

# CONSULTATION PAPER

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## THE SUPREME COURT OF INDIA'S BURGEONING BACKLOG PROBLEM AND REGIONAL DISPARITIES IN ACCESS TO THE SUPREME COURT

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## I. INTRODUCTION

Over time the Supreme Court of India has attempted to establish itself as an accessible and interventionist court, and is often referred to as the ‘people’s court’.<sup>1</sup> However, this ease of access has resulted in the caseload of the Supreme Court ballooning to critical proportions.<sup>2</sup> Between 1995 and 2014, the number of cases pending in the Supreme Court of India at the end of each calendar year has increased from 36,056 to 64,919.<sup>3</sup> In the last ten years alone, i.e., between 2004 and 2014 the number of cases filed has increased from 58,931 to 81,583 per year.<sup>4</sup> The increasing backlog of cases and the increasing filings suggest that though the Supreme Court has expanded to thirty one judges, the problem of backlog is only going to get larger.

This has had larger consequences for the Supreme Court as an institution apart from just the delay in the disposal of cases. Several lawyers and legal scholars have observed that the Supreme Court has noticeably altered its original character and stature.<sup>5</sup> The constitution framers envisaged the Supreme Court to serve as a Constitutional Court primarily. They expected the court to exercise restraint in intervening in ordinary disputes between private individuals. In the Constituent Assembly, Dr. Ambedkar while discussing the Supreme Court’s power to grant special leave also said,

*“The Supreme Court is not likely to grant special leave in any matter whatsoever unless it finds that it involves a serious breach of some principle in the*

<sup>1</sup> Nick Robinson, *Structure Matters*, p. 104 available at <http://ssrn.com/abstract=2061061> .

<sup>2</sup> Ibid, p. 106.

<sup>3</sup> Supreme Court of India, Annual Report 2014-15, p. 78-9, available at <http://sci.nic.in/annualreport/annualreport2014-15.pdf>.

<sup>4</sup> Supreme Court of India (n 3). The figures for 2014 are current up to November, 2014.

<sup>5</sup> T. R Andhyarujina, “*Restoring the Supreme Court’s Exclusivity*”, The Hindu (28 February, 2014) available at <http://www.thehindu.com/opinion/lead/restoring-the-supreme-courts-exclusivity/article5076293.ece> ; Nick Robinson , “*A Court Adrift*” The Frontline (3 May, 2013); <http://www.frontline.in/cover-story/a-court-adrift/article4613892.ece> K.K Venugopal, “*For Proximate and Speedy Justice*”, The Hindu (May 2, 2010) available at <http://www.thehindu.com/opinion/lead/for-proximate-and-speedy-justice/article418735.ece>.

*administration of justice, or breach of certain principles which strike at the very root of administration of justice as between man and man.”<sup>6</sup>*

However, a prima facie analysis of the Supreme Court’s recent history would show that it has definitely strayed from its original character and has transformed into a court of regular appeals.<sup>7</sup> Recent studies point out that disputes pertaining to taxation, corporate law, land acquisition, service matters and criminal law matters constitute the bulk of the Supreme Court’s docket.<sup>8</sup> Another recent newspaper report suggests that there are around 1568 Public Interest Litigations pending before the Supreme Court currently, with the oldest one having been filed 23 years ago.<sup>9</sup> Meanwhile the Court has had little time to devote to hearing critical constitutional cases. In 2014 for instance, one study showed only 7% of the judgments delivered by the Supreme Court related to constitutional matters.<sup>10</sup> Over the years, the number of cases heard and disposed of by five judge Benches has come down from 15.5% in the 1950s to 0.12% in the first decade of the 21st century.<sup>11</sup>

It is evident that the number of constitutional cases being disposed by the Supreme Court of India, when compared to the overall number of cases being disposed by it, has been declining steadily and steeply over the years. While the number of constitutional cases disposed have declined steadily, the data from the Supreme Court suggests that both the number of ordinary appeals disposed and pending cases have grown exponentially.<sup>12</sup> This

<sup>6</sup> CONSTITUENT ASSEMBLY OF INDIA - VOLUME VIII (6 June, 1949) available at <http://parliamentofindia.nic.in/ls/debates/vol8p16b.htm> accessed on 25.8.2015.

<sup>7</sup> T. R Andhyarujina, “Restoring the Supreme Court’s Exclusivity”, The Hindu (28 February, 2014) available at <http://www.thehindu.com/opinion/lead/restoring-the-supreme-courts-exclusivity/article5076293.ece> accessed on 25.8.2015.

<sup>8</sup> Nick Robinson, “A Court Adrift” The Frontline (3 May, 2013) <http://www.frontline.in/cover-story/a-court-adrift/article4613892.ece> accessed on 24.8.2015.

<sup>9</sup> “1,598 PILs pending before SC; oldest goes back 23 years” The Economic Times (10 August, 2015) available at <http://economictimes.indiatimes.com/news/politics-and-nation/1598-pils-pending-before-sc-oldest-goes-back-23-years/articleshow/48423692.cms> accessed on 18.8.2015.

<sup>10</sup> Rukmini Shrini, “Fewer Constitutional Matters in SC,” The Hindu, 20 January 2015, available at <http://www.thehindu.com/news/national/fewer-constitutional-matters-in-supreme-court/article6799562.ece>.

<sup>11</sup> Nick Robinson et al., *Interpreting the Constitution: Supreme Court Constitution Benches since Independence*, available at <http://www.jgls.edu.in/uploadedDocuments/ConstitutioEPW.pdf>

<sup>12</sup> Nick Robinson, Supreme Court Quantitative Analysis, *A Quantitative Analysis of the Indian Supreme Court’s Workload*, December 13, 2012). Journal of Empirical Legal Studies. Available at SSRN: <http://ssrn.com/abstract=2189181> or <http://dx.doi.org/10.2139/ssrn.2189181>

confirms the assertions made by many regarding the departure of the Supreme Court from its role as a Constitutional Court. The increase in the number of ordinary appeals seems to have been one of most important factors behind the inability of the Supreme Court to entertain constitutional cases.

In response to the massive increase in caseload, the Court has already increased its sanctioned strength considerably. While the Supreme Court initially comprised only eight judges when it first sat in 1950, it presently comprises 31 judges.<sup>13</sup> The increase in judges however, barely seems adequate to tackle the case-load before the Supreme Court. By way of comparison, the number of cases filed in the Supreme Court has gone up from 1,215 in 1950 to 81,583 in 2014<sup>14</sup> i.e., 67 times more, though the number of judges has been increased only to about four times the initial number.

The Court has been cognisant of this trend in the increase of its workload. Bhagwati J (as he then was) in *Bihar Legal Support Society, through its President, New Delhi v. Chief Justice of India*<sup>15</sup> reiterated the aforementioned concern by stating,

*“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.”*<sup>16</sup>

Presently, the Supreme Court sits in one bench of the Chief Justice’s Court consisting of three judges and 13 or 14 benches of two or more judges in 13 or 14 courtrooms. It is essential to note that in the recent past several critical cases pertaining to decriminalising homosexuality under the Indian Penal Code<sup>17</sup>, permitting passive euthanasia<sup>18</sup>, holding a death sentence to be in-executable on account of excessive delay in disposing mercy petition<sup>19</sup> among others have been adjudicated upon by two or three judge benches. Recently, the Supreme Court refused to constitute a higher bench comprising more than

<sup>13</sup> Available at <http://supremecourtindia.nic.in/history.htm> accessed on September 11, 2015.

<sup>14</sup> Supreme Court (n 3).

<sup>15</sup> (1986) 4 SCC 767.

<sup>16</sup> Ibid, para 3.

<sup>17</sup> *Suresh Kumar Koushal v. NAZ Foundation*, (2014)1 SCC 1.

<sup>18</sup> *Aruna Ramchandra Shanbaug v. Union of India*, (2011) 4 SCC 454.

<sup>19</sup> *V. Sriharan @ Murugan v. Union of India*, 2014 (5) SCJ 196.

five judges in the seminal case which involves replacing the collegium system with a national judicial appointment commission for the appointment of members of the higher judiciary.<sup>20</sup> This practice is hugely problematic as the Constitution mandates that cases involving a substantial question of constitutional interpretation should be heard by a bench of five judges or more.<sup>21</sup> Further, most apex courts across the world- United States, South Africa, United Kingdom, Canada et al., sit either in full benches or in large benches consisting of five or more justices depending upon the significance of the case.<sup>22</sup>

Various recommendations have been put forth to address the aforementioned concerns regarding the functioning of India's highest court. The Law Commission of India in its 95th Report titled "Constitutional Division within the Supreme Court - A proposal for" suggested that the Supreme Court should consist of two Divisions, namely, (a) Constitutional Division, and (b) Legal Division. The proposed Constitutional Division would adjudicate exclusively upon questions of constitutional importance while the Legal Division would be entrusted with all other matters.<sup>23</sup>

Subsequently, in 2009 the Law Commission of India suggested that a Constitution bench be set up at Delhi to deal exclusively with constitutional matters and four Cassation benches be set up in Northern region at Delhi, the Southern region at Chennai/Hyderabad, the Eastern region at Kolkata and the Western region at Mumbai to deal with the appeals against orders arising out of the High Court of the respective regions.<sup>24</sup>

A recent study conducted by a student of John F. Kennedy School of Government, Harvard University underscored the fact that increase in number of judges has failed to address the problem of mounting pendency at the Supreme Court. The study recommended that the Ministry of Law and Justice along with the National Judicial Academy, should organize regular sessions to disseminate information to Supreme Court judges on the extent to which the high rate of admission of cases contributes to the problem of backlog and delay. This

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<sup>20</sup> Writ Petition (Civil) 13 of 2015.

<sup>21</sup> Article 145(3) of the Constitution of India.

<sup>22</sup> T. R Andhyarujina, "Restoring the Supreme Court's Exclusivity", *The Hindu* (28 February, 2014) available at <http://www.thehindu.com/opinion/lead/restoring-the-supreme-courts-exclusivity/article5076293.ece> accessed on 20.8.2015.

<sup>23</sup> Law Commission of India, *95<sup>th</sup> Report on Constitutional Division within the Supreme Court- A Proposal For*, (March 1984), p. 24-25.

<sup>24</sup> Law Commission of India, *229<sup>th</sup> Report on Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai* (2009).

report also recommended the establishment of a central body called National Authority for Judicial Statistics, which would be responsible for the collection of detailed statistics about cases filed in the Supreme Court.<sup>25</sup>

Other eminent jurists have also outlined their concerns at this state of affairs. Senior Advocate of the Supreme Court, Mr. K.K Venugopal also articulated the enormous pressure on Supreme Court's docket and the alarming shift in the nature of the Court by stating,

*“A cursory glance at the Supreme Court's Practice and Procedure Handbook will reveal how far the court has strayed from its original character as a Constitutional Court and gradually converted itself into a mere court of appeal which has sought to correct every error it finds in the decisions of the 21 High Courts and numerous Tribunals from which appeals lie to it. The jurisdiction of the Supreme Court may now be invoked in relation to matters falling within any of 45 categories listed in the Practice and Procedure Handbook.”*<sup>26</sup>

He has also supported the recommendation that four regional appellate courts should be established in Delhi, Kolkata, Mumbai and Chennai to hear appeals against the orders of High Courts from the region.<sup>27</sup> According to Mr. Venugopal, after setting up the regional courts of appeals (RCA), the Supreme Court should only adjudicate upon the following:

- All matters involving substantial questions of law relating to the interpretation of the Constitution of India or matters of national or public importance.
- Settling differences of opinion on important issues of law between High Courts or between Courts of Appeal;
- Validity of laws, Central and State;
- Judicial review of Constitutional Amendments;

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<sup>25</sup> Simi Rose George, *Releasing India's Supreme Court from the Shadow of Delay | A Proposal for Policy Reform*, p. 42, available at [www.hks.harvard.edu/index.php/.../1/.../SYPA\\_SimiGeorge\\_2014.pdf](http://www.hks.harvard.edu/index.php/.../1/.../SYPA_SimiGeorge_2014.pdf) accessed on 1 September, 2015.

<sup>26</sup> K. K. Venugopal, “Towards a true Constitutional Court”, The Hindu ( April 29, 2010), available at <http://www.thehindu.com/opinion/lead/towards-a-true-constitutional-court/article417979.ece>.

<sup>27</sup> K.K Venugopal, “For Proximate and Speedy Justice”, The Hindu (May 2, 2010) available at <http://www.thehindu.com/opinion/lead/for-proximate-and-speedy-justice/article418735.ece> accessed on 24th August, 2015.

- Resolving conflicts between States and the Centre or between two States, as well as the original jurisdiction to dispose of suits in this regard; and
- Presidential References under Article 143 of the Constitution <sup>28</sup>

Bhagwati J (as he then was) proposed the setting up of a National Court of Appeals (NCA), to tackle the heavy backlog of cases in the Indian Supreme Court. He stated:

*“We must, therefore, reconcile ourselves to the idea that like the apex court which may be wrong on occasions, the High Courts may also be wrong and it is not every error of the High Court which the apex court can possibly correct. 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.”*<sup>29</sup>

Another eminent jurist, Mr. T.R Andhyarujina has also expressed his concern regarding the “*expansive and open-door jurisdiction*” of Supreme Court. According to him, there is an urgent need to undertake a “*fundamental reappraisal of the role of Supreme Court in society*” and “*restore the exclusivity*” of the Supreme Court of India. He recommended the setting up of a National Court of Appeals (NCA), which has all the regular appellate powers exercised by the Supreme Court currently and allowing the Supreme Court to function exclusively as a Constitutional Court.<sup>30</sup>

The issue of the lack of access to the Supreme Court has been raised also in a Public Interest Litigation filed by a Puducherry based advocate, Mr. V Vasantha Kumar with the Court issuing notice to the Central Government.<sup>31</sup> Relying upon the observations of CJI Bhagwati mentioned above, and the Law Commission reports, the PIL seeks a direction from the Court to the Central Government to consider setting up a National Court of Appeals with regional benches.

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<sup>28</sup> K K. Venugopal, “*Towards a true Constitutional Court*”, The Hindu ( April 29, 2010), available at <http://www.thehindu.com/opinion/lead/towards-a-true-constitutional-court/article417979.ece>

<sup>29</sup> *Bihar Legal Support Society, through its President, New Delhi v. Chief Justice of India* (1986) 4 SCC 767.

<sup>30</sup> T.R Andhyarujina, “*Studying the U.S. Supreme Court's Working*”, (1994) 4 SCC (Jour) 1.

<sup>31</sup> <http://www.livelaw.in/sc-seeks-response-centre-national-court-appeal/> last accessed 11 September, 2015.

Given the discontent that is being voiced in many quarters about the present state of affairs, this Consultation Paper seeks to find a feasible solution to the three major problems being faced by the Supreme Court presently first, an overburdened docket; second, an inability to focus on constitutional matters; and third, geographic disparities in the access to justice.

This Consultation paper is divided into three sections. The first section is a preliminary survey of the empirical data and studies that have been carried out to assess if the functioning of the Supreme Court has changed over time resulting in it becoming a court which largely deals with regular appeals and not constitutional questions. This section will also examine another issue that has been flagged in respect of the Supreme Court's appellate jurisdiction: the disproportionate number of cases being heard from High Courts closer to Delhi. This suggests an access to justice issue that will be examined on the basis of the data available.

The second section will discuss other relevant jurisdictions which have a National or Federal Courts of Appeal in addition to the existing Constitutional Court. This section will involve a comparative study of the institutional structures in these jurisdictions relating to the appellate and constitutional functions of the apex court, whether they have been separated, if so, why and if not, why not.

The last section will examine what institutional solutions may be considered. This section will also examine the feasibility of other alternate proposals to improve the Supreme Court's functioning in light of the problems that are currently being faced by it.

The purpose of this Consultation Paper being to initiate conversation and discussion on the proposed reform of the functioning of the Supreme Court, it will also outline further areas of research and study which need to be carried out in order to obtain a fuller picture for the reform of the Supreme Court.

This consultation paper, it is hoped, will be the basis for a more detailed empirical study of the Supreme Court as an institution, to address the problems it faces and offer detailed proposals for legislative and institutional reform to improve its functioning and restore it to the intended focus.

## II. STATISTICAL SURVEY OF THE SUPREME COURT DOCKET

The Supreme Court's jurisdiction can be broadly classified under three heads: Original Jurisdiction, Appellate Jurisdiction and Advisory jurisdiction.<sup>32</sup> The Original Jurisdiction of the Supreme Court consists of:

- a. Writ Jurisdiction under Article 32.
- b. Election Disputes relating to the President/Vice President of India under Article 71.
- c. Original Suits relating to inter-State and Centre-State disputes under Article 131.
- d. Transfer of cases between any two High Courts or between subordinate Courts in different States under Article 139 and transfer to itself under Article 139A.
- e. Appointment of arbitrators under Section 11(6) of the Arbitration and Conciliation Act, 1996
- f. Contempt of Court jurisdiction under Section 23 of the Contempt of Courts Act, 1971 read with Article 145 of the Constitution of India.<sup>33</sup>

The Appellate Jurisdiction of the Supreme Court of India consists of:

- a. Appeals against the judgment of a High Court where there is a substantial question of law as to the interpretation of the Constitution.
- b. Appeals against the judgment of a High Court where there is a substantial question of law of general importance that needs to be decided by the Supreme Court
- c. Appeals against judgment of the High Court setting aside acquittal of an accused and awarding death penalty.
- d. Appeals by Special Leave under Article 136 of the Constitution.
- e. Statutory appeals under any one of the twenty legislations currently in force providing for an appeal to the Supreme Court of India.<sup>34</sup>

The Advisory jurisdiction of the Supreme Court relates to

- a. Advice sought by the President under Article 143.
- b. Reference on the removal of a Public Service Commission member under Article 317.

<sup>32</sup> Supreme Court of India (n 3), p. 59.

<sup>33</sup> Supreme Court of India (n 3), p. 59-60.

<sup>34</sup> For a full list of such legislations, see Supreme Court of India, (n 3), 60-61.

c. Removal of members of various statutory bodies and authorities.<sup>35</sup>

In addition to these, the Supreme Court exercises review jurisdiction against orders passed in any of the above and curative jurisdiction against orders passed in review.

The sources of the Supreme Court's jurisdiction therefore can broadly be traced to the provisions of the Constitution and the various laws passed by Parliament which has the sole power to enhance the jurisdiction of the Supreme Court.<sup>36</sup> The initial jurisdiction conferred on the Supreme Court has been widened over the years by multiple legislation which have permitted direct appeals to the Supreme Court from statutory tribunals bypassing the High Court.<sup>37</sup>

In this section we will briefly survey the existing data and studies that have been conducted on the disposal of cases by the Supreme Court. We have looked both at the primary data that the Supreme Court itself has put out in its "Court News" publications, on its monthly statements relating to the numbers of cases pending and the numbers of judgments delivered over the years. The Supreme Court has also provided historical data on filing and disposal in its latest "Annual Report" for the year 2014-15.<sup>38</sup> Published after a gap of nearly five years, it contains data related to case filings and disposal up to November, 2014. In addition, we have also relied on the fairly exhaustive qualitative analysis by Nick Robinson of the Supreme Court's case disposal of cases up to 2012.<sup>39</sup> Robinson's analysis, with all the caveats relating to the data, shows a court which is in dire need of a serious course correction and is discussed here in some detail. This will also be supplemented with other research and empirical studies of the Supreme Court which have highlighted some of the problems which have crept into its functioning.

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<sup>35</sup> Supreme Court of India (n 3), 62.

<sup>36</sup> Article 245, read with Article 246 and Entry 77 of List I of the Seventh Schedule.

<sup>37</sup> See for instance Section 18 of the Telecom Regulatory Authority of India Act, 1997 which provides for appeals from the orders of the Telecom Disputes Settlement Appellate Tribunal; Section 30 of the Armed Forces Tribunal Act, 2007 which provides for appeals from the orders of the Armed Forces Tribunal; Section 22 of the National Green Tribunal Act, 2010 which provides for appeals from the orders of the National Green Tribunal.

<sup>38</sup> Supreme Court of India, (n 3).

<sup>39</sup> Nick Robinson, (n 12).

### a) Increase in cases being filed turning out to be unsustainable

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Since it began functioning in 1950, the number of cases being filed and heard in the Supreme Court has increased almost exponentially. In the first year of its existence, 1215 cases were filed in total in the Supreme Court, whereas in 2014 (up to November) 81,853 cases had been filed.<sup>40</sup> The Supreme Court, in the data put out, classifies cases as “admission matters” and “regular matters”. Admission matters relate to those cases which have not yet been formally admitted by the Supreme Court for a formal hearing on merits whereas Regular Matters are those admission matters which have been formally so admitted. In that respect, to understand how many *new* cases are being filed, it may be relevant to compare the admission matters only over time to understand the *external pressure* on the Supreme Court.

Whereas 1037 admission cases were filed in 1950, the number had increased to 70837 in 2014;<sup>41</sup> an increase by 68 fold in 64 years! This suggests a Cumulative Annual Growth Rate of 6.8% in filing per year. It further evinces the fact that the number of cases filed in the Supreme Court doubles every decade or so on average and if the trends continue, the Supreme Court is likely to be facing a burden of nearly 1.5 lakh cases by 2025.<sup>42</sup>

In fairness, it must be pointed out that the Supreme Court has in fact kept up with the flood of admission matters by increasing the number of cases disposed. In 2014 for instance, 72,082 admission matters were disposed of bringing down the number of pending admission matters to 34,421.

However, even with the increase in the number of cases being disposed of per year, the fact remains that the number of cases pending has more than doubled in the last decade. In

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<sup>40</sup> Supreme Court of India (n 63), 76-9.

<sup>41</sup> Supreme Court of India (n 63), 76-9. All the data for 2014 mentioned in this part of the paper has been compiled by Vidhi on the basis of monthly statements of pendency put out by the Supreme Court.

<sup>42</sup> One caveat must be made here with reference to the historical data since 1950. As Nick Robinson and others have pointed out, the Supreme Court changed the manner in which the cases were being counted in 1993 by treating “hyphenated cases” or multiple petitions filed in the same case as one matter, when earlier they were being treated as separate cases. This change in the accounting method brought down the number of pending cases in the Supreme Court between 1992 and 1993 from 97,476 to 58,974. All the numbers for cases filed, disposed and pending in the Supreme Court subsequent to 1993 have been recorded in this manner.

2004, the total number of pending cases 30,151, whereas at the end of 2014 it was 62,971 even though, in this period total number of cases instituted (admission and regular) increased only from 58,931 to 81,583 and the Supreme Court's sanctioned judge strength went up from 26 to 31.<sup>43</sup> This was after the pendency had reduced from 52,950 in 1994 to a low of 19,032 in 1997 and marginal increase to 26,750 by the end of 2003.

### b) Fewer final disposals and Constitutional cases being disposed

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Since absolute numbers by themselves may not be very illuminating, comparing the number of pending cases to those disposed every year could yield a better picture on the problem of pending cases. Where the number of pending cases far outstrip the number of cases being disposed every year, it suggests a serious problem of pendency. In this respect, it may be pointed out here that while average number of admissions cases pending in the last five years are less than half the average number of admission cases disposed in the same period, the average number of regular cases pending in the last five years are four times more than the average number of regular cases disposed of in the same period.<sup>44</sup>

While much more granular data is necessary to specifically identify the precise causes for the pendency, *prima facie* it would seem that the Supreme Court's task is its inability to stem the high onslaught of Special Leave Petitions under Article 136 of the Constitution. The power to grant special leave to challenge the orders of any court, tribunals and quasi-judicial bodies, is discretionary with a vast ambit. It has been recognised by the Supreme Court that given this wide amplitude of the power, its usage must be judicious and sparing in exercise.<sup>45</sup> Despite the jurisprudential view favouring a circumspect and cautious approach to prevent frivolous SLPs, in practice their exponential increase has impeded the Supreme Court's functionality, and attenuated its efficiency.

However regular matters being those which the Supreme Court accepts for hearing, this would be a good measure of how much the Supreme Court's functioning has resulted in the increase in backlog and pendency. Here we find that the pendency of regular matters has ballooned over the last decade or so going from 15,156 pending at the end of 2004 to 28,370 at the end of 2014.

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<sup>43</sup> The increase was provided for in 2009 Amendment to the Supreme Court (Number of Judges) Act, 1965.

<sup>44</sup> Supreme Court of India, (n 3)

<sup>45</sup> *P.S.R. Sadanatham v. Arunachalam*, (1980) 2 SCR 873; *Narpart Singh v. Jaipur Development Authority*, (2002) 3 SCR 365; *J.P. Builders v. A. Ramadas Rao*, (2011) 1 SCC 429

Nick Robinson has broken down the “acceptance rate”<sup>46</sup> of cases in the Supreme Court show a wide variation across the subject categories. Although the average acceptance rate across the board, between 2005 and 2011, was around 12%, this ranges from 22.6% for all indirect taxes matters to 5.8% for contempt of court and 6.2% for Rent Act matters.<sup>47</sup> There is no clear pattern which determines why certain kinds of matters tend to get accepted for hearing by the Supreme Court over others and may be suggestive of the preferences of the judges on what kinds of matters they think should be accepted by the Supreme Court for hearing.

While acceptance rates relate to those cases where the Supreme Court grants “leave to appeal” (for an SLP) or admits the civil appeal or issues rule on a Writ Petition, it still doesn’t reflect the number of hearings that have taken place prior to this acceptance or also those cases where the Supreme Court heard both parties before deciding not to issue notice to the other parties. A better reflection of the “acceptance rate” may be obtained by studying how many cases were not dismissed in limine by the Supreme Court but accepted for further hearing. By issuing notice in a matter, the Supreme Court has already allowed the case into the system whether or not it ultimately decides to give it a full fledged hearing.

Examining all the 22900 civil matters filed as Special Leave Petitions in 2014, we found that as of 2015 August, around 34% were still pending. Examining a random sample of 378 cases, we found that Supreme Court issued notice to the other party on the first hearing in nearly 40% of the cases. With respect, this should be the “acceptance rate” of the Supreme Court” since the decision whether or not to issue notice to the other party affects whether a case enters the Supreme Court system or not. Once it enters the system, for better or worse, a case becomes part of the list of pending cases in the Supreme Court (separate from those filed and awaiting hearing). Sometimes they may be disposed of without granting leave to appeal, admitting or issuing rule, but the fact remains that judicial time is spent on such cases for multiple hearings.

This means that there is less time to hear and dispose of those matters which have been admitted and are treated as “regular hearing” matters. This manifests itself in the delay in hearing important three-, five- or seven-judge bench matters which have been pending for more than five years.

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<sup>46</sup> Defined as the percentage of admission matters which are accepted for final hearing by the Supreme Court. *Nick Robinson* (n 12), 29-30.

<sup>47</sup> *Nick Robinson* (n 12), 29-30.

Generally, the percentage of pending “regular” matters that have been pending for a period of more than five years increased from 7% to 17% between 2004 and 2011 though they did come down from a high of 23% in 2009. It must be kept in mind that this is how long they have been pending since they were instituted as “regular” matters and not from the day they were first filed as an admission matter.<sup>48</sup>

The problem of delay and pendency in the regular matters can also be seen from the wide disparity between the number of such matters disposed and those pending.

Apart from the increased number of filings, the Supreme Court also seems to be unable to devote enough time to its role of adjudicating constitutional issues, especially in respect of Writ Petitions under Article 32.

A high majority of the total number of cases instituted before the Supreme Court is that admission matters (or SLPs). Historically, the Supreme Court has always been a platform for safeguarding an individual's constitutional and fundamental rights. In the aftermath of the National Emergency (in the 1970s), there was a spate in the total number of Writ Petitions filed before the Supreme Court. In fact, in 1975, the Writ Petitions increased to 26%, which rate was further augmented to 31% in 1980. This spike in the number of Writ Petitions is attributable to the high number of public-centric petitions, commonly known as Public Interest Litigation(s), being filed before the Supreme Court.<sup>49</sup> The onset of the 1990s witnessed a stark decline in the number of Writ Petitions, which can also be explained by the growing concern against PILs,<sup>50</sup> as well as the Supreme Court's insistence on preferring Writ Petitions before the concerned High Courts under Article 226.<sup>51</sup>

While Writ Petitions under Article 32 had considerably reduced during the 1990s, since 2008, their total share has decreased to less than 2% of the total freshly instituted cases.<sup>52</sup> In addition, one study of the number of judgments related to constitutional law delivered by the Supreme Court in 2014 revealed that only 7% of the total judgments in 2014 related to

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<sup>48</sup> There are of course rare instances where the Supreme Court grants leave to appeal or admits a matter for hearing in the first hearing itself, but our data suggests that they are 2-3% of cases where notice was issued in the first hearing.

<sup>49</sup> Varun Gauri, *'Fundamental Rights and Public Interest Litigation in India - Overreaching or Underachieving'*, in Suresh and Narrain, *'The Shifting Scales of Justice'*, Orient BlackSwan, (2014), at P. 79-108

<sup>50</sup> Varun Gauri, [n. 48].

<sup>51</sup> Nick Robinson, (n 12)

<sup>52</sup> Nick Robinson, (n 12), at P. 17-18.

Constitutional law.<sup>53</sup> This decline has not affected the ‘exploding docket’ of admission cases or SLPs. It therefore, poses a complex question on how the Supreme Court should regain its crucial role of safeguarding fundamental rights under Part III of the Constitution. However, in fairness, it must be admitted that even SLPs which are preferred under Article 136, can involve questions a person’s fundamental and constitutional rights. Judgments and Final Orders of the High Courts adjudicating *inter alia* fundamental and constitutional rights of person (individual and juristic) under Article 226, are also assailable by special leave of the Supreme Court. It is pertinent to mention here that at present, due to the lack of specific data segregating SLPs involving questions regarding fundamental and constitutional rights, from the total pool of SLPs filed, the analysis presented hereinafter, is limited in this aspect.

### c) Geographic distribution of cases coming from various High Courts

Constitutionally, the Supreme Court must be accessible and open to all litigants who wish to invoke any of its jurisdiction(s) under the pertinent provisions of the Constitution of India. In practice however, a major contention has repeatedly surfaced against the ‘centralised’ structure of justice dispensation, by geographically locating, and limiting the Supreme Court to the national capital.<sup>54</sup> As with courts in other countries and jurisdictions, there are serious issues of accessibility for litigants who wish to approach the Supreme Court seeking redressal of their grievances. While the Supreme Court has made efforts to make itself more accessible to the ordinary citizens of the country, there is one area where it hasn’t addressed the issue of accessibility adequately: geography.

A research article by Nick Robinson has captured how statistically, most of the admission matters before the Supreme Court have come from three High Courts in closest proximity to it.<sup>55</sup> Robinson’s study also highlights the fact that the disparity in access is further enforced on a ‘cost analysis’ in respect of the region or High Court from where the appeals are preferred. Economically well off regions, where the per capita of litigants is higher, will directly have a higher appeal rate. Thus, the cost of litigation, and a litigant’s ability to bear such cost, directly affects the rate of appeals from a particular High Court.<sup>56</sup> A pictorial

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<sup>53</sup> Rukmini Shrini, (n 10).

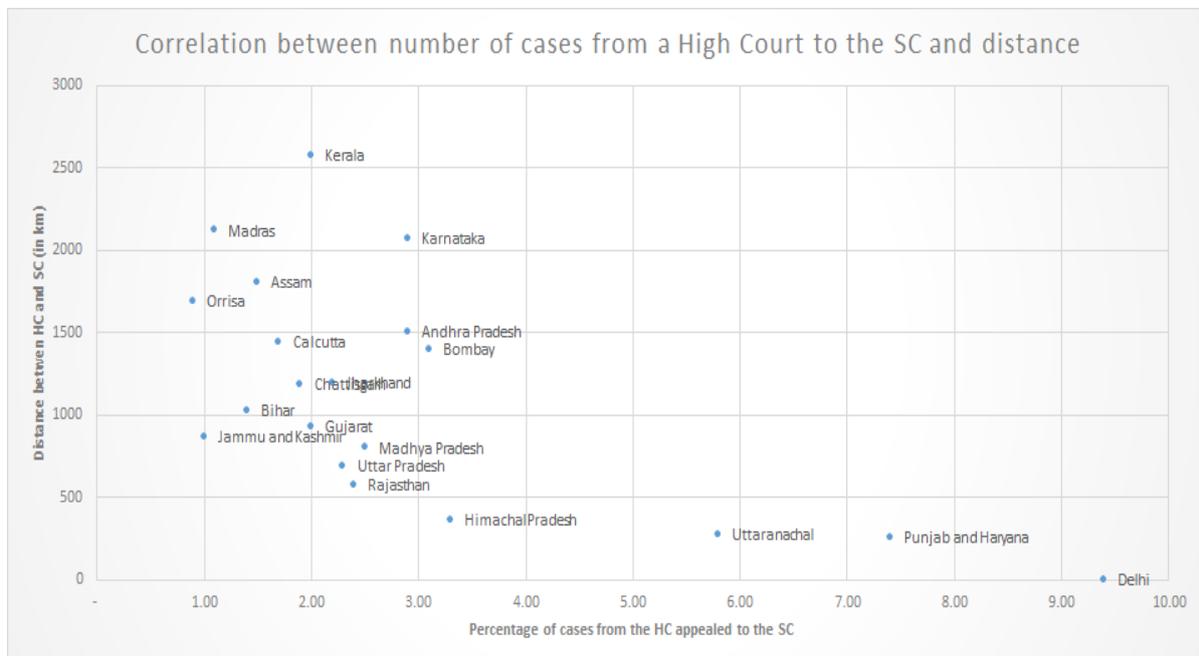
<sup>54</sup> Questions of Judicial Access, The Hindu, available at <<http://www.thehindu.com/opinion/op-ed/questions-of-judicial-access/article99519.ece>>, accessed on September 11, 2015.

<sup>55</sup> Nick Robinson, (n 12).

<sup>56</sup> The formula to determine the approximate percentage of appeals per High Court is as follows:  
Number of cases Appealed to the Supreme Court/ Total cases disposed of by the High Court \* 100.

representation of the disparity in access to the Supreme Court, by litigants appealing from different High Courts is presented in the graph, hereinafter:

Chart 1: Correlation between number of cases from a High Court to the Supreme Court and distance between high Court and Supreme Court for cases in 2007, 2008, 2009 and 2011.



The national average of percentage of cases appealed from each High Court to the Supreme Court was 2.7%.<sup>57</sup> A review of Chart 1 above will indicate that regions which were closest in proximity to the Supreme Court, have the highest percentage of cases appealed from their respective High Courts. This position starkly hits at the notion of equal justice which is constitutionally mandated to each citizen. Indeed this lack of accessibility to the Supreme Court is what has driven much of the demand for either regional benches of the Supreme Court in different parts of the country,<sup>58</sup> or a National Court of Appeals.

Equally, the level of economic development in a State seems to affect the number of appeals from that High Court as seen in Chart 2 below:

Chart 2: Correlation between percentage of cases filed in appeal from a HC to the SC and GSDP per capita income for that state in 2011 prices.

<sup>57</sup>Nick Robinson, (n 12).

<sup>58</sup><http://onelawstreet.com/2015/07/supreme-court-rejects-plea-for-its-bench-at-chennai-or-running-it-through-ipads-etc>



### III. EXPERIENCES OF FOREIGN JURISDICTIONS

Several jurisdictions across the world have also previously grappled with overburdened apex courts. A few of them have dealt with this difficulty by constituting a separate national or federal court of appeals, in addition to an existing constitutional court. This section seeks to discuss briefly, the history and structure of the judicial system in some of the countries across the world. It also seeks to examine the experiences of foreign jurisdictions to see if there are principles which may be usefully adopted in the context of judicial system in India as well.

The jurisdictions discussed here are Canada and the United States of America. They have been chosen keeping in mind two factors: common law jurisdictions, and a written federal constitution. The two examples cited here are by no means exhaustive of all jurisdictions which meet the above criteria but are being discussed in this particular Consultation paper only by way of illustration.

#### a) Canada

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##### A. History and Background:

The Canadian Constitution which came into force in 1867 divides the judicial system of the country between the federal government and the ten provincial governments. The provincial governments are authorised to organise and maintain the courts- both civil and criminal- at the provincial level. However, the Constitution empowers the federal government to establish “a General Court of Appeal for Canada and any Additional Courts”. It is under this provision of the Constitution that the Supreme Court of Canada as well as the Federal Court of Appeal have been constituted.<sup>59</sup>

Presently, there are four levels of courts in Canada. First, at the lowest level are provincial and territorial courts, which handle a majority of the cases that come into the system. Second are the provincial/territorial superior courts. These courts focus on more serious crimes and also have appellate jurisdiction over provincial/territorial courts. On the same

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<sup>59</sup> Available at <http://www.scc-csc.gc.ca/court-cour/sys-eng.aspx> accessed on 28 August, 2015.

level, but exercising jurisdiction over matters such as immigration and patents are the Federal Court. At the next level are the provincial/territorial courts of appeal and the Federal Court of Appeal. At the apex of the Canadian judicial system is the Supreme Court of Canada.<sup>60</sup>

#### B. Supreme Court of Canada: Composition and Jurisdiction

The Supreme Court of Canada is the highest court of appeal and presides over the entire judicial system in Canada. The Court sits only in Ottawa. The Supreme Court comprises the Chief Justice and eight other judges who are all appointed by the federal government.<sup>61</sup>

Much like the Supreme Court of India, the Supreme Court of Canada also adjudicates disputes on all areas of law, including constitutional law, administrative law, criminal law and civil law. The Governor-in-Council can also request the Supreme Court to give its opinion on references - important questions of law pertaining to the constitutionality or interpretation of federal or provincial statutes.<sup>62</sup>

#### C. Provincial/Territorial Courts of Appeal:

Each province in Canada has a court of appeal. This Court hears appeals against decisions of the superior courts and provincial/territorial courts. These courts typically resolve disputes pertaining to commercial law, property law, family law, bankruptcy etc. Courts of appeal also hear matters involving constitutional issues that may be raised in appeals which involve individuals or governmental bodies.<sup>63</sup> This court therefore seems to occupy judicial standing similar to the High Courts located in every state in India.

#### D. Federal Court:

The Federal Court in Canada decides federal disputes pertaining to subjects that have been assigned by the Parliament. This includes the following matters:

- i. interprovincial and many federal-provincial issues;
- ii. immigration and refugee disputes;
- iii. intellectual property disputes;

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<sup>60</sup>Available at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/page3.html> accessed on 27 August, 2015.

<sup>61</sup>Available at <http://www.scc-csc.gc.ca/court-cour/sys-eng.aspx> accessed on 28 August, 2015.

<sup>62</sup> Ibid.

<sup>63</sup> Department of Justice, Canada, *Canada's Court System*, p.7 available at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf> accessed on 27 August, 2015.

- iv. citizenship appeals;
- v. competition law cases; and
- vi. disputes involving Crown corporations or departments of the Government of Canada<sup>64</sup>

#### E. Federal Court of Appeal:

The Federal Court of Appeal hears appeals from the Federal Court and the Tax Court of Canada. It also has the jurisdiction to conduct judicial review of certain federal tribunals. The decisions of the Federal Courts of Appeal can be appealed to the Supreme Court only.

#### F. Supreme Court of Canada: Analysis of Caseload and procedure of admission

Each year the Supreme Court of Canada considers nearly 500 to 600 applications for grant of leave to appeal. However, only around 65 to 80 appeals are granted leave to appeal on an annual basis by the Supreme Court.

The table below reflects the data available publicly and shows a break up of numbers of cases admitted and disposed by the Canadian Supreme.

**Table 1: Caseload of the Canadian Supreme Court (2004-2014)**

Year	Leave to appeal filed	Appeal Granted	Percentage granted	Total Judgements Delivered
2004	559	83	15	78
2005	575	65	11	89
2006	477	55	12	79
2007	629	69	11	58
2008	509	51	10	74
2009	518	59	11	70
2010	465	55	12	69
2011	541	69	13	71
2012	557	69	12	83
2013	529	53	10	78
2014	502	47	9	77

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<sup>64</sup> Ibid p. 8.

Much like the Indian Supreme Court, the Canadian Supreme Court also hears a dispute only if leave to appeal is first granted. Leave is granted typically when a case raises a question of public importance, or a critical question of law, or if it is generally of a significant nature.<sup>65</sup> An analysis of the publicly available figures captured in a tabular form above suggest that the Canadian Supreme Court uses its power to grant leave to appeal very sparingly. The Canadian Supreme Court enjoys a wide subject matter jurisdiction like the Indian Supreme Court. The Court has demonstrated considerable restraint in granting leave to appeal as less than 15% of the applications filed before it have been successful. In Supreme Court of India, the percentage of admission matters that are special leave petitions has increased steadily from 78-82% in the 1990s to 83-86% from 2005-2011, and of these the cases where the Supreme Court granted leave or admitted for final hearing is about 12%.<sup>66</sup> While there are serious issues with the accuracy of the figures given by the Supreme Court on this front, nevertheless it suggests that given the number of cases filed, it should be even lower to be manageable for the Court.<sup>67</sup>

## b) The United States of America

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### A. History and Background:

The federal judicial system in United States of America had a three tier structure initially, at the base of which were the district courts and at the apex was the Supreme Court of the United States.<sup>68</sup> The middle tier comprised the circuit courts where appeals against orders of district court were heard by a panel of three judges which included a Supreme Court Justice and two district court judges.<sup>69</sup> Around 1861, however the country began to feel the inadequacy of its existing judicial system. Both the circuit courts and Supreme Court were overburdened with backlog of cases due to growth in business and expansion of their

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<sup>65</sup> Ibid, p.11.

<sup>66</sup> Nick Robinson, *Quantitative Analysis Of Indian Supreme Court*, p. 18, 30 available at <http://ssrn.com/abstract=2819181>.

<sup>67</sup> Ibid p. 30.

<sup>68</sup> Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S Courts of Appeals*, Vol. 56, No. 2, The Federal Court System (Spring, 1989), 603.

<sup>69</sup> Cal Jillson, AMERICAN GOVERNMENT: POLITICAL CHANGE AND INSTITUTIONAL DEVELOPMENT available at <https://books.google.co.in/books?id=NLKfnwhdnPIC&pg=PT352&dq=U.S.+Courts+of+Appeals+history&hl=en&sa=X&ei=1yA-VZOUkceyuQSN6IGQBg&ved=0CDsQ6AEwBQ#v=onepage&q=U.S.%20Courts%20of%20Appeals%20history&f=false> accessed on 27 April, 2015.

jurisdictions. In 1869, Congress had created nine circuit judgeships, even though the Supreme Court judges were too few in number to attend but a fraction of the circuit court sessions. Numerous proposals were put forth to deal with the increase in workload. Some recommended an intermediate court of appeals, while others proposed an eighteen-member Supreme Court, with nine judges serving in circuit courts through a three judge rotational scheme. Some also suggested that the Supreme Court be divided into three panels to hear common-law, equity, and admiralty and revenue cases while the constitutional cases be heard *en banc*. Ultimately, Congress was enacted the Circuit Court of Appeals Act of 1891, commonly known as the “Evarts Act”, as it was drafted by Mr. William Evarts, to resolve this crisis. The chief intention of the legislation was to relieve the Supreme Court of its appellate caseload burden.<sup>70</sup>

The Evarts Act, 1891 (“Evarts Act”) set up nine courts of appeals, one for each judicial circuit. The existing circuit courts were retained however, to serve as trial courts alongside district courts.<sup>71</sup> The change brought about by Evarts Act can be elucidated with the following example. The Fifth Circuit includes the states of Texas, Louisiana, and Mississippi. Cases from the district courts of these states are appealed to the United States Court of Appeals for the Fifth Circuit, which is headquartered in New Orleans.<sup>72</sup> Currently, a total of 94 district courts exist. These 94 federal judicial districts are divided into 12 regional circuits and each circuit still has one court of appeals. The Courts of Appeal have grown in size and number since their establishment in 1891. There are thirteen courts of appeal today having a total number of 179 judgeships.<sup>73</sup> Twelve have territorial jurisdiction while the thirteenth court of appeal has jurisdiction over tax, patent and international trade cases.<sup>74</sup>

#### B. Supreme Court of United States: Composition and Jurisdiction

Article III of the Constitution of United States vests the judicial powers of the country in the Supreme Court and such other courts that Congress may create from time to time. The Supreme Court of United States is the highest court of the land, and both appellate and original jurisdictions are vested in it. The Supreme Court was formerly established by the

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<sup>70</sup> Russell R. Wheeler & Cynthia Harrison, CREATING THE FEDERAL JUDICIAL SYSTEM (2005), p 9-18.

<sup>71</sup> Available at [http://www.fjc.gov/history/home.nsf/page/landmark\\_12.html](http://www.fjc.gov/history/home.nsf/page/landmark_12.html) accessed on 27 April, 2015.

<sup>72</sup> Available at <http://www.ushistory.org/gov/9b.asp> accessed on 29th April, 2015.

<sup>73</sup> Available at [http://www.fjc.gov/history/home.nsf/page/courts\\_of\\_appeals.html](http://www.fjc.gov/history/home.nsf/page/courts_of_appeals.html) accessed on 29th April 2015.

<sup>74</sup> Cal Jillson, AMERICAN GOVERNMENT: POLITICAL CHANGE AND INSTITUTIONAL DEVELOPMENT (2013) P.388.

Judiciary Act of 1789. According to this legislation, the Supreme Court was to be headed by a Chief Justice and five associate judges.<sup>75</sup> The Supreme Court of United States has grown in size since then in response to the growth in population and the number of district courts, although it still remains compact when compared to the Supreme Court of India. Currently, the Supreme Court of United States is headed by a Chief Justice and 8 associate judges.

The United States Supreme Court has the jurisdiction to hear disputes pertaining to the following matters:

- It has exclusive jurisdiction in certain matters such as suits between two or more states;
- It has original jurisdiction with regard to cases involving ambassadors and other public ministers<sup>76</sup>
- It has original jurisdiction in disputes between state and a citizen.<sup>77</sup>
- It has appellate jurisdiction on almost any other case that involves a point of constitutional or federal law such as cases to which the United States is a party, cases involving Treaties, and cases involving ships on the high seas and navigable waterways.
- It also has the power of judicial review wherein it can decide if a legislation enacted by the Congress or an executive act is in accordance with the Constitution or not.<sup>78</sup>

#### C. United States Courts of Appeal: Composition and Jurisdiction

The Chief-Justice and the associate justices of the Supreme Court are assigned to each circuit. The circuit judges within each circuit and the several district judges within each circuit, are competent to sit as judges of the circuit court of appeals within their respective circuits.<sup>79</sup>

The Evarts Act grants the U.S. courts of appeal jurisdiction over majority of appeals from the U.S. district courts and the U.S. circuit courts. There is a right of direct Supreme Court review from the district courts in some categories of cases<sup>80</sup> and from the circuit courts of

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<sup>75</sup> Section 13, Judiciary Act, 1789.

<sup>76</sup> Section 13, Judiciary Act, 1789.

<sup>77</sup> Ibid.

<sup>78</sup> Marbury v. Madison, 5 U.S. 137, 138 (1803).

<sup>79</sup> Section 3, Evarts Act, 1891.

<sup>80</sup> Section 5, Evarts Act, 1891- That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: -In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be

appeals in others.<sup>81</sup> Most other cases ranging from criminal, diversity, admiralty, and revenue and patent matters were transferred to the courts of appeals for final disposition.<sup>82</sup> The Appeal courts could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari. Additionally, a court of appeals also hears appeals from decisions of federal administrative agencies.<sup>83</sup>

#### D. Creation of Courts of Appeal: Impact on Workload

The establishment of courts of appeal had a significant impact on the caseload of the Supreme Court. Prior to the establishment of the Courts of Appeal in 1890, 623 cases were filed before the Supreme Court whereas in 1891, number of cases filed reduced to 379. In 1892, the number of cases filed was 275.<sup>84</sup> Subsequently however, there was a rise in the docket of Supreme Court and in 1923 nearly 750 matters were filed before it. Therefore, in spite of redesigning of the judicial architecture in 1891, there have been numerous occasions wherein the alarming increase in caseload of the Supreme Court has been discussed.<sup>85</sup> The Freund Committee was constituted to investigate the increase in workload and make recommendations to address it. The Freund Committee made four recommendations, *first*, it recommended that a National Court of Appeals should be established to screen the certiorari petitions and allow only “review worthy” petitions to progress to the Supreme Court. *Second*, the Committee recommended introducing statutory amendments to eliminate procedures that allow direct appeal to Supreme Court from District Courts. *Third*, the Committee proposed the creation of a non-judicial body to

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certified to the Supreme Court from the court below for decision. -From the final sentences and decrees in prize causes. -In cases of conviction of a capital or otherwise infamous crime. -In any case that involves the construction or application of the Constitution of the United States. -In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question. - In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

<sup>81</sup> Section 4, Evarts Act, 1891.

<sup>82</sup> Russell R. Wheeler & Cynthia Harrison, *CREATING THE FEDERAL JUDICIAL SYSTEM* (2005), p. 18.

<sup>83</sup> Available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx> accessed on 29th April 2015.

<sup>84</sup> Richard Hodder-Williams, *The Workload of the Supreme Court, A Comment on the Freund Report*, *Journal of American Studies*, Vol. 10, No. 2 (Aug., 1976) at 215.

<sup>85</sup> *Ibid.*

investigate and report complaints filed by prisoners. Finally the report recommended that the Supreme Court should be provided with increased staff members.<sup>86</sup>

Thereafter in December 1975, a bill to establish a National Court of Appeals within the federal judiciary was introduced in the United States Senate (the Bill). According to this Bill, the court would have two types of appellate jurisdiction: *first*, a reference jurisdiction which would authorize it to adjudicate upon appeals referred to it by the Supreme Court, and *second*, a transfer jurisdiction which would empower the court to decide appeals transferred to it by the regional courts of appeals.<sup>87</sup> However opponents of the Bill argued that this would dilute the influence of the Supreme Court and the authority of the existing courts of appeal system.<sup>88</sup> It would also lead to the increase in litigation as litigants would be more likely to opt for a review of circuit court decisions, thereby defeating the very intention of decreasing workload of the judiciary.<sup>89</sup> Given the fierce opposition to creation of a new National Court of Appeals, the Bill never got enacted.

It is also essential to analyse the data pertaining to the number of cases filed before the U.S Supreme Court and the Courts of Appeal in the last few years. The data available in public domain that is captured in the tables above shows that in case of the Supreme Court, the number of filings have reduced steadily with the exception of the year 2010 where the number of cases filed increased by 5.4%.

**Table 2: Caseload of Supreme Court of United States**

Year	Cases filed	Percentage increase/ decrease	Cases Argued	Cases disposed
2005 <sup>90</sup>	7,496	4% decrease	87	85
2006 <sup>91</sup>	8521	13.7 % increase	87	82

<sup>86</sup> Ibid, p. 218.

<sup>87</sup> Judge Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, Indiana Law Journal Vol. 51:327  
<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3149&context=ilj>

<sup>88</sup> Nancy E. Marion, *Federal Government and Criminal Justice* (2011) p. 24.

<sup>89</sup> Available at <http://www.reagan.utexas.edu/roberts/Box52JGRSupremeCourt2.pdf> accessed on 3 September, 2015.

<sup>90</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf> accessed on 3 September, 2015.

<sup>91</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> accessed on 3 September, 2015.

2007 <sup>92</sup>	8857	4% increase	78	74
2008 <sup>93</sup>	8241	7% decrease	78	74
2009 <sup>94</sup>	7738	6.1% decrease	87	83
2010 <sup>95</sup>	8159	5.4% increase	82	77
2011 <sup>96</sup>	7857	3.7% decrease	86	83
2012 <sup>97</sup>	7713	1.8% decrease	79	73
2013 <sup>98</sup>	7509	2.6% decrease	77	76
2014 <sup>99</sup>	7376	1.77 % decrease	79	77

**Table 3: Caseload of Federal Courts of Appeal**

Year	Cases filed	Percentage increase/ decrease
2005 <sup>100</sup>	68,473	9% increase
2006 <sup>101</sup>	66,618	3% decrease

<sup>92</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf> accessed on 8.9.2015.

<sup>93</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf> accessed on 8.9.2015.

<sup>94</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf> 8.9.2015.

<sup>95</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> accessed on 3.9.2015.

<sup>96</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> accessed on 3.9.2015.

<sup>97</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf> accessed on 3.9.2015.

<sup>98</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf> accessed on 3.9.2015.

<sup>99</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf> accessed on 3.9.2015.

<sup>100</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf> accessed on 3.9.2015.

<sup>101</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> accessed on 3.9.2015.

2007 <sup>102</sup>	58,410	12% decrease
2008 <sup>103</sup>	61,104	5% increase
2009 <sup>104</sup>	57740	6% decrease
2010 <sup>105</sup>	55992	3% decrease
2011 <sup>106</sup>	55126	1.5% decrease
2012 <sup>107</sup>	57501	4% increase
2013 <sup>108</sup>	56475	2% decrease
2014 <sup>109</sup>	54988	3% decrease

Although the total number of cases disposed of by the Supreme Court of United States every year is not released by the Court, the data available publicly seems to suggest that the Court is able to dispose most of the cases that are argued before it. This is quite contrary to the state of ‘exploding docket’ of the Supreme Court India.

Similarly, the figures available publicly for federal courts of appeal in the United States also reveal that the number of cases being filed have been reducing steadily. There has been a decrease in filing every year with the exception of the year 2012 where the number of cases filed increased by 4%.

<sup>102</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf> accessed on 8.9.2015.

<sup>103</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf> accessed on 8.9.2015.

<sup>104</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf> accessed on 8.9.2015.

<sup>105</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> accessed on 3.9.2015.

<sup>106</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> accessed on 3.9.2015.

<sup>107</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf> accessed on 3.9.2015.

<sup>108</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf> accessed on 3.9.2015.

<sup>109</sup> Available at <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf> accessed on 3.9.2015.

In spite of being the apex court of a large country with a large population, the Supreme Court of United States has clearly been successful in ensuring a declining rate of institution of cases. On the other hand, the Supreme Court of India has only witnessed an alarming rise in the number of cases filed. A recent study shows that between 2000 and 2010 the number of new admissions that were filed with the Supreme Court almost doubled from 24,747 to 48,677. This amounts to an increase of about 97%. Further, the number of regular hearing matters admitted also nearly doubled from 4,507 to 8,824. This demonstrates an alarming increase of 96%.<sup>110</sup> Comparison with the U.S. Supreme Courts the docket exposes the flawed mechanism of accepting cases adopted by the Indian Supreme Court. However, as stated earlier, historically, the United States Supreme Court also suffered from an overburdened docket during the end of the 19th century. This issue was tackled with some success by the introduction of a new tier of courts in form of federal courts of appeal. This experience of the United States judiciary seems to suggest that setting up a new tier of appellate courts might be an institutional solution that can be adopted in the context of Indian judiciary, to address the pressing problems of the Supreme Court.

### c) Canada, United States of America and South Africa- A Comparative Analysis

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A study of the judicial systems in South Africa, United States and Canada reveals three very different models of separating the appellate and constitutional functions of federal judiciary. While South Africa has established a separate Constitutional Court which adjudicates upon constitutional matters only, the apex court of United States additionally also adjudicates disputes involving international treaties. The Canadian Supreme Court, much like the Indian Supreme Court, does not restrict itself to constitutional matters only and hears civil and criminal matters involving private individuals. However, all three apex courts seem to exercise restraint in granting leave to appeal and ensure that only matters involving important questions of law make it to the highest court of the land. As mentioned earlier, this practice is quite unlike the practice of granting special leave adopted by the Supreme Court of India.

Further, as apparent from the discussion above, apex courts in some of the most well-known legal jurisdictions across the world concentrate on resolving disputes pertaining to critical questions of law or constitutional cases. Further, as mentioned earlier apex courts of countries like United States of America, United Kingdom, South Africa and Canada, Australia et al sit *en banc* or constitute large benches of five or more judges to hear constitutional

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<sup>110</sup> Nick Robinson, *Quantitative Analysis Of Indian Supreme Court* , p. 3-4 available at <http://ssrn.com/abstract=2819181>.

matters. While it would be ideal to ensure that the Supreme Court of India functions solely as a Constitutional Court, much like the Constitutional Court of South Africa, it is also important to adopt the practice of constituting large benches to adjudicate constitutional matters like all the above mentioned jurisdictions.

It is also pertinent to note that certain other common law countries like United Kingdom and Israel do not have a constitutional court that is distinct from an apex court of appeals. In 2005, a most significant constitutional development took place in England with the creation of its Supreme Court. Unlike the South African Constitutional Court, the Supreme Court of United Kingdom does not hear constitutional matters exclusively, it serves as the final court of appeal in both civil and criminal cases from the territories of England, Wales and Northern Ireland. Even though the court does not refrain from hearing civil and criminal matters, it is critical to point out that the Court *focuses* mainly on constitutional matters and matters that raise important questions of law.<sup>111</sup> Similarly, the Israeli Supreme Court serves as the apex appellate court and hears both criminal and civil appeals from District Courts and Magistrates' courts.<sup>112</sup> The Israeli Supreme Court usually sits in panels of three justices. However, during an important case the Court can also decide to have an "additional hearing" where a panel of five or more justices re-hear a case decided by a smaller panel.<sup>113</sup> It is also critical to study the judicial systems of countries that have not separated the appellate and constitutional functions to get a sense of how to tackle the issue of overburdened appellate docket if separation of the two functions is not feasible.

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<sup>111</sup> Available at <https://www.supremecourt.uk/about/role-of-the-supreme-court.html>.

<sup>112</sup> Available at <http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx> accessed on 10 April, 2015.

<sup>113</sup> Ibid.

## CONCLUSION

After a prima facie analysis of the functioning of the Supreme Court of India, it is evident that the Court has departed from its intended mandate and stature and has transformed into a court of routine appeals with little focus on cases of constitutional significance. With SLPs being the overwhelming bulk of the matters in the Supreme Court, and constitutional questions being delayed and heard rarer and rare, there is a growing fear that the Supreme Court may have lost its institutional focus on its Constitutional role. Further, as mentioned earlier, critical constitutional cases requiring the interpretation of rights within the constitution have been adjudicated by benches comprising two or three judges. This has wide ranging repercussions as it leads to incoherence and lack of clarity on the position of law as regards critical fundamental rights.

Attempts to reduce delay and backlog in the Supreme Court by increasing the number of judges have also failed to yield any concrete result and a further increase in bench strength may not be feasible or desirable for the institution.

Various other solutions have been proposed both by the Law Commission of India, and individual academics and lawyers to address the aforementioned issues. We are of the view that upon analysing the empirical and other evidences on the issue, one of the following three interventions appears feasible:

1) A National Court of Appeals could be set up to serve as the apex appellate court for all non-constitutional matters. This Court should hear all appeals preferred against decisions of the High Courts. The NCA should be seated in Delhi. Further, the exclusivity of the Supreme Court could be restored by restricting the power to grant special leave. Consequently, the Supreme Court will have jurisdiction over the following matters only:

- All matters involving substantial questions of law relating to the interpretation of the Constitution of India, or matters of national or public importance.
- Settling differences of opinion on important issues of law between High Courts or between Courts of Appeal;
- The judicial review of Constitutional Amendments;
- Constitutional validity of Union and State legislations;
- Resolving conflicts between States and the Centre or between two States, as well as the original jurisdiction to dispose of suits in this regard; and
- Presidential References under Article 143 of the Constitution.

2) Although, the Supreme Court has expanded its jurisdiction and reach, its critics point out that it continues to remain elitist and inaccessible. This is largely due to the fact that it is located in Delhi. Litigants from across the country have to travel to Delhi and retain Delhi-based senior advocates and this adds to greatly to the cost appealing to the Supreme Court. A recent study highlights that the rates of appeal to the Court are higher among states with higher per capita incomes and states which are situated closer to the national capital of Delhi.<sup>114</sup> A National Court of Appeals situated in Delhi will not address this problem. Therefore, many have recommended the setting up of a Regional Court of Appeal in the four metropolitan cities- Delhi, Chennai, Mumbai and Kolkata. Each RCA will hear appeals against the orders of the High Courts in their specific region. Further, the setting up of RCAs will also yield the same result as setting up an NCA by limiting the jurisdiction of the Supreme to the disputes enumerated expressly in the Constitution.

3) If establishing an NCA or RCAs is not considered as feasible, certain other institutional solutions can be explored. As stated earlier, some academicians have suggested that the Ministry of Law and Justice along with the National Judicial Academy, should organize regular sessions to disseminate information to Supreme Court judges on the extent to which the high rate of admission of cases contributes to the problem of backlog and delay. Such training sessions, they believe will go a long way in altering the mind-set of judges and have an impact on the number of admissions granted.

### Next Steps:

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#### A. Empirical Research to strengthen the case for creation of National or Regional Court of Appeals

The data that we have presented above only represents material that is available in the public domain currently. In order to set out the structure and composition of an apex court of appeal in concrete terms, it is imperative to have more detailed information on the workload of the Supreme court, the subject matter of cases being admitted, the number of cases admitted and disposed of in the past ten years, the states from where appeals are

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<sup>114</sup> Simi Rose George, *Releasing India's Supreme Court from the Shadow of Delay- A Proposal for Reform* available at [http://www.hks.harvard.edu/index.php/content/download/66823/1240102/version/1/file/SYPA\\_SimiGeorge\\_2014.pdf](http://www.hks.harvard.edu/index.php/content/download/66823/1240102/version/1/file/SYPA_SimiGeorge_2014.pdf) accessed on 26.8.2015.

being preferred, the number of judges assigned to constitutional cases over the past ten years etc.

The data available at present in the public are fragmented and riddled with the kind of problems mentioned above in the second section of this paper. To address this, data collection methods must be tweaked to try and obtain as accurate a picture of the position as possible. Only a robust data set giving us a clear picture of the actual problems being faced by the Supreme Court will help in resolving the issues being faced by the Court.

#### B. Deliberation on the shape and structure of the Court of Appeals

There is a need for further deliberation and discussion on the way in which the problems arising out of the present structure and jurisdiction of the Supreme Court can best be tackled. It is also critical to consult various stakeholders namely advocates, academicians, litigants and judges on the feasibility and manner in which a Court of Appeals may be established. The specific questions that will require deliberation and debate are:

- i. Whether a single National Court of Appeals is more feasible than Regional Court of Appeal?
- ii. Will the Supreme Court continue to have the power to grant special leave? Should Supreme Court's power to grant special leave be restricted and to what extent?
- iii. Should the sanctioned number of judges of the Supreme Court be reduced and to how much?
- iv. What will be the structure of the National Court of Appeals/ Regional Courts of Appeal?
- v. How should the judges of National Court of Appeal/ Regional Court of Appeals be appointed?

In the alternative, if it is found that the National Court of Appeal or a Regional Court of Appeals do not present a viable solution, there's a need to discuss what would be the appropriate way to address the following problems:

- a. Increase in the Supreme Court's overall docket;
- b. The need for a systematic approach to Special Leave Petitions;
- c. The shrinkage in the number of constitutional cases being decided by the Supreme court;
- d. The delay in constitution of larger Benches to decide important questions of interpretation of the Constitution; and
- e. The unequal access to the Supreme Court to citizens in different parts of the country.

### C. Constitutional Amendments required

Whatever solution is adopted, either by way of the creation of NCA or RCA and the limiting of the power to grant special leave will necessitate the enactment of a constitutional amendment bill. Following deliberations, and after having finalised the structure of the Court of Appeals, a constitutional amendment bill can be drafted for constituting the NCA or RCAs. This bill should ideally also include provisions regarding the manner of appointment of judges and the details regarding administration of the newly established appellate court or courts.

If, in the alternative, the NCA or an RCA is not feasible, then the appropriate next steps also need to be discussed.

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