# Institution Matters: A Critical Analysis of the Role of the Supreme Court of India and the Responsibilities of the Chief Justice

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**Abstract**: Today, the Indian Supreme Court serves as a constitutional court, a regular appeals court and as an equal partner in governance of the country. This year, questions over the administration of the Court repeatedly arose in public discourse, particularly with respect to the Chief Justice's discretionary power in listing cases. This paper closely examines the manner in which the listing practices are employed to fulfil the various roles of the Supreme Court, and argues that the Court would perform better if the responsibility for its administration vested with the institution rather than the Chief Justice alone. We argue that with a heavy backlog, and a high number of cases being filed every year, the only realistic way that a Chief Justice can try to solve the crisis facing the Court is by seeking to hear and dispose of more cases quickly. Through an analysis of the listing practices employed by successive Chief Justices between 2012 and 2017, we show that this emphasis on disposal is problematic because it prioritizes cases that may be grouped together and cases that can be disposed of quickly irrespective of their relative importance in terms of content. Moreover, we show that this approach seems to encourage more litigants to try their luck before the Court, and effectively leaves the Court with relatively less time to hear constitution bench matters and regular matters. We further argue that the current ad-hoc and judge-dependent approach toward administering the Court runs the risk of being abused by wealthy litigants who may not have the most important or urgent cases. Finally, we argue that an institutional approach toward administering the Court would best answer the questions recently raised and the problems identified in this paper, and we outline how an institutional approach should work.

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## Introduction

The Supreme Court of India is popularly known as the most powerful judiciary in the world.[2] Like many apex courts across the world, its role as depicted by the text of the Constitution is fairly limited.[3] However, over time, the Supreme Court (SC) rebranded itself as the Court of the people and for the people. Today, a large number of individuals directly approach the SC by filing "public interest" cases (PILs), and the Court regularly hears appeals from all lower courts against all types of orders and judgments through the mechanism of Special Leave Petitions (SLPs). It almost seems that there is no relief that the Court cannot grant, and no subject matter it cannot rule on.

Recent scholarship has raised questions over the legitimacy and competence of judges to undertake matters of general governance.[4] However, there is little scholarship on how the Court decides which cases to hear in the first place. This paper seeks to fill several gaps in the scholarship on the SC by carrying out a mixed-methods study that critically examines the manner in which cases are listed before it. Through this study, we argue that the administration of the SC would be better served through an institutional approach than it is under the current system where administrative responsibilities fall solely upon the Chief Justice of India.

This paper is structured as follows: Part I provides an overview of the SC's structure and jurisdiction, the types of cases filed before it, and the role of the Chief Justice of India (CJI) in administering the SC. In Part II, we track the rise of SLPs and suggest that the rise can be better understood when seen in the context of the Court becoming more accessible through its public interest litigation movement. In Part III, we show that CJI has limited power to control the rise of SLPs, and explain that the CJI is left with the difficult task of listing cases in a way that balances the various burdens on the Court. In Part IV, we examine the listing practice of the Court over several decades to show that successive CJIs have focused on disposing of cases in quantitative terms. We demonstrate that in tenures where backlog was reduced, priority was accorded to shorter cases and group cases. In Part V, we critically evaluate the Court's disposal-oriented approach, and argue that it interferes with the Court's original role of deciding important cases including constitutional cases as well as its additional role of remedying a wide range of injustices. We also argue that the Court's approach will not achieve its intended goal of reducing backlog but is instead likely to encourage the institution of more SLPs. Finally, in Part VI, we emphasize the relative benefits of adopting an institutional approach to handling the administration of the SC.

2 The Economic Times, Indian judiciary one of most powerful in world: Chief Justice of India Altamas Kabir, https://economictimes.indiatimes.com/news/politics-and-nation/indian-judiciary-one-of-most-powerful-in-world-cji-altamas-kabir/articleshow/20634022.cms (last accessed on 19 November 2018).

3 Art. 130-136, Constitution of India, 1950. See infra Part I.

4 An excellent book in this regard is *Anuj Bhuwania*'s, Courting the People, Cambridge 2017.

For this paper, 24 people were interviewed,[5] including Advocates on Record, who are lawyers exclusively empowered to file cases and even argue cases in the Supreme Court, as well as arguing counsels, Senior Advocates,[6] clerks and registry officials and journalists. 32 clerks were also asked to fill a survey. Most interviewees spoke on the condition of anonymity. As a result, all interviewees are referred to based on numbers randomly assigned to them. To calculate backlog, we have relied on the Annual Reports of the Supreme Court, the Supreme Court's quarterly Newsletter and Monthly Statements requested from the Supreme Court, as well as obtained from Rajeev Dhavan and Nick Robinson.[7]

## I. Overview of the Structure and Jurisdiction of the Indian Supreme Court and the Role of the Chief Justice of India

Before we analyze the listing practice of the Court, it is necessary to set out the structure of the Indian Judiciary, the place of the SC therein and the terminology used to refer to the different types of cases listed in the SC.

### *A. Structure of the Indian Judiciary*

The Indian judiciary is structured in the form of a pyramid with three layers of courts. At the lowest level, there are District Courts, spread across each of the 29 states in India. District Courts are the courts of first instance for most civil and criminal cases. Many a time, they can also have an appellate stage. At the next level, the appeal goes to the High Court. Most States have their own High Court, with each High Court having supervisory jurisdiction over District Courts in the State.[8] Running parallel to the District Courts and High Courts, there are several specialized tribunals that have been created over time to deal with cases of specific subject matters such as tax, service law, army personnel cases and con-

5 Most interviews with lawyers, journalists and registry officials took place in Court or in their offices and lasted between an hour and two hours. Interviews with clerks took place over the phone or by email.

6 Senior Advocates are designated by the SC in recognition of their proficiency and experience and are usually involved in most constitutional cases and high profile matters. A number of them also take on pro-bono work.

7 As may be seen from the frequent citation of Dhavan and Robinson's work in this paper, our study seeks to build on many points brought out by their respective analyses of data, which spread across forty-five years of the functioning of the SC (from the mid-1970s till around 2010).

8 However, the Bombay High Court, Calcutta High Court, Guwahati High Court and Punjab and Haryana High Court are shared by more than one state and/or Union Territories.

sumer cases. Appeals from some of these specialized tribunals lie with the SC while for others it lies with the High Courts. The SC sits atop the pyramid.[9]

### *B. Jurisdiction of the Supreme Court*

The SC's jurisdiction is defined in the Indian Constitution. The Court has original, appellate and advisory jurisdiction. As the Court's advisory jurisdiction is rarely invoked, we focus here on the other two.

#### (i) The Supreme Court's Original Jurisdiction

Under Art. 32 of the Constitution,[10] individuals have the right to approach the SC directly for enforcement of fundamental rights. It may be noted that there are no limits on the territorial jurisdiction of the SC for disputes arising in any part of India. However, the judges of the SC often encourage parties to first approach the High Court closer to where a fundamental right claim has arisen before bringing a claim to the SC.[11] Exceptions are made for issues that seriously affect people across the country and require to be addressed urgently. Aside from Art. 32, the SC also has original jurisdiction over disputes between the Government of India and one or more States and disputes between two or more States.[12]

#### (ii) The Supreme Court's Appellate Jurisdiction

Under its appellate jurisdiction, the SC hears appeals from the High Courts of all decisions as well as against decisions of some tribunals. The bulk of cases filed before the SC are those that invoke its appellate jurisdiction. Crucially, however, the SC is not an automatic court of appeal.[13]

As per Art. 132, "an appeal shall lie to the Supreme Court … in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of [the] Constitution."[14] As per Art. 133, an appeal may be filed against a judgment, decree or final order of a High Court in a civil proceeding that either "involves a substantial question of law of general importance" or in-

9 This section merely provides an overview of the structure of the Court. For a more detailed explanation, see Annual Report of the SC 2005-2006, p. 42, https://www.sci.gov.in/pdf/AnnualReports/annualreport2005-06.pdf (last accessed on 19 November 2018).

10 See Art. 32, Constitution of India.

11 This has also been noted by *Nick Robinson*, A Quantitative Analysis of the Supreme Court's Workload, Journal of Empirical Studies 10 (2013), pp. 570, 584.

12 See Art. 131, Constitution of India.

13 The only exception to this rule is appeals from tribunals that have been recently constituted. There, a right to appeal to the SC is typically conferred under the statute establishing the tribunal.

14 See Art. 132, Constitution of India.

volves a question "that in the opinion of the High Court … needs to be decided by the Supreme Court."[15] As per Art. 134, an appeal may be filed against a judgment, decree or final order of a High Court in certain criminal proceedings where the High Court has sentenced a person to death, and in other criminal proceedings where the High Court "certifies under Article 134A that the case is a fit one for appeal to the Supreme Court."[16] Art. 134A, which is referred to in Art. 132, 133 and 134, merely lays down the procedure by which a High Court may determine whether to grant a certificate of the nature referred to in the previous provisions.[17] To summarize the above, in addition to certain cases laying down death sentences, the SC would hear an appeal from the High Court if a certificate is granted by the High Court stating:

1. "that the case involves a substantial question of law as to the interpretation of this Constitution"; or
2. "that the case involves a substantial question of law of general importance"; or
3. "the case is a fit one for appeal to the Supreme Court."

In the event that the High Court does not grant a party a certificate of appeal, a party still has the option to file a "special leave petition" (SLP) before the SC under Art. 136.[18] An SLP is essentially an application asking the SC to hear an appeal even though the High Court has not granted a certificate under Art. 134A. In these cases, the Court first hears the application to decide whether or not the case must be heard on merits. This preliminary hearing is called an "admission hearing". If the Court is of the opinion that the case must be heard, it exercises its discretion under Art. 136 to grant "leave" in the SLP. If not, the SLP is dismissed. If leave is granted, the SLP is then converted to a Civil or Criminal Appeal.

In sum, there are two paths laid out in the Constitution for appeals filed before the Court to be taken to the substantive hearing stage. The first is in cases involving a "substantial question of law" where the High Court certifies in the form prescribed under Art. 134A that the case is one the SC should hear.[19] The second is in cases where a party approaches the SC without a certificate from the High Court and instead requests the SC to exercise its special discretion provided for under Art. 136 of the Constitution to hear the appeal. This second route was intended to be exercised sparingly and was never intended to be the main route to reach the Supreme Court.[20] However, over time SLPs have come to form a signifi-

15 See Art. 133, Constitution of India.

16 See Art. 134, Constitution of India.

17 See Art. 134A, Constitution of India.

18 Art. 136(1) states: "136. Special leave to appeal by the Supreme Court.
(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India".

19 As explained above, cases brought under Art. 132, 133 and 134 of the Constitution fall under this category.

20 See infra, Part II.

cant portion of the Court's workload.[21] As such, this paper focuses on SLPs, the implications of them now forming the bulk of the SC's workload, and how the SC deals with so many of them.

### *C. Terminology used to describe the cases listed in the Supreme Court*

As per the Annual Reports and Monthly Statements of the SC, the SC broadly divides its cases into "Admission" and "Regular" cases.[22] Each case in the SC is filed as an admission case. It is either listed on a Monday or a Friday where the Court briefly hears the case to decide whether it would admit the case for hearing.[23] If it is admitted for hearing, the case is converted to a regular hearing case.[24]

There exists a further categorization within admission cases. These categories are "fresh cases", "adjourned cases" and "after notice cases."[25] When a case is first listed for admission, it is listed under the "fresh" category. In this hearing, the Court decides whether or not to admit a case for hearing or dismiss the case. If a case is adjourned on this day, it is usually listed the next time under the "adjourned" category. If the Court dismisses a case at the fresh or adjourned stage, it is referred to as *in-limine* dismissal as the court does not have to give reasons for this dismissal. If, the Court admits the case, it will 'issue notice' to the other party. The case then becomes an "after notice case". The case is then usually listed before the Registrar, a judicial officer, to ensure that the pleadings are completed.[26] Once pleadings are completed, the general practice is that the case is placed before the Court and the court directs that the case be listed for final disposal or processed for listing and the case is converted to a regular hearing case.

In respect of SLPs, the same procedure albeit with a few differences is followed. An SLP will be also be listed as a fresh case (or adjourned case, if adjourned). The Court will either dismiss the case or issue notice if it wants to hear from the respondent(s) before granting leave. The case then becomes an after-notice case. After the pleadings are filed,

21 Ibid.

22 The Annual Reports of the Supreme Court are available at https://www.sci.gov.in/publication (last accessed on 19 November 2018). The Monthly Statements are on file with the author.

23 None of the interviewees, including lawyers aged between 30 and 85, were able to accurately say when this practice of dedicating days to miscellaneous cases started. One interviewee suggested that this practice originated in the late 1970s. It is possible that this practice started because institution was increasing but many cases would be dismissed at the threshold stage at thus, it was necessary to streamline such cases.

24 In the annual statement, a case converted from an admission to regular hearing case is reflected as a disposal on the admission column and an institution on the regular column.

25 This categorization of admission cases is evidenced from the Monthly Statements of the Supreme Court where the Court keeps track of disposals at the *in-limine* stage, the adjourned stage and after notice stage.

26 Courts have now occasionally started undertaking this function in an effort to dispose of a case faster at the miscellaneous stage. See infra Part III.

the Court considers whether leave should be granted or the case should be dismissed. Till this point, the Court can dismiss the case without giving reasons. If the Court grants leave, the case is converted to a regular hearing case.[27]

Once a case is converted from an admissions case to a regular hearing case, its turn for regular hearing does not come up immediately. Instead, it joins the back of the line of regular hearing cases and they are usually heard in chronological order. These hearings take place on Tuesdays, Wednesdays and Thursdays. Due to the Court's backlog, the Court is still hearing cases from the previous years. For instance, the cause list of cases listed in September 2018 lists several cases pending from 2007.

It is pertinent to note that in the cause lists issued by the court,[28] all admission cases are included in the category of miscellaneous cases.[29] Mondays and Fridays are dedicated to hearing admission cases are usually referred to as miscellaneous days.[30] Tuesdays to Thursdays are considered regular heating days. Hereinafter, we will refer to admission cases as miscellaneous cases.[31]

A significant feature of the SC is that most of the judges[32] now sit in benches (panels) of two.[33] However, more important cases are heard by judges sitting in panels of five, sev-

27 Miscellaneous cases are usually numbered in single or double digits ranging from 1-99. Regular matters are usually numbered in three digits starting with 101, and goes on to 102, 103, etc. Cases specially listed before a three judge bench start with the number three. Similarly, cases listed before five judge benches would start with the number five, and so forth for cases listed before seven judge and nine judge benches.

28 Cause lists are issued for every working day of the Court and list all the cases the Court will hear on the day divided by courtrooms. They are available at https://www.sci.gov.in/causelist (last accessed on 19 November 2018).

29 The variety of matters falling under the term "miscellaneous matters" may be seen from the cause-lists. As Robinson points out, the term "miscellaneous matters" can be confusing because between the 1970s and the 1990s, the term was only used to refer to interim applications filed under pending cases. In this paper, we use the term, "miscellaneous matters" in the same way it is currently used by the SC registry. See *Robinson*, note 11, p. 577.

30 There are some exceptions to this. For example, at certain points some CJIs constituted larger benches to sit on Monday and Friday afternoons to hear special kinds of cases.

31 Our reason for doing so is two-fold. First, this paper will examine cause lists and the practice of the court where these cases are referred to as miscellaneous cases. Further, as will be clear from Part IV, the term "admission" does not fully capture the true scope of how the court deals with after-notice cases before they are converted to regular hearing cases.

32 The SC began with a strength of seven judges in 1950, which has grown over time in light of the increase in the workload of the Court. Thus, in 1956 the strength was increased to eleven, in 1960 it was further increased to fourteen, and so on. Since 2008, the sanctioned strength is 31 judges. There are typically a number of vacancies on the Court. As of 1 October 2018, there are 25 judges on the SC of India.

33 See *Nick Robinson et al*, Interpreting the Constitution: Supreme Court Constitution Benches since Independence, Economic and Political Weekly 9 (2011), pp. 27, 28.

en, nine, eleven and thirteen. These benches are referred to as "constitution benches".[34] The manner of constituting these benches is addressed below.

### *D. The role of the Chief Justice of India:*

Formally, the CJI is the administrative head of the SC. This power has been entrusted to the CJI under different provisions of the Supreme Court Rules 2013,[35] framed under Art. 145 of the Constitution.[36] The scope of administrative decisions under the charge of the CJI vary broadly, and cover the allotment of certain cases to a certain composition of judges, the setting up of larger benches to hear cases requiring larger benches, the listing of certain cases urgently, the number of cases listed before each bench of the Court, the kinds of cases to be listed on particular days, and whether cases may be "mentioned",[37] among other issues. Given the significance of these decisions, it is important that they are made fairly and reasonably. However, many of these decisions are made without reasons explicitly being stated, and some of these decisions are not recorded in any public documents.

Some litigants recently filed petitions challenging the administrative power of the CJI, especially the discretion to list and allocate cases to judges.[38] One petition[39] argued that the "collegium", consisting of the five senior-most judges must make these decisions.[40] The SC dismissed these petitions noting judicial precedent that states that the CJI must be the "master of the roster" so as to maintain judicial discipline and judicial decorum.[41] Notably, the SC rejected the suggestion that administrative decisions should be taken by the collegium, reasoning that such decisions have to be taken on a day-to-day basis as opposed to judicial appointments that are undertaken infrequently.[42]

As per convention, the senior-most judge is usually designated the CJI. Since the retirement age of each judge is 65, and judges typically reach the SC in their mid or late fifties,

34 It may be noted that this term is frequently used to refer to all sorts of cases being heard by five or more judges, regardless of whether or not a question of constitutional law is involved.

35 For instance, under Order VI, the Chief Justice has the power to nominate the judges on a two judge bench, and constitute benches of three or more judges when required. See Supreme Court Rules 2013, https://www.sci.gov.in/sites/default/files/Supreme%20Court%20Rules%2C%202013.pdf (last accessed on 19 November 2018).

36 Art. 145 gives the SC the power to frame rules for "regulating generally the practice and procedure of the Court.".

37 "Mentioning" is a practice where the lawyer makes an oral plea to have a case listed out of turn on a particular date. Over time, these requests have increased and take up precious hours of the Court.

38 *Asok Pande v. Supreme Court of India*, WP (C) No. 147 of 2018.

39 *Shanti Bhushan v. Supreme Court of India*, WP (C) No. 789 of 2018.

40 It may be noted that as per precedent, five senior most judges decide on judicial appointments to the SC, see *SCORA v. UoI*, (1993) 4 SCC 441.

41 *Campaign for Judicial Accountability and Reforms v. UoI* & Anr, (2018) 1 SCC 196; *State of Rajasthan v. Prakash Chand*, (1998) 1 SCC 1.

42 We return our attention to this judgment in Parts III and IV of the paper.

tenures are short. In 68 years, India has seen 45 CJIs. The shortest tenure has been 17 days and the longest tenure has been 2696 days. As per our calculation, the median tenure of a chief justice is 397 days or 1 year, 1 month.

## II. The Expansion of the Judicial Role and the Rise of SLPs

In this Part, we examine the changes in the SC's approach to dealing with SLPs under Art. 136 over time. In Section A, we rely on previous scholarship to show how the SC reconceived and expanded its role with respect to protection of rights while developing its public interest litigation jurisprudence. In Section B, we argue that SC simultaneously expanded its role under Art. 136, and suggest that there is a link between the two. We buttress this point by relying on statistics to show the massive increase in the number of SLPs filed in this period. Finally, in Section C, we show how the rise in SLPs led to the SC's current problem of backlog and delay.

### *A. Public interest litigation and the expanded role of the Supreme Court*

Traditionally, the SC followed strict standing requirements, which meant that only affected parties could file writ petitions in Court in respect of enforcement of fundamental rights. This was coupled with a general view that individual rights would trump directive principles that stressed the importance of pursuing the common good.[43] Both of these features of Indian jurisprudence were abandoned with the public interest litigation (PIL) movement that took place in the early 1980s, where the Court took note that certain individuals/communities found it difficult to access the Court due to their weak socio-economic status and thus allowed their interests to be represented indirectly. Several scholars have argued that the Court evolved its PIL movement as a way to reclaim its legitimacy after its failure to stand up to the Government.[44] Bhuwania notes that this is no longer a disputed issue but a widely accepted fact.[45]

Over the years, the PIL movement has manifested itself in a variety of ways, beginning with the SC relaxing rules of standing and procedures for filing petitions,[46] and extending to the recognition of a broad range of rights being recognized as being covered under the "right to life and personal liberty" enshrined in Art. 21 of the Indian Constitution.[47]

43 See for example *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

44 *Upendra Baxi*, The Indian Supreme Court and Politics, Scaborough 1979, p. 126; *Shyam Divan*, Public Interest Litigation, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016. Also see *Arun Thiruvengedam*, The Constitution of India: A Contextual Analysis, New Delhi 2017, pp. 122-126.

45 *Bhuwania*, note 4, p. 60.

46 See for example, *Sunil Batra v. Union of India*, 1980 SCR (2) 557 (Krishna Iyer J.); *Hussainara Khatoon v. Union of India*, (1980) 1 SCC 81.

47 For a detailed survey of the SC's PIL jurisprudence, see *Divan*, note 44.

Scholars have shown that these judgments frequently refer to the SC as "the Court of the people".[48] As the PIL movement was unfolding, one scholar observed, "it appears that there is a search for new bases of legitimation of its own power. Broadly the Court is seeking legitimation from the people."[49] This statement is important, as it explains that the Court was now deriving its legitimacy from what it thought the people wanted at a particular time, and not necessarily based on the text of the Constitution.[50] In other words, the expanded purview of the SC's power took place more on the ground that it had public support than based on a development in legal reasoning. In the next section, we show that a similar shift can be observed in the SC's approach to other kinds of cases, resulting in a lower threshold for invoking the jurisdiction of the Court under Art. 136.

### *B. The expansion of Article 136 and the rise in filing of SLPs*

In Part I, we noted that Art. 136 did not provide an automatic right of appeal, but vested a discretionary power with the SC to allow "special" appeals where the party appealing could not obtain a certificate of appeal from the High Court.[51] Between 1950 and 1980, the SC repeatedly employed a literal interpretation of Art. 136, affirming that the provision is not an automatic route of appeal,[52] and holding that the power under Art. 136 is only to be exercised on a restricted set of grounds.[53] While hearing a case in the year it was established, the SC noted the broad wording of Art. 136,[54] but cautioned that "the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article."[55] The Court further observed, "the only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal only in those cases where special circumstances are shown to exist."[56] In the same year, the Court

48 *Bhuwania*, note 4.

49 *Baxi*, note 44, p. 126.

50 This may also be described as the SC shifting from legal legitimacy to social legitimacy, at least in a relative sense. For a useful explanation of the difference between sociological and legal legitimacy, see *Richard Fallon*, Legitimacy and the Constitution, Harvard Law Review 11 (2005), pp. 1787, 1794-1795.

51 See infra Part I.B.

52 See for example: *M/s Bengal Chemical & Pharmaceutical Works Ltd*., AIR 1959 SC 633; *State of Bombay* v. *Rusy Mistry and Anr.*, AIR 1960 SC 391; *Basudev Hazra*, (1971) 1 SCC 433.

53 See for example: *Pritam Singh v. State*, AIR 1950 SC 169; *Subedar* v. *State of UP*, (1970) 2 SCC 445.

54 For the text of the provision, see note 18.

55 *Pritam Singh v. State*, AIR 1950 SC 169, para 9.

56 Ibid.

expressly stated that it could not correct errors of the High Courts under Art. 136 jurisdiction.[57]

However, this strict standard was relaxed over time. Notably, in 1979, while dealing with a writ petition under Art. 32 and an SLP under Art. 136 together, the SC stressed the need for performing judicial functions in a way that structure a remedy "so as to make it personally meaningful and socially relevant", and then observed that the "principle of affirmative action is within our jurisdiction under Article 136 and Article 32."[58] In several cases thereafter, the Court moulded the relief given by High Courts without setting aside the orders passed by them. In one case, this exercise was termed an exercise of the Court's "extraordinary jurisdiction under Article 136".[59] In other cases, the Court went ahead and set aside decisions of the High Court in order to correct their errors, justifying this as necessary to uphold the rule of law.[60]

By the late 1980s, the SC began interfering with concurrent findings of facts of lower courts noting that Art. 136 did not prevent it from doing so. In a case relating to specific performance of a contract, the SC noted that "If and when the Court is satisfied that great injustice has been done it is not only the 'right' but also the 'duty' of this Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed thrice."[61] This statement shows how the grounds for invoking Art. 136 became more relaxed over time by focusing on the injustice in a case. Another example is the SC's decision in *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai,*[62] where the Court acknowledged the case law advocating restraint in exercising discretion under Art. 136 mentioned above, but then went on to observe:

> *"All said and done, in spite of the repeated pronouncements made by this Court declaring the law on Article 136 and repeatedly stating that this Court was a Court meant for dealing only with substantial questions of law, and in spite of the clear constitutional overtones that the jurisdiction is intended to settle the law so as to enable the High Courts and the courts subordinate to follow the principles of law propounded and settled by this Court and that this Court was not meant for redeeming injustice in individual cases, the experience shows that such self-imposed restrictions placed as fetters on its own discretionary power under Article 136 have not hindered the Court from leaping into resolution of individual controversies once it has been brought to its notice that the case has failed to deliver substantial justice or has per-*

57 *The Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd.*, AIR 1950 SC 188.

58 *State of Kerala v. Kumari T.P. Roshana*, AIR 1979 SC 765, para 40. Strikingly, the SC does not consider the possible distinctions between legal proceedings under Art. 32 and 136.

59 *State of Madhya Pradesh v. Ram Ratan*, (1980) Supp SCC 198, para 13.

60 See for example: *Municipal Board, Pratabgarh. v. Mahendra Singh Chawla*, (1982) 3 SCC 331.

61 *Indira Kaur v. Sheo Lal Kapoor*, (1988) 2 SCC 488, para 7. See also: *Variety Emporium v. V.R.M. Mohd. Ibrahim Naina*, (1985) 1 SCC 251.

62 *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai* (2004) 3 SCC 214.

> *petuated grave injustice to parties or is one which shocks the conscience of the Court or suffers on account of disregard to the form of legal process or with violation of the principles of natural justice. Often such are the cases where the judgment or decision or cause or matter brought to its notice has failed to receive the needed care, attention and approach at the hands of the Tribunal or Court below, or even the High Court at times, and the conscience of this Court pricks or its heart bleeds for imparting justice or undoing injustice."*[63]

It is worth noting that the language employed by the SC in expanding the scope of Art. 136 is strikingly similar to the language it used while expanding its jurisdiction through the PIL movement.[64] Interestingly, around the same time as the PIL movement and the SC judgments liberally interpreting Art. 136, the annual data of the Supreme Court shows a massive increase in the number of SLPs.[65] This may be seen from Table 1 below:

*Table 1: Tracking the rise of SLPs*

| Year | SLP (Civil) instituted | SLP (Criminal) instituted | Total SLPs instituted |
|---|---|---|---|
| 1960 | 903 | 1068 | 1971 |
| 1965 | 1370 | 996 | 2366 |
| 1970 | 2476 | 1273 | 3749 |
| 1975 | 3247 | 1341 | 4588 |
| 1980 | 11541 | 3473 | 15014 |
| 1985 | 17579 | 3907 | 21486 |
| 1990 | 16394 | 2568 | 18962 |
| 1995 | 18676 | 3938 | 22614 |
| 2000 | 15730 | 4798 | 20528 |
| 2005 | 20323 | 6917 | 27240 |
| 2010 | 30953 | 10847 | 41800 |

Source: This data has been taken partly from Rajeev Dhavan's book titled *The Supreme Court Under Strain: The Challenge of Arrears* (Indian Law Institute, 1978) and partly from annual and Monthly Statements provided by Nick Robinson.[66]

Table 1 shows that the total number of SLPs filed in 1975 exceeds the total number filed in 1965 by 2,222, while the total number of SLPs filed in 1985 exceeds the total number filed

63 Ibid., para 34.

64 This is not altogether surprising. The list of heroes in the stories of the SC's expanding role in both spheres have quite a few names in common.

65 For a comprehensive account of the increase in number of cases filed in the 1970 and 1980s, see *Rajeev Dhavan*, Litigation Explosion in India, (Bombay: N.M. Tripathi: 1986).

66 Data compiled by Robinson was graciously provided by Robinson to the authors.

in 1975 by 16,898. The total number of SLPs filed in 1985 is 368% more than the total number of SLPs filed in 1975. Notably, the percentage of SLPs instituted per year out of the total number of cases instituted per year amounted to 54% in 1970, 69% in 1980, and shot up to 85% in 1990.[67] As Robinson shows in a published study,[68] in 1993 SLPs constituted 81.9% of the total cases instituted, and, except for two years in the middle,[69] the percentage of SLPs instituted to total number of cases instituted has remained over 80%. In this study, the last year Robinson compiles data for is 2011, where the number of SLPs instituted amounted to 84.6% of the total number of the cases instituted in the SC that year. These figures are significant because they demonstrate how the jurisdiction of the SC that was meant to be reserved for "special circumstances" was sought to be invoked in most of the cases filed before the Court.

In our view, it is quite plausible that as the Court that abandoned narrow interpretations of fundamental rights to do justice through its PIL jurisprudence, it recognized a need to similarly abandon its narrow interpretation of Art. 136 so as to do justice to parties aggrieved by all sorts of errors made by lower courts. Admittedly, a lot more work needs to be done on the link between the SC's approach to PILs and SLPs.[70] However, our limited discussion in this section of the paper was to show that, as an institution, the SC found a seemingly compelling reason to expand its interpretation of Art. 136 in the late 1970s.

Since the 1970s, the number of cases filed in the SC every year has consistently remained high. An attempt to address this issue was made by increasing the number of judges on the SC.[71] Thus, while there were only 14 judges on the bench in 1960, this number was increased to 17 in 1977.[72] Again, in 1986 the number was increased from 17 to 26, and finally in 2008 the number was increased from 26 to 31.[73] However, the number of total SLPs filed in 2010 is higher than the number of total SLPs filed in 1960 by over 2000%, whereas the increase in judges in the same time period was only by 100%. Perhaps unsurprisingly in this context, the SC has been largely unable to beat the rate of institution through its rate of disposal ever since the number of SLPs rose exponentially in the late 1970s.

67 It may be noted that that Civil Miscellaneous Petitions and Criminal Miscellaneous Petitions have been excluded from these calculations.

68 *Robinson*, note 11, p. 584.

69 The two years are 1996 and 1997 when the percentage of SLPs instituted out of the total number of cases instituted was 79.6% and 78.7% respectively.

70 Other scholars have also noted this link. See for example, *Rishad Ahmed Choudhry*, Missing the Wood for the Trees: The Unseen Crisis in the Supreme Court, NUJS Law Review 5 (2012), pp. 351, 366. Perhaps the best starting point for research on this issue is *Dhavan*, note 65.

71 *Nick Robinson*, Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts, American Journal of Comparative Law 61 (2013), p. 101.

72 Ibid.

73 Ibid.

This has resulted in the building of backlog. The problem of backlog is often considered the primary problem in the judiciary, and has been extensively written about.[74] In 1951, after one year of its establishment, the SC had 690 cases pending. By 1990, the backlog of the SC increased to 109,277. This number was brought down to 19,032 in 1997 but has been rising almost continuously ever since. Between 1996-2005, the average number of cases instituted annually was 41,745 cases.[75] Between 2006-2016, the average number of cases instituted went up to 75,864. As of August 2017, the backlog of the SC was 58,272.[76] In the next Part, we explain how the expanded interpretation of Art. 136 and the rise of SLPs poses several administrative difficulties.

## III. The Dilemma before the Court (and specifically, the Chief Justice)

In Part I, we showed that as per the SC's original role, it was meant to focus on substantial questions of law and fundamental issues concerning the interpretation of the Constitution. In Part II, we have seen that the SC has expanded its role under Art. 136 to hear SLPs against decisions of lower forums that need not involve substantial questions of law, but suffer from mistakes causing a variety of forms of injustice. However, the SC has limited hours to hear all these cases. Every week, the Court sits from Monday to Friday from 10:30 am to 4 pm with a lunch break from 1 to 2 pm. Thus, the Court has a maximum of 22.5 working hours in a week. Today, the Court must distribute its 22.5 hours in a week to discharge both its original and additional role. To compound the problem further, the SC must also deal with the problem of heavy backlog of cases.

At this stage, two further facts are worth pointing out. First, between 2014 and 2016, approximately 40.9% of the SLPs instituted in the SC were dismissed *in limine*.[77] As noted in Part I, *in limine* dismissals occur when a case is dismissed at its preliminary stage. It may

74 See 14th Report of the Law Commission of India, Reform of Judicial Administration 1958, http://lawcommissionofindia.nic.in/1-50/Report14vol1.pdf; 79th Report of the Law Commission of India, Delay and Arrears in High Courts and Other Appellate Courts 1979, http://lawcommissionofindia.nic.in/51-100/Report79.pdf; 120th Report of the Law Commission of India, Manpower Planning in Judiciary: A Blueprint 1987, http://lawcommissionofindia.nic.in/101-169/report120.pdf (all last accessed on 19 November 2018).

75 See Annual Report, Supreme Court of India, 2016-2017, https://www.sci.gov.in/pdf/AnnualReports/Annual%20Report%202016-17.pdf (last accessed on 26 September 2018).

76 Ibid.

77 This figure has been calculated from the Monthly Statements of January 2014-December 2016 provided by the Court by calculating the number of SLPs dismissed at the *inlimine* stage as a percentage of the total number of SLPs instituted in the month. However, it is important to note that this number is only an approximate estimation. This is because the Monthly Statements of the SC suffer from a range of problems. See *Robinson*, note 11, p. 575. Additionally, it is not clear if the number of disposed of cases pertains only to the cases instituted in the current month or also includes the previous month. Cross checking from the annual report seems to suggest that it only pertains to the present month. In any case, lawyers interviewed also pegged this figure as between 40-50%.

be recalled that a bulk of the cases instituted each year are SLPs. Second, and in a similar vein, it has been shown that in 2010, only 17.5% of the cases instituted before the SC were accepted for regular hearings.[78] These numbers show that a high number of the cases filed before the SC are not deemed suitable for regular hearings. Yet, it takes time even to hear cases to decide whether they are suitable for regular hearing.[79] The rise in SLPs eats in to the time the SC has to discharge its responsibilities under its traditional role. Simultaneously, the more time the SC spends deciding whether or not to admit fresh cases, the less time it has to has to spend deciding cases on their merits. So, what can and should be done?

Two broad approaches to solving this problem stand out.[80] One is for the SC to devise policies or guidelines that would discourage the institution of certain cases, which could include identifying kinds of cases that would not be heard under the SC's Art. 136 jurisdiction, and making advocates accountable for continuously filing cases that do not fall within this jurisdiction. The second approach would be for the SC to maintain a rate of disposal that is higher than its rate of institution, so that it can gradually reduce backlog, while also hearing the fresh cases instituted before it.

With respect to the first approach, it may be noted that a policy seeking to disincentivize the institution of weak cases and hold advocates accountable would only be successful if it is uniformly implemented across the various benches of the SC. However, the emphasis on "injustice"[81] in the judgments rendered through the 1970s and 1980s left a considerable degree of discretion with judges to decide which cases should be admitted. This discretion coupled with the multiple bench structure of the SC give rise to inconsistency in the Court's approach to similar kinds of cases. Noting this inconsistency, Robinson describes the SC as a "polyvocal court" and warns against the inaccuracy of the phrase, "*the* Indian Supreme Court".[82] Similarly, Chintan Chandrachud divides the SC's approach to constitutional interpretation into multiple phases, and describes the phase following the mid-1970s as one of "panchayati eclecticism", "with different benches adopting inconsistent interpretive approaches based on their conception of the Court's role, and arriving at conclusions that were often in tension with one another."[83] In essence, the lack of a uniform interpretive methodology gradually led to a breakdown of precedent across fields of law

78 *Robinson*, note 71, p. 104.

79 See infra Part IV.

80 These approaches are not mutually exclusive. We return to how they may be employed in concert in Part VI.

81 See infra Part II.

82 *Robinson*, note 71, pp. 113-114.

83 *Chintan Chandrachud*, Constitutional Interpretation, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, pp. 114-115. Chandrachud's examples go beyond cases interpreting the Constitution and include the interpretation of statutes as well.

that has multiplied the possible ways in which decisions of lower courts may be challenged.[84]

Notably, in 2010, a two-judge bench of the SC expressed concern that "all kinds of special leave petitions are being filed in this Court against every kind of order",[85] and that the arrears in the Court "are mounting and mounting" as the Court "has been converted practically into an ordinary appellate court which … was never the intention of Article 136."[86] The two-judge bench further cited several SC judgments noting that the SC had failed to lay down a uniform standard to determine the kind of cases in which leave was to be granted under Article 136, and accordingly requested the CJI to constitute a constitution bench to settle the interpretation of Art. 136.[87] Interestingly, in 2016, when this constitution bench was ultimately constituted, the bench cited contrary case law that emphasized the need to interpret Art. 136 broadly, and ultimately held:

> *"Upon perusal of the law laid down by this Court in the aforesaid judgments, in our opinion, no effort should be made to restrict the powers of this Court under Article 136 because while exercising its power under Article 136 of the Constitution of India, this Court can, after considering the facts of the case to be decided, very well use its discretion. In the interests of justice, in our view, it would be better to use the said power with circumspection, rather than to limit the power forever."*[88]

Ironically, it may be said that the attempt to frame a policy to reign in the wide discretion under Art. 136 failed on the judicial side due to disagreement among judges over whether "discretion" could be restricted. Effectively, this judgment simply expressed faith in the judges of the SC to use their power under Art. 136 "with circumspection." While there may be good reasons to take the view that discretion under Art. 136 should not be restricted through a single broad policy, this view does not engage with the problems of backlog and delay that continue to haunt the SC.

Given the failure of attempts to constrain SLPs on the judicial side, it is worth asking whether the first approach of framing a policy to restrict could be undertaken on the administrative side of the SC. Under the current system, only the CJI is in a position to make large-scale administrative decisions that could modify the manner in which the SC hears

84 Ibid. As several of our interviewees pointed out, the co-existing but conflicting decisions of the SC has given rise to a proliferation of "questions of law" that advocates are able to invoke while challenging lower court decisions to present their cases as worthy of attention under Art. 136.

85 *Mathai v. George*, (2010) 4 SCC 358, para 3. In the writ petition before the High Court, the petitioner had disputed the correctness of a Forensic Science Laboratory report on the genuineness of a will adduced in a suit, and sought a court order demanding an opinion by a second expert. The petitioner's writ petition was dismissed, following which the petitioner filed an SLP against the High Court order.

86 Ibid.

87 Ibid., paras 26-29.

88 *Mathai v. George,* (2016) 7 SCC 700, para 6.

cases and the kinds of cases it hears. In our view, the CJI could not possibly devise a policy that would discourage the institution of cases for three crucial reasons. The first reason is simply that such a policy could reasonably be challenged on the ground that it is beyond the ambit of the CJIs administrative power. In reality, however, this hurdle may be overcome if a particular CJI has the support of the other judges, as it is ultimately the CJI who would decide which judges would hear the challenge to the policy. This takes us to the second hurdle.

As we have shown in Part II, the SC remodeled itself as the "people's Court",[89] meant to remedy all forms of injustice.[90] Any broad policy that restricts SLPs is likely to be seen as a withdrawal of protection by the SC. One might argue that this is not necessarily the case, as the public is likely to respond positively if the SC filtered out weak appeals so as to reduce backlog and delay. However, given the number of backlog cases and the current rate of institution of SLPs, any reasonable policy seeking to restrict SLPs would be unlikely to see results in the short term. Since CJIs typically have short tenures,[91] there is little incentive for a CJI to frame a strict policy that might make the SC less accessible or even appear to make it less accessible.[92]

Finally, even assuming a CJI is not concerned with the perception of the Court and its social legitimacy, the current system stands in the way of developing a policy that can reign in the large number of SLPs filed due to a third, structural reason. Any policy that seeks to contain the number of SLPs filed would have to be implemented across the benches of the SC. Thus, the CJI would have to have to know the merit in the SLPs being placed before each of the benches of the SC. However, the CJI is just as burdened as the other judges in hearing cases through the day, and is further burdened by the administrative responsibilities that currently come with the office. As such, the structure of the Court and the current distribution of responsibilities make it impossible to collect enough information on the types of cases being filed to frame a policy on which SLPs are to be heard.

This discussion shows that while the CJI holds wide discretionary powers with respect to administering the SC, the issue of the high number of cases filed before the SC is largely beyond the reach of the CJI. This leads us to the CJI's dilemma. On the one hand, the CJI

89 See *Robinson*, note 71, pp. 104-105.

90 Ibid. Indeed, many lawyers we interviewed stressed that the SC needed to intervene since the quality of decisions of the High Court is poor (interviewees 2, 8, 9 and 11). In particular, a criminal lawyer explained that bail cases which form a significant part of the SC's workload were meant to be dealt with by the Trial Courts. He pointed out that over time, trial courts have become conservative in granting due to the prolonged duration of trials. Thus, the lawyer explained, such cases must travel up to the SC to decide whether the denial of bail was in fact justified. When asked how we can reconcile the number of SLPs filed in the SC with the number that are dismissed on the first hearing, the lawyer stated, "human hope never dies and as a result someone incarcerated and their family will indeed exhaust every avenue available to them.".

91 See infra Part I.

92 This assumes that a strict policy seeking to address backlog and delay in the long term is continued by successive CJIs. In Parts IV and V, we show the difficulties in making that assumption.

must figure out how the SC can fulfill its traditional role under the Constitution. On the other hand, the CJI cannot entirely step away from the SC's expanded role, but must somehow handle the massive number of SLPs now being filed in the SC every year. At the same time, the backlog of cases burdening the SC is well known to the public and it is closely related to the issue of delay in disposing of cases. Thus, the dilemma is actually a "trilemma", where the CJI must devise a strategy that enables the SC to fulfill its traditional and additional role while also not allowing the backlog of cases to increase, and the strategy must consider the fact that the SC has only 22.5 working hours a week.

We have shown that under the current system there are several factors preventing the SC from discouraging the institution of weak SLPs. This brings us to the second approach of beating the rate of institution by the rate of disposal. This approach depends heavily on how the CJI, who has the sole responsibility over the listing practices of the SC, lists cases. The next Part examines the listing practices employed by several CJIs.

## IV. Listing Practices Employed in the Supreme Court

In this Part, we critically evaluate the Court's listing policy to demonstrate that the Court's listing policy has largely been aimed at increasing the Court's disposal rate so as to reduce backlog. To demonstrate this, we briefly examine the Court's early approaches to reduce backlog in the 1990s, and 2000s in Section A. In section B, we examine the listing practices employed during the tenures of CJIs from 2012 to 2017, when the SC successfully brought down judicial backlog.

### *A. Understanding the Court's Listing Policy*

#### (i) 1990-2010

Mounting backlog was always on the Court's mind and reforms were consistently explored.[93] Concrete reforms were undertaken in the 1990s resulting in a significant decrease of backlog. During Justice Venkatachaliah's tenure as CJI,[94] the SC made significant changes in its accounting method and undertook a stocktaking exercise to allow for the expiry of old applications to bring down pendency to 35,000 cases.[95] Immediately after, backlog came down for the first time for two consecutive years during Justice Ahmadi's tenure

93 See 14th, 79th and 120th Report of the Law Commission of India, note 74.

94 His tenure ran from February 1993-October, 1994.

95 See Justice Venkatachliah's comments in *Harish Narasappa / Shivabhushan Hatti / Kavya Murthy*, An Evening With Justice M.N. Venkatachaliah, http://dakshindia.org/an-evening-with-justice-m-n-venkatachaliah/ (last accessed on 7 March 2018; *Robinson*, note 11, p. 580.

who undertook measures such as computerization of the registry, a system of classification of cases to ensure streamlining, as well as training of judicial officers.[96]

After 1997, the SC did not see a reduction of backlog until 2010.[97] As Justice Venkatachaliah pointed out in an interview, "From 1,87,000 cases in 1991, the total number of cases in the SC was reduced to 16,200 [in 1998]. We added another 3,60,000 over the next eight years, with an average of 40,000 per year."[98]

*Table 2: An overview of the Court's Backlog 1992-2017.*

| | | Institution | | | Disposal | | | Pendency | |
|---|---|---|---|---|---|---|---|---|---|
| Year | Admission | Regular | Total | Admission | Regular | Total | Admission | Regular | Total |
| 1992 | 20435 | 6251 | 26686 | 20234 | 15613 | 35847 | 62291 | 34985 | 97476 |
| 1993 | 18778 | 2870 | 21648 | 17166 | 3718 | 20884 | 37549 | 21245 | 58794 |
| 1994 | 29271 | 12775 | 42046 | 35853 | 12037 | 47890 | 30967 | 21983 | 52950 |
| 1995 | 35689 | 15754 | 51443 | 51547 | 16790 | 68337 | 15109 | 20947 | 36056 |
| 1996 | 26778 | 6628 | 33406 | 35227 | 10989 | 46216 | 6660 | 16586 | 23246 |
| 1997 | 27771 | 4584 | 32355 | 29130 | 7439 | 36569 | 5301 | 13731 | 19032 |
| 1998 | 32769 | 3790 | 36559 | 31054 | 4179 | 35233 | 7016 | 13342 | 20358 |
| 1999 | 30795 | 3888 | 34683 | 30847 | 3860 | 34707 | 6964 | 13370 | 20334 |
| 2000 | 32604 | 4507 | 37111 | 30980 | 4320 | 35300 | 8588 | 13557 | 22145 |
| 2001 | 32954 | 6465 | 39419 | 32686 | 6156 | 38842 | 8856 | 13866 | 22722 |
| 2002 | 37781 | 6271 | 44052 | 36903 | 5536 | 42439 | 9734 | 14601 | 24335 |
| 2003 | 42823 | 7571 | 50394 | 41074 | 6905 | 47979 | 11483 | 15267 | 26750 |
| 2004 | 51362 | 7569 | 58931 | 47850 | 7680 | 55530 | 14995 | 15156 | 30151 |
| 2005 | 45342 | 5198 | 50540 | 41794 | 4416 | 46210 | 18543 | 15938 | 34481 |
| 2006 | 55402 | 6437 | 61839 | 51584 | 4956 | 56540 | 22361 | 17419 | 39780 |
| 2007 | 62281 | 6822 | 69103 | 56682 | 5275 | 61957 | 27960 | 18966 | 46926 |
| 2008 | 63346 | 7006 | 70352 | 61219 | 6240 | 67459 | 30087 | 19732 | 49819 |
| 2009 | 69171 | 7980 | 77151 | 64282 | 6897 | 71179 | 34976 | 20815 | 55791 |
| 2010 | 69456 | 8824 | 78280 | 71867 | 7642 | 79509 | 32565 | 21997 | 54562 |
| 2011 | 68020 | 9070 | 77090 | 67131 | 6002 | 73133 | 33454 | 25065 | 58519 |
| 2012 | 68887 | 8030 | 76917 | 64682 | 4062 | 68744 | 37659 | 29033 | 66692 |
| 2013 | 68478 | 8264 | 76742 | 70385 | 6700 | 77085 | 35752 | 30597 | 66349 |
| 2014 | 74730 | 14434 | 89164 | 75980 | 16742 | 92722 | 34421 | 28370 | 62791 |
| 2015 | 69485 | 8959 | 78444 | 70763 | 11329 | 82092 | 33263 | 26009 | 59272 |
| 2016 | 71460 | 7784 | 79244 | 68618 | 7361 | 75979 | 36105 | 26432 | 62537 |
| 2017 (01.01-31.08) | 33882 | 4175 | 38057 | 37032 | 5290 | 42322 | 32955 | 25317 | 58272 |

In 2003-2004,[99] the Court began publishing Annual Reports explaining the Court's administration. These reports are the only self-reflexive source on the SC, where the Court presents its priorities for the future to the public. Interestingly, the Reports primarily present

96 For a detailed explanation of the measure undertaken see *Hiram Chodosh / Stephen Mayo / Aziz Ahmadi / Abhishek Singhvi*, Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process, NYU Journal of International Law and Politics 30 (1998).

97 See Table 2. An exception is 1999 where backlog reduced by 24 cases.

98 See Justice Venkatachliah's comments in *Narasappa / Hatti / Murthy,* note 95.

99 This Annual Report (AR) of 2003-2004 is not available in public circulation. However, the remaining reports can be found at https://www.sci.gov.in/publication (last accessed on 19 November 2018). These reports were not published between 2009-2013.

the measures undertaken by the Court to reduce backlog.[100] Additionally, a survey of these Reports reveals that the policies employed to reduce backlog have exclusively focused on increasing disposal.[101] Notably, the Reports between 2005 and 2010 focus on the following:

1. Miscellaneous cases and their proclivity for quick disposal

The Reports point out that the procedures of the Registry were streamlined and automated to ensure that cases are listed as soon as they are filed. Initially, it would take around one month after its filing for a case to be listed.[102] The 2005-2006 Report explains the rationale behind the change - "All fresh matters are listed within 10 to 14 days of registration and many of them are disposed of in the preliminary hearing."[103] Thus, by the Court's own admission, the Court reduced the time the registration and filing of fresh cases so that cases are heard swiftly and disposed of instead of adding to backlog over time. However, the reduction in the time it takes for the court to list a case also encourages institution as a losing litigant can try her luck before the SC before it is time to execute the order of the lower forum.[104]

Similarly, the Reports have also focused on listing more miscellaneous cases on miscellaneous days. For instance, the 2005-2006 report notes that "the number of cases being listed on miscellaneous days has been increased (up to 65), which has resulted in increased disposal."[105] In 2008-2009, this statistic was increased to 72.[106] Each judge is thus expected to read 72 case files for each miscellaneous day.

2. Miscellaneous cases on regular hearing days

The Reports of 2005-2006 and 2006-2007 note that miscellaneous cases can be listed for final disposal "without following the usual procedure of leave granting and hearing in due course. This course of action expedites hearing and has increased disposal."[107] If leave were granted, the case would join the back of the line of regular hearing cases and would have to wait its turn. However, through this mechanism, the case can jump the line and be heard

100 The exception to this is the AR 2005-2006 that mentions backlog only as a part and parcel of general reforms and specifically lists out the constitution bench matters heard by the court.

101 For instance, see AR 2007-2008 notes, "The total disposal of cases in the year 2001 was 38,842 cases, whereas the disposal of cases in the year 2007 was 61,957, cumulative increase being as much as 59.5% (approximately) in a period of 6 years as a result of these measures. See also, AR 2015-2016, p. 51.

102 Interviewee 15.

103 AR 2005-2006, p. 56.

104 Interviewee 14. See infra.

105 AR 2005-2006, p. 56; AR, 2006-2007, p. 72.

106 AR 2008-2009, p. 63.

107 AR 2005-2006, p. 56; AR 2006-2007, p. 72; AR, 2007-2008, p. 6.

first. Such miscellaneous cases usually take priority over regular hearing cases on Tuesdays to Thursdays.[108] Usually these are after-notice cases that require urgent hearing or can be disposed of quickly in a few hearings. The decision to list a miscellaneous case on a regular hearing day lies with either the judge hearing the case or the CJI, who can as a matter of general policy decide that certain types of miscellaneous cases will be listed for hearing on regular hearing days.[109] As will be seen later, this practice is predominant[110] and certain types of cases are usually prioritized.

3. Priority to Group cases

Group cases are cases that can be heard together on the basis of a common issue. For instance, they could all be appeals that arise from the same High Court order, or a challenge relating to the same provision of a statute or a similar provision across statutes of different states. They could also relate to the same fact situation – for instance, land acquisition claims with respect to the same project or consumer claims with respect to the same building project. Over time, the definition of group cases has become rather unclear as lawyers tend to convince judges that their case can be tagged with other cases as a means of getting notice issued in the case.[111]

The 2005-2006 and 2006-2007 Reports note that "Group matters are given top most priority in listing so that maximum cases may be heard and decided by a common order."[112] The report of 2007-2008 reiterates this and also specifies that "the larger group precedes smaller group" in listing.[113] Even in respect of Constitution Bench matters, several Reports presume that a case is important because it has connected matters.[114]

From the above it becomes clear that the SC has focused on increasing its disposal rates to drive down backlog. However, the SC was not able to drive up its disposal rate to match its institution rate and thus was unable to bring down backlog.[115] This changed in the next decade.

108 Interviewee 14. This is also evidenced in cause lists and AR.

109 Ibid.

110 Interviewee 1, 3, 4, 6, 13 and 14 attested to this practice being prevalent in the SC. However, they were unable to point out precisely when the practice started. The Court staff interviewed was also unable to point out precisely when the practice was started. The AR seems to suggest that the practice dates back to at least 2005-2006.

111 Interviewee 6.

112 Ibid.; AR 2006-2007, p. 72.

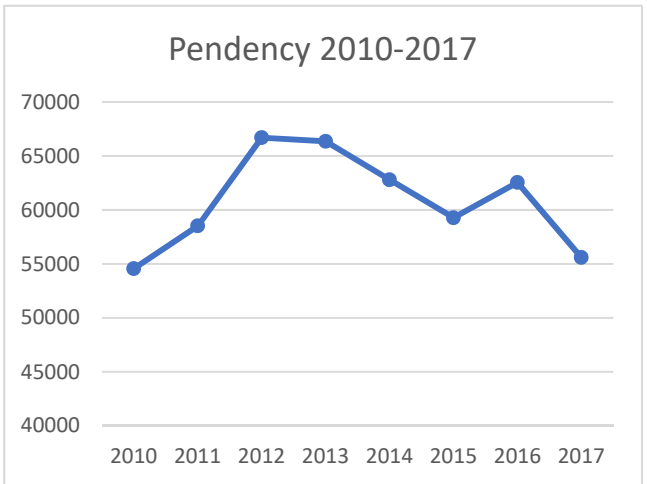
113 AR 2007-2008, p. 61.

114 "Constitution Bench/larger Bench are sitting regularly to decide important question of law and as a result, a large number of matters involving common issue are being disposed of expeditiously" in AR 2005-2006, p. 56. See also: AR 2006-2007, p. 56; AR 2007-2008, p. 61.

115 See statistics provided in AR 2014-2015, p. 76-79.

*B. A tenure-wise examination of the listing policy of the Court: Understanding the Court's listing policy better*

Figure : The Court's Pendency through 2010-2017




SC data reveals that backlog has been brought down in some years in the last decade.[116] In this section, we analyze the listing practice of CJIs between 2012 to 2017 on the following parameters: the number of miscellaneous cases listed during per court room per week, the number of constitution bench cases listed during the tenure, if and what types of miscellaneous cases were favored for listing on regular hearing days, and whether they were able to bring down backlog. We then comment on the distinctive features of tenures that resulted in the reduction of backlog.

Preliminary note on Methodology

For this analysis, we have counted the approximate number of miscellaneous cases listed in court every-day for each CJIs's tenure. The Court does not provide the number and type of cases listed in the Court but merely gives a list of all the cases listed per day in each courtroom. This list is called a Cause List. The number of miscellaneous cases have been counted from these cause lists.[117] Given that the total number of cases listed daily in SC goes up

116 "After the year 2000, there has been an enormous increase in the institution of fresh cases. Consistent efforts have been made to ensure that the disposal is higher than the institution. In fact, in the last three years, 2013–2015, the rate of disposal has been consistently higher than the rate of institution." in AR 2015-2016, p. 51.

117 In the cause lists, we have counted Interim applications, Fresh matters, adjourned matters and After-notice cases listed every week to calculate the average number of miscellaneous cases listed

to thousands, we have calculated the number of miscellaneous cases listed only in Court 1 and Court 4 as a representative sample.[118] Court 1, presided by the CJI, is an important indicator of the practice and priorities of the CJI. Court 4 is indicative of the practice in the remaining courtrooms.[119]

In cause lists, group cases are usually given one serial number and the connected/tagged cases in the group are not assigned a separate serial number. We have counted each connected case as individual cases since they are counted separately in the backlog data of the Supreme Court.[120] Since on many occasions the connected cases go into hundreds and thousands and can only be manually counted, the numbers provided are approximate and are intended to be indicators of the Court's practice.

We have derived the disposal rate of each CJI from the data provided in the Annual Report, the Monthly Statements of the Supreme Court and Court News (the quarterly Newsletter of the Supreme Court).[121] In respect of secondary sources, we rely on legal news sources such as Live Law and Legally India that have kept track of the listing practices of the Court as well as interviews with lawyers and clerks.

per week per courtroom. The cause lists have been taken from the SC Website as well as from the Court staff. However, despite checking from both sources, some cause lists could not be found. We have specified the number of days that are missing for each CJI.

118 In the SC, usually 12 courtrooms sit everyday with two judges each. This number may vary based on the numerical strength of the Court which changes often due to retirements and resultant vacancies not being immediately filed.

119 We have chosen Court 4 and not Court 2 or 3 as those Courts can occasionally have three-judge benches.

120 We provide different columns of number of cases listed excluding connected cases and including connected cases. Note: IAs don't appear to be counted in the Court's backlog so we have not counted the connected cases of IAs. However, we have included the number of IAs in the count of cases exclusive of connected cases to demonstrate the amount of time spent on these types of cases by the Court. In any case, IAs form a relatively small percentage of miscellaneous cases listed in a day especially on regular hearing days.

121 The Reports of the SC evaluate clearance of backlog on the basis of data provided in the ARs. See for instance, AR 2016-2017, p. 56; AR 2014-2015, p. 71. We have cross-checked the totals provided in the AR with the Monthly Statements and Court News that we used to ensure that the numbers across the different sources are uniform. However, for a note on other types of discrepancies, see *Robinson*, note 11, pp. 575-576. We resorted to the use of Monthly Statements and Court News in some cases because the AR only calculates backlog annually and monthly for some months. For instance, AR 2015-2016, provides backlog analysis for every month from January 2016 to August 2016. Similarly, AR 2016-2017 does the same from January 2017 to October 2017. It is necessary to know the month wise status as some judges need not serve an entire year but only a few months. Further, since for the year 2013 the Monthly Statement was not available, Court News was resorted to. It is also not possible to determine the exact disposal and backlog rates of each Chief Justice even using the Monthly Statements as it is possible that the Chief Justice changes in the middle of a month. If a CJI serves more than 15 days in a month, the month is attributed to his tenure, unless otherwise explained.

1. Justice Kabir (29 September 2012 - 18 July 2013)

Justice Kabir took over the reins from Justice Kapadia. During his ten-month tenure, the Court heard an average of approximately 130 miscellaneous cases per week per court. Miscellaneous cases were also heard on regular hearing days - an average of 18, 14 and 15 miscellaneous cases were listed on Tuesdays, Wednesdays and Thursdays respectively. If connected cases are included, the total number of miscellaneous cases goes up to 184 cases.

During Justice Kabir's tenure only 3 constitution bench cases were listed.[122] It is pertinent to note that Justice Kabir's predecessor, Justice Kapadia, listed around 16 constitution bench cases.[123] During Justice Kabir's tenure backlog did not reduce.[124]

2. Justice Sathisivam (19 July 2013 - 19 April 2014)[125]

Justice Sathisivam was CJI for approximately 10 months. Around the start of his tenure, he stated that "this difficulty [delay in disposal] can be overcome by enhancing judicial productivity both qualitatively and quantitatively."[126] During his tenure, backlog did see a significant and sustained reduction since the rate of disposal was consistently higher than the rate of institution every month. An average of approximately 152 miscellaneous cases were listed weekly in every court room, the highest in the data set, including 32, 10 and 21 miscellaneous cases on Tuesdays, Wednesdays and Thursdays respectively. If connected cases are counted, the cases go up to 231 miscellaneous cases per week per courtroom. However, only 5 constitution bench cases were listed in these 10 months.

122 Constitution benches have been counted from the cause lists as well as through a search on Manupatra, an online legal database in India.

123 Justice Kapadia served as CJI for around 27 months.

124 Even though, Justice Kabir served 18 days of July 2013 as Chief Justice, the month has been excluded from the calculation of his backlog. This is because the Monthly Statement of 2013 was not available, so we relied on Court News which provides information for every quarter. Since July's data is a part of the data on July, August and September, there is no way to decipher the data for only July 2013. In any case, this should not affect the finding that backlog did not reduce during Justice Kabir's time since the total decrease in backlog from July to October, 2013 is less than the increase in backlog during the remaining part of Justice Kabir's tenure (October 2012-June 2013).

125 Six cause-lists are missing.

126 New Delhi Television, Justice P Sathasivam sworn in as 40th Chief Justice of India, https://www.ndtv.com/india-news/justice-p-sathasivam-sworn-in-as-40th-chief-justice-of-india-528838 (last accessed on 20 November 2018).

3. Justice Lodha (27 April 2014 - 27 September 2014)[127]

Justice Lodha's tenure of five months was short but memorable.[128] Those who observed Justice Lodha's Court remember it being extremely efficient with strictly enforced time limits that allowed cases to be disposed of efficiently.[129] During his tenure, the usual practice of hearing miscellaneous cases on regular hearing days continued. A total of 118 miscellaneous cases were listed per week per courtroom, the lowest in the dataset, including 23, 7 and 12 miscellaneous cases on Tuesdays, Wednesdays and Thursdays respectively. If connected cases are included this number comes up to 184 cases. Interestingly, 14 constitution bench cases were listed in this five month tenure, which is the highest in the dataset. Backlog did not reduce during Justice Lodha's tenure and the disposal rate trailed the institution rate by 4,700 cases.

4. Justice Dattu (28 September 2014 - 27 December 2015)[130]

During Justice Dattu's 15-month tenure, pendency came down from 64,612 cases to 59,272 cases.[131] This is attributable to several policies. Special benches were set up to hear tax, commercial, criminal and public interest cases (these included public interest petitions that had been pending for a long time). This streamlining was a success as most benches resulted in high disposals.[132] An average of approximately 130 miscellaneous cases were listed every week in every courtroom. If connected cases are included the number goes up to approximately 156 cases. However, the practice in the CJI's Court is worth noting - 198 miscellaneous cases were listed every week which is a break from the usual practice where significantly fewer cases are listed in the CJI's Court so as to allow the CJI to focus on important cases (see table 4). Most of these cases were group cases. In fact, if connected cases are included, an average of approximately 443 miscellaneous cases were listed, including an average of 116, 123 and 84 listed on Tuesdays, Wednesdays and Thursdays respectively.[133]

127 Four cause-lists missing.

128 An interviewee described him as a "magnificent Chief Justice" interviewee 6.

129 Interviewee 22.

130 13 cause-lists are missing.

131 Calculated from AR 2014-2015, Court News for 2015 and Monthly Statement 2015.

132 One of the interviewees, number 19, pointed out that Justice Dattu's specialization was tax and he was generally concerned about the welfare of downtrodden. This could explain his inclination to list these type of cases.

133 This number almost always runs in two digits for other judges.

*Table 3: Tenure wise break up of approximate number of miscellaneous cases listed in the CJI's court per week*

| Chief Justice | Average no. of Misc cases per week | Average Number of Misc cases per week including connected cases |
|---|---|---|
| Justice Dattu | 198 | 443 |
| Justice Lodha | 114 | 221 |
| Justice Sathasivam | 93 | 140 |
| Justice Thakur | 85 | 130 |
| Justice Khehar | 79 | 95 |

The Annual Report of 2014-2015 states "in view of directions of Hon'ble CJI, group matters relating to land acquisition, compensation matters […] are being listed before the bench being presided over by his Lordship. In this way, a large number of matters have been decided thereby resulting in the reduction of pendency." This practice is evidenced in the cause lists and confirmed by interviewees. Many a time, in the cause-lists the number of connected cases would run into hundreds. In fact, on a given day where one case was listed, 14 cases were listed of which one case had approximately 1100 connected cases. As per interviewees, Justice Dattu had carefully identified the types of cases that have a number of matters pending on the same issue and he was able to dispose them of together by managing the court efficiently.[134] It is also pertinent to note that during Justice Dattu's tenure, the time between registration of a case in the SC and its listing was reduced from 10 to 14 days to 7 days.[135] The Annual Report once again notes that many of them are disposed off at the preliminary hearing.[136]

However, the listing of constitutional cases was refused. For instance, Justice Dattu expressed inability to list the constitutional challenge to the Government's biometric ID card program, AADHAAR, that impacts the privacy rights of each citizen that had to be heard by a nine judge bench.[137] In this context, Justice Dattu reportedly said, "Question is do I have nine judges to spare? What happens to other matters? Please understand my problem."[138] A constitution bench was then constituted only for issuing interim directions in the case.[139] Only three other constitution bench cases were heard. In his last interview as Chief

134 Interviewee five, 19, 23.

135 AR 2014-2015, p. 72; interviewee 14.

136 AR 2014-2015, p. 72.

137 *Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors.*, WP (C) No. 494 OF 2012.

138 Livemint, CJI Dattu likely to decide on a larger bench for Aadhaar case on Friday, https://www.livemint.com/Politics/NRicg2GXdTGTXNmB7DGCMP/CJI-Dattu-likely-to-decide-on-a-larger-bench-for-Aadhaar-cas.html (last accessed on 20 November 2018).

139 Livement, Supreme Court Provides Partial Relief to AADHAAR, https://www.livemint.com/Politics/XoXAlzO9SeGqB15LvBj0yN/SC-extends-voluntary-use-of-Aadhaar-for-govt-schemes.html (last accessed on 20 November 2018).

Justice, Justice Dattu expressed anguish at the state of affairs with 220 cases being filed every day. He noted "many cases involving hearing by five judges could not be taken up as it was not possible to spare that many judges as it affected other cases. Even a bench of three judges was a difficulty."[140]

5. Justice Thakur (3 December 2015 - 3 January 2017)[141]

At the beginning of his approximately 13-month term, Justice Thakur was quoted saying that "2016 will be the year for clearing arrears."[142] During his tenure, the Court employed techniques that would increase disposal. For instance, a study was commissioned ranking all the judges by their disposal rate.[143] This study was critiqued on the ground that it did not account for the fact that different types of cases would take different amounts of time in being disposed of.[144]

One must also critically evaluate whether the measures employed achieved the rate of disposal required to beat the rate of institution. A high number of miscellaneous cases, approximately 136, were listed per week per courtroom including 22, 13 and 5 miscellaneous cases on Tuesdays, Wednesdays, and Thursdays, which included fresh, after notice and adjourned cases. If connected cases are counted, this number goes up to approximately 234 cases per week including 70, 46 and 21 cases on Tuesdays, Wednesdays and Thursdays respectively. However, the annual report notes, "A special drive was initiated to hear after-notice matters which had literally clogged the entire system. About 5,000 after-notice matters had accumulated and were decided."[145] The report notes that only around 666 such cases were disposed of by August 2016, eight months into the tenure.[146] This seems to suggest that the cases chosen for listing were older cases and not necessarily cases that are likely to be disposed of quickly or *en masse*.[147] In the same vein, the Report goes on to note that six three-judge benches were constituted to sit on Mondays and Fridays to hear important cases

140 Legally India, 220 new cases filed in SC daily yet pendency reduced from 64,000 to 58,000 during Dattu, https://www.legallyindia.com/the-bench-and-the-bar/220-new-cases-filed-in-sc-daily-yet-pendency-reduced-from-64-000-to-58-000-during-dattu-20151202-6923 (last accessed on 20 November 2018).

141 12 cause-lists are missing for this tenure.

142 Legally India, CJI Thakur succeeds CJI Dattu, vows to tackle pendency in 13-month-term, https://www.legallyindia.com/the-bench-and-the-bar/cji-thakur-succeeds-cji-dattu-vows-to-tackle-pendency-in-13-month-term-20151203-6928?lang=en&language=en-GB&option=com_content&catid=19&id=6928&view=article&Itemid=546 (last accessed on 20 November 2018).

143 Times of India, Dave top scorer among SC judges on tackling pendency, https://timesofindia.indiatimes.com/india/Dave-top-scorer-among-SC-judges-on-tackling-pendency/articleshow/50490902.cms (last accessed on 20 November 2018).

144 Ibid.

145 AR 2015-2016, p. 51.

146 Ibid.

147 Contrast this with the AR 2014-2015.

and a special bench to hear bail cases and another bench to hear tax cases were also constituted. These benches had resulted in the disposal of 100, 104 and 112 cases till August 2016 respectively.[148]

A total of 14 constitution bench cases were listed in Justice Thakur's tenure.[149] Several of these cases were older cases that had been pending for a long time.[150] However, in the last 4 months of Justice Thakur's tenure as CJI, a nine-judge bench was constituted to consider the validity of the levy of entry tax.[151] The Annual Report declares that the entry tax case would lead to the disposal of 1,240 connected cases in the SC.[152] It is pertinent to note that the AADHAAR case which also required to be heard by 9 judges was pending at the time. This is important because the case affects a large percentage of the Indian population. Factors such as these tend to be ignored when the focus is on increasing the Court's disposal rate. 2016 came to a close with the Court's disposal rate trailing the rate of institution of cases by 3,265 cases. This can be explained by the fact that the cases listed did not have enough connected cases.

### 6. Justice Khehar (5 January 2017 - 27 August 2017)[153]

Justice Khehar served a shorter than average tenure of eight months which saw a net decrease in backlog from 62,537 to 58,272 cases. A total of 133 miscellaneous cases were listed per week per courtroom including 19, 13 and 17 cases on Tuesdays, Wednesdays and Thursdays. If connected cases are included, this number goes up to 181 cases. At the start of his tenure, a circular was issued stating "On Tuesday, Wednesday and Thursday in addition to regular hearing cases, 10 after notice short cases including fresh cases shall be listed."[154] It is important to pay attention to the word, 'short.' The Annual Report explains, "Short matters relating to Rent Act, Arbitration petitions, criminal matters relating to maintenance, criminal matters relating to bail/interim bail/anticipatory bail and transfer petitions are being listed before the Hon'ble Court on non-miscellaneous days for speedy dispos-

148 AR 2015-2016, p. 52. However, it is unclear if the this number includes connected cases. There is reason to believe that it does since the report includes connected cases while referring to other cases such as the entry tax case.

149 Constitution Benches also heard two review petitions and one contempt petition.

150 *Abhiram Singh and Ors. v. C.D. Commachen (Dead) by L.Rs. and Ors., (2017)2SCC629*; *Krishna Kumar Singh and Ors. v. State of Bihar and Ors., (2017)3 SCC 1, Union of India v. Jai Bir Singh, (2017) 3 SCC 311*.

151 *Jindal Stainless Steel v. State of Haryana, (2017) 12 SCC 1*.

152 AR 2015-2016, p. 52.

153 Ten cause-lists are missing for Justice Khehar's tenure.

154 Live Law, CJI Khehar Brings in Changes No More NMDs, Social Justice Bench Reconstitution, https://www.livelaw.in/cji-khehar-brings-changes-no-nmds-social-justice-bench-reconstituted-read-circular/ (last accessed on 20 November 2018).

al."[155] This trend is borne out by the Cause lists. Thus, the Court once again chose types of cases to be listed on non-miscellaneous days.

Only three constitution bench cases were listed during Justice Khehar's tenure.[156] It is pertinent to note that one of these constitution benches was listed during the summer vacation and not during the regular working days of the Court.[157] Another bench only passed a short order relating to the regulation of the Medical Council of India.[158] Further, the case challenging the constitutional validity of the Government's biometric identity card program (AADHAAR) was listed on the limited question of whether there exists a right to privacy when the lawyer stated that he would wrap up the hearing in two days instead of three weeks as initially suggested by the lawyer.[159]

## V. A Critical Evaluation of the Supreme Court's Performance

From the above survey of listing practices, it becomes clear that the Court has adopted a disposal oriented approach with a view to reduce backlog. Two of the SC's working days are dedicated to miscellaneous cases, where the Court only considers whether or not it would admit cases. Lately, we have seen an increase in the rise of miscellaneous cases even on regular hearing days and increased priority being given to group cases and shorter cases.[160] In this Part, we argue that the Court's current approach to reduce backlog by increasing disposal creates several problems. These are detailed below:

### *A. Low priority to listing constitution bench cases*

As noted in Part I, the traditional role of the SC was to hear cases involving substantial questions of law of general importance including questions of constitutional interpretation. Many of these cases take relatively long[161] and are usually heard by judges sitting in bench-

155 AR 2016-2017, p. 56.

156 Additionally, a suo moto contempt petition relating to the conduct of a judge in the Madras High Court was also listed. *In Re: C.S. Karnan, Suo Motu Conmt. Pet. (C) No. 1 of 2017*. We have excluded contempt and review petitions from the count of Constitution Bench cases.

157 *Shayara Bano v. Union of India*, *(2017) 9 SCC 1*.

158 *Amma Chandravati Educational and Charitable Trust and Ors. vs. Union of India*, C.A. No. 4060/2009.

159 The authors were present in Court. Interestingly, the hearings went on for approximately two weeks given the importance of the case. (2017) 10 SCC 1.

160 Not every CJI's tenure outlined in Part IV of all these characteristics but adopts at least one of the approaches to reduce backlog.

161 Interviewee two and five. Several recent cases involving substantial questions of law and questions of constitutional interpretation stretched over two to three weeks. Some even went on for four to five weeks.

es of three or more.[162] However, such benches need to be constituted by the CJI on request. A study by several scholars has shown that the percentage of constitution benches hearing cases has gone down significantly over the years.[163] While constitution benches heard 15.5% of the total cases listed between 1950 and 1954, this number was as low as 0.12% between 2005 and 2009.[164] In part IV we have seen that the listing of constitution benches was refused on numerous occasions on the ground that it takes time away from other shorter cases.

*Table 4: Correlation between Backlog and Constitution Bench Cases*

| Chief Justice | No of Constitution Benches[165] | Whether Backlog Reduced |
|---|---|---|
| Justice Lodha | 14 | No |
| Justice Thakur | 13 | No |
| Justice Kabir | 3 | No |
| Justice Khehar | 3[166] | Yes |
| Justice Sathasivam | 5[167] | Yes |
| Justice Dattu | 4[168] | Yes |

In fact, as shown in Table 2, constitution benches made infrequent appearances in tenures where backlog reduced.[169] These include the tenures of Justice Sathasivam, Justice Dattu and Justice Khehar where four, three and four Constitution Bench cases were instituted. It is pertinent to note that during the tenures of Justice Lodha and Thakur with constitution bench cases were listed respectively. As on 6 April 2018, there were 933 cases waiting to be heard by three-judge benches, 395 cases waiting to be heard by five-judge benches, 12

162 As per current practice, the first courtroom always consists of three judges, and often the second courtroom does as well.

163 *Robinson et al*, note 33. Also notable is Rishad Ahmed Choudhry's argument that the Supreme Court's emphasis on hearings cases under Article 136 has "inhibited the Court's performance of more important, constitutional functions." Choudhry explains that the Court often defers cases requiring to be heard by large benches, and that the Court sometimes seeks to address issues of constitutional significance through smaller benches, which he shows to be problematic. *Choudhry*, note 70, pp. 371-374.

164 Id, p. 28.

165 While counting the number of constitution benches constituted, we have excluded contempt and review petitions listed before constitution benches.

166 This number includes one constitution bench listed during the vacation.

167 This number includes one case listed before a five-judge bench that decided to refer the case to a seven-judge bench.

168 This number includes a bench constituted to pass an interim order.

169 This does not mean that the converse is true, that in cases where less constitution bench cases are listed, backlog will reduce. Since reduction of backlog also depends on the disposal rate of judges. See for instance, the tenure of Justice Kabir.

cases waiting to be heard by seven-judge benches and 139 cases waiting to be heard by nine-judge benches.[170]

### *B. Insufficient time to hear regular hearing cases*

It may be recalled that regular matters are those that have been admitted for hearing to the SC through the admissions process and are waiting in a long chronological queue for their turn.[171] These include both cases involving substantial questions of law and cases where the lower court has erred. Part IV reveals that miscellaneous cases are being instituted on regular hearing days above regular hearing cases. An average of 131 miscellaneous cases were listed per week per courtroom from 2012-2017. In fact, while the policy of the Court was to list such miscellaneous cases only on Tuesdays, they have gradually been listed on Wednesdays and Thursdays. Since 2017, it is the formal practice of the Court to list 10 miscellaneous cases on all three regular hearing days including fresh cases. Even though each case may be listed because it is short and can easily be disposed off, the hearing of each case adds up, leaving less time for regular hearings.

The cause list on a regular hearing day will first list part-heard cases,[172] followed by after notice cases, and finally there would be a list of 10 to 20 regular hearing cases. One of our interviewees pointed out that miscellaneous cases listed on Tuesday, Wednesdays and Thursdays often take up a substantial percentage of the SC's time on those days.[173] A second interviewee stated that with the current listing practice, "the only chance of regular hearings almost definitely being heard was on Thursdays."[174] A third interviewee argued against the current system on the ground that litigants whose case is listed as the 15th or 20th regular hearing case would travel all the way to Delhi in the hope that her case would reach, especially after having waited many years to see the case on the SC's list.[175] Thus, the current listing practice of the Court is not conducive to its original and extended role.

170 Internal data maintained by the Supreme Court of India (on file with authors).

171 See Part I.

172 A part-heard case is so designated by the judge because it was in the process of being heard the previous day.

173 Interviewee three. Interestingly, this interview was carried out in the SC at 12.30 pm on a Wednesday. When asked, "how long would miscellaneous cases take on non-miscellaneous days?", the interviewee pointed to the board displaying the cases being heard in each courtroom which showed that all benches of the Court were still hearing miscellaneous cases two hours into the day. In the words of the interviewee, "many a time, the entire day could go in hearing a miscellaneous case.".

174 Interviewee six.

175 Interviewee 20. In fairness, it may be pointed out that some judges try to prevent this from occurring by identifying the time likely to be taken by cases and informing the parties waiting for later cases. However, this ad-hoc system can at most provide modest possibilities to plan. Further, it may be pointed out that many judges are alive to the problem of stakeholders and lawyers losing time, and try to prevent it from occurring by assessing how long each regular hearing would take, and then informing the advocates waiting for regular cases listed later as to whether or not their

However, it is open to argue, as a couple of the lawyers we interviewed did, that the miscellaneous cases listed on regular hearing days are just as important as the long-pending regular matters since they also either involve substantial questions of law or grave errors by lower courts.[176] In the next section, we evaluate and respond to this argument in greater detail.

### *C. Prioritized hearing of miscellaneous cases*

Lawyers supporting the SC's current listing practice pointed out that the miscellaneous cases listed on regular hearing days are listed on priority because they are urgent.[177] One of these lawyers further justified this practice on the ground that most old cases had either become infructuous or clients had lost interest in them,[178] and that even if an old matter was in need of urgent disposal, an application for early hearing could be filed.[179] The lawyer further explained that the Court's time was being managed at the level of each individual courtroom by the judges.[180] These claims are important, as they suggest that the listing practice of the SC is based on justifiable distinctions between categories of cases. In other words, it suggests that the SC's listing practice is receptive to the needs of particular cases, and that even without there being a formal policy to identify urgent and important cases, the practice of the SC enables individual benches to identify such cases and thus prioritize cases based on qualitative, rather than purely quantitative grounds. Given its importance, this argument must be scrutinized in detail.

A reading of the Annual Reports and analysis of cause lists referred to in Part IV above, demonstrates that the miscellaneous cases listed on regular hearing days are often prioritized on the basis of them being short or capable of being grouped with other cases, rather than on the basis of urgency or importance of subject matter.[181]

Further, several of the lawyers and law-clerks we interviewed suggested that the question of whether or not a case is given high priority depends heavily on the lawyer engaged and the judge hearing a particular case.[182] It is common knowledge that senior lawyers are frequently given more patient hearings than other lawyers, regardless of the

case is likely to come up for hearing. Even so, this is a minor consolation for litigants eagerly waiting a regular hearing.

176 Interviewees four and 13.

177 Ibid.

178 Interviewee 13. This statement is important, and we return to it in Part VI below.

179 Ibid.

180 Ibid.

181 See Part IV. This can be seen from the AR published describing Justice Dattu's tenure where land acquisition cases and other compensation cases were listed. Further, during Justice Khehar's tenure rent control and criminal cases relating to maintenance and bail applications were listed.

182 Interviewees one, six, ten and 15. The Interviewee numbers of the law-clerks are not mentioned here.

substance of a case.[183] It is also well known that senior lawyers charge high fees per appearance because of their ability to get notice issued in matters that otherwise would have been dismissed by the court. It is a fact that most people cannot afford these lawyers.[184] This suggests that the SC's listing practice may be more ad-hoc than is apparent, and certainly less justifiable to that extent.[185] The lawyers and law-clerks mentioned above further stated that the prioritization of cases also depends heavily on the philosophy and priority of individual judges. While some judge are more inclined to grant early hearings in criminal matters, others are more inclined to grant early hearings in arbitration and commercial matters.[186] Here, it may be noted that some CJIs did try to implement institutional policies so that certain types of cases should be given priority.[187] However, as may be seen from the data presented in Part IV, the types of cases that have been given priority have changed every time a new CJI is appointed, and seems to depend entirely on their differing political philosophies.

The above discussion makes it clear that the argument defending the SC's current listing practice, though compelling, is flawed. Rather than being based on justifiable distinctions between categories of cases, the practice of the Court appears to be ad-hoc, irregular, and opaque. Even if the listing practice enables certain judges to prioritize cases requiring urgent hearing over others, it is clear that the practice does not give rise to an institutional practice.

183 Though in fairness it must be pointed out that some judges are an exception to this in that they encourage relatively younger advocates to argue before the Court. A very small percentage of judges even admonish senior advocates for appearing in very weak cases.

184 For a slightly out-dated survey of the fees of some senior advocates, see Legally India, Which 9 top lawyers easily charge Rs 15+ lakh per hearing? 42 Delhi seniors' fees revealed, https://www.legallyindia.com/the-bench-and-the-bar/revealed-delhi-rsquo-s-top-advocates-won-rsquo-t-even-touch-your-case-for-less-than-rs-5-lakh-20150908-6555 (last accessed on 20 November 2018).

185 It may be reiterated here that since our emphasis is on the Chief Justice's role, we have not considered the issue of prioritization by other judges in great detail. For a detailed view on that issue, arguing that the current practice is ad-hoc, and that the prioritization carried out by individual benches is unfair when seen in a larger context, see *Choudhry,* note 70, pp. 362-363.

186 Notably, one of the interviewees, number one, took strong objection to CJIs who were inclined toward the latter. The lawyer remarked, "I don't understand how some judges can decide to hear an arbitration case first while seeing that a criminal matter from 2010 is pending on his list (and that it may not reach on that day)." That said, even among lawyers there is a considerable degree of disagreement over what the priorities of the Court should be. For example, interviewee two supporting special commercial benches remarked, "those complaining that even human rights issues need to be addressed by courts must remember that we are also part of the G20 and need to compete on that level. Eventually, the resources that would be gained from economic growth can be applied to all types of matters." Interestingly, even the government has spoken of the need to reduce backlog in order to perform better on the Ease of Doing business Index. Ministry of Finance, Economic Survey of India 2017-18, http://mofapp.nic.in:8080/economicsurvey/ (last accessed on 20 November 2018).

187 See Part IV.

### *D. Grouping of cases*

As briefly mentioned in the section above, one of the reasons provided for prioritizing hearing certain cases under the current listing practice of the SC is that they can be grouped along with others, resulting in a high disposal rate. In Part IV, we showed that all Annual Reports mention that group cases, that is, cases that involve a number of connected or tagged cases, will be given priority. This is problematic at three levels. First, it does not seem fair that a case is prioritized merely because it connects to other cases, and not on the basis of its subject matter. Applying this logic, 100 cases on a very minor issue could take precedence over one case involving a very significant issue.

Second, the prioritization of group matters creates an odd incentive structure where, on the one hand, the SC is extra keen to group together cases, and on the other, petitioners with weak cases would be keen to have their case grouped with an already pending set of cases, even if the connection between the two cases is very weak. This incentive structure could easily give rise to situations where unworthy petitions ride along with petitions raising important issues, but ultimately are heard separately before the SC when it is found that they are based on a set of distinguishing facts that preclude the application of a legal principle uniformly across all the grouped cases.

Third, the current emphasis on grouping matters could lead the SC to overlook distinctions between cases even when petitioners seek to bring the distinctions to their attention. One of the lawyers we interviewed stated that when he objected to the grouping of his case with other cases on the ground that his grievance was with an error in the lower court decision specific to his case, the SC ignored his objection in its haste to group cases.[188] The lawyer further stated that this problem repeatedly comes up when the SC groups matters that are each impugning specific errors in lower court decisions. This discussion demonstrates that both the intention and the wisdom of grouping cases are questionable.

### *E. The resilience of backlog cases and the effect of an open-door policy*

Finally, it may be argued that the current approach of the SC would allow the court to first tackle backlog and then deal with important cases. However, the Court's method is unlikely to succeed in reducing backlog. While backlog has reduced in 2013, 2014, 2015 and 2017, the data in Table 3 shows that the rate of disposal was not significantly higher than the institution rate. This suggests that the Court merely scratched the surface of backlog pending from previous years. For the court to make a significant dent in backlog it would have to increase the number of cases it lists and/or increase its rate of disposal. However, all except 1 of the 32 clerks survey stated that the Court could not handle more workload than it was now.[189]

188 Interviewee five.

189 Surveys with law-clerks.

*Table 5: An Overview of Disposal Rates in Years when Backlog reduced*

| Year | Institution | Disposal | Difference |
|---|---|---|---|
| 2013 | 76742 | 77085 | 343 |
| 2014 | 89164 | 92722 | 3558 |
| 2015 | 78444 | 82092 | 3648 |
| 2017 (till August) | 38057 | 42322 | 4265 |

Moreover, as per Robinson's calculation, it would have taken about 3.76 years in 2011 to clear backlog if no new case was admitted in court. At the time, pendency stood at 58,000. At the end of October 2017, pendency stands at 55,259. Thus, the situation may not be very different today. However, there is reason to believe that Court's practice of listing more and more miscellaneous cases to bring down disposal is likely to encourage institution by making the court more accessible.

Robinson, who tracked the Court's workload till 2011, has pointed out that the institution of cases in the Supreme Court has steadily increased over the years at a rate disproportional to the disposal rate of the High Court.[190] From 2011-2016, the data does not reveal any consistent signs of reduction of institution and an average of 70,176 cases were instituted in the SC every year.[191] Moreover, since 2014, the Court reduced the time between registration of a case to the listing of a case in the Supreme Court from ten to 14 days to seven days. Interestingly, there was a sharp increase in admission cases in 2014 to 74,730 from 68,478 cases in 2013. In 2017 under the new listing system, the Court has reduced this time to a maximum of four days. [192]

Our interviews with lawyers reveal that dexterous and moneyed litigants are likely to try their luck at the SC even if they are unlikely to win.[193] The practice of the court to list cases as soon as they are filed and increasing the number of days miscellaneous cases are listed on has the potential of encouraging such litigants to file appeals against interim orders of the High Courts since the appeal in the SC will likely be listed and heard before the next date of hearing in the High Court. These cases take up the time of the SC even though they may eventually be dismissed at the preliminary stage.[194] Indeed, this may also explain Robinson's finding that appeals are more likely to be filed against orders of High Courts

190 *Robinson*, note 11, p. 589.

191 Calculated from AR.

192 An overview of the new scheme for automated listing of cases, Supreme Court of India, https://www.sci.gov.in/pdf/LU/rationalisation%20of%20assignment_final1.pdf (last accessed on 20 November 2018).

193 Interviewees one, four, 14 and 15.

194 Admittedly, the rate of institution in 2017 was relatively lower at 55,000 but it is too soon to assess whether the decrease in institution will be a trend.

that are closer to Delhi, where the SC is located or from wealthier states,[195] suggesting that resources at hand play a big role in deciding whether to appeal a case to the SC.

When asked whether lawyers discourage the institution of such cases that are likely to be dismissed in a preliminary hearing, many lawyers indicated that they were not in a position to do so. A senior advocate asked, "What is a frivolous case? Who defines it?"[196] Every other civil lawyer too argued that filing a case in the SC was a gamble that could go either way because the Court was not following any standard to being with. Another lawyer explained, "after you spend enough time in drafting a file (petition) with all the facts and grounds, it does seem like that there's something there for the court to intervene."[197] Interestingly, law-clerks who assist the judges by preparing briefs on miscellaneous cases listed took a very different view on the substance of the cases filed before the SC.[198] As per our survey, law-clerks on average felt that 69% of the cases filed in the SC should not have been filed in the first place. When asked how often judges would admit cases that the law-clerks expected to be dismissed, they responded, on average, that this would happen only around 20% of the time. This view is in tension with the widespread view held by lawyers that the Court is extremely unpredictable and that it is near impossible to say which SLP will be dismissed.[199]

The disparity between the views of lawyers and law-clerks is one worth examining in greater detail.[200] Notably, upon being asked follow up questions on why the dismissal rate of the SC was so high and why the high rate of dismissal did not discourage clients from filing SLPs, most lawyers interviewed gave the same response – that if they did not agree to take the case, clients would just go to another lawyer and invariably call them to say that

195 *Robinson*, note 11, p. 586.

196 Interviewee seven.

197 Interviewee two.

198 It may be noted that most law-clerks join the SC immediately after graduating from law college. Their inexperience may be seen in two ways. One is to take the view that their understanding of what constitutes a question of law worthy of the SC's attention is at a nascent stage which shall undergo a considerable degree of development over the years. Another is that because they are relatively new to the system, and do not benefit from the filing of a higher number of cases before the Court, their view is relatively independent and worth paying attention to. In this paper, we peg the views of law-clerks somewhere in between these two points – we do not take their view on what kind of case is worth a SC hearing as equal in weight to that of more experienced stakeholders involved in the system, but at the same time we think that their views merit a certain amount of respect, especially given their lack of monetary interest in the issue.

199 Of course, it could be argued that even 20% is a wide enough margin for petitioner's to be justified in fancying their chances. However, the tension between the two views is because one suggests that the SC is entirely unpredictable whereas the other seems to find its approach relatively predictable.

200 Once again, a good place to start is *Dhavan*'s, note 65, p. 85. Dhavan argues that the proliferation of Art. 136 petitions may largely be attributed to "short-sighted abuse of the legal process" by lawyers.

notice was issued in the case that they refused to take up.[201] The lawyers stated that savvy clients with deep pockets were always "willing to take a chance."[202] To this, some added that if a court above the SC was created, clients would even appeal the decisions of the Supreme Court.[203] These interviews suggest that either many of the parties filing SLPs are not seeking a "just" decision or that even the SC fails to deliver "just" decisions. Indeed, a study conducted under the aegis of Justice Ahmadi during his tenure as Chief Justice identified "free access for litigants to courts and incentives for frivolous, party-controlled litigation processes (including initiation without cause, extension without excuse, motions without merit)" as one of the leading causes of backlog.[204] Thus, the practice of the court to list more and more miscellaneous cases to facilitate their speedy disposal is likely to backfire as it makes the SC more accessible to such clients.

From the above interviews and surveys, it is clear that, notwithstanding the expansion of the Court's mandate as an attempt to do justice in every case, the current system suffers from a number of problems. Most of Mondays and Fridays are consumed in hearing admission cases of which 40% are dismissed in one hearing and therefore should not have been filed in the first place. On regular hearing days, cases are listed out of turn with little transparency on the criteria employed to list a case out of turn with low priority being given to constitution bench cases. The system is run on the individual discretion of judges and is further marred by short institutional changes made by CJIs in their short tenures. Every CJI tries to innovate the manner of listing and prioritizing cases in order to bring down pendency. The Indian SC is now easily accessible. This gives ample advantage to lawyers and clients to challenge interim orders of the High Courts and statutory tribunals in the SC to stall proceedings by getting an interim ruling or adjournment by the SC.

## VI. The Need for an Institutional Approach

As explained in Part III, the CJI is the only person who holds the power to bring large-scale change to the manner in which the SC hears cases. We have also shown that the most important issue with respect to the workload of the SC is the unrelenting institution of SLPs, over which the CJI has no control. Thus, CJIs have focused on what they did have control over – the listing of cases in the SC. By examining the listing practices of successive CJIs, we showed how they all sought to address the massive number of SLPs instituted by focusing on disposing as many cases as possible. Finally, we argued that the listing practices employed by successive CJIs are problematic, and that a more systematic approach is required to better handle the SC's workload.

201 A notable exception was interviewee 12.

202 This statement is reminiscent of the view of the eminent Indian jurist, H.M. Seervai, who argued that Article 136 of the Constitution encouraged litigants to "take a chance." *H.M. Seervai*, Constitutional Law of India (4th Edition, 2013), pp. 2964-2965.

203 Interviewee two, four, five, nine and 15.

204 See *Chodosh / Mayo / Ahmadi / Singhvi*, note 96.

Interestingly, some previous CJIs have also noted that the current system is faulty and needs repair. For instance, in 2013, Justice Sathasivam advocated a fixed term of two years for each CJI, arguing that such (relatively) long terms would be necessary to effectively manage the SC's workload.[205] Justice Lodha took a different view, suggesting that there should be an institutional framework in place for administration of the SC.[206] In this Part, we argue that an institutional framework would enable the SC to fulfill its various responsibilities more effectively.

The potential benefits of an institutional approach may be best understood by contrasting such an approach from the current system, where the task of administering the SC is left to the CJI alone. Below, we provide four examples of how an institutional approach would enable the SC to perform its various responsibilities better than the current system:

1. Developing an institutional stand toward interpreting and understanding Article 136

In Part II of this paper, we have seen how the SC began interpreting Art. 136 liberally, and in Part III, we noted several problems that resulted from this. Most importantly, we showed that the liberal approach to interpreting Art. 136 facilitated the breakdown of precedent, which in turn made it easier for advocates to present their SLPs as requiring the SC's intervention. This was supported by an argument stressing that a high percentage of SLPs are dismissed at a preliminary stage. We then showed that a constitution bench of the SC refused to frame a policy to restrict SLPs on the judicial side, and that it was undesirable, unreasonable and impractical to have the CJI seek to resolve the issue through an administrative decision. Simply put, we showed that this major issue fell under a blind-spot in terms of holding anyone accountable for it. The CJI could not possibly frame the Court's policy alone, as it would extend beyond the mandate of administering the SC, even if such a policy was necessitated by the administrative difficulties posed by the loosening of doctrine on Art. 136. At the same time, the other judges could legitimately ignore the expansion of the SC's workload, taking the view that the task before them was merely to interpret the text of Art. 136.

In our view, if the administration of the SC was to be undertaken at an institutional rather than individual level, then the issue could be understood as simultaneously involving judicial and administrative responsibilities. Perhaps if all the judges on the SC, or even just the senior half of the SC, were made responsible for the administration of the SC, there

205 Outlook India, R.M. Lodha Sworn-In As 41st Chief Justice of India, https://www.outlookindia.com/newswire/story/rm-lodha-sworn-in-as-41st-chief-justice-of-india/838761 (last accessed on 20 November 2018).

206 Interestingly, in the recent conference on pendency organized by the Supreme Court of India, some Judges have noticed the need for reforms in some of the problem areas that we have identified in this paper. See generally, Conference Proceedings of the National Initiative to Reduce Pendency and Delay in Judicial System, available at https://www.sci.gov.in/pdf/PublicationOther/Proceeding_Book_SupremeCourt.pdf (last accessed on 20 November 2018).

would be a broader understanding of the need for an institutional policy on the kind of cases that would be granted leave under Art. 136, so as to control the number of cases filed, and consequently the time the Court has to focus on cases it specifically deems worthy of being heard. In response, it might be argued that this proposal ignores the fact that even an institutional policy would not be able to envisage and recognize beforehand all the categories of cases that are worthy of being granted leave. This argument is valid. However, while the current system is completely paralysed with respect to the issue of Art. 136, an institutional approach would mean that a body exists to collectively take responsibility for the issue, as well as pitfalls that may arise from the policy it frames to tackle the issue. In other words, if it is pointed out that the policy framed by the institution excludes an important category of cases, the persons aggrieved may ask the institution responsible to remedy this lapse.[207] In fact, regardless of whether parties express grievances with respect to the policy framed, this institution could meet every month to discuss whether its policy is framed in the best possible way. With this, we move to our second example.

2. Collecting and processing information

At several points in the paper we note the polyvocal nature of the SC and the distinct problems created by it. Notably, it is difficult for a CJI to address this issue without keeping a track of the substantive decisions of all benches of the SC. Keeping in mind the number of SC decisions rendered in a year, and the fact that the SC almost always has a minimum of twelve benches, it can be said that this is a very difficult task. Through an institutional approach involving monthly meetings, it would be much easier to collect information on the areas of law where precedent has broken down and also to discuss how it might be repaired. Judges recognizing inconsistencies in their decisions may even resolve the inconsistencies without further cases being brought to the SC.

Further, under the current system, the CJI alone is expected to process the complex data on the workload of the SC and to devise a strategy by which that workload could be managed. As we have pointed out earlier in this paper, this is particularly problematic because the CJI is just as burdened with judicial duty as the other judges. An institutional approach to administration would enjoy two comparative benefits in this regard. Firstly, and simply, by distributing the task among several persons, the burden on each would be lighter. In this case, that would mean that the burden on the CJI would decrease significantly. Secondly, and perhaps more importantly, one of the tasks required is for the administrative head/body to keep track of the developments in the workload of the SC. Involving more persons in this process would automatically increase the base of knowledge that is brought to the table.

207 Notably, this would cater to the concerns raised by both the two-judge bench and the five-judge bench that heard the *Mathai v. George* case, where the SC considered whether to frame a broad policy restricting the kinds of cases that could be filed under Art. 136. See notes 85 and 88.

3. Prioritizing issues and grouping cases

In Part IV we showed that the listing practice of the SC has been dominated by a focus on disposal, and in Part V we explained the problems arising from that focus. In particular, we argued that the focus on disposal resulted in the SC becoming largely unresponsive to the qualitative significance of issues. We further showed that the only exception to this was based on the views of individual CJIs. An institutional approach would entail discussion as to which are the important issues that the SC ought to focus on, and perhaps even prioritize in deciding what to hear. While the current practice is ad-hoc and favours resourceful litigants, these problems are invisible due to the individualized way in which different benches operate. An institutional approach would be more likely to identify structural disadvantages, and trade ad-hoc approaches for a clearer and more uniform approach. Finally, while the current system has been criticized for poorly grouping cases, an institutional approach would present a broader range of views on the kinds of cases that are frequently filed before the SC and the possibilities and difficulties of grouping them.

4. Stability in listing practices employed by the SC

In Parts IV and V we showed that despite the overall focus on disposal, the listing practices of CJIs continuously changed. In our view, this can be partly explained by the expectations that come with the office of CJI. Every time a new CJI tenure begins, all eyes turn to the CJI to see how they intend to take the SC forward. In this context, it is not all that surprising that every CJI feels the need to bring change. This is problematic both because frequent change upsets predictability in the legal system and because it makes it difficult to effect long-term change in the SC. In contrast, an institutional approach would help stabilize the listing practice of the SC in three ways: (a) decisions on listing practices taken by multiple actors would be more likely to be based on objective reasons rather than subjective experiences; (b) an institutional approach would include future CJIs in the discussion, who would then be keen to see the institution's policies continued; and (c) since the responsibility for developing the policies would vest with a larger number of judges, if not the institution as a whole, the policy would not be seen as the hallmark of particular CJIs tenures.

In addition to these four examples showing how an institutional approach would function better than the current system where the administration of the SC is left solely in the hands of the CJI, there are several more general reasons why a larger body would be better positioned to handle the task of administering the SC.[208] Some of these reasons are listed below:

208 It may be noted that these arguments are very similar to the arguments in favor of having all the judges on a SC sit together. We recognize that that is not possible in the Indian context. In our view, having an institutional approach to administering the SC is a "second-best" way of achieving the benefits of having a single bench.

a) As mentioned throughout this paper, one of the major issues plaguing the SC is the high number of SLPs filed that are seemingly without any merit. An institutional approach to administering the SC may help to identify recalcitrant lawyers and litigants who repeatedly file frivolous or weak cases that are listed across benches.
b) An institutional approach may help keep track of judges from lower courts and tribunals who frequently make errors in deciding cases. Collection of this information might help identify whether certain errors are more common across the country, and correspondingly whether judicial training may be targeted to prevent such errors.
c) An institutional approach may increase the perception that there is a need for an institutional policy regulating the time taken by lawyers while arguing cases involving interpretation of the constitution, specifically fundamental rights cases.
d) Finally, a larger body of administrators might find it easier to conduct a stock-taking exercise to identify important cases among those which are pending before the SC, and identify infructuous cases or those where parties are no longer interested, as well as verify the accuracy of the data regarding the SC's backlog[209] as starting points.

In response to our argument, it may be argued that an institutional approach does not really require a formal change, as most of the examples we have provided can be achieved informally under the current system. For example, there is nothing stopping the CJI from collecting information from the other judges, seeking their advice on aspects of administration, or even discussing the need for an institutional approach to interpreting Art. 136. In our view, there are two significant points of difference between a formal and informal institutional approach. Firstly, a formally recognized institutional approach does not depend on individual CJIs, whereas an informal approach does. This is particularly relevant in the recent context of the SC, where disagreements with the CJI led to four judges junior to the CJI holding a press conference expressing concern over the manner in which the institution was being run.[210] Second, under a formal institutional approach, each of the actors forming part of the institution would be held responsible for the failures and successes of the institution. This is a crucial difference, as under the current system, only the CJI can really be held responsible for the overall performance of the judiciary, while other judges may only be held responsible for heading individual benches a certain way or for what they write in their judgments. In our view, many of the problems faced under the current system arise due to the impossibility of the one individual handling the administration of the SC, and thus we argue that sharing responsibility among more persons is crucial to enabling the SC to better perform its responsibilities under the Indian Constitution.

209 For instance, Robinson points out that cases are being double counted in the court's tally of backlog. See *Robinson*, note 11, p. 576.

210 The Hindu Business Line, Supreme Court Crisis: All Not Okay, Democracy At Stake, Say Four Senior-Most Judges, the Hindu Business Line, https://www.thehindubusinessline.com/news/supreme-court-crisis-all-not-okay-democracy-at-stake-say-four-seniormost-judges/article10028921.ece (last accessed on 20 November 2018).

**Conclusion**

This paper has sought to explain the listing practices of the court in light of the role of the Court. Indeed, every Chief Justice has adopted a slightly different approach from their predecessor. The multiplicity of approaches brings to light the numerous factors that the Chief Justice must consider and balance while devising the listing policy of the Court. Recently, the incumbent, Chief Justice Gogoi, articulated this dilemma by pointing out 1000 cases are filed every week and need to be listed. He asked the Bar for a solution.[211] Through this paper, we have pointed out that for the past few years the balance in listing practices has been struck in favor of increasing disposals. This has led to an increase of listing of miscellaneous cases especially shorter cases and group cases. Moreover, the system of listing is ad-hoc and discretionary. We have sought to put forth a case against continuing with the disposal oriented approach adopted by the SC on the ground that it interferes with the Court's role of hearing cases regarding substantial questions of law including constitutional questions, as well as its additional role of hearing cases where there has been a substantial injustice. Paradoxically, the Court's approach is also unlikely to lead to a reduction of backlog in the near future as the practice of listing more and more miscellaneous cases has made the court more accessible. The need of the hour is to undertake measures that aim at both disincentivizing filing of SLPs in the SC as well as eliminating the need to file them in the first place, to devise a uniform approach to the Court's jurisdiction under Art. 136 as well as to undertake a stock taking exercise of both cases pending in the SC and the accuracy of the Court's data before deciding its listing priorities. These measures entail institutional will and cannot be dependent on a single individual. Therefore, there is a strong need to make the responsibility of listing cases an institutional responsibility.

211 Live Law, Thousand New Cases Filed in a Week, We have only 11 Benches, Give us a Solution: Chief Justice Gogoi, https://www.livelaw.in/thousand-new-cases-filed-in-a-week-we-have-only-11-benches-give-us-a-solution-justice-gogoi/ (last accessed on 20 November 2018).