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TOWARDS AN EFFICIENT AND EFFECTIVE SUPREME COURT:

ADDRESSING ISSUES OF BACKLOG AND REGIONAL DISPARITIES IN ACCESS

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EXECUTIVE SUMMARY

The Supreme Court of India is suffering from an overburdened docket, primarily attributable to the large volume of fresh appeals filings and special leave petitions. Consequently, its role as the highest constitutional court of the country has diminished drastically, with constitutional matters now forming a negligible percentage of the total disposal rate of cases per year.

The Consultation Paper on the Supreme Court's burgeoning backlog underscored the problems of its exploding docket; and the patent disparity in accessing it depending on the geographical proximity of High Courts in different states, and the per capita income in different regions. The present Report has also added to the original empirical data presented in the Consultation Paper, to highlight these significant concerns in the functioning of the Supreme Court. A summation of the main findings of the empirical study is presented hereinafter:

(a) The number of constitution benches hearing matters of interpretation of the Constitution and substantial questions of law have decreased over time;

(b) Inversely, the Supreme Court faces an unprecedented influx of regular appeals, especially Special Leave Petitions under Article 136 of the Constitution of India; and

(c) The geographical proximity of a state High Court to the Supreme Court, as well as the economic conditions of a region have a direct impact on the rate of appeals coming to the Supreme Court from such High Courts.

To address all these issues, the present Report has examined the following recommendations:

(a) Setting up an independent Court of Appeals;

(b) Setting up specialised benches within the Supreme Court, and engaging experts on a more permanent basis to assist with complex, interdisciplinary issues;

(c) Exercising greater restraint and judicial discipline in granting special leave to appeal under Article 136 of the Constitution of India;

(d) Setting up a permanent bench which would exclusively adjudicate constitutional cases;

(e) Enhancing the overall use of technology in terms of the proposals of the e-committee of the Supreme Court;

(f) Exercising power under Article 128 of the Constitution to make *ad-hoc* appointments of retired judges, to contain the exploding docket; and

(g) Reforming the manner of hearing civil and criminal transfer petitions by amending the Supreme Court Rules, 2013.

The present Report endorses setting up specialised benches, making *ad-hoc* appointments of retired judges as a temporary measure, implementing the Supreme Court E-Committee's three phased programme in a timely manner; setting up a Constitutional bench, and exercising greater circumspection in granting special leave to appeal under Article 136. However, the setting up of an independent Court of Appeal may not be feasible given the constitutional hurdles in the path and the fact that as a solution, it may not adequately address the problems being faced by the Supreme Court.

INTRODUCTION

a) Background

The Supreme Court of India is one of the one most powerful apex courts in the world with a wide jurisdiction and wielding enormous powers of judicial review against executive action and laws made by the legislature, and it has vested within itself the power to review amendments to the Constitution as well.[1] It is also the apex body charged with resolving disputes between the Centre and States, and the States inter se, under Article 131 of the Constitution.

The Supreme Court's jurisdiction can be broadly classified under three heads: Original Jurisdiction, Appellate Jurisdiction and Advisory jurisdiction.[2] The Original Jurisdiction of the Supreme Court consists of:

1. Writ Jurisdiction under Article 32.
2. Election Disputes relating to the President/Vice President of India under Article 71.
3. Original Suits relating to inter-State and Centre-State disputes under Article 131.
4. 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.
5. Appointment of arbitrators under Section 11(6) of the Arbitration and Conciliation Act, 1996
6. Contempt of Court jurisdiction under Section 23 of the Contempt of Courts Act, 1971, read with Article 145 of the Constitution of India.[3]

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.

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[1] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 ("*Kesavananda Bharti*")

[2] Supreme Court of India, Annual Report 2014-15, available at <http://sci.nic.in/annualreport/annualreport2014-15.pdf> (accessed January 28, 2016), p. 59. ("*Annual Report*")

[3] Annual Report (id), p. 59-60.

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 the acquittal of an accused and awarding the 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.[4]

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.
c. Removal of members of various statutory bodies and authorities.[5]

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

The sources of the Supreme Court's jurisdiction therefore can 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.[6] The initial jurisdiction conferred on the Supreme Court has been widened over the years by multiple laws which have permitted direct appeals to the Supreme Court from statutory tribunals, bypassing the High Court.[7] Indeed, all of this led to the Law Commission of India to conclude that the Supreme Court of India has one of the widest jurisdictions of any apex court in the world.[8]

However, the breadth of the Supreme Court's jurisdiction has also meant that its workload, given its present constitution, might soon become unsustainable. The number of cases pending in the Supreme Court of India at the end of each calendar year has increased from

[4] For a full list of such legislations, see Annual Report, (n 2), p. 60-61.

[5] Annual Report (n 2), p. 62.

[6] Article 245, read with Article 246 and Entry 77 of List I of the Seventh Schedule.

[7] 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.

[8] Law Commission of India, Report 125 on *The Supreme Court - A Fresh Look*, available at <http://lawcommissionofindia.nic.in/101-169/report125.pdf> (accessed 28 January, 2016) ("*Report 125*")

36,056 to 64,919. 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.[9]

Given the discontent that is being voiced in many quarters, Vidhi issued a Consultation Paper titled '*The Supreme Court's Burgeoning Backlog Problem and Regional Disparities in Access to the Court'* (hereinafter the "Consultation Paper"), highlighting the crippling effect that this *exploding docket* has had on the overall efficiency of the Supreme Court.

Two significant alterations in the Supreme Court's role as the apex court of the Indian Judiciary were noted in the Consultation Paper:

(a). The Supreme Court has drastically reduced the adjudication of cases involving important questions of constitutional law. In 2014, as per one study, only 7% of the judgments delivered pertained to constitutional matters.[10] Additionally, the number of matters heard by constitutional benches (i.e. of five or more judges) has reduced from 15.5% in the 1950s to 0.12% in the first decade of the 21st century.[11]

(b). The Supreme Court has seen an inversely proportional rise in the admission and adjudication of regular appellate matters. In particular, there has been a spate in the filing and admission of Special Leave Petitions. This increase in fresh filings of appeals has consequentially increased the number of pending 'regular matters',[12] and also the time taken for disposal of such matters.[13]

In addition to the problems caused by a fast growing judicial backlog, the Consultation Paper highlights the problem of disparity in accessing the Supreme Court. A direct nexus exists

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[9] See 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> ("*Nick Robinson Quantitative Analysis*"); p. 15 of the Consultation Paper.

[10] 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 August 25,2015).

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

[12] 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; p. 11 of Vidhi's Consultation Paper.

[13] The general percentage of "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; p. 13 of Vidhi's Consultation Paper.

between the geographical proximity of a state's High Court from the Supreme Court, and the number of cases challenged from such High Courts, as mentioned earlier.[14] Along with the geographical distance, the per capita of litigants in economically well off regions also influences the rate of appeals from different High Courts.[15]

The Consultation Paper has also reviewed other common law jurisdictions, namely Canada and the United States, to analyse and evaluate the constitutional role of their respective Supreme Courts.

The Canadian Supreme Court shares some significant features with its Indian counterpart. 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. However, the most significant functional difference between the two Supreme Courts is the manner in which power to grant special leave to appeal is exercised. 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.[16] To give perspective, in 2014 out of a total number of 502 leave to appeal petitions filed, appeals were granted only in 47 of them (or approximately 9 percent of the total petitions).[17] An analysis of the publicly available figures, captured in tabular form above, suggest that the Canadian Supreme Court uses its power to grant leave to appeal very sparingly, as less than 15% of the applications filed before it have been successful.

The United States has a differently structured judicial hierarchy, compared to the Indian judiciary. Notably, the US judiciary has an independent tier of Courts of Appeals in its different circuits. Additionally, the US Supreme Court is the highest court of the land, and

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[14] The High Courts of Punjab & Haryana, Delhi and Uttarakhand have the highest percentage of cases appealed before the Supreme Court, thus indicating to the influence of geographical proximity on the ability of litigants to access the Supreme Court. See Nick Robinson Quantitative Analysis (n 9); p.15 of Vidhi's Consultation Paper.

[15] High Courts of Bombay, Andhra Pradesh and Karnataka depict higher rates of appeal, given the financial ability of litigants from these courts to sustain litigation costs for pursuing appeals before the Supreme Court. See, Vidhi's Consultation Paper, p. 14-16.

[16] Department of Justice, Canada, *Canada's Court System*, p.11, available at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf> (accessed on 27 August, 2015); p. 20 of the Consultation Paper.

[17] Department of Justice, Canada, *Canada's Court System*, available at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf> (accessed on 27 August, 2015); p. 19 of the Consultation Paper.

can exercise both original and appellate jurisdictions. The setting up of an independent tier of courts of appeals helped reduce the total cases filed before the US Supreme Court.[18] The US Supreme Court has also shown remarkable success in ensuring a declining rate of institution of cases before it, unlike the Indian apex court. Between 2005 and 2014, the US Supreme Court has steadily witnessed a declining rate of case filings (with the exception of 2010)., During the same period, the Indian Supreme Court has experienced an increase of 97% in fresh filing of cases, and 96% increase in the regular hearing matters.[19]

Unlike these jurisdictions, South Africa has established a separate Constitutional Court which adjudicates upon constitutional matters only. Furthermore, unlike the Indian Supreme Court, the apex court of South Africa sits *en banc*, or constitutes large benches of five or more judges to hear constitutional matters. While ensuring that the Supreme Court of India functions solely as a Constitutional Court would be ideal, much like the Constitutional Court of South Africa, it is also important for the Supreme Court to constitute large benches for constitutional matters, like all the above mentioned jurisdictions.

Along with the Consultation paper which surveyed existing empirical research and discussed possible solutions, we have also gathered data on the cases filed in the year 2014 in the Supreme Court by "scraping" them from the website of the Supreme Court, through software developed for this purpose. We have analysed the data from these cases to get an understanding of its workload in an average year and how it may be managed more effectively.

Vidhi also conducted a Round Table discussion on 21st November, 2015 in Delhi, as a follow up to the dissemination of the Consultation Paper. The Round Table discussion spanned two sessions: the first session involving three key speakers including the Attorney General for India, and the second involving lawyers, academics and other members of the legal fraternity. The primary objective of the Round Table discussion was to get inputs, suggestions, comments and critiques, on the findings and proposed recommendations highlighted in the Consultation Paper.

This Report is thus a culmination of the above work, carried out over the second half of 2015 and the beginning of 2016.

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[18] 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, p. 23 of the Consultation Paper.

[19] Nick Robinson Quantitative Analysis (n 9), p. 3-4.

b) Structure of the Report

This report is divided into three sections. The first section is a study of the data that was extracted from the publicly available information about cases filed, disposed and pending in the Supreme Court for the year 2014.

The second section is a summary of the main points raised in the Round Table discussion, and inputs from various participants in the context of the Consultation Paper circulated by Vidhi.

The last section examines institutional solutions for some of the problems with the Supreme Court. This section also examines the feasibility of alternate proposals to improve the Supreme Court's functioning, and the pros and cons of adopting these solutions.

I. STATISTICAL SURVEY OF THE SUPREME COURT DOCKET

In this section we will analyse the data we have collected, after describing the methodology adopted to collect it. This is in addition to the survey of empirical studies of the Supreme Court already carried out and discussed in more detail in the Consultation Paper.[20] In our previous Paper, we looked at the primary data that the Supreme Court itself put out in its "Court News" publications, and in its monthly statements on the number of cases pending and judgments delivered over the years.[21] We also relied on the fairly exhaustive qualitative analysis by Nick Robinson of the Supreme Court's case disposal up to 2012.[22]

Here, we present and analyse data we collected independently from the information available on the Supreme Court's website, relating to cases filed in 2014.

a) Analysis of data collected from the Supreme Court website

A. Methodology

The Supreme Court website contains details of cases filed before the Court, giving each case a separate number in the format [Case Type] No. [Serial Number]/[Year of filing]. Using the serial number of each case, software developed for Vidhi "scraped" the information available about each case under the "Case Status" link in the Supreme Court website.[23]

For the purposes of the data here, one "case" is not each serial number of a case but includes cases which have been filed together and relate to the same judgment or order. Therefore, two SLPs filed together are represented as one "case" in our data, since they are heard together and the time spent by the court on them is concurrent. For instance, SLP(C) 34-36/2014 in the system is shown as three separate SLPs but counted as one in our system. Therefore, while the last serial number at which an SLP(C) was filed is SLP (C) 34501/2014, the actual number of distinct cases filed as SLPs is only 22,907.[24]

[20] Vidhi's Consultation Paper, p. 8-17.

[21] Annual Report (n 2).

[22] Nick Robinson Quantitative Analysis (n 9)

[23] <http://courtnic.nic.in/courtnicsc.asp>.

[24] It may be pointed out here that subsequently certain cases might have been tagged together or heard together by the Court, but we have not counted them separately to maintain consistency in the data.

Details of *all* cases filed in 2014 were not available on the website. We found that there were no details for approximately 5.5% of the total number of cases. In some cases, even when there was an entry for a particular serial number, no further details of that case were available. Error messages received from the system while collecting the data were not helpful and it was not clear why no details were present for a given case number. Since it is impossible to tell whether these are mistaken entries or cases of redaction, we have indicated such cases as "no details available here".

Table 1: Completeness of data by case type

CATEGORY	TOTAL NO. OF CASES	ALL DETAILS MISSING	SUBJECT MATTER DETAILS MISSING	ALL DETAILS MISSING %	SUBJECT MATTER DETAILS MISSING %
SLP(Civil)	22907	889	2602	3.88%	11.36%
SLP (Criminal)	10450	1227	2405	11.74%	23.01%
Civil Appeal	7650	360	437	4.71%	5.71%
Review Petition(Civil)	2237	101	269	4.51%	12.03%
Criminal Appeal	2100	56	59	2.67%	2.81%
Transfer Petition(Civil)	1713	30	57	1.75%	3.33%
Writ Petition(Civil)	1064	19	73	1.79%	6.86%
Review Petition (Criminal)	702	18	137	2.56%	19.52%
Transfer Petition (Criminal)	413	15	63	3.63%	15.25%
Writ Petition(Criminal)	223	4	23	1.79%	10.31%
	49459	2719	6125	5.50%	12.38%

Of these 49,459 cases, we were thus able to obtain full data only for 43,334 cases, or 87.62% of all cases that were filed or instituted in 2014. Overall, the number of cases for which all data was missing was 2719.

We have gathered data for all cases instituted in the Supreme Court in the year 2014 in the following categories:

a. Civil Appeals
b. Criminal Appeals
c. Special Leave Petitions (Civil)
d. Special Leave Petitions (Criminal)
e. Transfer Petitions (Civil)
f. Transfer Petitions (Criminal)
g. Writ Petitions (Civil)
h. Writ Petitions (Criminal)

These eight categories of cases constitute almost the entire bulk of the cases that are instituted at the Supreme Court. The other major case types on which data has not been collected but which form part of the workload of the Supreme Court are:

1. Arbitration Petitions
2. Civil Suits
3. Contempt Petitions (Civil)
4. Contempt Petitions (Criminal)
5. Curative Petitions (Civil)
6. Curative Petitions (Criminal)
7. References under Article 317 of the Constitution
8. Review Petitions (Civil)
9. Review Petitions (Criminal)

This is not to suggest that these case types are not important; they have been excluded for the present study since they either don't relate to the main functions of the Supreme Court or, if they do, they constitute very few cases (less than ten) in a given year.

Details of all the cases are maintained by the Supreme Court at its website "Courtnic," and with the help of software programmer Mr Nigel Babu, we collected the following data for each of the cases filed under the respective categories:

i. Case number
ii. Year of filing
iii. Petitioner
iv. Petitioner advocate
v. Respondent
vi. Respondent advocate
vii. Subject category
viii. Date of disposal/Last date of hearing
ix. Current status

B. Analysis

From the data available on the Supreme Court website, we gathered the data for 46,740 cases in 2014, broken down by case type as follows:

Table 2: Number of case details collected by case type in the Supreme Court

TYPE	TOTAL
SLP (civil)	22,018
SLP (criminal)	9,223
Civil appeals	7,290
Review petitions (civil)	2,136
Criminal appeals	2,044
Transfer petitions (civil)	1,683
Writs (civil)	1,045
Review petitions (criminal)	684
Transfer petitions (criminal)	398
Writs (criminal)	219
TOTAL	46,740

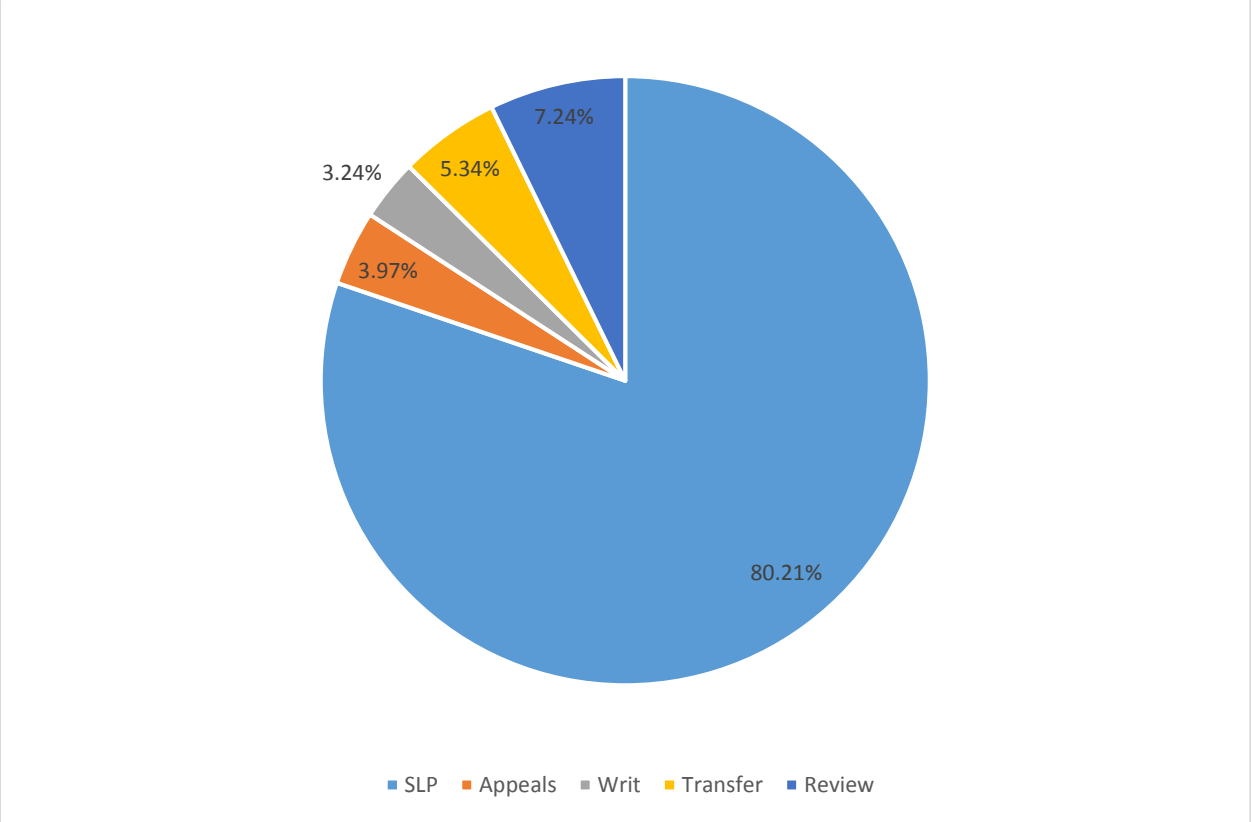
These figures do not represent the total number cases filed in each category since civil appeals of 2014 include Special Leave Petitions where "leave" has been granted, and which are therefore not fresh matters.

The number of fresh matters that we have been able to gather data for is as follows:

Table 3: Number of fresh cases filed in the Supreme Court in 2014 by case type:

TYPE	TOTAL
SLP (civil)	22,018
SLP (criminal)	9,222
Review petitions (civil)	2,135
Transfer petitions (civil)	1,682
Civil appeals	1,470
Writs (civil)	1,044
Review petitions (criminal)	683
Transfer petitions (criminal)	397
Writs (criminal)	219
Criminal appeals	78
TOTAL	38,948

Figure 1: Cases filed in 2014 split up by % of each case type



Since the data in each of these categories was collected between September and November, 2015, the pendency figures may have changed subsequently.

Table 4: Pendency of cases for which data was collected (as of November, 2015)

CATEGORY	PENDING	DISPOSED	TOTAL
SLP (CIVIL)	7,129	14,888	22,018
SLP (CRIMINAL)	1,739	7,483	9,222
CIVIL APPEALS	2,182	5,107	7,290
REVIEW PETITIONS (CIVIL)	96	2,039	2,136
CRIMINAL APPEALS	813	1,230	2,044
TRANSFER PETITIONS (CIVIL)	436	1,246	1,683
WRITS (CIVIL)	262	782	1,045
REVIEW PETITIONS (CRIMINAL)	34	649	684
TRANSFER PETITIONS(CRIMINAL)	74	323	398
WRITS (CRIMINAL)	36	183	219
TOTAL	12,801	33,930	46,740

One of the persistent myths that Supreme Court advocates and practitioners hold on to is that the Supreme Court dismisses a vast majority of SLPs (usually in the range of 80-90%). To understand how frequently the Supreme Court issues notice in an SLP in a fresh matter,

we isolated cases which were "disposed" with no advocate having appeared for the respondent. This suggests that the case was dismissed in limine without notice being issued to the respondent. It is possible that this case may have also been decided in favour of the petitioner with no appearance on behalf of the petitioner. However, a random sampling of the orders passed in these cases confirmed that they were largely cases dismissed in limine, with only a negligible number of cases that were disposed in favour of the petitioner with no appearance on behalf of the respondent.

Table 5: Fresh cases dismissed in limine

CATEGORY	TOTAL	NUMBER OF CASES DISMISSED IN LIMINE	% OF CASES DISMISSED IN LIMINE
SLP(CIVIL)	22,018	11,812	53.65%
SLP (CRIMINAL)	9,222	6,061	65.72%
REVIEW PETITIONS (CIVIL)	2,135	2,029	95.04%
TRANSFER PETITIONS (CIVIL)	1,682	510	30.32%
CIVIL APPEALS	1,470	959	53.65%
WRITS (CIVIL)	1,044	576	55.17%
REVIEW PETITIONS (CRIMINAL)	683	645	94.44%
TRANSFER PETITIONS(CRIMINAL)	397	237	59.70%
WRITS (CRIMINAL)	219	145	66.21%
CRIMINAL APPEALS	78	0	0.00%
TOTAL	38,948	22,974	58.99%

Not all Civil Appeals are "fresh cases," since they are by and large Special Leave Petitions where "leave" has been granted to the parties to appeal, and are therefore a continuation of proceedings. But these SLPs are not shown as "disposed," and therefore we have only counted those cases where there is a statutory appeal to the Supreme Court of India as "fresh appeals".

As is evident from the numbers, the number of SLPs, both criminal and civil, vastly outstrip the numbers of civil and criminal writ petitions. Whereas 33,357 SLPs were filed over the course of 2014, only 1,287 Writ Petitions were filed in the same time period. Thus, while SLPs accounted for 67.44%, or more than two thirds of the cases filed in the Supreme Court, Writ Petitions accounted for only 2.6% of the cases filed in the Supreme Court.

Interestingly, the Supreme Court is as likely to hear an SLP in detail as it is a Writ Petition. Whereas civil and criminal SLPs are dismissed in limine 53.65% and 65.72% of the time, the figure for civil and criminal Writ Petitions are 55.17% and 66.21% respectively. This suggests

that the Supreme Court is more inclined to hear civil cases than criminal cases, irrespective of whether they are SLPs or Writ Petitions.

With substantive criminal appeals, however, where the appeal is directly to the Supreme Court, it did not dismiss any criminal appeal *in limine*. Admittedly, such cases are few (given the very limited scope of such jurisidiction)[25]

On the other hand, as advocates are well aware, almost all review petitions are dismissed *in limine* with very few being posted for further hearing. The numbers for 2014 show that nearly 95% of all review petitions, civil and criminal, were dismissed *in limine*. This is almost certainly because the grounds for review petitions are very limited,[26] the "hearing" takes place in chambers, and review petitions are placed before the same judges as those who delivered the judgments for which parties seek review.

With SLP(Civil) cases, a sample of 378 out of 22,017 cases was selected to see the outcome of the first hearing.

Table 6: Impact of the appearance of a Senior Advocate

	Notice issued	Dismissed	Success rate (%)
Senior advocate appeared	67	45	59.82%
No senior advocate appeared	60	118	33.71%
Total	127	163	43.79%

As is evident from these numbers, the presence of a senior advocate nearly doubles the chances of notice being issued as opposed to instances where no senior advocate appears.[27]

[25] Supreme Court's non SLP criminal appellate jurisdiction; see Supreme Court Practice and Procedure Handbook, available at <http://supremecourtofindia.nic.in/handbook3rdedition.pdf> (accessed on September 3, 2015) ("*SC Practice Handbook*")

[26] Article 137 of the Constitution of India confers the power of Review on the Supreme Court, subject to the provisions of Section 114 of the Civil Procedure Code, 1908.

[27] A more detailed elaboration of our results was published earlier. See Alok Prasanna Kumar, "The true worth of a senior advocate", Livemint September 16, 2015 available at

This might support the claim that "grand advocates" have a disproportionate impact on the manner in which courts take up certain cases for hearing.[28]

C. Subject matter analysis

The data collected also contained details of the subject matter of the case. The Supreme Court has a list of 48 separate case categories and additional sub-categories.[29] Subject category details are not available for all cases; in some instances, the Court lists them as "Not available" whereas in others, no entry has been made at all. We consolidated some of the Supreme Court's categories since they deal with the same or similar subject matter., and have listed the ten most frequent subject categories below:

Table 7: Ten most frequently occurring subject categories for SLP (Civil)

Subject category	Number
Ordinary Civil	4,372
Service Law	3,395
Land	2,185
Direct Taxes	1,294
Indirect Taxes	965
Tort	947
Personal law	799
Labour	784
Rent Control	769
Consumer Protection	503

Of 19,142 SLP(Civil) cases for which data on subject categories was available, the five most common subject categories—Ordinary Civil, Service Law, Land law, Direct Taxes and Indirect Taxes—account for more than half (12,211) of the cases filed.

In criminal cases, "subject categories" are not strictly defined. Cases are categorised not just by subject matter, such as the law or section of IPC involved, but also by the type of

<http://www.livemint.com/Politics/FFgFOFnzN8rqvRNWTTgugM/The-true-worth-of-a-senior-advocate.html> (accessed January 25, 2016).

[28] Galanter, Marc and Robinson, Nick, India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization (November 1, 2013). HLS Program on the Legal Profession Research Paper No. 2013-5; Univ. of Wisconsin Legal Studies Research Paper No. 1240, available at <SSRN: http://ssrn.com/abstract=2348699 or http://dx.doi.org/10.2139/ssrn.2348699> (accessed January 25, 2016).

[29] Full list available at <http://supremecourtofindia.nic.in/subcat.pdf> (accessed January 14,2016).

relief sought, and type of punishment imposed. Nonetheless, we present the data as is below:

Table 8: Ten most frequently occurring categories for SLP (Criminal)

Subject category	Number	Dismissed in limine	% in limine
Bail	2,344	1,585	67.62%
Miscellaneous	1,828	1,087	59.46%
Quashing	962	592	61.54%
Minor Offences	425	308	72.47%
Corruption	398	269	67.59%
Cheque Bouncing	397	232	58.44%
Appeals by State against acquittal	347	167	48.13%
Kidnapping, Sexual Harassment and Abduction	283	149	52.65%
Dowry Death and Cruelty	277	179	64.62%
Appeal by complainant against acquittal	179	57	31.84%

Nearly a quarter of all criminal SLPs filed in the Supreme Court relate to bail and another tenth to the quashing of cases. It is highly unlikely that most of these cases raise substantial questions of law, since the principles underlying bail and quashing have long been well established. This might help explain why nearly two-thirds of 65.72% of criminal SLPs are dismissed in *limine* by the Supreme Court.

D. Transfer cases filing analysis

The Supreme Court has concurrent constitutional and statutory powers to transfer cases from one court to another, anywhere in India.

Apart from Articles 139 and 139-A discussed earlier, section 25 of the CPC empowers the Supreme Court to transfer a suit if it is "expedient for the interests of justice" – a widely-defined power that is not restricted either by the statute itself or by other legislation.[30] Likewise for criminal cases, a similar power is vested by Section 406 of the Code of Criminal Procedure, 1908 for transfer of a criminal case on the same grounds.

[30] *Guda Vijayalakshmi v Guda Ramachandra Sekhara Sastry* (1981) 2 SCC 646, 648-9, para 3.

In 2014, 1,682 Civil Transfer Petitions and 397 Criminal Transfer Petitions were filed. Although the power to transfer cases to itself or to other courts is contained under Article 139 and 139A of the Constitution, it is largely invoked in one or two specific contexts which do not involve a significant question of law or constitutional importance. Of 1,682 civil transfer petitions in the Supreme Court in 2014, 1,541 or 93.11% were filed under Section 25 of the Code of Civil Procedure, 1908 The subject category here is not helpful to determine the actual subject matter of the case but, by and large, anecdotal evidence suggests that these are mostly matrimonial disputes under the Hindu Marriage Act, 1955. It is not possible to confirm this with the data at present since the Supreme Court does not further sub-categorise transfer cases on the basis of subject matter.

Similarly, almost all the Transfer Petitions in criminal cases were preferred under Section 406 of the Code of Criminal Procedure, with 346 out of 349 for which details were available having been filed under the Code of Criminal Procedure, 1973.

This suggests that by and large, a vast majority of the transfer cases call upon the Supreme Court to exercise its transfer powers under statutes where the law has been well settled and do not concern major questions of law.

E. Government cases analysis

The Government is usually described as "the single largest litigant"; a true statement that yet does not capture nuances in Government litigation. In the Indian context, "Government" includes not just the Central Government, but also State Governments, municipal authorities, independent regulators and statutory authorities— in short, any organization that is statutorily or constitutionally recognised. For the purposes of this Report, however, we have only examined the cases filed by the Central Government in 2014. We have picked out cases filed by seven Government Advocates on Record designated for this purpose by the Central Agency Section, which handles all central Government litigation in the Supreme Court.[31]

Table 9: Cases filed by the Central Government in 2014

Case Type	Total cases filed	Central Government filed	% of cases instituted by Central Government
SLP (civil)	22,018	1,671	7.59%
SLP (criminal)	9,223	113	1.23%
Civil appeals	1,470	1,004	68.30%

[31] See <http://lawmin.nic.in/LITIGATION%20WORK.pdf>.

Review petitions (civil)	2,136	34	1.59%
Criminal appeals	2,044	36	1.76%
Transfer petitions (civil)	1,683	62	3.68%
Writs (civil)	1,045	0	0.00%
Review petitions (criminal)	684	2	0.29%
Transfer petitions (criminal)	398	0	0.00%
Writs (criminal)	219	0	0.00%
Total	38,954	2,886	7.41%

Of 38,954 fresh cases filed in the Supreme Court, a total of 2,886 were filed by the Central Government, accounting for 7.41% of the total. As per the Central Government's own figures, 5,166 cases were filed on behalf or against the Central Government in the Supreme Court. The bulk of the Central Government's cases filed in the Supreme Court relate to Civil SLPs (Civil) and Civil Appeals. In the latter, Central Government appeals alone account for nearly 70% of fresh Civil Appeals filed in the Supreme Court. This could be attributed to the large number of appeals that the Central Government files against the orders of tribunals from which it can directly appeal the Supreme Court. Indeed, our numbers suggest that, in 2014 alone, there were 890 appeals against the orders of the Armed Forces Tribunals filed by the Government, and only 34 were filed by private parties. Of these, 861 or 96.7% were dismissed *in limine*.

II. OVERVIEW OF THE ROUND TABLE DISCUSSION

A. Background

The completion and publication of the Consultation Paper titled '*Supreme Court's Burgeoning Backlog Problem and Regional Disparities in Access to the Court*' was the first step of this three phased research project. The Consultation Paper set out the research conducted and gavecontext for issues facing the Supreme Court. In our second step, we sought submissions and inputs with respect to the issues highlighted in the Consultation Paper. As part of this second phase, Vidhi also organised a Roundtable Discussion in Delhi[32] to consolidate the research presented in the said Paper and determine viable solutions for their redressal, both in the long and short term..

In the Round Table discussion, which spanned two sessions, all participants gave detailed inputs, comprising:

- Mr. Mukul Rohatgi, Attorney General for India;
- Ms. Meenakshi Arora, Senior Advocate;
- Mr. Amit Kapur, Senior Partner J. Sagar Associates;
- Ms. Vrinda Bhandari, Advocate;
- Ms. Aparna Chandra, Associate Professor (NLU Delhi);
- Mr. Pratik Dutta, Research Consultant, NIPFP;
- Mr. Anirudh Krishnan, Advocate and Founder, AK Law Chambers;
- Mr. Rahul Narayan, Advocate on Record (Supreme Court of India);
- Mr. Harish Narsappa, Advocate and Founder, Samvad Partners;
- Mr. Ritin Rai, Advocate, and
- Ms. Sowmya Rao, Advocate and Founder, Mudita Advisory.

Below, we present the suggestions, critiques and comments received, divided by Session.

B. Session One

Mr. Mukul Rohatgi, Ms. Meenakshi Arora and Mr. Amit Kapur were the main speakers in the first session. The following points were raised:

(i). Circumspect usage of the jurisdiction under Article 136

[32] The Roundtable Discussion was organised in a two session programme on November 21, 2015, at Conference Room II, India International Centre. ("*Round Table Discussion*")

All three speakers emphasised and reiterated the findings in the Consultation Paper pertaining to the growing bulk of SLPs in the Supreme Court.

Mr. Rohatgi expressed the need for judicial discipline while exercising this broad jurisdiction; he opined it should be used sparingly and not with the objective to correct every error in the High Courts' judgments and interim orders.

Ms. Arora highlighted the tendency of lawyers and litigants alike to test their chances of success by appealing any and all decisions in a routine manner before the Apex Court. According to her, lack of clarity in jurisprudence under Article 136 and the conflicting judgments emerging from different benches of the Supreme Court on similar cases have aggravated this tendency of chancing appeals before the Supreme Court.

Mr. Kapur, while concurring with the other two speakers, also stressed the need of stronger deterrence from the Supreme Court against lawyers and litigants filing frivolous appeals and SLPs.

(ii). Specialised Benches and Experts to Assist the Supreme Court

All three speakers emphatically supported setting up *specialised benches*, and engaging experts more frequently rather than on *ad-hoc* basis.

Mr. Rohatgi supported the suggestion to set up specialized benches with the example of the Taxation Bench, and its success in handling cases.[33]

Ms. Arora highlighted that setting up *specialised benches* would provide judges the opportunity to adjudicate matters in areas of law wherein they have expertise, past work experience and personal inclinations. She pointed out that such benches would also help dispose cases faster.

Mr. Kapur espoused creating a panel of experts to provide judges an interdisciplinary understanding of issues, pertaining to economics, science, technology, and so on. He further suggested that the Supreme Court revamp its roster system to ensure specialisation of judges, and that the High Courts do so as well. Such rosters, according to Mr. Kapur, would

[33] *'Why the Supreme Court's tax bench is timely'*, Alok Prasanna Kuma r, Live Mint, March 11, 2015, available at <http://www.livemint.com/Politics/zS9slLqZu3ySWkAHEBvv6M/Why-the-Supreme-Courts-tax-bench-is-timely.html> (accessed on December 21, 2015).

allow the concerned judge to be optimally efficient in her or his area of expertise and would therefore ensure well-reasoned and definitive judgments.

(iii). Larger Constitutional Benches

The speakers also reaffirmed the Consultation Paper's findings regarding the decline in the number of constitutional benches (of 5 or more judges). The Supreme Court's diminishing role as a Constitutional Court has been the subject of much debate between jurists, lawyers and judges alike, which the Consultation Paper traced over time.[34] The Supreme Court presently functions primarily in two judge benches, contrary to its original scheme.

While tracing the history of the Supreme Court, it was emphasised how it was set up primarily to address complex questions of Constitutional Law by benches comprising 5 or more judges. He opined that the Supreme Court should revert to its original character and constitute constitutional benches more frequently, which at present is logistically implausible given its exploding docket. The recent NJAC judgment was referred to as a case in point, highlighting the Supreme Court's inability to constitute larger benches.

It was also pointed out that smaller benches often pass conflicting judgments on common propositions of law, thereby muddling jurisprudence. larger bench judgments would thus ensure clarity in jurisprudence emerging from the Apex Court, especially on contentious issues like the scope of powers under Article 136 of the Constitution. It was suggested that such clear and unequivocal jurisprudence would go a long way in curtailing the frivolous litigation rampant in the Supreme Court.

It was suggested that the Supreme Court needs to be more prudent in its capacity as a constitutional court.

(iv). National Court of Appeals

The Consultation Paper had made the following argument:

[34] 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>; see also, Justice Bhagwati's opinion in *Bihar Legal Support Society, through its President, New Delhi v. Chief Justice of India* (1986) 4 SCC 767 ("*Bihar Legal Support Society*").

(a). An exploding docket, largely comprising SLPs and regular appeals, is undermining the Supreme Court's ability to exercise its Original Jurisdiction and address issues of greater public importance.

(b). While numerous institutional and administrative reforms aimed at rectifying the Supreme Court's diurnal functioning are in the pipeline, a more drastic change is needed to abate the high number of appeals.

(c). One such change could be setting up National or Regional Courts of Appeals that are at par with the Supreme Court but adjudicate only non-constitutional appellate matters.[35]

The speakers, however, had a mixed response to the proposed Court of Appeals. While some accepted the proposal as a possible solution, opposition to it was against it for two reasons. First, that the actual possibility of the constitutional amendment needed to establish this additional hierarchy would be bleak; second, that setting up regional courts of appeals might result in divergent views and conflict jurisprudence on vital questions of law.

C. Session Two

The second session of the Round Table discussion involved lawyers, academics and other stakeholders from the legal fraternity, namely Ms. Vrinda Bhandari, Ms. Aparna Chandra, Mr. Pratik Dutta, Mr. Anirudh Krishnan, Mr. Rahul Narayan, Mr. Harish Narsappa, Mr. Ritin Rai and Ms. Sowmya Rao. The following suggestions and comments were received during this session:

(i). While most speakers agreed that the Supreme Court should mainly adjudicate important questions of constitutional law, they also believed that establishing additional Court of Appeals would add to the exploding docket. As such, they argued reforms should be pursued within the existing framework of the Judiciary.

(ii). To regulate the length of submissions made at the time of issuing notice and admitting a matter, some speakers suggested that paper arguments would be more efficient than oral submissions.

(iii). Some also emphasised that any reforms in the Supreme Court should be accompanied by similar reforms in state High Courts and subordinate levels of the judiciary.

[35] T.R Andhyarujina, *"Studying the U.S. Supreme Court's Working"*, (1994) 4 SCC (Jour) 1 <http://www.livelaw.in/sc-seeks-response-centre-national-court-appeal/> (accessed September 11, 2015).

(iv). With respect to disparity in access, it was recommended that videoconferencing should be used to ensure access to distant litigants in a cost effective manner.

(v). In order to improve the overall functionality of the Supreme Court, it was pointed out that administrative staff should be afforded more competitive incentives to attract better candidates for these positions.

D. Suggestions, Points and Critiques to Be Incorporated

Given the wide array of inputs received at the Round Table Discussion, we divided them into four heads as follows:

(a). Suggestions on the judicial side;

(b). Suggestions for judicial administration;

(c). Suggestions for executive changes; and

(d). Suggestions for legislative changes

(A). *Suggestions on the Judicial Side*

(i). *Jurisdiction under Article 136:* The paramount concern relating to a purely judicial aspect was the excessive exercise of the Court's discretionary jurisdiction under Article 136 of the Constitution, to grant *Special Leave* to appeal. As recorded in the Consultation Paper, around 34 percent of SLPs filed in 2014 were still pending in 2015. Furthermore, random sampling of 378 SLPs pending before the Supreme Court indicated an extremely high acceptance rate of 40 percent. The subsequent chapters of this Report will incorporate recommendations made to reign in this ballooning 'acceptance rate.' These include the need for the Supreme Court to exercise greater judicial discipline, stabilise and clarify jurisprudence on Article 136, impose reasonable costs on lawyers and litigants filing frivolous SLPs to deter wanton disregard of the Apex Court's time and resources, and prepare a succinct format for drafting SLPs to ensure concise and precise arguments. The Report will also explore the lack of trust that afflicts the relation between the Supreme Court and different High Courts, and how the practice of *continuous mandamus* is detrimental to the judicial setup.

(B). *Suggestions regarding Judicial Administration*

i). *Specialist Benches and Engagement of Experts*: In an age when litigation involves interdisciplinary issues, often in niche subject areas, engaging experts is paramount to the

justice delivery mechanism. Earlier this year, in its latest edition of the *Scarman Lecture* series, the Law Commission of the UK received some vital inputs on the utility of experts in determining legal policy and adjudication,[36] given their ability to deliver precise and well-reasoned arguments in relevant disciplines, especially in interdisciplinary disputes.

As mentioned above, the main speakers in session one also suggested expanding the use of experts and re-assigning rosters to set up specialised benches. The subsequent chapters of this Final Report will review these suggestions, and evaluate the viability of setting up an independent research panel of experts and a more efficient and meritorious mechanism of recruiting judicial clerks.

ii). *Adjudication of Constitutional Disputes* – The Consultation Paper used empirical data from Nick Robinson's research to show how the Supreme Court has transformed into a regular appellate court,[37] a troubling aberration given its original purpose to adjudicate important questions of law. The Round Table provided inputs regarding means to gradually reverse this trend. The subsequent chapters of this Report will incorporate these proposed solutions and emphasize the importance of larger Constitutional Benches. They will review the pros and cons of retaining this new avatar vs. restoring its original status.

iii). *Re: Miscellaneous Suggestions* - In addition to the abovementioned points, the following inputs were received:

(a). Laying down potential timelines to adjudicate regular appeals;

(b). Improving the standard of judicial clerks who assist judges with research;

(c). Expanding e-court facilities such as video conferencing to improve accessibility;

(d). Conducting regular orientation sessions for Supreme Court judges on current trends of judicial backlog and possible solutions.

(C). Suggestions Regarding Executive Changes

i). *Re: Guidelines Regulating Centre and State Governments' Litigation* – As mentioned before, the Government, at the Central and State levels, is the biggest litigant before the

[36] "The Law Reform Enterprise: Evaluating the Past and Charting the Future", Scarman Lecture 2015, March 24, 2015. The transcript of this lecture is available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/05/Scarman_Lecture_2015_as_delivered.pdf> (accessed on November 23, 2015) ("*Scarman Lecture*").

[37] Nick Robinson Quantitative Analysis (n 9).

Supreme Court. The Ministry of Law and Justice issued a list of elaborate Guidelines titled 'National Litigation Policy' to curb inexpedient governmental litigation.[38] In its endeavour to streamline its litigation, the said policy recommended that government litigation should be well coordinated between the concerned officials, ensuring pursuit of 'good cases' and removing bad ones.

Both sessions at the Round Table Conference yielded valuable inputs in this regard. Mr. Amit Kapur suggested that concerned officials in the government should be required to stipulate their reasons for preferring the regular appeal, or a SLP, and put these reasons on record as part of the file noting(s).

This Report will thus recommend how to more stringently implement this policy, either by amending it or by adopting other more definitive regulatory and statutory frameworks.

(D). *Suggestions Regarding Legislative Changes*

i). *Re: Setting up Court of Appeals* – As mentioned earlier, while the Consultation Paper made this proposal, it received a mixed response at the Round Table. Subsequent chapters of this Report will review these submissions and the original conclusions presented in the Consultation Paper, to present the pros and cons of setting up a Court of Appeals.

ii). *Re: Amendments to Statutes Granting Right of First Appeal against Tribunals* Many participants, particularly the three main speakers in session one, said that the laws setting up adjudicatory tribunals needed amendments. They argued that most of these laws conferred the rights of first appeal directly to the Supreme Court, without assessing the judicial impact of this right. Some of the statutes conferring the right to first appeal directly to the Supreme Court, against any judgment or order passed by a statutory tribunal constituted thereunder, are as follows:[39]

(a). Electricity Act, 2003 (under Section 125, appeals against decisions of the Appellate Tribunal for Electricity vest in the Supreme Court);

(b). The Armed Forces Tribunal Act, 2007 (under Section 30, appeals against final decision or order of the Tribunal can go directly to the Supreme Court);

[38] The said guidelines are available at <www.lawmin.nic.in/la/nlp.doc> (accessed on December 19, 2015).

[39] Annual Report (n 2), p. 60-61.

(c). Customs Act, 1962 (while CESTAT is the final appellate authority in matters pertaining to classification and valuation, an order from the Tribunal is appealable directly to the Supreme Court);

(d). Competition Act, 2002 (under Section 53T, orders or decisions of the COMPAT are appealable directly to the Supreme Court);

(e). The National Green Tribunal Act, 2010 (under Section 22, any award, decision or order of the NGT may be assailed before the Supreme Court);

(f). The Securities and Exchange Board of India Act, 1992 (under Section 15Z, any decision or order passed by the Securities Appellate Tribunal may be assailed before the Supreme Court);

(g). Telecom Regulatory Authority of India Act, 1997 (under Section 18, any final order of the TDSAT is appealable to the Supreme Court, subject to the conditions listed therein)

As a result, there is a spurt of regular appeals preferred before the Supreme Court from statutory tribunals. These statutory appeals are in addition to the power of the Supreme Court to grant special leave to appeal under Article 136. This Report will review these legislations and emphasise the need for urgent legislative reforms and amendments. It will further review the comparative viability of vesting these appellate powers in National Court of Appeals, or before concerned High Courts.

E. Additional Suggestions and Inputs for the Supreme Court's functioning

While most suggestions and inputs received were quite helpful for the present Final Report, some points addressed the overall operational framework of the Supreme Court. While these suggestions present sound inputs for enhancing the working of the Court, they do not focus on the areas under review in the present Consultation Paper. The suggestions have been listed below, but will thus not be addressed within the framework of this Final Report:

(a). Do away with Senior Advocates to reduce litigation, as the nature of lawyers influences the filing of cases.

(b). Impose word limits in SLPs and limit Admission proceedings to 'written submissions' alone.

(c). Review the functioning of the social justice bench by attending its sessions regularly.

(d). Determine the reasons behind the Supreme Court's liberal disposition in allowing SLPs.

(e). Provide sufficient funding to High Courts and Subordinate Courts.

F. Issue of Geographic Proximity between High Courts and the Supreme Court

The Consultation Paper presented empirical data and charts to determine the effect of geographical proximity of a state's High Court to the Supreme Court of India in accessing the latter. Speakers in the Round Table discussion rebutted some of these findings and data. Therefore, in order to verify and reiterate its findings from the Consultation Paper, the subsequent chapters will attempt to further break down these empirical details, and validate these findings with additional data derived from secondary sources.

III. RECOMMENDATIONS AND SUGGESTIONS TO IMPROVE SUPREME COURT FUNCTIONING

In view of the findings of our empirical research, as well as the inputs received at the Round Table Discussion, the present chapter has reviewed seven main recommendations. This chapter will present the benefits and shortcomings of each and conclude with our final suggestions.

National and Regional Courts of Appeals and Regional Benches of the Supreme Court

As mentioned earlier, the Consultation Paper proposed a National Court of Appeals to contain the SC's exploding docket due to regular appeals, which received a mixed response at the Round Table discussion. An independent Court of Appeals has several benefits and shortcomings. The benefits of such a Court of Appeals would be that it would restore the Supreme Court's focus onconstitutional cases, as well as reduce its exploding docket.

However, any new Court of Appeals will be burdened with a cumbersome workload on inception. Merely setting up an independent tier of Court of Appeals, without exercising greater judicial restraint, will not reduce the exploding docket, since the Court of Appeals would inevitably succumb to similar pendency problems. Thus there would little chance of such a court making the judiciary more efficient.

Another shortcoming is that an independent Court of Appeal might not viable under the present constitutional framework. Setting up an independent Court of Appeals would require a Constitutional Amendment stipulating two main principles – first, transfering Appellate jurisdiction, hitherto vested in the Supreme Court under the Constitution, as well as independent statutes,[40] to the newly established National and Regional Court of Appeals; and second, conferring power on the Parliament to enact appropriate legislation for the setting up and functioning of the Court of Appeals, and allied matters. Numerous eminent lawyers[41] and a former Chief Justice of India,[42] have expressed reservations against splitting

[40] SC Practice Handbook, (n 25).

[41] Indu Bhan, *'Do we really need a National Court of Appeal?'*, the Financial Express, November 5, 2014, available at <http://www.financialexpress.com/article/industry/do-we-really-need-a-national-court-of-appeal/5254/> (accessed on December 27, 2015).

[42] *Inaugural R.K. Jain Memorial Lecture*, Address by Hon'ble Mr. Justice K.G. Balakrishnan (Chief Justice of India as he then was), available at <

the Supreme Court into regional benches, which will tamper with the original concept of an apex court, envisioned by the drafters of the Constitution. With growing ambiguity on how the Supreme Court invokes the *Basic Structure* doctrine to ensure its *primacy* and independence,[43] there are legitimate concerns about any constitutional amendment, and accompanying legislation, that would divest the Supreme Court of its appellate jurisdiction and transfer this jurisdiction to an independent Court of Appeals.

Thus, while the idea of a tier of Courts of Appeals is attractive, it is bound to run into these challenges, concerning the constitutional *vires* of such a tier of appellate courts Further, as already discussed, such newly established Courts would inherit an overburdened docket which will not yield the desired result in improving efficiency. Reducing judicial backlog will still need greater judicial discipline in the Supreme Court's exercise of its appellate jurisdiction. In view of the fact that the proposed Court of Appeals do not adequately resolve the *exploding docket* of the Supreme Court, and has huge costs and challenges in its implementation, this solution is not feasible at the moment.

a) Specialised Benches and Greater Engagement of Experts in the Supreme Court

In light of the comments made at the Round Table discussion, the present recommendation explores two specific facets: namely, setting up specialised rosters and benches, and engaging more experts in complex and interdisciplinary disputes before the Supreme Court.

With respect to setting up specialised benches, the Supreme Court's recent experiment of constituting a two-judge bench to address tax cases[44] has yielded positive results. [45] As per our empirical research, the specialised bench regularly heard (and disposed of) more than

http://supremecourtofindia.nic.in/speeches/speeches_2010/cji_address_-_rk_jain_lecture_-_30-1-10.pdf> (accessed on January 04, 2016).

[43] *SC Advocates on Record Association & Anr. v. UOI*, (2015) 6 SCC 408 (NJAC Judgment). The Supreme Court struck down the Ninety-Ninth Constitutional Amendment and the NJAC Act, as unconstitutional, *inter alia* holding that both were violating the *basic structure* by transgressing the independence of the judiciary. This reasoning of the Supreme Court has evoked strong criticism about the ambiguous manner in which the *basic structure* has been morphed into an evolving doctrine, rather than a fixed, inalienable set of constitutional ethos.

[44] Shreeja Sen, *'Supreme Court sets up new benches for tax, criminal cases'*, live Mint, available at <http://www.livemint.com/Politics/o1CE12NRGJBYSxFTkMmuJI/Supreme-Court-sets-up-new-benches-for-tax-criminal-cases.html> (accessed on January 7, 2016).

[45] Alok Prasanna Kumar, *'Why the Supreme Court's Tax Bench is Timely'*, live Mint, available at <http://www.livemint.com/Politics/zS9slLqZu3ySWkAHEBvv6M/Why-the-Supreme-Courts-tax-bench-is-timely.html> (accessed on December 22, 2015).

1000 tax cases (delivering 289 orders and judgments) between March to December 2015. While specialised benches are not the only reform needed to reduce judicial backlog, the specialized Tax Bench certainly inspires confidence in this measure. In addition to the Tax bench, the Supreme Court also constituted a "Social Justice" bench to address certain kinds of public interest litigations in December 2014.

As has been noted before in this report, the Supreme Court is facing a growing influx of cases pertaining to taxation, ordinary civil matters, issues arising out of land acquisition, service law matter involving governmental employees, and criminal matters, especially pertaining to grant or denial of bail.[46] While the Supreme Court has been disposing of these regular matters, these have inevitably constrained its time and resources for adjudicating more important matters on questions of constitutional law. It is therefore recommended that specialised benches of two judges each may be constituted as a pilot programme, to study and review its success, for cases pertaining to the following areas of law:

(a). Service matters;

(b). Criminal Appeals;

(c). Cases relating to land laws.

The Tax bench set up last year should continue hearing tax related questions exclusively, in addition to the additional specialist benches proposed above. This would effectively leave 23 judges of the Supreme Court to deal with and adjudicate other pending cases in the docket. These remaining judges should also be re-assigned on the roster, to adjudicate familiar issues as per their prior work experience as a litigator, or judge.

As suggested in the Roundtable, interdisciplinary experts in different fields, including economics, environment and health care, scientists, social scientists and activists, and academics, should be engaged in a structured and permanent fashion. Most legal disputes before the Supreme Court involving questions of public importance transcend a purely legal nature. They require a meticulous and thorough understanding cutting across disciplines, which may not be adequately covered through legal summations alone. Thus, engaging *experts* or specialists in such cases can be resourceful. Such engagement must be made more structured, where experts are allowed to file detailed briefs addressing legal disputes in their capacity of *amicus curiae*. We also recommend that the Supreme Court drafts and

[46] *Nick Robinson, "A Court Adrift"* The Frontline (3 May, 2013), available at <http://www.frontline.in/cover-story/a-court-adrift/article4613892.ece> (accessed on August 24, 2015) ("*Nick Robinson Court Adrift*").

notifies regulations formalising the engagement of experts in different cases, primarily based on need.

While setting up specialised benches and engaging experts would certainly reduce pendency in particular cases and help in delivering quality judgments, their contribution to reducing the backlog would be limited. For example, the special Tax Bench set up by the Supreme Court has brought down the number of taxation cases pending before it. However, the overall number of judgments for 2015 (when the Tax Bench was sitting) was only marginally better than the preceding year (i.e. 2014). Moreover, setting up such benches will use scarce judicial resources between the aforementioned cases, without making a significant impact on efficiency.

However, in light of the positive effects of the specialised Tax Bench, we still recommend that specialised benches in the aforementioned classes of cases be set up. It can be reasonably expected that such benches will improve the efficiency of the Supreme Court, despite not showing drastic and immediate success.

b) Ad-hoc Appointment of Retired Judges under Article 128 of the Constitution

Article 128 of the Constitution of India empowers the Chief Justice of India to request a former judge of the Supreme Court, or of a High Court who is duly qualified for appointment as a Supreme Court judge, to sit and act as a judge of the Supreme Court, with the previous consent of the President. The Law Commission highlighted the importance of re-engaging retired judges, in exercise of the powers under Article 128, in its 125th Report.[47] The Law Commission made the following recommendations in this regard:

> *"4.8 …These retired judges constitute a pool of rich talent which requires to be fully utilized…. They have sharpened decision-making process which is an asset. Art of adjudication is in their blood. Court processes and court procedure are handy to them. They have acquired a certain expertise in dealing with matters civil, criminal, tax, labour and constitutional, coming before them…*
>
> *4.12…It is recommended that the retired judges, minimum 12 in number, may be requested to sit in four Benches, each of three, and to take up old civil and criminal appeals… For implementing this suggestion, constitutional amendment is not necessary because article 128 will effectively assist in implementing this suggestion…."*

[47] Report 125 (n 8).

The nature and scope of the power under Article 128 of the Constitution is broad and resourceful. As has been duly noted by the Law Commission in its 125th Report, retired judges constitute a skilful pool of adjudicators, with extensive knowledge of law and procedure. At a time when the Supreme Court has repeatedly experienced a massive constraint on its judicial resources, this power can prove to be opportune in reducing the mounting judicial backlog. As per the quantitative study on the Supreme Court's docket undertaken by Nick Robinson,[48] in 2011, seventeen percent (17%) of the regular hearing matters were more than five years old. Additionally, thirty-three percent (33%) of fresh admission matters were languishing at the stage of issuing notice for more than two years.

The above cited figures reflect a troubling trend of increasing delay in justice delivery, especially since they indict justice dispensation by the highest court in the land. The present Report, therefore, reiterates the recommendation of the Law Commission to constitute additional benches of *ad-hoc* judges to adjudicate and dispose older cases.

Such *ad-hoc* appointments certainly inspire confidence as a temporary measure to reduce the cumbersome workload, without compromising the quality of justice delivery. However, the constitution of such additional benches must not replace more permanent institutional and legislative reforms for reducing judicial backlog. This recommendation is merely to temporarily ameliorate the critical situation of judicial backlog by providing expeditious reprieve in long overdue cases. However, other recommendations as discussed in the present Report must be implemented simultaneously to bolster it.

At a time when judicial resources are scarce, it is essential that the provision under Article 128 of the Constitution of India is utilised to enhance the quality, as well as expedite the justice delivery mechanism by the Apex Court. The *ad-hoc* appointment of retired judges will allow to set up specialised courts without diluting the present strength of justices of the Supreme Court. There will obviously be additional costs which must be accounted for by enhancing expenditure on the judiciary. *Ad-hoc* appointments must also not be treated as a permanent solution to the problem of scarce judicial resources. Efforts must be made to make timely appointments to judicial offices and bolster the current strength with additional permanent personnel, including permanent judges.

c) Special Leave Petitions under Article 136 of the Constitution

As has been noted in the earlier parts of this Report, the spate in special leave petitions filed before the Supreme Court is a massive burden on its docket and a primary cause of the

[48] Nick Robinson Quantitative Analysis (n 9).

burgeoning judicial backlog. The power to grant special leave to appeal before the Apex Court is broad and therefore requires judicial discipline in its exercise. This problem of overzealous exercise of the discretionary power in Article 136, requires a multi-pronged solution:

(a). The Supreme Court must exercise greater restraint and judicial discipline, limiting the invocation of this extraordinary jurisdiction under Article 136 to rare cases involving some serious question of law, or otherwise of public importance. This power must not be equated to a fact-finding mechanism, engaged at correcting every possible error in the judgments and orders emerging from the High Courts and numerous tribunals. Some cases which may be considered appropriate for exercising this extraordinary jurisdiction, are as follows:[49]

i) Matters involving substantial questions of law relating to the interpretation of the Constitution of India, or of national or public importance;

ii) Cases including questions on the validity of laws;

iii) Cases involving judicial review of constitutional amendments; and

iv) Cases where the Supreme Court is satisfied there is evidence of a grave miscarriage of justice.

An important caveat is that these aforementioned criteria are not absolute; they are possible yardsticks for the Supreme Court to determine the propriety of allowing an SLP. The actual merit of a case is subjective to its factual matrix and the question(s) of law raised therein. In line with this reasoning, a constitutional bench of the Supreme Court categorically refused to lay down guidelines for curtailing the rate of Special Leave Petitions, in a recent Order.[50] It is important to note that the reform proposed here is not to limit the Court's jurisdiction under Article 136 but merely to suggest the exercise of greater discipline in *interpreting* that jurisdiction. Therefore, it does not conflict with the said Order passed by the constitutional bench, refusing to limit the scope of Article 136, since restricting the Supreme Court's power is different from exercising greater restraint in using that power.

(b). A stringent mechanism of cost imposition must be developed and enforced by the Supreme Court at an institutional level. Litigants experiment and file frivolous appeals in a last ditch attempt to secure their interests, disregarding the constraints such practices pose to judicial time and resources. With inadequate guidance from the concerned advocates

[49] Sh. K.K. Venugopal (Senior Advocate), R.K. Jain Memorial Lecture, transcript available at http://www.thehindu.com/multimedia/archive/00112/R_K__Jain_Memorial__112842a.pdf (accessed on January 12, 2016).

[50] Order dated 11.01.2016 in *Mathai @ Joby v. George & Anr.*, SLP (C) No. 7105 of 2010.

advising and handling these matters, this tendency has become commonplace. It therefore necessitates a harsher imposition of costs on both litigants and lawyers who indulge in or encourage frivolous petitions for special leave to appeal.

(c). The government, being the single largest litigant, should be more efficient in pursuing appeals before the Supreme Court. While the absolute percentage of matters filed by the Government, as our numbers show, is less than 10% overall, in certain types of cases, such as appeals against the orders of the AFT, the Government share in such litigation is overwhelming. Given the low rate of success of such cases and the burden they impose on the Court's time, it is necessary for the Central Government to re-examine its litigation policies.

The National Litigation Policy, 2010,[51] was introduced to curtail the growing trend of frivolous litigation pursued by different departments of the Government. The same policy is in line to be revised; however, it is noteworthy that despite such a policy being in effect since 2010, the rates of government litigation remained unabated, as was highlighted in a status report.[52] It is therefore recommended that the revised Policy, as and when effectuated, should provide a more binding mandate. This is primarily an institutional reform that must be enforced with greater rigour than it has witnessed since its inception. One particular suggestion is to require concerned officials to stipulate their reasons for preferring the appeal, on record, as part of the file noting(s), and to present a cost benefit analysis for preferring an appeal. The revised Policy may incorporate possible departmental action against deviant officials; however, it should also devise a comprehensive programme to sensitize officials and concerned bureaucrats against pursuing frivolous appeals. An example for this is the recent circular issued by the Central Board of Direct Taxes,[53] *inter alia*, prescribing revised '*tax effect*' monetary values for filing appeals before the Appellate Tribunal, the High Courts, as well as SLPs before the Supreme Court. The case for filing an

[51] In pursuance of a resolution presented by the Minister of Law and Justice, Government of India, the National Litigation Policy was launched on June 23, 2010, with the main objective of transforming the government into an efficient and responsible litigant. The Government is now working towards reviewing and revising the National Litigation Policy. See *'National Litigation Policy, 2015 to be implemented soon, says Gowda'*, Business Standard, July 25, 2015, available at <http://www.business-standard.com/article/economy-policy/national-litigation-policy-2015-to-be-implemented-soon-says-gowda-115072500864_1.html> (accessed on January 14, 2016).

[52] *Status Report on the National Litigation Policy*, available at <http://lawmin.nic.in/la/status%20note%20on%20nlp.pdf> (accessed on January 14, 2016).

[53] Circular No. 21/2015, F. No. 279/Misc. 142/2007-IT J (Pt), dated December 10, 2015, available at <http://taxindiaupdates.in/revised-monetory-limit-of-tax-effect-for-filing-appeals-by-department-before-itat-hc-sc/> (accessed on December 29, 2015).

appeal must conform with the prescribed *'tax effect'* values, and also be meritorious enough to pursue the appeal.

While streamlining the filing and admission of SLPs will have a tremendous impact on the overall functionality of the Supreme Court, there are objections to this measure. As was highlighted in the Round Table discussion, the manner in which the Supreme Court has frequented the invocation of its jurisdiction under Article 136, has inspired people to approach the apex court more readily. The Supreme Court has granted special leave to appeal in regular civil and criminal matters, cases pertaining to land acquisition, and other disputes involving questions of socio-economic justice. Thus, a direct consequence of limiting the exercise of the power under Article 136 might be the proportional reduction of such petitions.

But the present recommendation is not an attempt to limit the scope of the jurisdiction conferred on the Supreme Court under Article 136 of the Constitution of India. It advocates the need of greater judicial restraint in exercising this power, in cases which legitimately warrant such intervention by the Apex Court. As the available empirical data evinces, its 'exploding docket' is primarily attributable to the spate in SLPs being admitted by the Supreme Court. Therefore, implementing the present recommendation will have a realistic and significant impact in reducing judicial backlog pending in the Supreme Court.

d) Constitutional Division within the Supreme Court

The Consultation Paper explored the transition of the Supreme Court from a Court primarily adjudicating constitutional issues, to an institution portraying the trappings of a regular court of appeals.[54] As mentioned earlier, in 2014 only seven percent (7%) of the judgments delivered were on constitutional matters;[55] and judgments delivered by constitutional benches of five or more judges, comprise only 0.12% of the total decisions since 2000.[56]

The Apex Court was envisioned to be the highest court sitting on judgment in issues pertaining to constitutional interpretation, and other aspects of public law. However, the above numbers paint a picture incongruent with the original scheme and framework envisioned by the drafters of the Constitution. While it is equitable and just that the Supreme Court has undertaken major initiatives to secure crucial legal, human, and

[54] Nick Robinson Court Adrift (n 48).

[55] 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>.

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

fundamental rights, this cannot be viably pursued at the cost of adjudicating vital constitutional issues.

The recommendation on establishing specialized benches overlaps with the present recommendation. To restore the Supreme Court, or at least gradually augment the number of constitutional matters heard by it, an exclusive *Constitutional* Bench of five judges must be created. Where deemed necessary, the Chief Justice may add more judges to such a constitutional bench, based on the requirements of subjective cases. The Law Commission has recognised and advocated for the creation of a constitutional division of the Supreme Court, in the following words:[57]

> *"The tenth Law Commission in its 95th Report titled "Constitutional Division within the Supreme Court – A Proposal for", submitted in 1984, recommended that the Supreme Court of India should consist of two Divisions, namely, (a) Constitutional Division, and (b) Legal Division. The proposed Constitution Division of the Supreme Court should be entrusted with matters of constitutional law, i.e., every case involving a substantial question of law as to the interpretation of the Constitution or an order or rule issued under the Constitution and every other case involving a question of constitutional law…."*

It is therefore recommended that a Constitutional Bench within the Supreme Court is required to augment its role as the highest court adjudicating constitutional issues. This will be more commensurate with its role envisioned under the constitution, without compromising its position as a bastion of socio-economic justice.

To reiterate, setting up an exclusive constitutional bench will ensure an increase in adjudication of constitutional cases and the determination of important questions of constitutional interpretation by larger benches, as well as reduce the time taken to dispose of constitutional matters. However, as is the case with setting up specialised benches, the said constitutional bench will require at least five judges (or more, if so required in certain cases). Comprehensive planning is therefore imperative to determine which cases will be judged as having constitutional importance and to formulate proper guidelines. The Constitutional Bench must ensure that matters listed before it are in conformity with these guidelines and involve significant questions pertaining to the interpretation of the Constitution, failing which the ends of constituting this exclusive bench will not be achieved.

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[57] Law Commission, 229th Report, f.n. 47; see also, Law Commission of India, 95th Report on *Constitutional Division within the Supreme Court – A Proposal for*, available at <http://lawcommissionofindia.nic.in/51-100/report95.pdf>.

The role of the Supreme Court as the highest court for adjudicating important issues of Constitutional Law is integral to the constitutional framework. Given the decline in its constitutional functions, the constitution of an exclusive bench for these issues is feasible and recommended. Matters before this court should be adequately scrutinised so that unlike with the extraordinary jurisdiction under Article 136, this Constitutional Bench is not exposed to an unrestrained influx of frivolous litigation under the pretext of constitutional, or public importance. As such, this bench must exercise judicial discipline in adjudicating matters, without compromising its 'constitutional' duties.

e) Enhancing Technological Usage to Improve Accessibility and Justice Dispensation

The Round Table discussion yielded an interesting recommendation of enhancing technological aides in courts to improve accessibility and the process of justice dispensation by the Supreme Court. The E-Court Committee of the Supreme Court detailed an elaborate National Action Plan[58] highlighting *inter alia* the significant enhancements of Information and Communication Technology ("ICT"). The present Report reiterates the need to ensure timely completion of this three-phased programme, in order to secure greater access to justice, as well as improve the overall justice delivery process. In this regard, the E-committee of the Supreme Court itself has acted as a watchdog to ensure its implementation. As per its last review in January 2014, Phase I (pertaining to infrastructure and software implementation) was on the cusp of completion. In its document,[59] the E-committee focused on the groundwork for initiating Phase II.

Given the comprehensive set of reforms already underway, we limit ourselves here to reinforcing the need for regular oversight and effective implementation of the aforesaid three phased action. Given the massive resource and time investment in pursuing these reforms and enhancing the ICT capabilities of the Supreme Court, it is critical that the same is effectuated on schedule.

[58] *E- Committee Supreme Court of India*, Policy and Action Plan Document, January 8, 2014, available at http://supremecourtofindia.nic.in/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf (accessed on January 10, 2016). ("*Policy and Action Plan Document*")
[59] *Policy and Action Plan Document*, Id.

f) Transfer Petitions to be Decided by a Single Chamber Judge

The final recommendation to ease pressure on the constrained judicial resources and time of the Supreme Court is with respect to the adjudication of transfer petitions filed before the Supreme Court.[60] The Supreme Court Rules, 2013, stipulate the list of matters which must be placed before a single judge in chambers of the Supreme Court.[61] By analysing data on cases pending and disposed, available from the Supreme Court's website, it becomes evident that regular transfer petitions have become commonplace. The bulk of the transfer petitions, as our data shows, are filed in cases which do not raise substantial questions of law and simply require the court to exercise its discretion to transfer the case based purely on the facts of the given case.

It is therefore recommended that such transfer petitions should be added to the list of matters which may be heard and decided by a single chamber judge of the Supreme Court. The sole objective behind this recommendation is to expedite the hearing of transfer petitions without expending the valuable time of two judge benches, given that these petitions involve procedural questions, rather that complex legal questions. If the chamber judge is of the view that decision on the transfer petition does require adjudication on a question of law or involves interpretation of the Constitution, she should have the power to place the matter before a larger Bench if so required.

The only amendment needed for actually effectuating the present recommendation is in the Supreme Court Rules mentioned hereinabove. An addition of 'Transfer Petitions (both civil and criminal)' under the CPC and Cr.P.C., respectively, to Order V of the said Rules will suffice for implementing this minor reform. As such, there is no potential legislative stalling or other impediments hampering the execution of this recommendation. Also, no additional costs or resources will be incurred in implementing this recommendation as it is to be incorporated in the existing rosters and judicial framework of the Supreme Court. That said, the total number of transfer petitions pending before the Supreme Court, is a small fraction of the overall judicial pendency and backlog. As such, the total impact of this measure in improving efficiency and reducing backlog will not be drastic.

Transfer petitions are still on the rise, however, and they hamper judicial efficiency by taking up considerable time of two judge benches. It would thus be favourable to have

[60] Section 25 of the Code of Civil Procedure, and Section 406 of the Criminal Procedure Code, confer transfer powers on the Supreme Court in civil and criminal matters, respectively.

[61] Order V, Supreme Court Rules, 2013, *Business in Chambers*, available online at <http://supremecourtofindia.nic.in/Supreme%20Court%20Rules,%202013.pdf> (accessed on January 21, 2016).

transfer petitions heard by single judges sitting in chamber, by suitably amending the pertinent provisions of the Supreme Court Rules.

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