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THE JUDICIARY

Hard to reach

NICK ROBINSON

A survey of the Supreme Court's docket finds a court overwhelmed by petitions from those with money and resources.

V. SUDERSHAN

THE Indian Supreme Court has a reputation for being a “people’s court” or, as one judge put it, a “last resort for the oppressed and bewildered”. The Constitution gives all Indians the right to petition directly the Supreme Court if their fundamental rights are violated and the right to appeal to it in many other cases. The judges have reached out to make access more egalitarian, even by treating letters complaining of injustices as petitions.

Yet, despite these efforts to democratise access by the Constitution’s framers and the judges themselves, a survey of the Supreme Court’s docket finds a court overwhelmed by petitions not from poor or ordinary people but from those with money and resources. In fact, these more privileged litigants very often swamp the court using the very mechanisms that were historically justified to make it more accessible to the less fortunate.

One can get a quick sense of the disparities in access to the Supreme Court by looking at the appeal rates to the court on a map of India. While on an average, nationally, there was about a 2.5 per cent chance in 2008 that a case will be appealed from a High Court to the Supreme Court, in States close to Delhi, such as Punjab, Haryana and Uttarakhand, the appeal rates were more than

double this. In Delhi itself the appeal rate was 10 per cent, giving credence to those who dub the court the “Supreme Court of Delhi” for its proclivity for taking up cases from the national capital.

Meanwhile, in the four southern States there was only a 1.7 per cent appeal rate, and in Tamil Nadu it was about 1 per cent (see table).

These regional differences in appeal point to a far larger problem than under-representation of certain geographic areas on the court’s docket. The farther one is from Delhi, the more expensive it becomes to bring a case, and many potential litigants simply cannot afford that cost. Orissa, for example, has the lowest appeal rate, at less than 1 per cent, seemingly the result of a combination of the State’s low income levels and distance from the national capital.

Fighting a case in the Supreme Court can be very expensive. With multiple hearings, delays and several trips to Delhi, the cost quickly becomes prohibitive for all but a few.

To give one’s case the greatest chance of both winning and moving more quickly through the system, the best bet is one of the handful of top advocates. These lawyers are amongst the most expensive in the world. Ironically, they are especially sought-after on admission day, when a judge quickly hears the merits of dozens of cases to decide whether an appeal should have a full hearing on a later date.

Skewed Caseload

The high cost of access to the Supreme Court has had a defining effect on the types of matters the court spends its time on. In 2007, almost 40 per cent of the Supreme Court’s regular hearing decisions were on cases relating to tax, labour or service issues. These matters, along with arbitration cases, were also amongst the most likely to be admitted by the court for regular hearing. A disproportionate number of appeals are made up of these cases, which generally involve the more affluent litigants or government lawyers (who do not bear the cost of appeal themselves).

Meanwhile, the mechanisms created to allow the poor and the disenfranchised greater access to the court seem themselves marginalised. In 2008, writ petitions, where people approach the Supreme Court directly to enforce their fundamental rights, accounted for only about 2 per cent of all admission matters and none was admitted.

Compare this with the 1970s when, as Rajeev Dhavan has documented in his book *The Supreme Court Under Strain*, fundamental rights petitions constituted, on an average, about 10 per cent of admission matters and over half of them were admitted.

In 2008, the court received 24,666 letters, postcards, or petitions asking for its intervention in cases that might be considered public interest litigation. Of these, just 226 were even placed before judges on admission days, and only a small fraction of these were heard as regular hearing matters. The rest were rejected.

Recent analysis by Varun Gauri, an economist and legal scholar, of cases relating to fundamental rights and public interest litigation heard over the past 30 years finds that the Supreme Court has ruled increasingly against the socially disadvantaged. During the same period, more privileged litigants have become more successful in such cases. This research lends credence to critics, such as Supreme Court Senior Advocate Prashant Bhushan, who argue that public interest litigation is being used increasingly for the concerns of the middle class and the wealthy.

Constitutional benches, where significant matters of constitutional law are heard, now make up fewer than 1 per cent of the court's regular hearing decisions. At the same time, over 90 per cent of regular hearing cases are civil, criminal, service, labour, tax, land and business matters, which are generally fairly routine requests to correct a lower court's decision.

To handle all of these cases, most Supreme Court benches now consist of two judges, who cannot overturn a verdict by a two-judge or stronger Bench. As a result, in most sittings, the Supreme Court is essentially acting as just another High Court for those who can afford to appeal, lengthening the litigation process for everyone involved. This system diverts the court's attention from pressing constitutional issues and working to make the judicial system more just for those without the resources to reach the Supreme Court's corridors.

[For Wide Access](#)

Despite today's lopsided use of the Supreme Court by the wealthy, its open access has more populist historical underpinnings. Before Independence, the Federal Court could only hear appeals on certificate by a High Court, and only 100 cases were heard during the Federal Court's entire 12-year existence. After the colonial abuses experienced under the British, when the time came to craft a Supreme Court, the founders were firmly on the side of wide access. The court would act as a final safeguard for justice in a newly democratic India.

However, a handful of Constituent Assembly members claimed that high-profile advocates, more interested in their own fees, were promoting easy appeal out of self-interest. Biswanath Das, who would later become Chief Minister of Orissa, spoke in the Assembly about how "families have been destroyed" by long appeal processes and labelled lawyers a "parasite on the people".

Indeed, members of the Constituent Assembly seemed to believe that the Supreme Court would exercise its special leave jurisdiction (where the court can accept an appeal even if a High Court has not certified it) only under exceptional circumstances, and so it would be rarely used. This miscalculation would prove glaring in hindsight. A former Chief Justice of India, Mehr Chand Mahajan, who sat on the court in the 1950s, had recalled that soon after Independence "[the judges] were soon flooded with applications for special leave to appeal wherever a litigant could afford the high cost of such a

proceeding in the Supreme Court". Today, these uncertified petitions constitute about 90 per cent of the court's docket.

Access Leads to Backlog

Driven largely by special leave petitions, there has been a steady increase in filings in the court since the 1950s, and in 2008 as many as 63,346 petitions were filed. In response to this enlarged caseload, the number of judges on the Supreme Court has been raised five times, from the original eight to 31 today.

Simply adding more judges, though, has always been a temporary fix. In the 1950s and the 1960s only about 20 per cent of cases in the Supreme Court had been filed more than three years earlier. By 1977, over 60 per cent of cases were older than three years. In 2008, their number had been brought down marginally, but was still at 54 per cent, while 25 per cent of the cases were filed more than five years earlier. Notably, almost half the number of cases before the constitutional Bench were instituted more than five years ago, indicating a disproportionate backlog of vital constitutional matters.

The media often highlight the pendency crisis in the Supreme Court, but an over-emphasis on backlog can become counter-productive. A court's ability to decide lots of cases quickly does not say anything about the quality of those judgments. More importantly, it does not indicate whether the court should have even accepted these petitions. In any court system, appeal to a higher court is used to help alleviate concerns about judgments of lower courts. In India, there is a concern that some High Court judges favour or discriminate based on parochial interests such as caste, that some judges may be corrupt, and that overall the quality of judgments across High Courts is inconsistent.

Still, if these are the reasons for allowing such broad access to the Supreme Court, appeal can only be a part of the answer. Instead, the court should investigate which High Courts or tribunals give poorer-quality judgments, which seem to discriminate more, and which are perceived to be more corrupt.

Strikingly, if these are the reasons for continued open access, the court's docket does not reflect it. For example, the Delhi High Court has the highest appeal rate to the Supreme Court. Similarly, service and tax matters are accepted at amongst the highest rate by the Supreme Court although there is little reason to think that judges have to scrutinise lower courts more closely in these matters over others.

Too often it seems the court simply accepts that the types of cases appealed to it are a good representation of the ones it should hear, instead of actively shaping its docket to address the shortcomings it sees in the lower judiciary and the law more broadly.

Reframing Access

Anecdotal stories about the court reaching out to a downtrodden litigant, or a man of humble means appealing an injustice all the way to Delhi, are generally just that: anecdotal. The numbers give a more accurate tale. Most of the cases the court decides are brought on appeal by those with money and resources. In August 2008, a Law Commission Report recommended that the Supreme Court be broken up into a constitutional Bench, to better prioritise constitutional cases, and cassation Benches that would sit in four different regions of the country in order to improve access to the court.

Chief Justice of India (CJI) K.G. Balakrishnan remarked in a recent interview to *The Hindu* that the Supreme Court must “think... seriously” about setting up a constitutional court. Many countries have a separate constitutional court and some also have separate highest courts for criminal, civil, and administrative matters. By segregating types of matters explicitly, a smaller group of judges can dedicate itself to managing a smaller docket of cases, prioritising neglected areas of law or those that have a broader effect on ordinary Indians.

Meanwhile, the proposed cassation benches outside Delhi would hear issues that did not involve substantial questions of constitutional law to help reduce “the unbearable cost of litigation for those living in far-flung areas of the country”. Such sittings of the court outside Delhi have been a long-standing demand of many Members of Parliament, and under the Constitution the Chief Justice may set up these benches at his discretion. Indeed, a small panel of the Supreme Court sat in Hyderabad for three months in 1950 to deal with cases left over from the Nizam’s era.

However, successive CJIs, including the current CJI, have not been sympathetic to this demand because it would further disperse a Supreme Court that already has difficulty acting as a cohesive whole. Further, if this step is taken in isolation it will likely only lead to more cases being filed, owing to the lower cost involved in filing an appeal, and additional delay.

If the Supreme Court denied appeals more strictly either in its current or a reworked structure, it could focus on laying down clearer principles for the lower courts to follow. Lawyers and lower court judges often complain that the

Supreme Court produces unclear or conflicting precedents. With such uncertainty, losing lawyers have greater incentive to try their luck with a Supreme Court appeal, helping perpetuate a vicious cycle of backlog that usually the wealthy are best positioned to navigate.

Prioritising access in the Supreme Court for cases that affect ordinary Indians should be encouraged, but for most Indians the lower judiciary is where their interactions with the justice system begin and end. Chief Justice Balakrishnan made a forceful argument in December 2009 that the number of subordinate courts should be doubled to 35,000 to reduce backlog. More judges in the lower courts are needed, but they also must be of good quality and must be monitored effectively. The National Arrears Grid proposed in October by Law Minister M. Veerappa Moily, which will track arrears at every level of the judiciary, is a promising start, especially if it can help highlight how certain types of cases fare in the system.

Reforms could also take inspiration from another emerging power: Brazil. In 2004, Brazil amended its Constitution to create a National Council of Justice, a 15-member body whose majority is judges, while also containing top government lawyers and distinguished citizens. This Council was charged with restoring people's faith in the lower judiciary. Amongst other powers, it controls the judiciary's budget, tracks the entire judiciary's caseload, reassigns judges to where they are most needed, and removes judges who engage in improper behaviour.

Since its inception it has brought high-profile corruption cases against lower judicial officers. It has also laid down stringent rules that limit the ability of lawyers to ask for hearings to be delayed. It is still too early to gauge its ultimate success, but so far it is helping coordinate welcome reforms to the Brazilian judiciary, and a modified version might do well in India.

The Supreme Court has been rightly lauded for its often creative attempts to bring justice to all Indians. Any reforms to the Supreme Court should return to these ideals and draw upon this reservoir of imagination to help ensure that not only is the court the "people's" court but that it is also leading a "people's" judicial system.

Nick Robinson is a Yale Law School South Asia Teaching and Research Fellow and a visiting fellow at the Centre for Policy Research, New Delhi.