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The Supreme Court

Madhav Khosla,
*Columbia Law School*, mkhosl@law.columbia.edu

Ananth Padmanabhan,
*University of Pennsylvania Carey Law School*

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Abstract
Over time, the Supreme Court of India has evolved from being a court of law to a major institutional actor in the political arena. The present chapter analyses this transition by directing external and internal lenses on the court’s functioning. The external lens reveals engagement by the Court with legislative and executive domains of governance, and the current concerns of transparency and accountability that it faces. The internal lens scrutinizes the Court’s success as a court of law and its capability to streamline the judicial process such that the judicial system lives up to the legitimate expectations of the litigant public. Using the insights offered from these dual perspectives, the authors suggest important changes to the court’s functioning and a reorientation of its priorities that can render it a more effective public institution.

Keywords: Supreme Court, judicial review, locus standi, collegium, national judicial appointments commission, special leave petition, pendency, case management, lower judiciary, senior advocates

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Even a bare perusal of news from India on any given day captures the extraordinary place that the Indian Supreme Court has come to occupy within public life. Yet, outside of careful and important legal analyses of the Court and its doctrine, the institution (and the broader judicial system) remains surprisingly understudied. The crucial contributions in various areas of Indian law have been largely written by and for the legal community. Their attention has been devoted towards legal doctrine and practice; it has been to unpack and demystify the conversations that cover judicial hallways. But the Supreme Court is not alone. It is situated in a broader political and social universe, and to better understand the institution we must engage with that universe. This chapter hopes to plug some holes in this regard and consider the Supreme Court as a public institution. The Supreme Court has a dual identity. It is both a legal institution—a court of law that has appellate and constitutional powers—and a public institution that is required to engage with, respond to, and negotiate the political pressures and social expectations that surround it. The relationship
The Practice of Judicial Review
between both these roles is complex, and one beyond the scope of this chapter, though one might note that in principle the Court could be a powerful political institution, in the power and public legitimacy that it enjoys, and yet be a rather weak legal institution, in its capacity to both enforce justice and also in its internal doctrinal coherence and vision. Indeed, the current status of the Indian Supreme Court might not be too far from this picture. This chapter begins by considering the relationship between the Supreme Court and Indian democracy. It first examines the Court’s practices of judicial review and the way in which the use of its power, say through developments like public interest litigation, have shaped the form of adjudication it performs. It then turns to the question of judicial appointments, especially recent controversies on how accountability and independence are to be secured within the higher judiciary. The chapter then explores the inner working of the Supreme Court, that is, its structure and functioning. This involves examining the rules that determine how the Court is approached, its bench structure, the management of case load, and so on. We also explore the topics of legal aid, a crucial component in assessing access to the institution, and the legal fraternity, whose organization and role has had major, if unexplored, consequences for judicial power and functioning in India.

The Supreme Court and Indian Democracy

The formal powers of the Supreme Court of India—the nature of its jurisdiction and authority—are the familiar stuff of legal scholarship. The Court’s power to enforce fundamental rights, the range of its jurisdiction (from the authority to issue writs to admit appeals), and so forth have been subject to careful legal analyses. However, the Supreme Court’s place within the larger democratic framework in which it resides has invited markedly less attention. Both contemporary historical accounts as well as studies by political scientists reveal scant interest in the relationship between the Supreme Court and Indian democracy. In other words, there has been surprisingly limited scholarship on the Supreme Court as a public institution, in contrast with an institution that is simply a neutral arbiter of legal disputes.

If such disinterest may have been justified in the early years of the Indian republic—and that very much remains an open question—it seems impossible to justify today. It is hard to imagine any major issue in Indian political life which has not become the subject of legal contestation. The Supreme Court is today a crucial actor within Indian politics. It intervenes in even the most ordinary of political matters; its voice has become a fixture in the daily rituals and drama of democratic life. How can we account for this fact and how might we make sense of the Court’s journey through the course of independent India?

There are two aspects to the Supreme Court’s emergence as one of India’s most significant public institutions. The first has to do with an enlarged understanding of what falls within the Court’s ambit. Since the late 1970s, India’s representative institutions—namely the legislature and the executive—have weakened. This weakening has been linked to both the ineffectiveness and the corruption associated with these institutions. The Court’s emergence in Indian politics occurred against the backdrop of this decline. It positioned itself as an institution that was responsive and capable, as well as one that was committed to larger substantive socio-economic goals. This repositioning of the Court was noticeably distinct from its identity in the 1950s and 1960s. To be sure, in these years the Court made a range of powerful decisions and hardly acquiesced to the other branches of government. A notable example would be the protection of private property. Yet, the Court’s ambit was narrowly defined, and its self-conception was clear.

Scholars have taken note of the Court’s reinvention through the 1970s, some paying attention to changed practices of constitutional interpretation over time, with others highlighting the importance of political events like the Emergency. But it is important to notice that the Court’s reinvention occurred through two
legal developments, which took place by and large simultaneously. One was an enlargement of the subjects considered fit for judicial resolution. In the early 1970s, the Court put forth the basic structure doctrine, by which it placed limits on Parliament’s power to amend the Constitution. A subsequent development was the emergence of substantive due process. This principle, which the Supreme Court had previously rejected in A.K. Gopalan, became a constitutional guarantee in Maneka Gandhi. The Court now declared it suitable to judicially consider the fairness of a range of legislation (like preventive detention laws) on non-procedural grounds. Another crucial instance of the broadening of judicial matters was a reinterpretation of the word ‘life’ in Article 21 of the Constitution. The right to life was interpreted to guarantee an astonishingly wide range of socio-economic goods, an interpretation which effectively made the explicitly unenforceable directive principles of state policy enforceable. There were now, through these interpretive moves, a host of questions and topics and concerns which acquired legal significance. A range of matters that had been part of political life, from the substantive character of constitutional amendments to the social welfare policies, were transformed into matters of law.

These developments in the substantive character of the guarantees which the Constitution offered were accompanied by procedural developments. Through ‘public interest litigation’, which diluted standing requirements and allowed petitioners to approach the Court even though they themselves had suffered no legal injury, the Court made itself readily available for redressing a host of public grievances. The relaxation of locus standi occurred alongside other procedural changes in the judicial process. Interim orders emerged as a form of ordinary judicial relief, proactive steps were taken to reach out to different interest groups, it became standard practice for the Court to assume a kind of supervisory role, and so forth. If an expansive interpretation of constitutional guarantees altered the character of disputes, public interest litigation and its associated process-based developments changed the nature of litigation and adjudication. The Supreme Court became accessible and involved in hitherto unseen ways—even if such access and involvement was very much mediated by an elite set of lawyers and activists—and made its decisions through negotiation, compromise, and interaction between different stake holders as if it were an overarching omnipotent body supervising the unravelling of Indian democracy.

These substantive and procedural developments were crucial to the Supreme Court’s repositioning, but a second crucial feature of the Court’s emergence relates to the internal doctrinal character of its decisions and its approach towards legal reasoning. The Court’s framing of legal questions, its determination of fault, and its awarding of remedies all made it a ‘player’ in Indian democracy—an actor in an ongoing set of political interactions. The Court’s routine involvement has made it extremely active, but this activism, as it were, has taken place alongside considerable conformism in terms of the merits of particular decisions. At the very least, what this means is that in substantive terms, the Supreme Court does far less than its visibility and self-proclaimed narrative might suggest. In the case of socio-economic rights, for example, while the Court has recognized rights such as the right to education, the right to health, and so on, this recognition has not been matched by the awarding of strong remedies.

The modesty of specific remedies has been witnessed across the spectrum. On corruption, for example, the Supreme Court has done little to truly ruffle political feathers and challenge the state. The more serious consequence of the Court’s form of legal adjudication, where law is not developed through the parsing of texts and principles but instead through the perceived interests of different groups, has been its implications for the rule of law. As Pratap Bhanu Mehta has argued, ‘the Court’s concern for its own authority has meant a reading of the political tea leaves as it were; the judicialization of politics and the politicization of the judiciary have turned out to be two sides of the same coin’. The rise of the Supreme Court, as Mehta notes, should not be confused with the rise of constitutionalism. The Court’s legitimacy has been closely linked to its ability to satisfy different agendas and to intervene through affirmation of the prevailing gestalt, rather than reshaping public opinion. In doctrinal terms, this has meant that the courtroom is hardly what Ronald Dworkin once famously termed as ‘the forum of principle’. In a sense, the
remarkable achievement of the Supreme Court in Indian politics has been its capacity to be openly political—not in the way that Western judiciaries are often thought to be (where judges are often alleged to have clear associations with specific political interests), but rather in the sense that its adjudicatory techniques guide and intervene in a set of compromises between different players rather than ruthlessly settle questions of right and wrong in strong rule of law terms. Many of the fears that were once voiced with regard to group litigation in the UK—that is, a jettisoning of the values of independence, rationality, and finality—have come to be true in the Indian context.\footnote{10}

Such an approach has been central to the Court occupying a seat in the front row of Indian politics, but it should not be viewed as simply an attempt to preserve its own power. Often, the departure from rule of law characteristics occurs out of a concern for the viability of judicial outcomes. In other words, the Court has no option but to work in a universe of dysfunctional public institutions; any attempt to ignore that would only mean the irrelevance of its decisions. The cloud of state failure hangs over Indian constitutionalism. Indians have turned to the Supreme Court as the saviour of their democracy—as the institution which can bring integrity into politics, which can enable social justice and welfare policies—out of a lack of other alternatives. On certain specific issues, such as in the areas of accountability and governance or in the daily workings of welfare schemes, the Court’s interventions have often been crucial and, at the very least, they have highlighted matters which the ordinary political process has been able to avoid. But the entry into lands where judiciaries rarely traverse has meant a significant departure from ordinary practices of judicial review. In addition to the issue of constitutional legitimacy, such departures also prompt the all-important question of whether judges of the Supreme Court possess the competence and expertise to enter such unconventional terrains. Over the long term, it remains to be seen whether such departures mark a positive development not simply for Indian democracy but also for Indian constitutionalism.

**Judicial Independence and Accountability**

The Supreme Court’s emergence and place within Indian democracy has been made possible through its practices of judicial review. A second crucial factor in preserving the Court’s position has been the procedure for the appointment of judges. Judicial independence has many facets—the financial autonomy of the judiciary, the mechanism for the transfer of judges, post-retirement norms for judges, and so forth—but above all, it is secured by the way in which judges are appointed.\footnote{11} Under Articles 124 and 217 of the Constitution, appointments to the higher judiciary are to be made by the executive in consultation with the judiciary. In what are now known as the Three Judges Cases, the Supreme Court interpreted these provisions to hold that the collegium of the Supreme Court (the five most senior judges, including the Chief Justice of India) would have control over appointments to the Supreme Court and High Courts.\footnote{12}

The collegium system for appointments emerged out of executive interference with the judiciary during and after the Emergency. Judicial independence was regarded as central to India’s separation of powers scheme, and control over appointments to the judiciary was considered to be the chief means for securing this independence. Despite the fact that the Three Judges Cases seemed difficult to reconcile with the bare text of Articles 124 and 217, the collegium system managed to survive because of the legitimacy enjoyed by the judiciary, in comparison with the legislature-executive. There were few reasons to believe that appointments by the representative organs of the state would not suffer from corruption and nepotism, corroding the judiciary in the same fashion as other public institutions had been corroded. Thus, although there were regular political calls and even formal attempts to create a new system for appointments, none led to any tangible change.

In 2014, a change was finally witnessed with the enactment of the 99th Amendment to the Constitution and the National Judicial Appointments Commission Act. These enactments took place amid growing concern with judicial accountability in India. In sharp contrast to the independence concern which had motivated...
and secured the collegium system, judicial accountability now acquired prominence. The collegium system’s opaque character and its lack of transparency were attacked amid growing discontent with the Indian judiciary. Incidents of mismanagement and internal conflict, episodes of corruption and professional impropriety, increasing doctrinal uncertainty and incoherence, and an incapacity to deliver tangible outcomes had all contributed to growing dissatisfaction with the judiciary. Two decades after its creation, it became politically feasible to replace the collegium system. The judiciary’s attempt at self-regulation was thought to have failed and external regulation was necessary. The 99th Amendment to the Constitution and the National Judicial Appointments Commission Act put in place a federal commission for the appointment of judges. Expectedly, such changes were challenged, and a four-to-one majority of the Supreme Court held that the impugned measures violated the basic structure of the Constitution.

An interesting feature of the Supreme Court’s decision was its clarification of the existing appointment scheme. This scheme, as laid down by the Three Judges Cases, was alleged to give the Court exclusive and complete control over the appointment process. Instead, the Court argued that the government’s own memoranda for Supreme Court and High Court appointments, issued in 1999, showed that the executive did, in fact, have a role to play in appointments. These memoranda were drafted after the Three Judges Cases to provide clarity on the precise mechanism of how appointments were to be made. On the specific issue of the executive’s role, the memorandum for Supreme Court appointments specifies that the opinion of the members of the collegium and the relevant High Court judge would be transmitted to the executive. The final recommendation of the Chief Justice would be sent to the Union Ministry for Law, Justice, and Company Affairs, who would forward the same to the prime minister, who in turn would advise the president as regards the appointment. In the case of the High Courts, the memorandum states that once the Chief Justice of India has sent the recommendation to the Union Minister of Law, Justice and Company Affairs, the minister would then obtain the views of the concerned state government and subsequently submit the proposal to the prime minister, who would in turn advise the president.

A simple reading of these memoranda does not seem to indicate any special role for the executive; that is to say, the role seems to be formal. Yet, the Supreme Court’s reliance upon them for the claim that the allegation of judicial exclusivity in appointments was false indicates the extent of opacity in the appointment process: both the judiciary and the executive did not even have a common understanding of how appointments are in fact made, regardless of the merits of the process. The Court’s reliance on the memoranda reframed the question posed by the impugned measures. Rather than judicial exclusivity, the question was whether judicial independence required judicial primacy in the appointment process.

The Court argued that the composition of the proposed National Judicial Appointments Commission violated judicial independence. The Commission was to include six members: the Chief Justice of India, two senior Supreme Court judges, the Union Minister for Law and Justice, and two ‘eminent persons’. Under the scheme outlined, Justice Khehar noted that the two eminent persons could reject all recommendations by themselves; the vesting of such powers in persons unconnected with the administration of justice was declared arbitrary. The role of the Union Minister for Law and Justice was similarly attacked by the bench. His inclusion was thought to raise major conflict of interests, given the extent of government litigation before the Court. Justice Lokur noted further that entrusting the Union Minister with such a role would tamper with the principle of cabinet responsibility. The Court noted that the constitutional scheme of mandatory consultations between the president and chief justice was made a sham exercise through the impugned measures, with the Commission as an intermediary.

A large part of the Court’s reasoning was based upon a perceived belief about how the Commission would work. Concerns were voiced by the Court over the bargaining between different actors that the impugned scheme would bring out, and the kinds of pressures that were likely to be at work. The state suggested that the judiciary should view the proposal with some degree of trust, and that the process had the potential to be deliberative. But the Court’s response was similar: the collegium system too had the potential to be
deliberative. In the end, which reasoning we find persuasive turns on whether we would rather trust the judiciary or the executive, and whether we see more dangers emerging from a lack of judicial independence or a lack of judicial accountability.

However, at least two observations may be made about this recent development and the road ahead. First, the legislature–executive seem to have lost a genuinely worthy opportunity to replace the collegium system. Two decades on, the system’s charm had expired, but the 99th Amendment to the Constitution and the National Judicial Appointments Commission Act were riddled with a number of concerns. These range from poor drafting, like in the case of undefined ‘eminent persons’, to the structure of the Commission, which offered several opportunities for undue executive influence. A more carefully constructed proposal, which may have given the judiciary primacy but had a genuine, meaningful role for the executive, would have been very hard for the Court to strike down. Second, by striking down the measure and reinstating the collegium system, the Court has only increased further scrutiny of its decisions. In its decision, the Court acknowledged the failures of the collegium system and vowed to improve the process. Although it has commenced consultations with the bar and the executive over how the collegium system might be reformed, it remains to be seen what such improvements would be. Importantly, however, the Court is no longer in the position that it was two or three decades ago. Over the past decade, it has lost much of the comparative institutional legitimacy that it once enjoyed. Unless it can look inward, tackling both doctrinal incoherence and administrative mismanagement, not to mention major concerns regarding corruption and accountability, its time in the sun is unlikely to last.

The Supreme Court: Structure and Functioning

A knowledge of the structure and design of the Supreme Court is crucial to the study of its efficacy. As Nick Robinson has shown, different structural approaches promote different conceptions of a highest court’s functions and values. The study of structure extends to all operational aspects of the Supreme Court’s functioning, the most important of these being the jurisdiction of the Court, its work allocation across benches, the norms and practices governing admissions, final hearings, adjournments, and urgent motions, and the supervisory role it plays in the functioning of the High Courts and the lower judiciary.

Of these, the jurisdiction of the court is detailed in the Constitution but the remaining aspects are covered sketchily, if at all. Article 145 of the Constitution of India leaves most operational aspects to be worked out through the rules framed by the Court, with presidential approval. Recently, the Supreme Court Rules 2013 came into effect, repealing the earlier 1966 rules. These rules, like the repealed set, are comprehensive, covering a whole gamut of matters integral to the functioning of the Court. These include the format of the various petitions and appeals, the professional standards governing advocates and advocates-on-record, the registry of the Court, summons and notices to parties, and so on. Aspects of these rules feature in the following discussion.

Pathways to the Supreme Court

Table 3.1 enumerates the different procedural pathways through which a case can reach the Supreme Court. Of these, the most important is the appellate route, and within the appellate route, the appeals that come up before the Court by way of special leave under Article 136 of the Constitution.
### Table 3.1 Jurisdiction of the Supreme Court

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<th>Type of Jurisdiction</th>
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| **Appeals under the Constitution** | (i) **Article 132:** Appeal to the Supreme Court from any judgement, decree, or final order of a High Court, whether in civil, criminal, or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.  
(ii) **Article 133:** Appeal to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court if the High Court certifies that the case involves a substantial question of law of general importance and in its opinion the said question needs to be decided by the Supreme Court.  
(iii) **Article 134:** Appeal to the Supreme Court from any judgement, final order, or sentence in a criminal proceeding of a High Court if (a) it has on appeal reversed an order of acquittal of an accused person and sentenced him to death, or (b) has withdrawn for trial before itself, any case from any Court subordinate to it and has in such trial convicted the accused and sentenced him to death, or (c) it certifies that the case is a fit one for appeal to the Supreme Court.  
(iv) **Article 136:** Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence, or order in any case or matter passed or made by any Court or tribunal in the territory of India except the Court or tribunal constituted by or under any law relating to the armed forces. |
| **Statutory Appeals** | (i) **Section 379 of the Code of Criminal Procedure, 1973:** Appeal from any judgement, final order, or sentence in a criminal proceeding of a High Court, if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or to imprisonment for a period of not less than ten years; (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years.  
(ii) **Section 130E of the Customs Act, 1962:** Appeal from any judgement of the High Court on a reference made under Section 130, in any case which the High Court certifies to be a fit one for appeal to the Supreme Court, or any order passed by the Appellate Tribunal relating to the rate of custom duty or the value of goods for the purpose of assessment.  
(iii) **Section 35L of the Central Excise and Salt Act, 1944:** Appeal from any judgement of the High Court delivered on a reference made under Section 35G, in any case which the High Court certifies to be a fit one for appeal to the Supreme Court, or any order passed by the Appellate Tribunal relating to the rate of duty of excise or the value of goods for purposes of assessment.  
(iv) **Section 23 of the Consumer Protection Act, 1986:** Appeal from orders made by the National Commission.  
(v) **Section 19(1)(b) of the Contempt of Courts Act, 1971:** Appeal, as of right, from any order or decision of Division Bench of a High Court in exercise of its jurisdiction to punish for contempt.  
(vi) **Section 38 of the Advocates Act, 1961:** Appeal from an order made by the Disciplinary Committee of the Bar Council of India. |
(vi) Section 116A of the Representation of People Act, 1951: Appeal on any question, whether of law or fact, from every order passed by a High Court under Section 98 or Section 99 of the said Act.

(vii) Section 10 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992: Appeal from any judgement, sentence, or order not being interlocutory order, of the special court, both on fact and on law.

(viii) Section 18 of the Telecom Regulatory Authority of India Act, 1997: Appeal against any order not being an interlocutory order, of the Appellate Tribunal (TDSAT), on one or more of the grounds specified in Section 100 of Code of Civil Procedure.

(ix) Section 15(z) of the Securities and Exchange Board of India Act, 1992: Appeal from any order or decision of the Securities Appellate Tribunal on any question of law arising from such order.

(x) Section 261 of the Income Tax Act, 1961: Appeal from any judgement of the High Court made on reference or appeal, upon certification by the High Court as a fit case for appeal.

(xi) Section 53T of the Competition Act, 2002: Appeal against any decision or order of the Competition Appellate Tribunal.

Original Jurisdiction

(i) Article 32: Writ jurisdiction for enforcement of fundamental rights.

(ii) Article 131: Jurisdiction over disputes between the Centre and one or more States or between the States themselves.

(iii) Article 71: Jurisdiction over disputes relating to the election of a President or Vice-President.

Transfer Jurisdiction

(i) Article 139A(1): Power to transfer to itself cases pending either before the Supreme Court and one or more High Courts, or before more than one High Court.

(ii) Article 139A(2): Power to transfer a case from one High Court to another.

(iii) Section 125 of the Code of Civil Procedure, 1908: Power to transfer a suit, appeal, or other proceedings from a High Court or other civil court in one State to a High Court or other civil court in any other State.

(iv) Section 406 of the Code of Criminal Procedure, 1973: Power to transfer any case or appeal from one High Court to another, or from a criminal court subordinate to one High Court to another criminal Court of equal or superior jurisdiction, subordinate to another High Court.

Advisory Jurisdiction

(i) Article 143(1): Opinion of the Court offered in cases where the President seeks such opinion because the case involves a question of law or fact of an expedient nature and public importance.

(ii) Article 317: Opinion of the Court offered in cases where the President seeks such opinion, involving the merits of an enquiry for removal of the Chairman or any other member of a Public Service Commission on the ground of misbehaviour.

Statutory References

(i) Section 257 of Income Tax Act, 1961: The Income Tax Appellate Tribunal can, through its President, refer to the Supreme Court, any question of law on which there is difference of opinion between different High Courts.

(ii) Section 14(1)/17(1) of the Right to Information Act, 2005: President of India/Governor of a State refers to the Supreme Court to conduct enquiry and report on the question of removal of Chief Information Commissioner/State Chief Information Commissioner or any Information Commissioner/State Information Commissioner on the ground of proven misbehaviour or incapacity.

Review Jurisdiction

Article 137: Supreme Court has the power to review any judgement pronounced or order made by it.

Curative Petition

As held in Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388, even after dismissal of a review petition under Article 137 of the Constitution, the Supreme Court may entertain a curative petition and reconsider its judgement/order, in exercise of its inherent powers in order to prevent abuse of its process, and to cure gross miscarriage of justice.

Interestingly, Article 136 was originally intended by the drafters of the Constitution to be minimally used. They apprehended that a wide exercise of the discretionary power contained here would eventually result in flooding the Court with too many appeals. Moreover, when the Court, in its first two decades, liberally granted leave to appeal, Parliament responded by enhancing the criminal appellate jurisdiction of the Supreme Court, and removing the pecuniary limit for civil appeals that required the dispute to be above a particular value to merit the Court’s consideration. These measures were introduced to ensure that in cases involving substantial questions of law or those where the stakes were high, appeals would automatically lie without the need for a separate admissions hearing. However, despite these efforts to widen the Court’s normal appellate powers, and thus indirectly nudge towards self-regulation of its discretionary appellate power, the Court has continued expanding the scope of Article 136 to the point where it is unclear what is excluded from its purview.

This move has, in turn, led to a rapid rise in the admission matters instituted before the Court at a scale much higher than the regular hearing cases, thereby moulding the court’s identity in a particular direction. In the mere five-year period from 1976 to 1981—the crucial Emergency and post-Emergency years—the number of admission matters went up five fold. This number has again nearly tripled over the present post-liberalization phase. Between 2005 and 2011, the number of cases appealed to the Supreme Court increased by 44.8 per cent and the number of cases the Court accepted for regular hearing increased by 74.5 per cent. However, the number of cases disposed of by the subordinate courts increased marginally by about 7.8 per cent during this timeframe, indicating that litigants were bypassing the subordinate judiciary and上诉ing to the Supreme Court wherever possible. The increasing acceptance of such appeals by the Court was also signalling them in this direction.

The admission-heavy character of the court’s weekly docket—Mondays and Fridays are now almost exclusively devoted to admission hearings—has resulted in three significant problems. The first is the arrears or pendency problem in the Supreme Court because of the sheer number of appeals arising from all over the country against orders—interim or final, passed by courts or tribunals—involving criminal, civil, regulatory, and commercial disputes. While the total arrears do not appear so alarming when contrasted with the pendency in the High Courts and lower courts, two factors are worth noting. First, the fact that Supreme Court arrears are spread over a total judicial strength of a mere 31 judges, unlike the pendency figures for the other courts, makes it all the more difficult for the Court to reduce its pendency in the coming years. This is particularly so because increasing judge strength in the Supreme Court is not an easy process, requiring as it does a parliamentary enactment. Moreover, the Court, as a matter of convention, does not function through resort to retired Supreme Court and High Court judges appointed on an ad hoc basis for disposal of arrears.

Second, that the pendency is disproportionately higher with regular hearing cases as compared to admission hearings seriously hampers the court’s role as a legal institution. To illustrate this further, consider the latest available figures for initiation and pendency of admission and regular hearing cases. In 2014, till the month of November, 67,965 admission cases were instituted, as opposed to 13,618 regular hearing cases. However, the pendency figure for admission cases is at 35,284, while that for regular hearing cases is at a disproportionately high 29,635. A possible explanation for this is that the high institution of admission cases has considerably reduced the time available for conducting regular hearings, thus clogging the disposal of final hearing cases. This is also borne out by some of the data, which shows that while 7 per cent of regular hearing matters had been pending for more than five years in 2004, the percentage had shot up to 17 per cent by 2011, that is, within a short span of seven years. In 2011, 41 per cent of five-judge-bench matters and 67.8 per cent of three-judge-bench matters were pending for more than five years, a particularly telling fact because a good many cases before such benches involve questions of constitutional significance. The more parties are made to wait for the final disposal of their cases, the lesser would be their perception of the Court as an effective legal institution.
The allied problem with an admissions-heavy system is that the serious responsibility of the higher judiciary—declaring and refining the law on a case-by-case basis—suffers. Regular hearings are the mainstay of a common law system, with the apex court at the top of the judicial edifice, laying down precedents for courts below to follow. Unless regular hearings are actually conducted on a timely basis, appeals will not get finally disposed of, resulting in parties to a dispute losing faith in the legal process itself. Even when regular hearings take place, the Court has very little control over the time allotted for such hearings. While it is common practice for the bar to justify prolonged hearings on the ground that adjudicating complicated legal issues cannot be time-bound, it is time the Supreme Court led by example and started imposing rigid timelines for completion of oral hearings. This reform could lead to much faster disposal of cases by the Supreme Court, adoption of a similar mechanism by High Courts to curb prolonged oral hearings, as well as drastic improvement in the quality of written briefs and arguments filed before courts in India.

Moreover, the irregularity in regular hearings can lead to ineffective response mechanisms on the part of the Court to refine or correct poor precedent. This is striking in the case of commercial litigation, as seen from the example of the Arbitration and Conciliation Act, 1996, and case law governing the scope of judicial intervention in both domestic and international arbitrations. The Court’s precedents have resulted in virtual paralysis of the arbitral panel appointment process, and confusion regarding the enforcement of international arbitral awards. Yet, each subsequent response from the Court to the problem has taken several intervening years, with the matter getting stuck before larger benches. In the interim, courts below are befuddled as to the correct approach, and divergent views emerge from multiple lower courts, contributing to confusion in the minds of commercial actors who look to the law to organize their affairs in advance. Litigation relating to higher education offers a similar story. Both higher educational institutions and prospective students are left to the mercy of the Court finally getting down to slot time for the actual hearing of the case, and must perforce rely on piecemeal orders in the interim that offer little regulatory guidance.

Despite the surge in admission matters, and the consequential pendency problem, the Court has unfortunately been unwilling to exercise its discretion carefully or frame clear guidelines to curtail unbridled resort to Article 136. In its own words, this provision is ‘an untramelled reservoir of power incapable of being confined by definitional bounds’, which can be deployed to fix ‘grave injustice’ or redress conduct ‘shocking the conscience of the court’. The irony of the situation is that the Court, after almost six years since a larger bench reference was made by a two-judge bench seeking broad guidelines for the exercise of its discretion under Article 136, recently declined to frame any guidelines. The Court held that ‘in the interest of justice’, it would be better to exercise its discretionary power ‘with circumspection, rather than to limit the power forever’. There can be no clearer invitation to parties to partake in the lottery that the special leave petition (SLP) admission process has become. This verdict will further clog the wheels of the regular hearing system. It would be arguably more effective, therefore, to experiment with novel ways to tackle the admission process itself, on the lines of replacing oral hearings with in-chamber deliberation on the drafted petitions. The Court already operates differently in the case of curative petitions, a novel form of judicially crafted relief, listed in Table 3.1. The Court could also consider creating a separate pool of judges, selected on rotating basis, who are exclusively dedicated to deciding on admissions, thus guaranteeing that the others can devote their time and expertise exclusively to the authoring of well-reasoned judgements in regular hearing cases all through the working week. However, there is a political economy built around the admissions system. The incentive structure, particularly for the senior advocates at the bar, is such that they earn much more, for likely less effort, from a short SLP admission matter on a Monday or Friday rather than by way of a regular hearing on other days. As Pratap Bhanu Mehta points out, Justice Krishna Iyer’s remark in Easwara Iyer v. Registrar, Supreme Court, that many oral arguments could be replaced with written submissions, provoked a strike that continued till the government of the day stepped in to declare that no such change would be introduced.
The Supreme Court’s last published annual report of 2014 lists several initiatives taken by the Court to boost up regular hearings. Most of the solutions mentioned, however, only address the symptom and not the cause. For instance, taking up cases for final disposal rather than first granting leave, increasing the number of matters listed before each bench on miscellaneous days, reducing the numerical requirement for listing identical cases as group matters from ten to five, or listing expedited regular hearing matters separately, do not perform the impossible task of adding time or the difficult one of freeing the time of the Court for regular hearings. They only offer an illusory comfort to parties that their case is featured in the cause list.

The situation in which the Court finds itself today is tricky. It is one that steadily weakens its identity as an effective legal institution meant to resolve questions of law in a clear and efficacious manner.

Finally, the Supreme Court’s approach towards the admission of cases was motivated in part by the poor state of affairs in the High Courts and lower judiciary. But by hearing cases which should ordinarily not be reserved for the apex court, the incentive to reform the High Courts and lower judiciary has diminished. The Court has only made matters worse by decreasing the significance of the High Courts and lower judiciary (about which we say a little more subsequently). In short, by attempting to do more, the Court actually appears to be doing much less than expected of an apex institution.

**Supreme Court Benches**

Article 145(2) leaves it to the Court, by way of rules, to fix the minimum number of judges sitting for any purpose, and to provide for the powers of single judges and division courts. The sole stipulation—often breached—is contained in Article 145(3), which provides that five shall be the minimum number of judges deciding any case involving a substantial question of law as to the interpretation of the Constitution. The proviso to this clause is instructive: this provision can be operationalized by referral to a constitutional bench of any appeal involving such questions, by the division bench currently hearing such appeal.

Decisions delivered by a larger bench are binding on smaller benches of the court. As laid down in *Dawoodi Bohra Community v. State of Maharashtra*, a bench of lesser quorum cannot doubt the correctness of any view on law taken by a larger bench. The smaller bench can only invite the attention of the Chief Justice and request for the matter to be placed for hearing before a bench of larger quorum than the bench whose decision had come up for its consideration. Only a bench of coequal strength can express an opinion doubting the correctness of the view taken by an earlier bench of coequal strength. In the event of such expression of doubt, the matter may be placed for hearing before a bench consisting of a quorum larger than that of the bench whose decision is doubted.

Constitution benches have played a key role in shaping the identity of the Court as a public institution, often asserting its independence and authority as the final voice on all matters legal. They have also distinctively shaped the law in the field of constitutional law. Yet, over the years, they have become a less common occurrence. Even larger benches, expressly constituted to resolve conflicting legal principles enunciated in verdicts by benches of equal strength, have featured less over time in the litigation landscape. Moreover, many such benches constituted through the process of referral by the lower bench to the Chief Justice finally get to hear the issue in question after inordinate delay and postponements, and in some cases, do not ever get to adjudicate the referred issue.

This is a direct consequence of the rising backlog, which in turn leads the Court to spread itself thin across more cases. Data reveals that the post–Emergency period, when the Court clearly felt the need to reassert itself as a strong institution in the political space, saw a drastic increase in writ petitions addressing diverse public–interest causes and a rapid decrease in the constitutional benches deciding important questions of constitutional law. This period also witnessed the rise in the two–judge bench system, as backlog and the relaxation of *locus standi* compelled the Court to transform the prevailing norm of three–judge benches into an exception. Individual benches, in turn, started focusing on fixing the issue before them rather than
crystallizing legal principles and providing a cohesive structure to the judge-made law. Benches started involving themselves with the detail of issue-specific guidelines, and wielded authority in a discretionary manner in matters ranging from grant of special leave to awarding of death penalty. This, in turn, has lent a polyvocality—the ability of an institutional actor to speak in multiple voices—to the Supreme Court’s identity as a public institution. Chief Justices of India, enjoying significantly lesser tenures on average when compared with their counterparts in the United States (US) or the UK, have been more concerned with the daily administration of justice than with lending coherence to the multiple voices emerging from these benches. The proliferation of chief justices calls for a rethink in the system of automatically appointing the senior-most judge as the Chief Justice, without factoring in the number of years (or months, as has been the case with many of India’s past Chief Justices) of service left for the judge in question. The common practice followed in the case of the senior bureaucracy, of appointing only those with a minimum of two years of service left in them to key positions, must be adopted when appointing Chief Justices of the Supreme Court. Today, lawyers are more likely to reference a particular bench than the Supreme Court as a whole, when proffering legal advice. This takes a heavy toll on the value ascribed by the public to the ‘law laid down’ by the Court. It can thus be posited that the Court’s dual identities have worked at cross-purposes here, and when its identity as a political institution assumed significance, its identity as a legal institution started taking a turn for the worse.

Arrears and Case Management in the Lower Courts

The top-heavy character of the judicial system has unfortunately resulted in huge pendency and a consequent lack of faith in the lower courts. A recent Law Commission report on arrears innovated upon the usual methods of calculating court arrears, and came up with a rate of disposal formula to measure pendency. The results are alarming, especially in the case of the lower judiciary (Tables 3.2 and 3.3).
### Table 3.2  State-wise Arrears in the Lower Judiciary: Higher Judicial Service

<table>
<thead>
<tr>
<th>State</th>
<th>Cases Pending for More Than One Year (as on 31 December 2012)</th>
<th>No. of Judges Required for Clearing This Backlog in</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1 Year</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>98,072</td>
<td>121</td>
</tr>
<tr>
<td>Bihar</td>
<td>184,746</td>
<td>928</td>
</tr>
<tr>
<td>Delhi</td>
<td>45,669</td>
<td>103</td>
</tr>
<tr>
<td>Gujarat</td>
<td>267,853</td>
<td>255</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>11,477</td>
<td>9</td>
</tr>
<tr>
<td>Jammu and Kashmir</td>
<td>25,152</td>
<td>34</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>40,603</td>
<td>193</td>
</tr>
<tr>
<td>Karnataka</td>
<td>98,970</td>
<td>148</td>
</tr>
<tr>
<td>Kerala</td>
<td>152,175</td>
<td>126</td>
</tr>
<tr>
<td>Punjab</td>
<td>43,769</td>
<td>47</td>
</tr>
<tr>
<td>Haryana</td>
<td>54,041</td>
<td>56</td>
</tr>
<tr>
<td>Sikkim</td>
<td>243</td>
<td>1</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>14,061</td>
<td>21</td>
</tr>
</tbody>
</table>

*Source: Based on data in Law Commission Report No. 245.*
### Table 3.3  State-wise Arrears in the Lower Judiciary: Subordinate Judicial Service

<table>
<thead>
<tr>
<th>State</th>
<th>Cases Pending for More Than One Year (as on 31 December 2012)</th>
<th>No. of Judges Required for Clearing This Backlog in</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1 Year</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>472,656</td>
<td>799</td>
</tr>
<tr>
<td>Bihar</td>
<td>1,038,598</td>
<td>4,871</td>
</tr>
<tr>
<td>Delhi</td>
<td>231,452</td>
<td>208</td>
</tr>
<tr>
<td>Gujarat</td>
<td>1,122,354</td>
<td>1,843</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>85,307</td>
<td>64</td>
</tr>
<tr>
<td>Jammu and Kashmir</td>
<td>83,431</td>
<td>67</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>187,939</td>
<td>573</td>
</tr>
<tr>
<td>Karnataka</td>
<td>657,058</td>
<td>658</td>
</tr>
<tr>
<td>Kerala</td>
<td>459,911</td>
<td>171</td>
</tr>
<tr>
<td>Punjab</td>
<td>252,973</td>
<td>231</td>
</tr>
<tr>
<td>Haryana</td>
<td>252,736</td>
<td>215</td>
</tr>
<tr>
<td>Sikkim</td>
<td>216</td>
<td>1</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>87,419</td>
<td>79</td>
</tr>
</tbody>
</table>

*Source: Based on data in Law Commission Report No. 245.*

These tables reveal that the present situation demands heavy infusion of judicial manpower in the lower judiciary—both higher and subordinate judicial services—to resolve the pendency problem. The Supreme Court, while aware of this, has failed to unequivocally support one initiative that was empirically shown to have worked: the setting up of fast-track courts. These courts, which by 2011 had disposed of nearly 33 lakh cases at a clearance rate of nearly 84 per cent of the total cases referred to them, were sought to be closed down in 2005, just about five years after they were initially set up. The central government, quite inexplicably, chose to starve this initiative of funds. Unfortunately, the Supreme Court, instead of directing continuation of funds, as it did in 2005, permitted the Union of India to shut down the project in 2012. About 1,500 judges were left in the lurch, as the Court sided with the Union to hold that they were ad hoc judges with no right to regularization. The fast-track scheme, at least in its initial period, provided some indication of how trials could possibly be concluded if judges were specifically allocated to this task and given a free hand in shutting the loopholes for adjournment present in the current law. The scheme was beset with several problems, but its closure indicated how litigation policy works in India—the decision was ad hoc without any substantial engagement with data and reform proposals.

The Supreme Court has called upon lower courts to be hard-nosed when granting adjournments and to ensure that delay does not defeat justice. The spate of amendments to the Code of Civil Procedure, 1908,
carried out in 1999 and 2002, provided inter alia that adjournments shall not be granted to a party more than three times during the hearing of a suit, and made mandatory the imposition of costs occasioned by the adjournment as well as higher costs in appropriate situations. When interpreting this provision, the Court chose to read it down and hold that the three-adjournment policy is not a hard and fast rule. While one cannot find fault with the Court’s concern for the instances in which a litigant was hapless enough to have suffered an emergency necessitating more than three adjournments, its interpretation has only resulted in encouraging clever lawyers to play fast and loose with the three-adjournment policy. The Court could have reshaped the law more purposively, stipulating the imposition of exponentially rising costs—borne by the party seeking adjournment—for every subsequent adjournment after the third. Leaving the grant of additional adjournments in the hands of the lower judiciary without much guidance for the exercise of such grant has weakened the amendment to an extent. Even so, the Court’s caution that adjournments in excess of the third must not be granted except for situations beyond the control of the applicant has had a signalling effect on lower courts, with the more earnest judges adhering to the three-adjournment policy. An overarching adjournment policy may not, however, resolve the pendency problem without a serious look at the actual stages of a hearing when a case is most likely to get stalled. A more nuanced policy, addressing grants and denials of adjournments during specific stages of a hearing and based on the type of case involved, would work better. The Supreme Court is best placed to facilitate such categorized policymaking using its supervisory powers. For instance, the adjournment problem in the Supreme Court, which mainly hears questions of law as an appellate forum, is different in its impact and possible resolution from that affecting the lower courts of first instance. One of the crucial stages of a trial identified by the Court for immediate redressal is that between the examination in chief and the cross examination of a witness. During this phase, it is very likely that the witness would be compelled to compromise. Lawyers can facilitate this process by buying time for their clients, time that can then be used to ‘get to the’ witness. Adjournments at this stage can, therefore, completely wreck the fairness of the trial process. The Supreme Court has, therefore, identified this stage of the trial as one demanding strict scrutiny of adjournment requests. The Court, resorting to strong language, branded adjournments as an ‘ailment’ and held that it is imperative that the cross-examination be completed the very same day as the examination-in-chief of any witness. The Court also directed circulating copies of this verdict to the High Courts, and through them, to the trial courts.

There is another important, if under-recognized, dimension to the adjournment problem: the fact that it severely affects the learning curve of the profession and its ability to plan in advance. The Supreme Court is the only institution that can infuse this thinking into the current debate on adjournments, which is heavily focused on the impact of adjournments on litigants. For litigation to hold as a promising career for fresh law graduates, the Court has to initiate reform measures built around the recognition that professionally oriented lawyers are as much victims of the adjournment crisis as litigants. A good step initiated in this direction, which also recognizes the reality that adding more judges may not necessarily work unless the process is itself altered, is the Court’s suggestion to introduce a case management policy. The Committee set up in pursuance of this suggestion has come out with a consultation paper which, if implemented, can potentially revolutionize the way cases are conducted in India. The most important shift in thinking ushered in by a case management policy is a proactive approach on the part of the judge and his staff to fix timelines for the completion of a case, rather than leaving it to the advocates for the parties, as happens to be the scenario presently. Another important area where the Supreme Court has signalled legal reform is the imposition of costs in civil cases. The Court has consistently maintained that the present system of levying meagre costs in civil cases is ‘wholly unsatisfactory’ and has only resulted in a ‘steady increase in malicious, vexatious, false, frivolous and speculative suits’. At the same time, it has been aware that mere transposition of systems in foreign jurisdictions that devote considerable time to the computation of costs will only worsen the
pendency problem. Correctly reasoning that attempts to reduce pendency or encourage alternative dispute resolution methods would be futile in the absence of ‘actual realistic costs’ suited to the Indian conditions, the Court has called for the Law Commission’s consideration of this issue. Subsequently, the Law Commission came out with its report, recommending changes to the Code of Civil Procedure that bring about the awarding of actual costs so as to indemnify successful litigants, deter vexatious litigation, and encourage early settlement of disputes. However, the bar is infamous for its resistance to any civil procedure reform, as borne out by the spate of strikes instigated by the earlier amendments of 1999 and 2002. Therefore, the Supreme Court will have to take it upon itself to compel suitable amendments to the law as proposed by the Law Commission.

Legal Aid and Access

The Supreme Court has placed considerable emphasis on access to legal services in general, and to its own jurisdiction in particular, through its rulings and administrative machinery. The Supreme Court Legal Services Committee was established as the successor to the erstwhile Supreme Court Legal Aid Committee, vide the set of regulations issued by the National Legal Services Authority in 1996. The primary function of the Committee is to administer and implement the Supreme Court’s legal services programme, and to maintain the panel of advocates who give legal advice in the Supreme Court. Forty-six senior advocates are also part of this panel, lending their assistance in murder cases, convictions under the Narcotic Drugs and Psychotropic Substances Act, 1985, and other serious offences where the sentence awarded to the accused is more than ten years. From 2005 to 2014, over 10,500 applicants have benefited from this service. The Committee has also been instrumental in organizing continuing legal education programmes for its panel advocates and national Lok Adalats for settling disputes under the guidance of Supreme Court judges. Realizing the potential of alternate dispute resolution methods to make the law more accessible and expedite conflict resolution, the Court has taken welcome baby steps in this direction, including the running of a mediation centre.

The complex issue of access to the Supreme Court brings into sharp relief the conflict between the dual identities—political and legal—assumed by the institution. As a political institution, the Court’s solitary presence in New Delhi makes perfect sense. Having more than one venue for the court—in the form of additional benches—can potentially expose it to higher political intervention in its functioning. Moreover, the signalling effect served by the Court speaking in one voice, from one building, is diluted when more benches are created. On the other hand, because the Court has, over time, spread itself thin and entertained appeals on a discretionary basis, and in a wide variety of cases from all over the country, there is a legitimate expectation on the part of the public that locational disadvantages do not hamper the hearing of their appeal. Unfortunately, some of the recent empirical work indicates that many more appeals are referred to the Supreme Court from orders passed by high courts near Delhi—mainly the Delhi High Court and the Punjab & Haryana High Court—as compared to the rest of the country. This is despite the other High Courts, including the Madras, Bombay, and Calcutta High Courts, hearing many more cases than the aforementioned courts.

When evaluating the Supreme Court as a legal institution, one is, therefore, sadly forced to admit that its location in New Delhi makes it less accessible to litigants from other regions. Aware of this, the Law Commission of India has come up with an interesting proposal: a Constitution Bench in Delhi to deal with constitutional and other allied issues, and four Cassation Benches in the northern, southern, eastern, and western regions of the country to deal with all appellate work arising out of the orders/judgements of the courts in these respective regions. Though this proposal may never be taken up because of a strong resistance to its implementation by the present Supreme Court bar, the splitting up of constitutional and appellate work may well enable the Court to cement its identity as a strong legal institution.
The Supreme Court’s effort to improve its registry, particularly through the use of technology, deserves special mention as a positive step enhancing litigant access. The Court registry, though a vital part of its administrative machinery, has several independent powers and functions that place it in a position of authority over litigants and lawyers. In several situations, the registry can actually play foul with the fate of a client who is desperate for an interim order or an order copy. This ‘living law’ presents an unhealthy scenario as it breeds favouritism towards certain law offices and a culture of unprofessional discharge of duty by officials in the registry. The Court appears to be trying to weaken the ill-effects of the strong inter-personal bonds festered between the bar and the registry by deploying technology and facilitating litigant-friendly measures such as e-filing of petitions, maintenance of an exhaustive website, and online accessibility to daily orders and judgements. It would be even better if the Court were to expand its experience with modernizing and professionalizing the registry to courts all over the country through a national policy for the revamp of court registries.

The Bar and Legal Fraternity

In order to function effectively, the Supreme Court also requires support from the bar. Two important constituents of the bar have been integral to the evolution of the Court as a competent and independent institution: senior advocates and advocates-on-record (AoRs). Order IV, Rule 2 of the Supreme Court Rules, 2013, provides that an advocate may be designated by the Chief Justice and other judges as a senior advocate if, in their opinion, he is deserving of such distinction by virtue of his ability, standing at the bar, or special knowledge or experience in law. Once so designated, these senior advocates cannot represent clients directly, and have to necessarily appear along with an advocate-on-record before the Supreme Court. Even senior advocates designated by the various High Courts and practising before the Supreme Court are bound by these constraints against directly advising or representing clients. Anecdotally, it appears that senior advocates have found ways to bypass the bar on them directly engaging with clients by routing the client through junior advocates who work in their chambers.

Apart from appearing on behalf of private parties and obtaining favourable outcomes, senior advocates have contributed significantly to the growth of the law, particularly in the first three decades when the Constitution was being tested regularly in the Supreme Court and many legal principles were yet to be fully settled. Eminent counsel such as Nani Palkhivala, M.C. Setalvad, Fali Nariman, Ram Jethmalani, and others have assisted the Court in shaping and defining the boundaries of the law across various substantive areas of practice. Many of them have also lent invaluable assistance to the court as amici curiae, particularly in public law matters where rights violations have been at issue.

But the system of the chosen few has also created, more so in recent times, an unhealthy incentive structure built around the discretionary lottery spawned by the grant or denial of special leave to appeal. In a recent study of the senior advocate system in the Supreme Court, Marc Galanter and Nick Robinson attribute the success of such advocates to the ‘extensive human capital they have developed within the court system and their nuanced knowledge of both formal and informal judicial procedure’. Indeed, one of the key insights offered by this study is that this cult of legal superstars—individuals who at times tower over even Supreme Court judges in stature and personality—manages to sustain and thrive because the Court is hard-pressed for time to dive deep into questions of law; success before the Court is much more about control in the interim and much less about outcomes at the end of a long, drawn-out hearing process. Research also indicates that a special leave petition argued by a senior advocate has roughly double the chances of being heard by the Supreme Court, compared with cases without a senior advocate. Given this, it is unlikely that the Supreme Court’s senior advocates will allow any real reforms to the admissions stage of hearings.

The other crucial tier in the bar consists of AoRs, a class of lawyers who are specially qualified to plead before the Supreme Court. As a collective body, they have been influential in shaping the practice of the
Court, and were instrumental in their capacity as the lead petitioner in bringing about the collegium system of judicial appointments. Order IV, Rule 1(b) of the Supreme Court Rules, 2013, makes it clear that no advocate other than the AoR for a party shall appear, plead, and address the Court unless such advocate is so instructed by the AoR. Rule 5 stipulates important preconditions to qualify as an AoR, including a minimum of four years of practice, training of one year with an AoR, and an office in Delhi within a radius of 16 kilometres from the court house. Despite all of this, the AoR system has, in reality, become one in which many AoRs are mere name- and signature-lenders to the petition and the real work is done by some other advocate who has a more direct relationship with the client. This practice came to the attention of the Supreme Court in a recent contempt action, when the Court observed that mere signature-lending on the part of the AoR, without assuming any responsibility for conduct of the case, would defeat the very purpose of this special class of advocates. Subsequently, an explanation was inserted in Order IV, Rule 10 of the Supreme Court Rules, clarifying that mere name-lending by an AoR without further participation in the proceedings of a case would amount to misconduct or conduct unbecoming of an AoR.

The Court also makes use of specially constituted commissions for various purposes that facilitate its adjudicatory role, the most common of these being fact-finding or fact-gathering missions. The composition of such bodies often varies depending on the nature of the task at hand, and their membership includes district judges, journalists, lawyers, mental health professionals, bureaucrats, technocrats, and expert bodies. In environmental matters, the Court has issued commissions to the Central Pollution Control Board and the National Environmental Engineering Research Institute to propose remedial solutions and monitor their implementation. Resort to such commissions is arguably effective when the Court is adjudicating on a public interest petition where the petitioner may have approached the Court with an important grievance but without sufficient facts to support the claim. However, the Court must be careful to check its commissions from lending an aura of technocratic influence over its decision-making process and the grant of final relief, in order to prevent the weakening of its identity as a legal institution.

Finally, formal law-clerk appointments are an important initiative by the Supreme Court to involve the legal fraternity in the making of law. This system, started in the early 2000s, has sought to tap into the potential of law graduates from India’s leading law schools. Although over a decade has passed since this system began, there seems to be no set of uniform norms that have developed over the exact functions and responsibilities that law clerks are to perform.

This chapter has aimed to provide an assessment of how the Supreme Court functions—both with regard to other public institutions and also internally. As we make clear, the Court presently faces a range of challenges. Current debates on legal reform in India have a tired quality to them, and blindness towards these challenges is bound to impact the Court’s legitimacy and efficiency. The Court’s performance will, in part, be improved by further studies on the Court as a public institution, by social science research and data-driven analyses that can shed light on its operation. The first step to improving the Court’s performance as a public institution might be to begin studying it.

Notes


For an excellent empirical and historical study on the factors that have shaped the appointment of judges to the Supreme Court, see A. Chandrachud, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India (New Delhi: Oxford University Press, 2014).


The Constitution (99th Amendment) Bill that replaced the collegium system met with unanimous support in both the Lok Sabha and the Rajya Sabha. At the time of voting, only the All India Anna Dravida Munnetra Kazhagam abstained from voting in the Bill in the Lok Sabha. There were no dissenter. The Bill was also ratified by 16 of the state legislatures.


Vakil, ‘Jurisdiction’.

Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.


Article 124(1), Constitution of India.

Technically, under Article 128, authority vests with the Chief Justice of India to request specific individuals from the pool of retired Supreme Court and High Court judges to serve on an ad hoc basis with prior presidential approval.

Regular hearing cases include both (a) cases where the Court has to mandatorily hear and dispose the appeal under law, and (b) where the Court has applied its discretion and admitted the appeal, thus expressing willingness to hear the appeal on its merits.


Robinson, ‘Quantitative Analysis’. The monthly statements issued by the Court after 2011 do not contain this detail.


For an excellent empirical and historical study on the factors that have shaped the appointment of judges to the Supreme Court, see A. Chandrachud, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India (New Delhi: Oxford University Press, 2014).
This is an almost baseless claim, considering similar issues of deep constitutional or legal significance are disposed of by the US Supreme Court through oral hearings that last for hours, not days or months as is the norm with the Indian Supreme Court.

The reference was made in Mathai v. George, SLP (C) No.7105/2010, vide order dated 19 March 2010.
See Or. XLVIII, R.4 of the Supreme Court Rules, 2013.
AIR 1980 SC 808.
‘Despite 1,000 Fast Track Courts, 32 Million Cases Still Pending’, The New Indian Express, 23 December 2013.
P. Salve, ‘1,200 Fast Track Courts in India but 600,000 Cases Still Pending’, Indiaspend, 18 January 2013.
Or. XVII, R.1.
Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353.
Salem Advocate Bar Association v. Union of India.
Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353.
As explained by the Commission, a court of cassation is the judicial court of last resort and has power to quash or reverse decisions of the inferior courts. 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 (New Delhi: Government of India, 2009).
Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441.