Court would be a couple of hours twice a week, which is relatively insignificant. The more-compelling underlying rationale for such reform (which might often pass unstated) is that the Court will ‘issue notice’ in less matters without the underlying pressures and dynamics of oral argument. This is quite plausibly true. But without a change in the structure and character of the Court, this measure appears to fall short of meaningfully altering the underlying dynamics.

As I note above, it seems highly implausible (even in this alternative universe) that all matters can be relegated to such ‘in chambers’ consideration. The most workable arrangement would seem to be that grant of oral hearing is a preliminary request to be made by the litigant, to be granted or denied at the discretion of the Court. If that be so, and given the strong preference for oral arguments in India, there is likely to be enormous pressure for these cases (in significant matters at least) to be listed in open Court. I recognize the possible appeal of the argument that, since the thesis identifies the pressures of oral argument as a significant contributory factor to the docket crisis, this is a manner of striking at the heart of the problem. But again, apart from the other objections highlighted above, such a move (and all the more in the absence of broader change in the institutional climate of the Court) would not fundamentally change the character of the Court. In a sense, it merely suppresses - rather than fundamentally addressing - the underlying malaise.

### **III. THE PATH FORWARD**

In this thesis, I have argued that the Supreme Court suffers from a chronic and unceasing struggle with its docket. I conclude that while the problem is of a serious and

continuing nature - in many senses a crisis - radical structural or institutional reform is not only infeasible, but also likely to prove significantly counter-productive.

The better analogy for these proposals, then, is not that of radical surgical intervention being the only recourse for an ailing patient, but of ill-advised surgery (not addressing the root cause of a serious ailment) being thrust upon a patient already weakened by the illness in question. As I write in Chapter II, notwithstanding the serious nature of the docket crisis, ‘baby steps’ towards making the Supreme Court a constitutional Court once more might truly be the most meaningful, radical reform possible. How might these ‘baby steps’ be taken, with the various institutional constraints on substantive change within the Court and the multiple stake-holders involved? What I propose can, in general, be implemented by the Chief Justice of India, although the most significant steps would as a practical matter require the support of other senior judges of the Court. The thought experiment is this - imagine a Chief Justice in the present-day Supreme Court, with the other institutional and ideological constraints unchanged - but tenure of five years (or even three). What could a Chief Justice so positioned attempt to accomplish, and how?<sup>67</sup>

For any such ‘baby steps’ to succeed, they must strike at the structural, institutional and cultural characteristics that have allowed the problem to thrive. I suggest an institutional alternative that is modest, politically feasible, minimally risky and yet offering the possibility of significant benefits for the institution as a whole. I suggest that the Court divides itself into a constitutional and non-constitutional wing.<sup>68</sup> While many permutations are possible, and the proposal is not contingent on strict adherence to any one specific version, it would seem sensible to maintain the Court’s size at the present level for the moment, while dividing it

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<sup>67</sup> I am grateful to William Hubbard for the suggestion to ground the analysis in such a (not-too-improbable) hypothetical scenario.

<sup>68</sup> I note that Rajeev Dhavan has proposed similar structural reform several decades earlier. See Dhavan, *Litigation Explosion*, *supra* note 16 at 97-98.

into two equal branches. Setting aside the Chief Justice for the moment (and assuming a full Court), this would result in fifteen judges being available for constitutional matters and fifteen for ordinary appellate work. Fifteen seems to be an appropriate number for a couple of reasons - for one thing, it is hard to envisage a bench of greater than fifteen Justices being required to be constituted. Indian law proceeds on the basis that only a larger bench can (formally) overturn precedent established by a smaller bench, and desiring recourse to a Thirteen-Judge Bench, for example, is not outside the bounds of possibility.<sup>69</sup> While such large benches may be constituted when necessary, many constitutional matters do not require the overturning of existing precedent, and can therefore comfortably be adjudicated by Five-Judge Benches. In many circumstances, therefore, it is possible to envisage three separate Five-Judge Benches sitting at any given point of time, removing much of the Court's hesitation in referring cases to Constitution Benches, or the Chief Justice's difficulty in constituting such benches in a timely manner.

What of the Court's ordinary docket? If my argument in this thesis is correct, the (effective) reduction in the number of judges available for ordinary appellate work is a virtue, and not a drawback, of the proposal. The increase in the strength of the Court has co-existed with, and at least partially contributed to, inconsistency in the Court's jurisprudence and the broader trend of *ad hocism* and interventionism I describe in earlier sections of the thesis. Nonetheless, a reduction in the size of the Court by Parliamentary legislation is hard to envisage. *Firstly*, this may well be taken to be an attack on the independence of the judicial branch and therefore opposed (or formally invalidated) by the Supreme Court on that count. *Secondly*, such an initiative would be in the teeth of notions conflating 'access to justice' with access to the Supreme Court, which this thesis argues against but are nonetheless deeply

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<sup>69</sup> There are several constitutional matters of great importance which have been pronounced upon by benches comprising eleven judges. *See, for e.g., T.M.A. Pai Foundation & Ors v. State of Karnataka & Ors* (2002) 8 SCC 481.



ingrained in the institutional culture of the Court today. This conception of the Court's role, again, cannot be countered or disregarded by the stroke of a pen, but can perhaps only be tempered through incremental means.

One reason to be somewhat optimistic about the potential of such incremental reform is that the seeds of the (desired) Court are there, even if dormant at the moment. As I note elsewhere, the Court when hearing constitutional matters functions very differently from the 'Monday, Friday' Court that is more prominent today. Appeals and Petitions can be heard for days (if not weeks), and a careful, deliberative process is discernable. Institutionalization of this facet of the Court's functioning gives it prominence, tweaks institutional practices and patterns of functioning, and nudges both the Bench and the Bar in this direction.<sup>70</sup> Ideally, indicators of professional prestige and success will gradually evolve for the Bar; the number of appearances before the Constitutional wing may become as important a mark of influence and recognition as the number of miscellaneous matters argued on the average Monday or Friday.

I suggest, therefore, that the Court establishes the constitutional wing on a permanent or semi-permanent basis, thereby signalling to the Bar and other stakeholders that the Court's constitutional docket will not be subordinated to the pressures of its ordinary appellate work. As I have said above, the details of such division are not important -what is likely more critical is credibly signalling that the division is not another *ad hoc* measure likely to be withdrawn or modified at short notice. At the same time, I recognize that there is likely to be a trade-off between the ease of implementing the measure and the strength of the signal; and

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<sup>70</sup> For a scholarly exploration of the concept of a 'nudge' in the direction of better individual choices, see Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin Books 2009).

for the measure to be successful this compromise would have to be delicately calibrated by the Chief Justice in question.

Nor does this proposal present the complexities and challenges of forum-shopping that the more radical reforms discussed above would involve. The primary structural change my proposal involves is the institutionalization of the Constitutional wing of the Court, and credible signalling of the fact that the constitutional docket will be prioritized over the Court's 'error-correction' docket. None of this involves forum-shopping opportunities greater than those that exist in any event on account of the large number of judges of the Court, and the fact that larger benches are required to be constituted while considering important questions of constitutional law or while re-considering prior precedent. In the Court as it exists today, novel questions of constitutional law are (or should be) referred to a Five-Judge Bench of the Court. Therefore, my proposal changes nothing on this count. To the extent that the measure succeeds in expediting the hearing of matters requiring the constitution of such larger benches, this only reduces uncertainties and delays in this listing process that might be exploited by one or the other of the litigants. *Secondly*, in the Court as it exists today, the Chief Justice enjoys essentially unlimited powers to determine the constitution of all benches, including Constitutional Benches. Again, this would not (necessarily) change on account of the division of the Court into two wings. While there could be versions of this proposal that involve such further institutionalization of the manner of allotment of cases to the Constitutional Bench (potentially reducing the discretionary role of the Chief Justice), I do not think it necessary to incorporate these elements.<sup>71</sup>

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<sup>71</sup> This is for a couple of reasons. One, as I mention above, I intentionally present the most modest (and therefore most likely to be acceptable) version of the model, eschewing details which are not essential to the fundamental change sought to be effected. But more importantly, I am not convinced that a narrowing of the Chief Justice's discretionary powers in this context is normatively desirable. The lack of transparency with respect to the Chief's exercise of his powers as 'master of the roster' means that much analysis is necessarily

Certain additional measures are probably necessary to supplement the institutional correction carried out by the establishment of the constitutional wing. I have written earlier in the thesis about the importance of costs and court fees to the appellate docket of the Court, and how - in the Court's new *avatar* as an error-correction court, these issues have been largely sidelined. To manage (and hopefully mitigate) the growing pressure on the appellate wing of the Court, I would propose the full-fledged implementation of the increase in court fees contemplated in the 2013 Rules, and a more rigorous enforcement of the norm of unsuccessful litigants' bearing the costs of litigation. Any and all of this would require the acquiescence, if not the enthusiastic backing, of the Supreme Court Bar as well, as therefore some degree of coordination between the Bar and the Bench. Lastly, along with stability in the tenure of the Chief Justice, relatively longer terms for judges generally are likely to be helpful in combating the collective action problems I reference in earlier parts of the thesis.

This apart, some relatively modest steps in the Court's management of its appellate docket might significantly mitigate uncertainty and inconsistency in the Court's adjudicatory processes. As discussed in earlier sections, the desire to tailor individual decisions to achieve 'just' outcomes delays and complicates the adjudicatory process considerably. The Court should be considerably more cautious than it is today, I suggest, in allowing new factual material or documents to be adduced before it or allowing new pleas (apart from purely legal ones) to be taken for the first time.

More broadly speaking, my analysis in earlier Chapters of the thesis confirms that structural factors as well as institutional culture, operating in a set of contingent, historical

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speculative, but I believe that these powers have often been exercised astutely. Particularly with respect to sensitive matters involving sentiments of community, caste or religion, Chief Justices have undoubtedly been alive to the importance of diversity on the bench in question. I think this 'play in the joints' serves useful purposes in varied contexts, and do not suggest tinkering with the same.

circumstances, have created both the docket crisis as well as the broader trend of *ad hocism* and interventionism that perpetuates this crisis (and in a sense renders it insolvable). As we see in Chapter III, this is not peculiar to the Supreme Court but permeates all levels of the judicial system.

Change comes slowly to the highest Court of the land, and that is perhaps as it should be. Viewed from any angle, the daunting challenges posed by the docket crisis in the Supreme Court can only be resolved through well-considered, incremental reform, and not by the various proposals for drastic structural reform that may for any reason be the fashion of the day.

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