India's Judicial Architecture

Nick Robinson*

Introduction

The power and functioning of different branches of government is intertwined with their structure. A bicameral legislature functions differently than a unicameral. The powers of an executive headed by a President differs from that headed by a Prime Minister. The judiciary is no different.

This article describes the architecture of the Indian judiciary–in other words, the different types of courts and judges in the Indian judicial system and the hierarchies and relations between them. In particular, it focuses on how the Indian judiciary coordinates its behavior through appeal and stare decisis and through a system of internal administrative control. Although the Indian judicial system, particularly the upper judiciary (i.e. the Supreme Court and High Courts), plays a central role in Indian political life and is widely covered in the media, there has been limited academic literature on the impact of the judiciary's structure. The functioning of the Indian Supreme Court has only begun to be explored (Dhavan 1978; Robinson 2013), and even less attention has been given to India's High Courts and subordinate judiciary (Dhavan 1986; Moog 2003: 1390; Krishnan et al 2014: 153).[1]

The top-heaviness of the Indian judiciary is striking, both in terms of the relative power of the upper judiciary and the number of cases these courts hear in relation to the subordinate. The origins of this top-heaviness are partly historical. When writing the Indian Constitution the drafters emphasized that the upper judiciary should be accessible to ordinary Indians, especially to enforce constitutional claims. They also wrote in safeguards to protect the judiciary's independence, giving Supreme Court and High Court judges a prominent role in court administration and the appointment of judges. After independence, both the accessibility and self-management of the upper judiciary have been further reinforced and strengthened through legislative action and judicial interpretation. Today, a broad distrust of the subordinate judiciary, both by litigants and judges of the upper judiciary, have led litigants to appeal from, or attempt to bypass, the subordinate judiciary in large numbers. As the Supreme Court in particular has become an omnivorous arbiter of last, and sometimes seemingly first, resort, it has seen an ever-mounting number of matters before it, which has caused a multiplication of judges and benches. These different benches of the Supreme Court give slightly, and sometimes markedly, different interpretations of the Constitution and law more generally, generating confusion over precedent, creating even more incentive for litigants to appeal to the Supreme Court.

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* Research Fellow, Center on the Legal Profession, Harvard Law School. I would like to thank Kartikey Mahajan for providing valuable research assistance.

[1] This article uses the term "subordinate" in referring to district courts and other affiliated courts and tribunals because the Indian Constitution uses this term (*see* Chapter VI of the Constitution of India). "Subordinate" is not meant to imply that these courts are in any way less important than the Supreme Court or High Courts. Indeed, a key thesis of this article is that the Indian judiciary has suffered due to misplaced faith in the powers and abilities of the upper judiciary at the expense of the subordinate.

This top-heavy system has arguably aided the upper judiciary in its active involvement in large swaths of Indian political and social life. However, India's disproportionate reliance on the upper judiciary has also slowed and added uncertainty to decision-making, contributing to the Indian judicial system's well-known underperformance on a range of measures from enforcing contracts to the duration of pre-trial detention.

I. A Hierarchy of Courts

On its face, the Indian Constitution organizes the country's judicial system with a striking unity. Appeals progress up a set of hierarchically organized courts, whose judges interpret law under a single national constitution. Although states may pass their own laws, there are no separate state constitutions, and the same set of courts interprets both state and national law. At the top of the judicial system, there is a single Supreme Court. Upon closer scrutiny of this seeming cohesiveness, however, two types of clear divisions quickly become evident–that between the judiciary's federal units and its different levels.

Each state in India has its own judicial service for the subordinate judiciary and judges of the High Court in a state are overwhelmingly selected from the state's judicial service and the state High Court's practicing bar. At the same time, each state provides funds for the operation of its judiciary. Since states in India are so socio-economically diverse this means that levels of funding for the judiciary can vary considerably, [2] as can the legal cultures, litigant profile, and governance capability of different states. As a result, state judiciaries can perform strikingly differently in terms of professionalism, backlog, and other measures of functioning and quality.

In India, the upper judiciary is traditionally viewed not so much as an extension of the subordinate judiciary, but as categorically distinct–more capable, less corrupt, and with a more central role in enforcing constitutional rights. The judges in the upper judiciary tend to be from generally more high status families and often have already had distinguished professional careers before joining the bench, unlike members of the subordinate judiciary who often join the judiciary directly from law school, making them less assertive and more likely to simply follow the arguments of more seasoned lawyers or the government (Galanter 1984: 481). Although court proceedings are mostly in English in the upper judiciary, and the judgments always are, in the subordinate judiciary proceedings are often in the local vernacular, while decisions are in English (although they are frequently not reported).

Even at the nation's framing, members of the Constituent Assembly, many of whom were lawyers in the High Courts, seemed distrustful of the quality and integrity of the district courts. The Constitution allows for litigants to directly petition the High Courts in constitutional matters (Article 226) and the Supreme Court if their fundamental rights are at stake (Article 32), although in recent years the Supreme Court has encouraged litigants to first approach the High Courts to remedy fundamental rights

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[2] SUPREME COURT OF INDIA, NATIONAL COURT MANAGEMENT SYSTEM POLICY & ACTION PLAN 26-32 (2012) (Showing the allocation and variation of different states' budgets to the judiciary. For example, in Maharashtra over 2% of the budget was devoted to judicial expenditures in 2011, while in Chattisgarh it was about .25%)

violations except for cases of national importance.[3] Article 228 of the Constitution allows for a High Court to withdraw any matter involving a substantial question of constitutional law from a subordinate court to itself. MP Singh has argued Article 228 should not prohibit the subordinate courts from hearing certain limited types of constitutional matters, but in practice the High Courts and Supreme Court are the de facto constitutional courts of the country with the subordinate courts hearing few such cases (Singh 2012).[4] Given the Constitution's length and detail, along with the judiciary's broad interpretation of it, many administrative law and other types of cases are considered constitutional matters and brought directly to the High Courts, further increasing the workload of the upper judiciary and further sidelining the subordinate courts.

A Description of the Courts

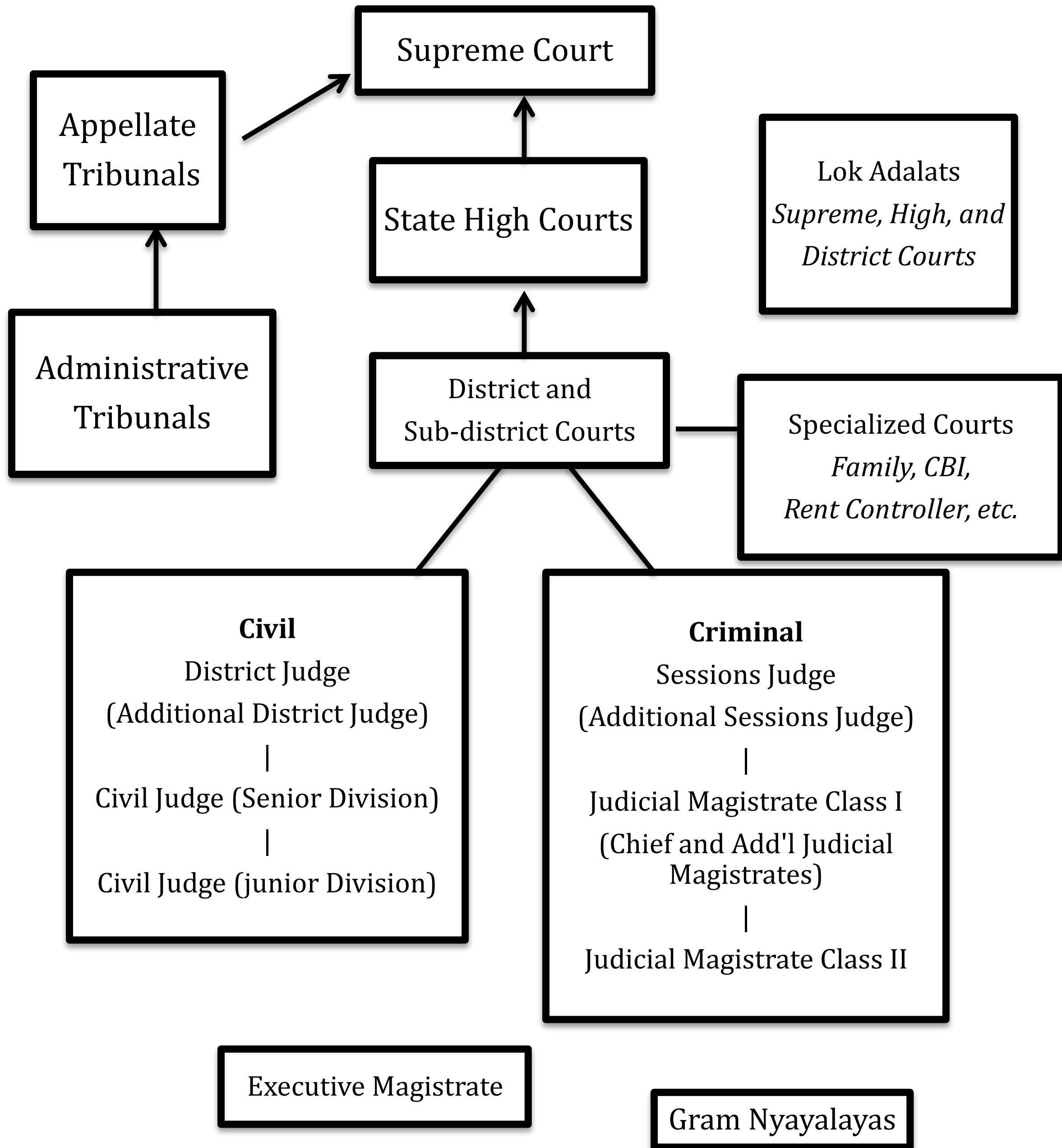
The Supreme Court sits in New Delhi (Article 130). The Chief Justice may also direct that judges of the Court sit in other parts of the country with the approval of the President. There are longstanding demands from those elsewhere in India, particularly the south, for judges to sit in multiple locations as the Court disproportionately hears cases originating from Delhi and nearby states (Robinson JELS 2013: 587). However, the judges of the Supreme Court have traditionally resisted attempts to have benches outside the capital fearing such a practice would weaken the Court's sense of institutional integrity.

In 2014 there were 24 High Courts in India, which ranged in size from 160 sanctioned judges in Allahabad to 3 in Sikkim. No state has more than one High Court (Article 214), but some High Courts have jurisdiction over multiple states (Article 231) and over union territories (Article 230). For example, the Bombay High Court is the High Court for the states of Maharashtra and Goa and the Union Territories of Daman & Diu and Dadra & Nagar Haveli (two island groups off the western coast of India). Although the High Court's principal seat is in Bombay, it also has benches that permanently sit in the state of Goa as well as two other large cities – Nagpur and Aurangabad – in Maharashtra.

[3] See, e.g., *P.N. Kumar v. Municipal Corporation of Delhi*, (1987) 4 SCC 609 (Detailing ten reasons litigants should generally approach High Courts before the Supreme Court for fundamental rights violations)

[4] Article 32(3) though does enable Parliament to pass legislation that would extend the Supreme Court's fundamental rights jurisdiction to other courts, including seemingly the subordinate judiciary.

Diagram One: A Hierarchy of Courts and Judges



There are 640 districts in India each with its own district court.[5] Additional sub-district courts may operate at the block level.[6] Some details that are not obvious from Diagram One are important to note. First, the diagram makes a clear distinction between judges on the civil and criminal side at the district level. In reality, a single judge will often wear both hats. For example, the top judge in the administrative hierarchy in a district court is called a District and Sessions Court Judge as she will hear both civil and criminal matters. Similarly, Civil Judges of the Senior or Junior Division are also often Chief Judicial Magistrates or Judicial Magistrates respectively. Although the District and Sessions Court Judge is the administrative head of the district she is otherwise a first amongst equals with Additional District and Sessions Court Judges in the same district. That is to say, the word "additional" in the title given to judges does not connote a lower rank.

Diagram One is only designed to give a general overview of the structure of the Indian judiciary. Historically there has been significant variation in the names used by different states to refer to types of judges and their grades and some of this nomenclature is still prevalent in parts of India, even if the overall judicial structure across the country is relatively similar. For instance, Junior Civil Judges are sometimes called Munsiffs and Senior Civil Judges are sometimes referred to as Subordinate Civil Judges.[7]

There are also noteworthy differences between Diagram One and the court structure in metropolitan areas.[8] In metropolitan areas the distinction between Judicial Magistrates of the first or second-class is absent and they are collectively referred to as Metropolitan Magistrates. Further, Chief and Additional Chief Judicial Magistrates are referred to as Chief and Additional Chief Metropolitan Magistrates respectively.[9]

The judicial service in the subordinate judiciary in a state will generally be broken up between the regular judicial service and the higher judicial service. District and sessions court judges will be in the more senior cadre while civil judges and magistrates will be in the lower cadre. This distinction proves pertinent not just because it demarcates seniority, but because members of the bar can be recruited directly into the senior cadre if they have practiced as advocates for seven years or more (Article 233(2)).

In most states, original jurisdiction for both civil and criminal matters begins in the subordinate courts. Under the Code of Criminal Procedure, which applies across India, a magistrate of the second class may pass a sentence of imprisonment not exceeding a year, while a Chief Judicial Magistrate can pass a sentence not exceeding seven years.[10] On the civil side, there is more state variation. Each state has a civil courts act under which a judge will have jurisdiction to hear a case depending on the monetary amount at stake in the suit. In the states with Presidency towns (Mumbai, Calcutta, and

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[5] The district (which on average contains about 1.9 million people) is the chief unit of administrative coordination below the state-level.

[6] Each district in India is composed of a number of blocks that can range from 3 to 30 depending on the geography of the district.

[7] LAW COMMISSION OF INDIA, 14TH REPORT: REFORM OF JUDICIAL ADMINISTRATION, vol. 1, 264 (1958) After the First National Judicial Pay Commission (Shetty Commission) Report in 1999 and the Supreme Court's subsequent intervention there has been substantial progress made in harmonizing these variations.

[8] These are areas having a population exceeding 1 million which are designated as metropolitan areas under Code of Criminal Procedure (CrPC), 1973, § 8

[9] CrPC §§ 3 (a) and (b) and 12(2)

[10] CrPC § 29

Chennai) and in New Delhi the High Court maintains original jurisdiction in civil matters above a certain amount or that originate in the old Presidency town itself. In the three Presidency towns, civil matters below such an amount are heard by the 'City Civil Courts.' Original jurisdiction civil matters in Mumbai, Calcutta, Madras, and New Delhi High Courts are heard in different courtrooms than appellate matters with High Court judges rotating between these courtrooms and respective jurisdictions. All high courts may also exercise extraordinary civil or criminal original jurisdiction at their discretion (Article 226).

District courts also frequently house family courts, juvenile courts, Central Bureau of Investigation (CBI) courts, rent control courts, and other specialized courts created under specific legislation. Judges from the regular judicial service cadre will be appointed to these postings. For example, an Additional District Court Judge may be appointed as a principal judge in a family court. For some particular local areas, state governments may after consultation with the High Court of that state establish a special court staffed by judicial magistrates of the first or second class to try particular cases or classes of offences (for example, only murder or rape cases).[11] Judges from the regular judicial cadre are also appointed to administrative posts (i.e. as court registrars and other key administrative staff in the judiciary).

Meanwhile, there are a number of tribunals, commissions, and courts whose judges are generally not drawn directly from the state judicial service, and instead have members that may be retired judges, former bureaucrats, social workers, or members of civil society. These non-cadre postings include consumer commissions, tax tribunals, administrative tribunals, labour courts, competition commissions, and environmental tribunals. Some of these tribunals are appealed to the High Court while others have specialized appellate bodies that may then be directly appealed to the Supreme Court. Litigants frequently attempt to bypass some of these tribunals (or the subordinate courts) by making a constitutional claim and bringing their matter directly to a High Court under its original jurisdiction for violations of fundamental rights.

Before independence, district magistrates, then appointed by the executive, could both prosecute and judge criminal matters in their district. One of the long-standing demands of the Indian independence movement was for the separation of these executive and judicial functions.[12] At the Constituent Assembly debates Jawahrlal Nehru reassured the delegates that the newly independent government would quickly secure the independence of the judiciary.[13] Embodying this promise, Article 50 of the Directive Principles states that, "The State shall take steps to separate the judiciary from the executive in the public services of the State." However, it was not until the 1973 Code of Criminal Procedure that this commitment was brought about by creating separate judicial magistrates.[14] Notably, even after 1973 there still are "executive magistrates", who are drawn from the administrative, not the judicial, service whose functions are administrative or executive in nature, such as the granting, suspension, or cancellation of

[11] CrPC § 11(1).
[12] Constituent Assembly Debates (CAD): Vol. 7 590 (Dr. Bakshi Tek Chand, Nov. 25, 1948)
[13] CAD: Vol 7, 589 (Jawaharlal Nehru, Nov. 25, 1948)
[14] Shetty Commission - 6.11 In order to bring about complete separation of judiciary from the executive, the Code of Criminal Procedure, 1973 ("1973 Code") was enacted.

a license, the hearing of a tax dispute, or the sanctioning of a prosecution.[15] For instance, tehsildars, who are revenue administrative officers, collect taxes and set land boundaries at the local level as well as hear disputes related to these functions.

Finally, there has been a push over many decades to create a more informal justice system through Lok Adalats[16] and alternative dispute resolution, as well as more local justice through Gram Nyayalayas.[17] These alternative dispute forums loosen procedural standards in order to quicken the hearing of more minor matters, and draw on historical ideals of village justice, even if the actual forums have become relatively formalized by the state. Some critics contend that poorer litigants rights are more vulnerable in these forums that lack as many procedural safeguards and the rigor of the regular courts (Galanter and Krishnan 2004; Guruswamy and Singh 2011).

Backlog and Top-Heaviness in the Judicial System

The Indian courts are notoriously backlogged, with cases often taking years and sometimes decades to resolve. Common explanations of backlog include a shortage of judges, poor judicial management of cases, procedural complexity, a promiscuous system of appeal, and, on the criminal side, the relatively rare use of plea-bargaining. While India's courts are certainly clogged, India itself has a relatively low per capita litigation rate. This is not surprising as more developed economies typically have higher civil litigation rates and, indeed, within India more economically and socially prosperous states have higher civil litigation rates than other states (Eisenberg, Kalantry, and Robinson 2013). This low per capita litigation rate does mean though that as India further develops economically it can expect to have even more cases enter its courts.

The upper judiciary hears a relatively large number of cases in the Indian court system. For example, in 2012 the subordinate courts disposed of 4.3 million civil matters and 13.9 million criminal matters, while the High Courts disposed of approximately 1.16 million civil matters and 625,000 criminal matters.[18] In other words, the High Courts were hearing 27% as many civil matters as the subordinate judiciary. Meanwhile, in 2012 the Supreme Court disposed of about 51,000 civil matters and 13,600 criminal matters.[19]

This top-heaviness has seemingly increased in recent years. Between 2005 and 2011, the number of cases disposed of by all the High Courts increased by about 33.4 per cent. During the same period, the number of cases that were appealed to the Supreme Court increased by 44.8 per cent and the number of cases the Court accepted for regular hearing increased by 74.5 per cent. Meanwhile, the number of cases disposed of by the subordinate courts grew by only about 7.8 per cent (Robinson JELS 2013: 581). In other words, litigants seem to be bypassing the subordinate judiciary where possible, appealing to the Supreme Court in greater numbers, and increasingly having those appeals accepted.

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[15] CrPC § 6

[16] Lok Adalats first found statutory backing in Ch. VI, The Legal Services Authority Act 1987

[17] Gram Nyayalayas were formalized in the Gram Nyayalayas Act, 2008

[18] In fact, these statistics give the impression that more full cases are being heard in the subordinate judiciary than actually are, since they include routine, and often uncontested, cases. For example, almost 40% of matters in the subordinate courts in 2010-12 involved traffic tickets. LAW COMMISSION OF INDIA, ARREARS AND BACKLOG: CREATING ADDITIONAL (WO)MANPOWER 78 (2014)

[19] These statistics are compiled from Court News available on the Indian Supreme Court's website.

This pattern seems to indicate either a breakdown in precedent giving by judges in the Supreme Court or precedent following by judges in lower courts.

The overall result is a judiciary whose caseload often looks more like an isosceles trapezoid than a pyramid. The wealthy and the government are in a better position to push their cases to the upper judiciary at the top of this isosceles trapezoid. In particular, they can hire prestigious, and expensive, lawyers who are well known for their ability to ensure that judges in the upper judiciary accept matters for hearing and secure interim orders, which are particularly important in a system where cases routinely take many years to be resolved (Galanter and Robinson 2014). While it is unlikely that the growth of matters in the upper judiciary will continue to outpace the growth of matters in the subordinate judiciary at such a striking rate, the large number of cases that the upper judiciary, and particularly the Supreme Court, hears has important consequences for the functioning of the overall judicial system as the next section explains.

II. Stare Decisis and Polyvocality

Since opening its doors, the Supreme Court has witnessed an ever-ballooning increase in its workload. Today, panels of two judges typically hear whether the Court should admit a case. This practice occurs during admission hearings, which currently occur on Monday and Friday, during which a single bench will commonly hear 70 or 80 matters. If a case is accepted for admission it is then heard during what is called a regular hearing. Regular hearing days are currently Tuesday, Wednesday, and Thursday, and a panel of generally two judges will hear anywhere from one to several regular hearing matters in a single day. In its first year of operation in 1950 over a 1,000 admission matters were filed with the Supreme Court. By 1970 over 4,000 were, and by 1980 this had jumped to over 20,000. The number of regular hearing matters it disposed of tracked a similar curve rising from 227 in 1951 to 2,433 in 1980. In 2010, almost 70,000 admission matters were filed with the Court, while it disposed of 7,642 regular hearing matters (Robinson 2013: 180-81). The Supreme Court now hears cases almost year round. Even when most of the justices are in recess for much of May and all of June a vacation bench sits to hear pressing matters. To accommodate the increasing number of cases, Parliament increased the maximum size of the Court from its original 8 judges to 11 in 1956, 14 in 1960, 17 in 1977, 26 in 1986, and finally to 31 judges in 2008 (Robinson 2013: 182).

The value of prioritizing wide access to the Court, which has led to this multiplication of benches and judges, has roots that are both idealistic and pragmatic. The Indian Constitution, and by extension the judiciary, was charged with changing a country rooted in hierarchy into one that internalized the liberal values of equality and due process for all its citizens. Arguably, a Supreme Court active in many cases has more opportunities to act as this sort of democratic school master, working to instill these values in a society still frequently resistant. The idea that anyone who has had their constitutional right violated can appear before a panel of the Supreme Court to have their case heard has deep democratic resonance. It is a populist ideal that carries added weight in a country wracked by sharp class, religious, caste, and ethnic divisions.

Wide access also has clear practical benefits. Accepting more cases for regular hearing allows the Indian Supreme Court to actively police the high courts, the

subordinate judiciary, and the assorted tribunals that have arisen since independence. Both the Supreme Court and many members of the public seem to distrust these courts, fearing that they might be incompetent, corrupt, or that local parochial interests such as caste biases or state politics unduly influence their decisions. Meanwhile, the somewhat peculiar, and time-consuming, practice of hearings for admission matters in the Supreme Court is a product of a system where written submissions are often under-developed and heavy reliance is placed on oral argument.

While Article 141 of the Constitution binds the rest of the judiciary to the Supreme Court's decisions, given its many benches speaking of *the* Indian Supreme Court is in many ways a misnomer. Instead, the many benches that make up the Court are perhaps better thought of as constituting a "polyvocal court" or "an assembly of empanelled justices" (Robinson 2013: 184; Baxi 2014: xvii). Any given bench may have a slightly different interpretation of the law than another bench, and sometimes a starkly different one (Chandrachud Interpretation Chapter OUP (forthcoming); Robinson 2013: 185).

The Indian Supreme Court itself is not bound by its past precedent, but may overrule decisions that are "plainly erroneous" based on "changing times" (*Bengal Immunity Company Limited v. The State of Bihar and Others* 1955 2 SCR 603). Although in *Keshav Mills Co. Ltd vs Commissioner Of Income-Tax*, 1965 AIR 1636, the Court warned that when deciding to overturn its decisions the Supreme Court should be cautious and that it should endeavor to create continuity and certainty in the law.[20] Statements that are not part of the *ratio decidendi,* or the principle upon which the case was decided, are considered *obiter dicta* and are not authoritative or binding precedent. Similarly, a judgment is not binding if it is made *per incurium* (i.e. based on ignorance of the terms of a statute or related rules), *sub-silentio* (i.e. made without any argument or reference to the critical point of law), or if the judgment is based on the consent of the opposing parties and they agree the judgment will not be binding. (*State of Uttar Pradesh v. Synthetics* (1991) 4 SCC 139; *Municipal Corporation v. Gurnam* (1989) 1 SCR 101).

A Supreme Court bench's precedent is binding not just on the rest of the judiciary, but also on smaller or equal sized benches of the Court, making much of the typical work of a Supreme Court judge resemble that of a High Court judge, unable to overrule previous Supreme Court decisions (Dhavan 1978: 36). In *Union of India vs. Raghubir Singh* 1989 2 SCC 754 the Court found that "the ideal condition would be that the entire Court should sit in all cases to decide questions of law . . . But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions." Affirming a long standing rule to promote consistency, in *Central Board of Dawoodi Bohra Community and Another v. State of Maharashtra and Another*, (2005) 2 SCC 673 a five-judge bench held that "The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength." The Court further found that a smaller bench should not publicly express doubt of the opinion of a larger bench, but may place it before the Chief Justice to be referred to a bench of coequal strength, which if it also doubts the judgment may place it before a

[20] Reaffirmed in *Jindal Stainless Ltd.& Anr. vs State Of Haryana & Ors.* on 16 April, 2010

bench of a larger strength. The Chief Justice may independently place any matter before a bench of any strength.[21]

Since overruling, or partially overruling, previous decisions requires ever more populated benches, large bench decisions become increasingly entrenched. For example, *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 is a seminal decision that laid down the basic structure doctrine, which allows the Court to strike down constitutional amendments if they violate a certain judicially interpreted "basic structure" to the Indian Constitution. Thirteen judges decided the case, in part because it needed to overrule an earlier bench of eleven judges. If *Kesavananda Bharati* is to be reconsidered, either in full or in part, a bench of fifteen judges is required or a smaller bench must carefully reinterpret parts of *Kesavananda Bharati* while claiming to be in compliance with the judgment.[22]

Rules over the precedent-setting ability of different bench sizes take on added relevance today as the Court mostly sits in benches of the minimum required two judges (The Supreme Court Rules, 1966: Order VII). In its early days, the Supreme Court generally sat in benches of three, five, or more judges. As more matters have come to the Court and backlog has increased, it has adopted smaller two judge benches to cope, even though historically a two-judge bench was considered a "weak bench" (Robinson 2013: 108). Traditionally, on a two-judge bench the opinion of the more senior judge prevails, although if the junior judge does disagree with their fellow judge they can dissent and the matter will be heard by a larger bench. This practice of hearing so many cases with two judges has not been without controversy. In *Union of India vs. Raghubir Singh* 1989 2 SCC 754 Chief Justice Pathak wrote that "We would . . . like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless for compelling reasons that is not conveniently possible." These words though have not been followed and the widespread use of two judge benches to hear both important (and relatively unimportant) matters has become the norm.

While smaller benches are supposed to follow the decisions of larger ones, the plethora of benches has lead to doctrine from different benches that often seems contradictory or at odds with itself. Overworked judges that are strained to capacity exacerbate this challenge. Rajeev Dhavan has described Indian Supreme Court judges as lacking "precedent consciousness" (Dhavan SCI: 450) while Upendra Baxi has noted Supreme Court judges will misapply or simply overlook previous holdings (Baxi 1983: 38) and that "neither the value of certainty nor that of finality has a very strong appeal to justices of the Supreme Court of India." (Baxi 1983: 45) Although these statements were made some thirty years ago, they could be equally applicable today. The ambiguity that develops from this system in predicting the Court's future orders adds uncertainty to a wide range of social, political, and economic relations and arguably motivates more cases

[21] In *Pradip Chandra Parija and Others vs. Pramod Chandra Patnaik* Dec. 4, 2001 the Court found that if a case involves a substantial question of the interpretation of the constitution and so implicates Article 145(3) than two judges may refer a matter directly to a Constitution Bench.

[22] This system of ever-increasing bench sizes did not have to be adopted and it is unclear why it was. The Court could instead have a rule that a bench of a certain size–perhaps seven or nine judges–could overturn a bench of any other size, even if smaller benches had to conform with the decisions of these larger benches.

to be brought to the Supreme Court.[23] Litigants realize even if their case is not strong that with a sympathetic bench they could get a better ruling so it may be worth taking the time and money to appeal. This uncertainty in the law also discourages private settlement as parties are less certain of how a court would ultimately rule in their case.

In theory, larger benches are supposed to clarify conflicts between smaller benches, and under the Indian Constitution five or more judges must hear any "substantial question of law as to the interpretation of the Constitution" (Article 145(3)), but there has been a decline in such larger benches. In the 1960's on average about 100 cases a year were heard by these "constitution benches" of five or more judges. After the Emergency, this dipped to about 10 a year as the Supreme Court was overwhelmed with other more ordinary matters (Robinson et al. 2011: 28). Determining the *ratio decidendi* of these judgments can also be difficult as they have on average gotten longer and more fractured after the Emergency, frequently making the holding of the majority difficult to discern (Robinson et. al: 30).

The Indian Supreme Court has given little guidance to what constitutes a "substantial question of Constitutional law" that is required to be heard by five judges as required by Article 145(3) of the Constitution.[24] However, the exact same language is used in two other places in the Constitution allowing for intratextual comparison. According to the Constitution, a "substantial question of law as to the interpretation of the Constitution" also can can be certified by a High Court to be heard by the Supreme Court (under Article 132) and can be withdrawn from a subordinate court to be decided by a High Court (under Article 228). Despite using identical language, articles 145(3), 132, and 228 have in practice been interpreted markedly differently. In recent years, under 145(3) five or more judges of the Supreme Court seem to generally only hear constitutional matters of very high jurisprudential or national importance, and do so rarely. Meanwhile, the High Courts seem to have adopted more of a middle path in its interpretation of the same language in Article 132, with High Courts certifying many, but certainly not all, constitutional matters to be appealed to the Supreme Court. Meanwhile, under 228 almost all matters in the subordinate judiciary that involve constitutional interpretation are withdrawn to a High Court. For the drafters of the Constitution a "substantial question of law as to the interpretation of the Constitution" seems to have meant any case where the substantial issue at stake was constitutional interpretation (in other words, the case could not be decided without deciding a constitutional question).[25] This is similar to how Article 228 is interpreted today, but not Article 132 or Article 145(3).

Those who advocate for more five judge benches by the Supreme Court argue that having such benches would reduce confusion over precedent, increase the quality of decisions, is supported by an intra-textual reading of the Constitution, and is in line with the founders vision. Yet, having significantly more five judge or larger benches would entail costs. The Court would need to either add more judges, thereby creating even more

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[23] If a High Court bench finds two Supreme Court judgments conflicting it should follow the one that it views as more accurate. *Amar Singh Yadav v. Shanti Devi*, AIR 1987 Pat 191

[24] Chintan Chandrachud Interpretation Chapter, Oxford Handbook on the Indian Constitution (forthcoming)

[25] CAD: Vol. 8, 613 (June 3, 1949, Ambedkar noting that all appeals to the Supreme Court involving constitutional questions should be heard by five judges).

possibility for contradictory precedent, or hear fewer matters, which some fear would leave the Supreme Court less opportunity to correct erring decisions of lower courts.

Judicial and Litigation Entrepreneurs and Chief Justice Dominance

The distinctive structure of the Supreme Court allows for different types of relations between judges, as well as the Court and litigants, impacting the Court's jurisprudence as a result. For example, the development of public interest litigation would have been far less likely without the Court's panel structure. Judicial entrepreneurs such as Justices Bhagwati, Iyer, and Verma played a leading role in developing public interest litigation (PIL) in the 1980's and 1990's frequently issuing decisions from smaller benches on which they were the senior judge. Litigation entrepreneurs from civil society who bring PIL are also able to use the Court's structure to attempt to shop for benches, using procedural techniques to try (not always successfully) to have their case heard by judges that may be more sympathetic to their arguments. The detailed orders and long hearings in public interest litigation cases were made possible on a widespread basis at the Supreme Court level by having a large number of smaller benches with the capacity to commit the time necessary to hear these cases. For instance, in the right to food case the Supreme Court issued over forty orders in a case that has gone on for over ten years, managing many of the country's primary social welfare programs on the basis of pleadings from the parties and recommendations by right to food commissioners who were appointed by the Court to help oversee its orders (Robinson 2013: 117).

When judges on smaller benches create new innovations like certain types of public interest litigation it enters a feedback loop. The press, public, and bar react with favorable or unfavorable views. If there is a largely favorable reception an expectation is created that other judges should follow a similar line of reasoning. Letting smaller benches first experiment with new paths in jurisprudence allows other benches of the Court to better understand the feasibility and real world implications of its judgments.

Having precedent more regularly reinterpreted through different Supreme Court benches may also be a strength in a country where there is little national consensus on many political issues from caste-based reservations to environmental policy. The judges can use their discretion to navigate the particularities of a specific case rather than try to impose a more cohesive jurisprudence. In this way, the Court's pluralistic polyvocality can be seen as a tool, conscious or not, to keep the law and the Court as an open arbitrator between different social and political forces with divergent views (Robinson 2013: 190).

While the Indian Supreme Court's polyvocality can seem almost anarchic, there are also forces that help foster more cohesiveness.[26] As has already been mentioned, there are theoretically strong precedent rules that oblige judges to at least be perceived as following the Court's precedent. The Chief Justice of India also plays an important role

[26] In order to help reduce backlog and resolve conflicts in the High Courts, in 1976 the forty-second amendment (further amended by the forty-fourth in 1978) gave the Supreme Court power to transfer a case to itself if two High Courts were hearing substantially the same questions of law that are of general importance (Article 139A(1)). The Supreme Court may also transfer cases if it deems it expedient to do so for the ends of justice (Article 139A(2)). This gives the Supreme Court preemptive power to clear up conflicts between High Courts. However, in reality since the multiple benches of the Supreme Court often have somewhat contradictory doctrine this frequently does not more generally help clarify precedent except for in the particular case or cases being heard.

in unifying and policing the system. The Chief Justice (who so far has only been male) selects which judges will sit together on panels, meaning he can place outlier judges on panels with more senior judges, making their voice less likely to be heard. The Chief Justice may also direct important cases to his own bench or other benches. Finally, he chooses when to constitute five judge or larger benches and who will be on them. As a result, he can influence the outcome of matters by simply choosing judges that he thinks will lean towards a certain outcome. For example, since independence the Chief Justice has been 6.5 times less likely to be in dissent than another judge on constitution benches, perhaps indicating that the Chief Justice is arranging benches that are less likely to disagree with him (Robinson et al. 2011: 31).

While Supreme Court judges, and in particular the Chief Justice, may seem to have considerable discretionary power, this power is checked by the relatively short time they have on the Court. Between 1985 and 2010 the average Indian Supreme Court judge was appointed to a High Court at the age of 45 and to the Supreme Court at the age of 59, which means on average they served six years on the Supreme Court (Chandrachud 2011: 72). The Chief Justice of India is appointed by the President (Article 126), but by tradition is the senior-most judge on the Supreme Court, meaning that a typical Chief Justice is Chief Justice for just over a year. Since judges' terms on either the Supreme Court or High Court are comparatively brief this limits the power of any given individual judge. At the same time, it may help empower prominent lawyers who will often be well respected fixtures at the Supreme Court and in the High Courts for much longer periods than the judges, giving these lawyers both potential reputational and institutional knowledge advantages over the judges (Galanter and Robinson 2014).

III. Management of the Courts

Besides hearing a disproportionate number of cases, the upper judiciary in India is also centrally involved in governing the judicial system. This is in part by constitutional design and in part by the upper judiciary, and in particular the Supreme Court, claiming more authority over the years, diluting, although certainly not eliminating, the role the executive plays in judicial appointments, management, and funding.

Under the Constitution, Supreme Court judges are appointed by the President in consultation with Supreme Court judges and with High Court judges that the President deems necessary (Article 124(2)). A Supreme Court judge must have been a High Court judge for at least five years, an advocate at a High Court for at least ten years, or a distinguished jurist (Article 124(3)). Somewhat analogously, under the Constitution, High Court judges are appointed by the President of India in consultation with the Chief Justice of India and the Chief Justice of the concerned High Court (Article 217). High Court judges must be High Court advocates with ten years or more of experience or judicial officers of the subordinate judiciary with ten or more years of experience (Article 217(2)). Currently, about one-third of High Court judges are promoted from the judicial service and two-thirds are selected from the bar directly.[27] High Court judges are traditionally selected from the state or states over which the High Court has jurisdiction. However, since 1983 there has been a policy of having the Chief Justice of each High Court be a senior High Court judge transferred from another state to ensure greater

[27] Chief Justices Conference 2009, Notes on Agenda Items, Aug. 14-15 (2009)

independence from local considerations (the President appoints the Chief Justice under Article 223 of the Constitution). The Law Commission recommended in the late 1970's that one-third of High Court judges should come from outside the state, but this proposal has never been implemented.[28]

While under the Constitution, it is the President who appoints Supreme Court and High Court judges in consultation with the judiciary, in practice the Supreme Court has a controlling hand in appointments. Through its orders in what is collectively known as the Three Judges Cases (*SP Gupta v. Union of India* AIR 1982 SC 149; *Supreme Court Advocates-on Record Association vs Union of India* AIR 1994 SC 268; and *In re Special Reference 1 of 1998*, AIR 1999 SC 1) the Court evolved new rules for the appointment and transfer of judges in the upper judiciary in order to guard against what it perceived as undue influence from the executive. Under this jurisprudence a collegium of the Chief Justice of India and the four most senior other judges recommends appointments to the Supreme Court. High Court judges are appointed on the recommendation of the Chief Justice of India, the two most senior judges of the Supreme Court, and the Chief Justice of the concerned High Court. These recommendations are almost always followed and the judiciary cannot be bypassed in the appointment process. Although appointments to the Supreme Court and transfers to be Chief Justice of a High Court are based on merit, seniority has traditionally played a central role in these appointments. In recent years, the Chief Justice of India has always been the judge who has served the longest on the Indian Supreme Court, making it possible to predict who will become the Chief Justice years in advance with a great deal of accuracy.

Under the Constitution the President may transfer High Court judges with the consultation of the Chief Justice (Article 222). During the Emergency sixteen judges were transferred as a punitive measure. Partly as a result, the *Supreme Court Advocates-on-Record* case required that all transfers be initiated by the Chief Justice with the consultation of the four most senior Supreme Court judges as well as any Supreme Court judges familiar with the concerned High Court.

The Supreme Court also creates its own rules as to who may practice before it, how proceedings are governed, what fees it may charge, and how it hears cases (Article 145). The administration of the Court, including the appointment and management of its staff, is directed by the Chief Justice and paid for out of a common fund (Article 146).

Subordinate Courts

To staff the subordinate courts, each state has its own judicial service that is chosen through competitive examination. The High Court, through a committee of judges, sets and administers the exam, although in some states this is done with the involvement of the state public service commission. The governor of a state appoints the judges of the subordinate judiciary, but must do so by consulting the High Court, and jurisprudence (see e.g. *M.M. Gupta v. State of Jammu & Kashmir* AIR 1982 SC 1579) has made clear the governor must as a rule follow the High Court's directions (Article 233).

Article 227 gives the High Court superintendence over all courts and tribunals in its jurisdiction (except military tribunals), allowing them to make rules for these courts

[28] India Law Commission, Eightieth Report on the Method of Appointment of Judges 33 (1979)

and call for returns. The High Courts control the posting, transfer, and promotion of judges in the subordinate judiciary in its jurisdiction (Article 235). A High Court can delegate some of these powers to an administrative committee of judges, but decisions of appointment, promotion, and disciplining are done during sittings of the entire High Court. The Chief Justice of the High Court is in charge of administering the bureaucracy of the High Court (Article 229), although in practice many of these duties are often delegated amongst the Court's most senior judges.

There has been a longstanding call for the creation of an All India Judicial Service to staff the subordinate judiciary. It has been argued that such a pan-Indian judicial service, modeled on the vaunted All India Administrative Service, would be more prestigious and so attract higher quality and more professional judges to the subordinate judiciary that would be less likely to entertain parochial interests since they would generally not be posted to the state of their origin. In 1976 Article 312 of the Constitution, dealing with the All India Services, was amended to explicitly allow for the creation of an All India Judicial service for the upper tier of the subordinate judiciary. The Supreme Court ordered the creation of an All India Judicial Service in 1992 (*All India Judges Association v. Union of India* AIR 1992 SC 165), but despite declared support from the Supreme Court and multiple Prime Ministers this order has yet to be fulfilled, in part because of resistance by state governments as well as state bar councils and members of the subordinate judiciary.

The state government also plays an important role in administering the courts in their state. Judicial appointments, both in the subordinate judiciary and the High Courts, are approved in part by the state government and funding, including for new posts and infrastructure improvements, is approved by the law minister of the state. Although there are few open conflicts between the judiciary and the government over the budget, the judiciary has long complained that it does not receive enough money from the state governments, which judges claim lead to under-resourced and backlogged courts (Chief Justices Conference 2009: 48-50).

Traditionally High Courts were at the center of judicial power in India and at independence they were given a dominant role in administering the subordinate courts in each state, while the Supreme Court was not provided with extensive powers to manage either the High Courts or the judiciary more broadly. However, the Supreme Court through its own, often wide, interpretation of the Constitution has subsequently provided for itself a pivotal, and frequently trumping, role in governing the rest of the judiciary.

Besides directing the creation of an All India Judicial Service, in *All India Judges Association v. Union of India* AIR 1992 SC 165 the Supreme Court ordered infrastructure and amenities for the subordinate judiciary be improved, found that recruits to the judicial service should have at least three years experience at the bar, and ordered the retirement age of the subordinate judiciary be raised to 60. In *All India Judges Association vs Union Of India* AIR 2002 SC 1752 the Court partially reversed its earlier decision and found that recruits to the judicial service did not require previous experience at the bar, as this had led to difficulty in recruiting qualified lawyers. The Court also called on the government to increase the strength of the subordinate judiciary from "the existing ratio of 10.5 or 13 per 10 lakhs people to 50 Judges for 10 lakh people" as well as increase the judiciary's pay scale. The decision also laid out guidelines for recruitment into the higher judicial service. In *Brij Mohan Lal v. Union of India* (2012) 6 SCC 502 the Supreme

Court directed that fast track judges, who had been funded by the central government, be regularized into the state judicial services. The Supreme Court has also quashed disciplinary and other actions against subordinate judges by High Courts (see, e.g., *R.C. Sood v. State of Rajasthan*, 1995 AIR SCW 198).

The Supreme Court has indirect influence over the subordinate judiciary through its interaction with High Court judges, particularly High Court Chief Justices, who often are eager to be appointed to the Supreme Court. The Conference of State Chief Justices is led by the Chief Justice of India and will frequently issue multiple resolutions impacting the administration and staffing of the subordinate judiciary.[29] Supreme Court judges will also interact with High Court judges at the National Judicial Academy in Bhopal and through other more informal meetings, giving them more opportunities to influence how High Court judges manage both the High Courts and the subordinate judiciary.

Finally, the Supreme Court performs a coordinating and information role. It tracks the number of instituted, disposed, and backlogged cases throughout the judicial system, the number of judicial officers and vacant positions, and has been working to create a National Court Management System to improve these information gathering and dissemination processes.[30]

Accountability

While the design of the Indian judiciary has insulated judges from the demands of the executive, it also makes them much more susceptible to the demands of judges further up the judicial hierarchy who may control their prospects for promotion or transfer. This power is accentuated by the tiered retirement age of judges. Subordinate court judges retire at 60 and so are eager to be appointed to the High Court if possible where retirement is at 62 (Article 217), while High Court judges desire to be appointed to the Supreme Court where retirement is set at 65 (Article 124(2)). In other words, promotion not only carries prestige benefits, but failure to be promoted can lead to an earlier end to one's judicial career.

Interactions between subordinate court judges and High Court judges are frequent and often demanding. For example, subordinate court judges are typically assigned to a committee of High Court judges, who in turn monitors and reports on their work. These reports are included in the subordinate court judges' file and form an important part of the information that informs decisions over the judges' promotion, which is done on the basis of seniority cum merit. This internal promotion of subordinate court judges ensures independence from the executive, but creates a high degree of norm following within the system as judges try to ensure they please – or at least do not upset – superiors within the judiciary. Judges both in the High Courts and subordinate courts may even shirk controversial cases by delaying their decision in order to not draw unfavorable attention from judges further up the hierarchy.

While the salary of judges is fixed by statute and cannot be reduced during their tenure (Article 125 and Article 221), some have claimed that judges become more sensitive to the concerns of the executive and corporate interests as they near retirement as after retirement many wish to be appointed to either positions on public tribunals or

[29] See, e.g., Chief Justices Conference Resolutions 2013, April 5-6 2013

[30] *See*, *e.g.*, Supreme Court of India, National Court Management Systems Action Plan (2012)

commissions (a decision made by the executive) or to arbitration panels (whose members are chosen by the – usually corporate – parties of the dispute). The base salary of a Supreme Court judge is currently 90,000 Rs a month and their pension is similarly modest.[31] Meanwhile, an elite well-paid advocate can make 400,000 Rs for just one appearance before the Supreme Court (Galanter and Robinson 2014). During their tenure, judges do have housing provided for them by the state, often in desirable locations, as well as a government car, driver, and other perks. These perks though may further incentivize some judges to find work after retirement that will allow them to maintain a comparable standard of living.

Adding to their post-retirement financial predicament, former Supreme Court judges may not practice again before any court in India (Article 124(7)), while High Court judges cannot practice again before any subordinate court (Article 220) and by tradition do not argue in the High Courts. Many former High Court judges are appointed as senior advocates at the Supreme Court once they retire, but it is usually difficult to start a robust Supreme Court practice so late in one's career.

Aspects of the self-management of the judiciary have been subject to particular scrutiny, leading to two major proposed reforms. Responding to criticisms of an opaque and unresponsive system to deal with complaints against judges (particularly regarding corruption) the Judicial Standards and Accountability Bill (2010) would require judges to declare their assets and creates a national oversight committee to hear complaints against judges comprised of a former Chief Justice of India, a current Supreme Court judge, a current High Court Chief Justice, the Attorney General, and an eminent person nominated by the President. Currently, these complaints are dealt with at the discretion of the Chief Justice. In the extreme, a Supreme Court or High Court judge may be removed by a two-thirds majority of both houses of Parliament for proved misbehavior or incapacity (Article 124(4) and 217(1)(b)).

In 2014 Parliament passed the Constitutional (121st Amendment) Bill, which establishes a National Judicial Appointments Commission (the amendment is yet to be ratified by one-half of the states as required by the Constitution). Under the amendment, a National Appointments Commission would appoint and transfer High Court and Supreme Court judges. It would be comprised of the Chief Justice of India (CJI), the two other senior most judges of the Supreme Court, the Union Minister for Law and Justice, and two eminent persons to be nominated by the Prime Minister, the CJI, and the Leader of Opposition of the Lok Sabha. Under the National Judicial Appointments Commission Bill (2014), passed in conjunction with the amendment, appointments would effectively require at least five votes of the six-member commission to be approved. The commission is meant to be more transparent, meritocratic, and accountable than the previous collegium system which was accused of incestuousness and sycophancy.

If the National Appointments Commission and Oversight Committee come into being they will likely create a new set of incentives for judges' behavior. While it will still be important for judges lower in the hierarchy to remain in good standing with judges further up the hierarchy they will also likely want to have their behavior be viewed favorably by the other political and apolitical actors that will become involved in appointments, transfers, and disciplinary action. This will likely shift influence to

[31] Sect. 12A, Act and Rules Governing the Service Conditions of Supreme Court Judges (2009)

political actors and to Delhi, as the influence of High Court judges and state governments decrease.

Conclusion

The Indian judiciary is a polycephalic creature – whose largest heads can snarl and sometimes bite – but which for much of its history has had an emaciated body. By centralizing power in the upper judiciary, and particularly the Supreme Court, the judiciary has helped protect and consolidate its independence, as well as corrected some of the worst errors of the rest of the judiciary. However, this top-heavy system has also led to promiscuous appeal, destabilizing stare decisis and creating more delay in the resolution of disputes. The interpretation of the Constitution, and law in general, frequently becomes polyvocal and in flux.

Today, India is investing more resources in its courts, including the subordinate judiciary. Nothing should be taken away from the critical role the High Courts and Supreme Court have played in checking some of the worst abuses or omissions of the state, but if the Indian judiciary is to truly be democratized it will be in the subordinate courts. It is only judges at a more local level that can systematically ensure a citizen unfairly imprisoned by the police or a shopkeeper attempting to enforce a contract receives justice.

Empowering the subordinate courts will require reforming the top-heavy nature of the Indian judiciary. For instance, the Supreme Court could hear fewer regular hearing matters and have more large benches in order to provide clearer precedent for the entire judiciary, helping discourage appeal and encourage settlement. Subordinate courts could be allowed to hear at least some constitutional matters, while efforts could also be made to dismantle the rigid social hierarchy that creates undue servility in the subordinate judiciary in relation to the High Courts and Supreme Court (equalizing the retirement age for all judges would be one concrete place to begin).

Judges do not make judicial decisions in isolation. Instead, they sit within courts and professional hierarchies that shape and constrain their role in the adjudicatory process. Mapping the structure of this larger architecture helps us understand how both judges and litigants navigate this system and the context in which the law and the Constitution are ultimately interpreted.

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