

FRONTLINE

Too many cases

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The number and type of cases the Supreme Court accepts rather than having too few judges causes the backlog of cases.

ONCE again the Supreme Court is facing a mounting backlog, which at nearly 50,000 cases is so high that judges have been unable to find time to constitute five-judge benches regularly. In response to this perceived crisis, the Supreme Court (Number of Judges) Amendment Bill, 2008, proposes to raise the number of judges in the Supreme Court (excluding the Chief Justice) from 25 to 30. However, increasing the number of judges would at best only provide short-term relief, and at worst ingrain judicial inefficiencies further. The backlog is more directly caused by the number and type of cases the court accepts than having too few judges.

From 2005 to 2008 the court accepted about 12 per cent of admission matters placed before it for regular hearing. For instance, in 2007 the court heard about 57,000 admission matters and accepted 6,900 of these for regular hearing (it decided about 5,000 cases during regular hearing in the same year). This acceptance rate, more than any other factor, has not only created the court's backlog, but defined its character and function.

The importance of the court's admission policy becomes clearer when placed within an international context. In the United States, for instance, an appeal to the Supreme Court is fairly easy, but its court only accepts about 1 per cent of these appeals and so generally hears less than a hundred cases each year. Several European constitutional courts have very high acceptance rates, but appeals can often only be generated upon request by the legislature or a lower court judge. Because of this the Italian Constitutional Court decides about 500 cases a year, while the French Constitutional Council, which has even stricter grounds for appeal, may decide only 50 cases in a year.

It is very easy to appeal a case to the Supreme Court of India (and often the court is legislatively required to take these cases), and in certain instances the court may even function as the court of first instance. The low barriers to petitioning the court, combined with the high percentage of cases the court ultimately accepts, lie at the root of the high backlog.

The cases the Supreme Court accepts are of a wide variety, but to an outside observer what is most striking is how much time the court spends on rather ordinary litigation. In 2007, the three subject categories that most dominated the court's docket were criminal matters (974 decisions), service matters (737 decisions), and indirect tax matters (651 decisions). Although on average the court accepted 12 per cent of matters placed before it for regular hearing, the highest acceptance rates were somewhat counter-intuitively for direct tax matters (20 per cent) and arbitration (19 per cent).

Contrary to popular belief, only about 1 per cent of the court's regular hearing decisions involve public interest litigation (PIL) and these types of cases have one of the court's lowest acceptance rates (although this says nothing of how long it takes the court to hear and manage these cases). In 2007, the court accepted about 7 per cent (or 68) PIL matters placed before it to be admitted for regular hearing. The actual acceptance rate for PIL, in fact, is much lower than this. In 2006, the court received almost 20,000 letter or postcard petitions pleading for the court's intervention in matters that could be considered as PIL. After being screened by the Registrar, only 243 of these 20,000 pleas were even placed before the judges to be considered for admission (out of which only a small fraction then made it to regular hearing).

Because of its large caseload of rather ordinary cases, the court has had difficulty scheduling important constitutional cases that require larger benches. The court disposed of only 13 five-judge-bench matters and one nine-judge-bench matter in 2007. In this regard, the Supreme Court actually takes on far fewer cases of large constitutional magnitude than most of its counterparts in other countries even as it takes on thousands more of cases overall.

The court's current heavy and diverse workload begs the question, what is a Supreme Court's caseload ideally suppose to look like? There is not as much clarity here as one might initially suppose. Supreme and constitutional courts are a relatively new phenomenon. Judicial review was first firmly established in the U.S. in 1803 with *Marbury v. Madison*, but it was not adopted anywhere else until the beginning of the 20th century. Only around the Second World War did judicial review become a widespread fixture of democracies. Indeed, the Supreme Court of India is one of the older Supreme Courts in the world.

Its numerous functions and high workload are a result of it adapting to the political and social realities of the country. The court has not only attempted to check government excesses or abuses, but often fill governance vacuums (through innovative tactics like PILs) that makes it more relevant to Indians. The court also provides uniformity in the implementation of the Constitution and legislation. Beyond this clarifying role, it takes on many rather ordinary cases out of a seeming distrust of the rulings of the lower judiciary. The ease of access is also driven by a populist impulse, which reinforces the legitimising idea that anyone can have his/her dispute heard before the highest court in the land (even if actual access to the Supreme Court is still most closely correlated with your ability to pay for a high-priced lawyer).

Tackling backlog

There have been several proposals to tackle the court's backlog problem. First among them has been to increase the number of judges. The court's size (excluding the Chief Justice) was increased from seven judges at the time of Independence to the current 25 through a series of constitutional amendments from the 1950s to the 1980s. Each time the increase was driven by the court's ever increasing docket, and each time the addition of new judges did allow the court to take on more cases. However, it never addressed the underlying causes of the court's backlog.

Not only is adding more judges of questionable effectiveness, but it is potentially harmful. Once the court increases in size it is difficult to later decrease the number of judges given the vested interests of both Supreme Court lawyers and judges, even if having such a large bench makes little sense in the future. Further, the more the number of judges the more difficult it is to find qualified persons to fill these positions.

This is not to say that the proposed constitutional amendment to add more judges should not be adopted, and indeed more judges could ease much of the court's current burden. The point is that this solution potentially comes with both short- and long-term negative repercussions. Certainly, India overall needs more judges as the country has a very low population-to-judge ratio, and more judges of sufficient quality in the lower judiciary could go a long way to ease the burdens on the Supreme Court.

Several other makeshift solutions to deal with the court's backlog problem have also been proposed. Some Members of Parliament have suggested reducing the vacation time of judges to get them to work more hours. Judges in India though appear far more days in court than their counterparts in most other countries (the Supreme Court heard arguments for 190 days in 2007, while the U.S. Supreme Court sat for only 38 days). Additionally, many judges use their "vacation time" to research and write major decisions, go through briefs to prepare for cases, and engage in professional development such as reading recent legal publications or attending conferences. It is becoming increasingly difficult to attract quality judges because of the job's long hours and comparatively low pay, and reducing vacation time would make this task even more challenging.

Other MPs have suggested creating a new bench to the Supreme Court that would sit in South India. This may make the court more accessible, but it would do little to decrease its high pendency rate, and may even increase it as the Supreme court becomes easier and cheaper for litigants in the South to access.

AT NEARLY 50,000 cases, the backlog in the Supreme Court is huge.

The court could make the role of clerks more prominent. The highest court in Brazil disposes of about 100,000 cases each year with far fewer judges. To take on such a large load, clerks and other staff take a central role in drafting decisions for the many routine matters the court hears before they are signed off on by the judges. This practice comes with a cost as the judges themselves cannot give as much attention to each matter. Even if the Brazilian experience is not fully adopted, clerks are currently underutilised in India with each judge having only one or, at most, two clerks. Having four to five clerks for each judge to help filter out appeals, write memos, and draft decisions, which is the norm in countries such as South Africa or the United States, could greatly reduce the judges' workload, while retaining their ultimate review of each case.

Beyond personnel changes, there are also potential procedural remedies. Currently, each bench of the court spends two days a week hearing dozens of admission cases, during which a lawyer pleads each case for an average of one to three minutes. Lawyers do sometimes sway judges during this time, but large amounts of the judges' time on these days is spent hearing lawyers who zealously defend cases with little or no merit. During actual hearing of the cases that are accepted, oral argument can drag on for hours, and in the case of some constitutional decisions, days if not weeks. This time-consuming oral tradition carries on because the judges are so overworked that they have little time to acquaint themselves with written submissions before hearing a case.

This though is largely a result of the poor quality of written submissions, which are often unnecessarily lengthy – a cycle perpetuated by the fact that lawyers know they do not have to submit well-crafted written submissions because they can make their main points during oral argument. Creating a page limit for written submissions as well as reemphasising the importance

of these submissions could allow the court to understand and decide cases more quickly, while reducing the amount of time needed for oral argument.

Another proposal to decrease the court's backlog is to create a separate constitutional court, which would only hear constitutional claims, while the final appeal for all other claims would be with a supreme court of appeal. Such a system exists in Germany and several other countries. The bulk of the Supreme Court's current docket would ideally be taken by a new supreme court of appeal, freeing up judges' time on the new constitutional court to deal with pressing issues of constitutional consideration that are currently being sidelined. Such a strategy would better differentiate and prioritise the cases judges spend time on, but to staff any supreme court of appeal, even more judges overall would be needed. Further, given the expansive nature of the Constitution, it is unclear which matters would go to which court, resulting in not only confusion, but also potential conflict between the two courts.

In the end, it is the Supreme Court's acceptance rates, and more importantly the type of cases the court is accepting, that create its current backlog and character. Too often it accepts a high number of rather ordinary matters, which then distract its attention from pressing constitutional and social issues.

Although additional judges may temporarily help a court from drowning in cases, the more important floodgate of the Supreme Court is its admission policy. The number and type of cases the court admits not only affects whether the court needs 25 judges or 30, or 10 or 100, but is central to defining the court's role in society and the values it promotes.

Nick Robinson graduated from Yale Law School in 2006. His article "Expanding Judiciaries: India and the Rise of the Good Governance Court" is due to appear in the Washington University Global Studies Law Review.

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