

MISSING THE WOOD FOR THE TREES: THE UNSEEN CRISIS IN THE SUPREME COURT

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It is a widely acknowledged reality that the Supreme Court today faces a crisis in the form of a severely over-burdened docket. This paper argues that, while the existence of the problem is well known, its genesis, underlying causes and broader impact are significantly misunderstood. It is in that sense that the crisis remains an unseen one. A core claim of the paper is that the burden on the Court is neither a historical inevitability nor primarily a resource-centric problem. Rather, it is the product of conscious choices made over a period of time by judges of the Court, choices which were shaped and constrained in significant ways by other important factors, but which nonetheless remained conscious choices. This trend is deeply troubling for many reasons, and calls for an urgent exploration of possible models for reform.

I. INTRODUCTION

The starting point for this paper is the widely acknowledged reality of the crisis of a severely over-burdened docket confronting the Indian Supreme Court today. While the problem is well-known, this paper argues that its genesis, underlying causes and broader impact are significantly misunderstood. It is in that sense that the crisis remains an unseen one.

This paper endeavours 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 capacity of the Court 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,¹ the societal expectations anchored to the Court, the very structure of

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¹ See, e.g., Fali S. Nariman, *Judicial Independence in India*, in DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW: ESSAYS IN HONOUR OF NANI PALKHIVALA 32 (2000).

the Court itself² and a sometimes profound and self-perpetuating inconsistency in the law.³ This paper does not analyse each of these factors fully, nor follows each to its logical conclusion. Rather, it attempts to advance a new account of why the Supreme Court is over-burdened today, one which has sometimes been hinted at, but never articulated in precisely this form.

A core claim of this paper 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 appears to be neither doctrinally compelled nor at least self-evidently socially beneficial.

This claim requires a discussion of the types of jurisdiction conferred on the Supreme Court, and the relative burdens imposed thereby,⁴ which is addressed in Part II. 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. In addition, Art. 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 may request the Court for advisory opinions on important questions of “law or fact” under Art. 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 Art. 136 of the Constitution.⁵ The Court has repeatedly asserted that

² To my knowledge, Nick Robinson’s forthcoming paper in the American Journal of Comparative Law is the only work of scholarship that analyses the broader ramifications of the “structure” of the Indian Supreme Court. Many of the underlying intuitions in his scholarship are shared by me, though constraints of space do not permit lengthy engagement with his arguments in this paper. See Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, AMERICAN JOURNAL OF COMPARATIVE LAW (forthcoming, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061061 (Last visited on June 15, 2012).

³ See discussion on Seervai’s views, *infra* note 28.

⁴ 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.

⁵ Constitution of India, 1950, Art. 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...”.

Art. 136 confers no right of appeal, and is instead a reservoir of extraordinary constitutional discretion.⁶

The paper 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.

Suggests present reality of a chronically over-burdened Court is, as this paper 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 the other factors articulated above, 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.

Normatively, Part III argues that this conception of the Supreme Court, of its 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 developed in some tension to the black letter of the law.⁷ Much of it has, I suggest, occurred without regard

⁶ See, e.g., *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214, 244: "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.R. Sadhanantham*, (1979) 2 SCC 297; *Durga Shankar Mehta v. Thakur Raghuraj Singh*, (1955) 1 SCR 267; *Kunhayammed v. State of Kerala*, (2000) 6 SCC 359.

⁷ See, e.g., *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214, 244. See also *Bihar Legal Support Society v. Chief Justice of India*, (1986) 4 SCC 767:

"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 any injustice at all, on account of the tremendous backlog of cases which is bound to accumulate. We

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 does this paper 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 much of the latter half of this paper 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 reasons that are elaborated upon below, the costs of the Court's excessive intervention are not being accurately perceived, acknowledged or accounted for.

The positive and normative analysis summarized above prepares the ground for a consideration of various conceivable solutions, or models for reform. That task is beyond the scope of the this paper and I leave it for another day. Before proceeding further, however, it is worth noting two significant points in relation to that broader project.

One, the fact that *conscious choices* on the part of judges have been highlighted 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 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

must realize that in the vast majority of cases the High Courts must become final even if they are wrong."

created unique path-dependence problems,⁸ 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 structural context within which such *choices* are made. Hence the need to, at least, consider the case for radical, structural 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,⁹ although the suggestion did not gain traction, and it is far from clear that it commanded the whole-hearted support of the Court itself. An alternative proposal advanced by 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.¹⁰ 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.¹¹ This warning appears prophetic today and constitutes the broader context for this paper.

The contemporary debate about the backlog of cases in India largely treats the judicial system as one whole. This can be understood in terms

⁸ See, e.g., Stan J. Liebowitz & Stephen E. Margolis, Path Dependence, Encyclopedia of Law and Economics, Volume I, The History and Methodology of Law and Economics, available at <http://encyclo.findlaw.com/0770book.pdf> (Last visited on June 13, 2012).

⁹ Bihar Legal Support Society v. Chief Justice of India, (1986) 4 SCC 767:
 "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 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."

¹⁰ K.K. Venugopal, *R.K. Jain Memorial Lecture: Towards a Holistic Restructuring of the Supreme Court of India*, January 30, 2010, available at http://www.hindu.com/nic/venugopal_lecture.pdf (Last visited on June 15, 2012).

¹¹ LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY FIFTH REPORT ON SUPREME COURT – A FRESH LOOK (1988).

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.¹² The ubiquitous nature of the problem has had the unfortunate effect of conflating these very different issues. This is certainly the case with respect to public-perception, where the arrears faced by the Court appear to merely be a part of the larger story of the institutional inadequacy of the judicial branch.

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 instead to pertain to narrower considerations of efficiency and resource-allocation. It is precisely this unstated assumption that this paper attempts to identify, flesh out and ultimately challenge.

Outside the domain of academic scholarship, the primary State-initiated reform that has taken place recently is the increase, yet again, in the maximum permissible strength of judges in 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 paper, is very different. Anticipating the 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.

II. A POSITIVE ANALYSIS OF THE CRISIS IN THE COURT'S DOCKET

“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 Bickel¹³

“Sometimes, we judges feel that when a case comes before us and we find that injustice has been done, how can we shut our

¹² At the end of 2010, over 30 million cases were pending adjudication in India's lower Courts and High Courts. See *Summary: Types of Matters in Supreme Court of India*, available at <http://www.sci.nic.in/outtoday/summary.pdf> (Last visited on November 9, 2012).

¹³ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

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.¹⁴

A. AN OVERVIEW OF THE COURT

The numbers speak for themselves in many ways. As on September 1, 2012, there were a total of 63,749 cases pending adjudication in the Supreme Court.¹⁵ Of this figure, 35,607 cases were at some stage of preliminary hearing, while about 28,142 cases awaited merits hearings (classified in the Court’s terminology as “miscellaneous” and “regular hearing” matters, respectively).¹⁶ In 2010-11, a staggering 79,150 new cases were instituted in the Supreme Court.¹⁷ An equally astonishing 79,621 cases were finally disposed off by the Court, leaving the backlog of pending cases largely untouched.¹⁸

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 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.¹⁹ 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.²⁰ This radical transformation of the Supreme Court since its inception in 1950 is perhaps the most visible mark of the struggle with the problem of an ever-expanding Supreme Court docket.²¹

¹⁴ Bihar Legal Support Society v. Chief Justice of India, (1986) 4 SCC 767.

¹⁵ See *Supra* note 12. 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.

¹⁶ *Id.*

¹⁷ *Supreme Court of India, Monthly statement of Pending Cases for the month of November, 2011*, available at <http://www.sci.nic.in/pendingstat.htm> (Last visited on November 9, 2012).

¹⁸ *Id.*

¹⁹ Constitution of India, 1950, Art. 124(1).

²⁰ See Supreme Court (Number of Judges) Amendment Act, 2008 (11 of 2009). Earlier, the sanctioned strength of Judges for the Supreme Court was increased to 26 in 1986.

²¹ 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, January 3-16,

Being such a large Court, it is not surprising that it never sits *en banc*.²² Ordinarily, the Court sits in panels (or “benches”) of two or three judges. 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 Art. 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.

On account of the developments highlighted above, today’s Supreme Court is not, in many senses, one Court. It is a poly-vocal institution,²³ 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.

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. K.K. Venugopal 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.

2009, available at <http://www.frontlineonnet.com/fl2601/stories/20090116260108100.htm> (Last visited on November 9, 2012).

²² 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.

²³ See Robinson, *supra* note 2.

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.”²⁴

This account of the Court is important as it draws attention to the fact that the ever-increasing docket not only leads to institutional shortcomings but also places an unsustainable degree of pressure on judges, further entrenching qualitative deficiencies. The analysis that follows is founded on this stark reality of present day practice in the Supreme Court.

B. POSITIVE ANALYSIS OF THE EXPANDING DOCKET OF THE COURT

I now turn to the core of the paper: how and why has the docket of the Supreme Court continued to expand over the years, stretching the capacity of the Court 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 now that any generalization about a trend in the behaviour of the Court is inherently problematic, in view of the structural characteristics of the Court. 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 starting difficulty, 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 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.²⁵ This difficulty is not unique to this paper though, and perhaps cannot be fully circumvented. For the present, such objections are bracketed and proceed to describe and analyse a trend that is hard to dispute.

1. Discretionary Jurisdiction of the Court

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. Special Leave Petitions

²⁴ See Venugopal, *supra* note 10.

²⁵ For a cautionary note about the perils of over-broad generalization (without a robust empirical basis) in legal and policy arguments, see Lee Epstein & Gary King, *The Rules of Inference*, 69(1) UNIVERSITY OF CHICAGO LAW REVIEW (2002).

constitute a vast majority of the total sum of cases filed in the Supreme Court each year.²⁶

Special leave is a familiar concept in many common law jurisdictions. Significantly, the essential concept is not dissimilar to the treatment of cert petitions in the U.S. Supreme Court. The jurisdiction is discretionary in nature and confers no right of appeal on the litigant. 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 courts below have diverged on. 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.

At first glance, the approach of the Indian Supreme Court appears to hew to this traditional understanding. Even at present, the Court dismisses the vast majority of the petitions filed under Art. 136 of the Constitution *in limine*.²⁷ Quite frequently, 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.

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. 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 U.S. Supreme Court. 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

²⁶ The Supreme Court does not, in its published statistics, classify Special Leave Petitions separately from other types of cases. It is, however, clear that the vast majority of cases filed in the Supreme Court are either civil or criminal Special Leave Petitions. *See, e.g.*, THE SUPREME COURT OF INDIA ANNUAL REPORT (2008-09), available at <http://www.supremecourtindia.nic.in/annualreport/annualreport2008-09.pdf> (Last visited on November 9, 2012) (discussion on the different types of jurisdiction exercised by the Supreme Court, and the observation that Art. 136 is the provision most often resorted to).

²⁷ *Id.*

way in which the Court is viewed. This change in perception, as argued below, can be deeply self-enforcing.

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 Art. 136 jurisprudence encourages litigants' to "take a chance".²⁸ This is particularly the case since approaching the Supreme Court, at least as far as Court fees are concerned, is not particularly expensive. Legal fees would often be a greater financial burden, but even here, fees vary widely and the Court runs a fairly effective Legal Aid program.

Another causative factor contributing to the greater-than-optimal degree of filing of such cases is that motivations other than an expectation of outright legal success might be at play. Delaying the inevitable is one such motivation: pendency may well delay the execution of an adverse judgment. Cognitive biases and irrational expectations might be further contributors. 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.²⁹

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.

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

²⁸ See H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2964-2965 (2010).

²⁹ The Ministry of Law and Justice, Government of India has itself acknowledged this to be a significant problem, and has formulated a National Litigation Policy to try and address the same. See Ministry of Law and Justice, Government of India, National Litigation Policy, available at lawmin.nic.in/la/nlp.doc (Last visited on November 9, 2012).

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. For one, it tells us something about the dynamics of oral argument. It was 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. Art. 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, in spite 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?³⁰ 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.

³⁰ State of Karnataka v. Umadevi (3), (2006) 4 SCC 1.

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.

The paper now turns to a more detailed analysis of the manner in which Special Leave Petitions impact the docket of the Court.

a. Types of Special Leave Petitions

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. One is what one might consider the archetypal example of a Special Leave Petition: a case genuinely raising "substantial questions of law of general public importance". The subject matter of these petitions ranges from conventional issues of constitutional law, to questions of statutory interpretation of first impression.

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 only be 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".³¹ It is the second subset that presents more interesting questions in the Indian context: cases that do not raise questions of first impression, but nonetheless have important practical consequences.

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. The typical Criminal Petition would involve an attempt to seek review of concurrent findings of guilt by two Courts below. A not-too-unusual Civil Petition might involve a challenge to what is claimed to be inadequate compensation for acquisition of agricultural property.

³¹ BICKEL, *supra* note 13.

In many of the cases in this third category, 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 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 U.S. Supreme Court, which genuinely rejects any notion of being an ‘error correction’ Court, is striking. As a U.S. attorney with experience in pleading and arguing before the Supreme Court once observed, the very worst way of drafting a ‘cert’ Petition before the U.S. 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!³²

b. Impact of Special Leave Petitions

As noted above, it is an empirical reality that the Supreme Court rejects an overwhelming majority of this type of petition. Nonetheless, the Court accepts enough – what this paper characterizes as a critical mass – that the perception of the Court and its functions is fundamentally affected. What are the considerations at play?

One, 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 Art. 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 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.³³ 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.³⁴ In all these cases, not surprisingly, the Supreme Court appears to be especially reluctant to play an ‘error correction’ role.

³² This observation was made by Michael Scodro, the Solicitor General of the State of Illinois, in his course on Supreme Court Litigation offered at the University of Chicago Law School in the Winter 2011 quarter.

³³ See, e.g., *Darshan Singh v. State of Punjab*, (2010) 2 SCC 333; *Tota Singh v. State of Punjab*, (1987) 2 SCC 529.

³⁴ See, e.g., *State of Maharashtra v. Anand Chintaman Dighe*, (1990) 1 SCC 397.

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 Art. 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 Art. 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 is perhaps merely 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 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.

2. 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”. Art. 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 Art. 142(1)? 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 the remedy 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. What constitutes culpability in the eyes of the Court is one interesting facet of this question, and one that has naturally varied over the years.

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 U.S. 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. The manner in which public interest litigation contributes to the problem of the docket is, however, 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 Art. 32, it interpreted Art. 32 in light of the substantive barriers to justice in a highly unequal society. It also signalled, however, the Court's general willingness to take a proactive role in remedying individual grievances. This 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.

3. The Slippery Slope

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 problem³⁵ is responsible for the bench paying inadequate attention to the first factor. In the very nature of things, any bench of the Court 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.³⁶ In addition, given that these

³⁵ See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

³⁶ This is arguably a version of a 'Tragedy of the Commons' problem. See Garrett Hardin, *The Tragedy of the Commons*, available at <http://www.sciencemag.org/content/162/3859/1243.full>

decisions are of a judicial nature, and in view of the formalistic orientation of the Indian legal profession, it is perhaps difficult (if not ethically problematic) for judges to coordinate their behaviour in any precise manner.

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.

Art. 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.” 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.

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. 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. 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*,³⁷ 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

(Last visited on June 15, 2012).

³⁷ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

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 finality and certainty in litigation and the quest for justice. In the end, a Constitution Bench held that the dismissal of a Review Petition could not be an absolute bar to the Supreme Court granting relief in the “rarest of the rare” case where grave and manifest injustice has ensued.

Undoubtedly conscious of the slippery slope, particularly given the already over-burdened docket, the Court laid down stringent guidelines respecting the conditions under which such petitions could lie. 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. 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. 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.³⁸

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 Certificate authored by a Senior Advocate, affirming that the case falls within the parameters of *Ashok Hurra*³⁹ and is a fit one for consideration under the Court’s curative jurisdiction.

In the decade since the Supreme Court first pronounced this new “jurisdiction”, it has apparently been successfully employed in only a single instance.⁴⁰ 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

³⁸ *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 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.

³⁹ *Id.*

⁴⁰ The case in question is *State of M.P. v. Sughar Singh*, (2010) 3 SCC 719.

matter of the Bhopal Gas tragedy, recently disposed of by the Supreme Court, is an excellent example.⁴¹ 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.

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 K.K. Venugopal's careful - and devastating - description of Supreme Court practice today.

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 paper,⁴² 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 arguably counter-productive. It plays a part in the wider narrative of the Supreme Court struggling heroically 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.⁴³ The reason the narrative is questionable is that 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 is no reason to assume that there now exists a stable equilibrium. This is particularly the case since the criteria delineated in *Ashok Hurra*⁴⁴ are explicitly clarified not to be

⁴¹ CBI v. Keshub Mahindra, (2011) 6 SCC 216.

⁴² See *infra*, Part III.

⁴³ See *supra*, Part II A.

⁴⁴ *Supra* note 37.

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.

III. NORMATIVE EVALUATION OF THE COURT'S EXPANDING DOCKET

This section advances a normative analysis of the trend of the expanding docket. The argument is exploratory in nature, and much undoubtedly remains unsaid. This part 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 that 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.

A. DELIBERATION, CONSTITUTIONAL DIALOGUE AND THE "POLY-VOCAL" SUPREME COURT

Leaving aside the general disquiet with the high volume of arrears, 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.⁴⁵ 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.⁴⁶ Nor is it

⁴⁵ For Bickel's account of the counter-majoritarian problem, see BICKEL, *supra* note 13.

⁴⁶ See, e.g., B.N. KIRPAL *et al.* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (2000). 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

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.⁴⁷ Much of what the Supreme Court does in exercise of its discretionary jurisdiction – aided by resort to Art. 142 of the Constitution – fosters its reputation as a court of justice, above the fray of partisan politics.

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 service of passive virtues. Nonetheless, there are reasons to strongly believe that this is at least sometimes the case. I reference below the long-pending challenge with respect to reservations in certain states exceeding the 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 constitutional dialogue, 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 most constitutional courts confront in one or another form.

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 a constitutional court: A

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 was by no means timid, and often robustly critical in nature, it is fair to describe the overall tenor of the work as profoundly optimistic.

⁴⁷ There is a considerable body of literature on strategic judicial behavior by Judges to maximize the reputation of the Court in question. See, e.g., Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, August 2011, available at <http://www.law.uchicago.edu/files/file/358-sd-judicial.pdf> (Last visited on June 15, 2012).

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

In terms of the mandate enshrined in Art. 145(3), substantial questions of law as to the interpretation of the Constitution require adjudication by a bench comprising 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.⁴⁸ 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.⁴⁹ 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 9th 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.⁵⁰ 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 an 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 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 recent 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.⁵¹ Another example is the decision concerning the constitutionality of a state sponsored militia in the state of Chattisgarh.⁵²

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 Constitutional Bench that might not be able to resolve it for several years. But again, notice

⁴⁸ See Nick Robinson *et al.*, *Interpreting the Constitution: Supreme Court Constitution Benches since Independence*, XLVI(9) EC. & POL. WEEKLY 27 (2011).

⁴⁹ Selvi v. State of Karnataka, (2010) 7 SCC 263.

⁵⁰ I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

⁵¹ Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454.

⁵² Nandini Sundar v. State of Chhattisgarh, (2011) 7 SCC 547.

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 Art. 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’.⁵³ Given that the types of questions typically adjudicated by Constitutional 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, 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 Art. 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.⁵⁴ To the extent that “extreme” decisions are avoided, the effect of this could be to mitigate the “*counter-majoritarian difficulty*”.

It has been argued here that the increasing tendency of the Apex Court to liberally exercise its discretionary jurisdiction has had the consequence

⁵³ For a basic summary of Condorcet’s Jury Theorem, see Condorcet Jury Theorem, Encyclopaedia of Mathematics, available at http://www.encyclopediaofmath.org/index.php/Condorcet_jury_theorem (Last visited on November 9, 2012)

⁵⁴ 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 & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

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 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 U.S. 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. 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 regulation of Art. 136 matters, which likely prevents Judges from preparing better, in advance, for oral arguments in important final hearings (in this context too, there is obviously a vicious circle in operation). 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. Thus, I have set aside the actual time spent by the 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.

C. QUALITY OF JUDGING IN THE COURT

As acknowledged above, the Supreme Court itself is not, in many senses, one Court. 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 does not appear to be 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 noted above, 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. It is also unclear how much time judges are able to devote to conferences with fellow judges, even while adjudicating significant cases. 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.⁵⁵ 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.

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. 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.

⁵⁵ 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*, 46(1) EC. & POL. WEEKLY (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743594 (Last visited on November 9, 2012).

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 paper, I have described the stark reality of the average Monday or Friday in the Supreme Court today.⁵⁶ It is far from clear that, burdened with between 60 to 70 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 adjudicating localized issues. In light of the fact that India has a single, unified judiciary; this consideration does not attract much attention. This may, however, 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. Even so, it is difficult to conclude that a greatly enhanced rate of intervention under Art. 136 is an appropriate response. *For one thing*, there are other responses – of a systemic or institutional nature – that are arguably more effective. *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.

IV. CONCLUSION

In this paper, 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

⁵⁶ Venugopal, *supra* note 10.

significant ways by external circumstances, but which nonetheless remained conscious choices. Moreover, the path adopted by the Court is neither doctrinally compelled nor self-evidently socially beneficial. 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. As indicated at the outset, that task is far beyond the scope of the present paper, but one that positively cries out for attention.

