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The Socially Optimal Policy Choices by the Supreme Court – A Strategic Analysis*

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Abstract

This paper discusses a number of important problems regarding administration of justice in different legal areas and jurisdictions across the legal hierarchies in different countries throughout the world. It is argued that the Supreme Courts can address these problems through strategic use of its policy instruments. The paper discusses a number of important and pressing problems plaguing the courts all over the world. These problems range from litigation explosion, delay (backlogs) and caseload problems in courts, corruption in the judiciary, problems of judicial review by a Supreme Court, inadequate standards of review, suboptimal legal innovations brought about by the judiciary and inefficiently designed judicial hierarchies. I argue that it is only the Supreme Court, through strategic use of its policy instruments, can bring about solutions to these problems and the desirable results.

JEL Keywords: K0, K1, K4

Section 1. Introduction

Ever since the publication of the first edition of “Economic Analysis of Law”, in 1973 by Richard Posner, the law and economics movement has been growing with remarkable speed. The growth has come about in terms of a variety of journals with informed theoretical and empirical contributions from an increasing group of specialized scholars in the field and publications of other important textbooks and one voluminous encyclopedia and numerous conferences on the subject held every year throughout the globe. Not surprisingly, the focus is no more merely on the optimal design of tort law, property rights and contract enforcement. Modern concerns cover terrorism, religious freedom, human rights, financial markets regulation, bankruptcy law, environmental law, employment regulation and other different aspects of law deemed important for economic development, social welfare and prudential regulation. Despite the branching of the subject, there is an underlying coherence in the subject. The coherence can be understood in terms of analyzing the positive effects of a legal rule on the allocation of resources caused by rational¹ socio-economic actors. This kind of analysis can enable policy makers to recommend the set of legal rules that maximizes social welfare. This philosophy has had major impact on the actual framing of a law in a legal system and on how judges actually decide a case. Tort law, child labor law, environmental law, intellectual property law, telecommunication law, to name a few, have incorporated the

¹ By rationality we mean the capability of goal induced actions taking into account constraints and knowledge of the consequences of different courses of actions. The modern trend is also to take into account the psychological and strategic aspects of the decision making by agents.

basic philosophical doctrine.

Substantive law have been much discussed in the literature. In this paper, I restrict my analysis of the substantive law to legal transplantations and reinterpretation of precedents. Instead, I examine mostly the procedural aspects of law as designed by the Supreme Court (hereafter referred to as SC) of a country. A SC is discussed in this paper in terms of its objectives, resources, policy instruments and constraints. A review of some various SCs is done to understand the differences and similarities between them in terms of these aspects. This paper discusses a number of important problems regarding administration of justice in different legal areas and jurisdictions across the legal hierarchies in different countries throughout the world. It is argued that the SCs can address these problems through strategic use of its policy instruments. I then explore the strategic interactions between the SC and other social agents like litigants, judges, the legislator and the executive, and then characterize the optimal policies for SCs.

The paper discusses a number of important and pressing problems plaguing the courts all over the world. These problems range from litigation explosion, delay (backlogs) and caseload problems in courts, corruption in the judiciary, problems of judicial review by SC, inadequate standards of review, suboptimal legal innovations brought about by the judiciary and inefficiently designed judicial hierarchies. The magnitude of these problems cannot be underestimated. While the lower courts are not unexpectedly burdened with these problems, the highest courts of appeal, i.e., the SCs in most countries are also suffering on these counts. It is the legal system, that has been entirely affected, with

deleterious consequences for the society and the economy on whose behalf the legal system administers justice. While these problems have long been recognized in each legal system, numerous informed debates and knowledgeable committees have not been able to produce desirable results through legal reforms. I argue that it is only the SC, through strategic use of its policy instruments, can bring about solutions to these problems and the desirable results.

Why are judicial reforms instituted throughout the globe of limited success and not meeting expectations despite so many informed debates and discussions, plethora of policy recommendations, measures by different law ministries, repeated initiatives at the different SCs throughout the world and despite continuing judicial reforms? Why do the problems persist? One answer offered by the policy makers is that there exist differences between planning and implementation: judicial hierarchy reorganization usually creates a lot of implementation problems, sometimes the upper-tier tries to regulate the lower tier without proper local information while at other times decentralization result in lack of coordination and appropriate legal and judiciary standards. As far as litigation explosion and the associated caseload crisis are concerned, policy makers feel that there seems to be little that can be done through traditional measures. An important factor behind delay and high backlogs are the procedural complexities of courts. But these procedures have their intrinsic reasons – they serve as checks and balances to guarantee freedom through judicial independence and constitutional review as pointed out by La Porta et. al. (2004). Moreover, procedures generate correct and relevant information and reduce the cost of errors in trials. So there are obvious limits to simplification of procedures. Corruption

too, seems to be difficult to control with incentives and penalties. Policy makers and analysts have observed that legal innovations brought about through legal transplantations, are not always suitable without proper adaptation to indigenous demand and supply conditions: in other words, straightforward legal transplantations (importing legal and judicial best practices from the developed world) does not always work (Milhaupt and Pistor (2008)). Strengthening the system of judicial review under the constraints of weak judiciary and lack of democracy seems to be almost impossible to some. Improving the system of appellate review requires high-powered and transparent system that the SC seems to be ambiguous about. Certainly, there are merits to these arguments. However, the arguments are neither necessary nor sufficient for dissuading us from constructing a proper theoretical framework that can inform and improve policy.

Planning for maximizing social welfare can proceed along different dimensions. The SC as a social planner seeks to maximize social welfare through the judicial system. The maximization of the social welfare function with respect to policy instruments should be viewed as being subject to the constraints on the effectiveness of the policy imposed by the behavioral reactions of the different agents. Thus the effectiveness of a policy depends on the strategic behavior of agents while the behavior of agents depends on the policy adopted. This motivates a game theoretic analysis of the problem. A game analyzes strategic interaction of agents where their actions and payoffs are dependent on each other. For applications of game theory in the analysis of Legal problems see Baird, Gertner and Picker (1998), Cooter and Ulen (2004), Shavell (2004) and Spurr (2010). This approach is increasing becoming popular in academic and popular discourse for

obvious practical and theoretical reasons.

The different actors in the legal hierarchy act in a strategic setting and condition their best response actions according to their guesses and knowledge of what other players (including the policy maker or the SC) are playing in subgame-perfect Nash Equilibrium. The policy maker or the SC usually has a first mover advantage in the game and can thus influence the outcome of the game substantively. It is of utmost importance that the policy maker understands how the different agents in the demand and supply side react to a policy. As the judicial policy changes, so does the behavior of the agents like litigants, courts and judges. A policy maker must take these behavioral changes into account before being informed by a suitable theory and implementing a (change in) policy². This is the first step in the construction of a proper theory and policy of judicial reform. The next step is to put in agent preferences and constraints relevant for the SC environment. The third step is to posit a social welfare function (that maximizes the specific impact of a policy that is in the general interest of the general public and agents in the SCs) which can be quantified and maximized with respect to choice variables.

We realize that the policy instruments or the choice variables of the social planner (Chief Justice of a SC and /or the Law Ministry) are too numerous and varied (also, only some of them can be amenable to quantitative analysis while others are essentially qualitative). As far as quantitative analysis is concerned, we restrict ourselves to finding the optimal litigation fees (court fees), bench strength (the total number of judges at the SC) and

² See Lucas, R. (1976) and also Kydland, F. and E. Prescott (1977).

judicial compensation (to deter corruption) as the only quantitative policy instruments for the social planner as affecting litigation rates and caseloads. Given the different problems enunciated, we have categorized social planner welfare functions into different categories that deals with each problem³. The problems of high litigation rates and high caseload per judges are variables which are endogenous in any reasonable model of litigation and judicial decision making, and this approach will be taken here. The second half of our analysis discusses the effectiveness of qualitative policy instruments in a strategic setting. We review the strategic role of the SC and the issue of effectiveness of judicial review, legal innovations, standards of review and the appropriate design of the judicial hierarchy as mediated by the SC and the law ministry of a country.

The present paper thus deals with some very pressing problems of society with regard to broad and different aspects of justice and should be seen as an original and benchmark study as well as a complementary analysis to different contributions in the literature mentioned above. It sheds important lights of the problems discussed with regard to the apex judicial organizations by laying down a preliminary as well as an extended theoretical and institutional analysis in an abstract way.

In Section 2, we review the SC as an institution. The institutional analysis covers the SCs of a number of developed and developing countries. Section 3 discusses in detail, the procedural problems of legal hierarchies all over the world. Section 4 discusses the

³ A Multi-goal programming is also feasible that discusses the tradeoffs involved from pursuing some incompatible aspects of policies. Such a discussion is relegated to the end of section 2.

effectiveness of quantitative and section 5 the qualitative policy instruments in a strategic setting. Section 6 concludes by discussing the policy implications of the paper in general and in different institutional settings.

Section 2. The Supreme Courts – A Comparative Review

The SC is the embodiment of the highest form of justice. The SC sets legal standards for the entire legal hierarchy. In some countries, it interprets laws and the Constitution and tries to provide uniformity in the application and interpretation of laws. The SC tries to see that an efficient substantive and procedural legal system is in place. It has the objective of making access to justice easy, efficient and equitable. It tries to minimize delay in the adjudication of legal proceedings in the SC and sometimes has the mandate to intervene in lower court adjudication to minimize delay and injustice. The SC seeks to reduce caseload of judges to a reasonable amount and tries to minimize court backlogs which is related to minimizing delay. Through all this, the SC tries to achieve an efficient and high quality justice. However, this idealistic view about the SC can be challenged, it indeed faces a number of significant constraints. Nevertheless, the legal institutional setup is such that the SC vigorously acts to achieve social welfare within the bounds setup by the constraints.

There is a big controversy as to the real power of a SC. The Constitution of a country creates the SC through an Act. Thus the SC policy instruments are subject to the Constitutional provisions and proscriptions as they stand in their original garb as well in

amendments. The SC is nevertheless the highest court of a country (unless the country has a separate Constitutional Court) and under it are the federal courts, state high courts, district high courts etc. The SC is the highest court of appeal and besides its appellate jurisdiction, it also has some original jurisdiction and the power of judicial review. The judges of a SC are appointed by the executive, with advice from the legislature. Thus, it can be argued that the SC is heavily influenced by Legislative and Executive policy. Usually, the legislature determines the number of judges and it requires special legislation to change the number of judges in the SC of a country. However, the SC also has its power to review legislative and executive wisdom. We add though, that those following the law will have noticed the limitation of this power. The SC is frequently involved in Constitutional politics through its power of judicial review (examples: SC of the United States, Indian SC). The power of judicial review has only been inadequately outlined in many Constitutions and has become only clearer in scope through the process of adjudication of adversarial proceedings. Thus, it only through the unfolding of the judicial and legislative process that the truth about the real nature of the power of the SC can be understood.

According to the Constitution of the USA, the original jurisdiction of the SC shall extend to all cases, in Law and Equity arising under the Constitution, the Laws of the US and the treaties made. These cases or controversies under the original jurisdiction are primarily of four kinds: (1) those between the United States and one of the fifty states; (2) those between two or more states; (3) those involving foreign ambassadors, or ministers, or consuls; (4) those commenced by a state against aliens or against a foreign country. The

primary task of the US SC is appellate through powers conferred by the Congress under some statutes of the US Constitution, and in that capacity it tries to decide cases through correct and uniform interpretation of the Constitution. Cases reach the SC for appellate review in three ways: (1) on a writ of appeal, as a matter of right; (2) on a writ of certiorari, as a matter of SC discretion; and (3) certification. All these appellate cases must involve a Constitutional question or Federal Law. The UK SC has limited original jurisdiction and prefers to hear appeal cases which involve points of law of general public importance. It has extended reach throughout the United Kingdom. The French Supreme Court (established in 1790) is the court of last resort in France but its scope of review is limited to question of law and not on facts⁴. The SC does not hear Constitutional cases or cases against the Government. For these there are other courts. France has not one but four senior courts and collectively they form the topmost tier of the judicial system. As far as the composition of the SC is concerned, there are justices, Office of the Prosecutor, Administrative Officer and specially certified barristers. The Indian SC has been established by part V, Chapter IV of the Indian Constitution and has served since 1950. As indicated in the Constitution, it is to serve as a federal court, guardian of the constitution and the highest court of appeal. It also takes writ petitions in case of serious human rights violations⁵. The SC of Uganda is the highest judicial organ in Uganda. Its powers are derived from Article 130 of the 1995 Constitution. It is generally an appellate court with only a few circumstances like Presidential election petition giving rise to original jurisdiction. Below the SC, is the Constitutional Court, the High Court and the

⁴ Source: http://en.wikipedia.org/wiki/Supreme_court

⁵ Source: <http://supremecourtsofindia.nic.in>, <http://en.wikipedia.org/wiki/SupremeCourt>

Magistrate's Court⁶. The SC of the Russian Federation ⁷ is the court of last resort in Russian administrative law, civil law and criminal law cases. It also has the supervisory power over the lower courts. The SC judges are nominated by the President, and appointed by the Federation Council. Plenary Sessions are held atleast thrice annually, and the SC reviews the functioning of the lower courts and provides uniform interpretation of laws. Judicial precedent is not recognized as a source of law but courts generally follow precedents. The SC has original jurisdiction in the following cases: (1) Challenges to acts of the Federal Assembly, decrees of the President and the Government (2) Challenging of delegated legislation of governmental agencies (3) Termination of political parties and NGOs and (4) Challenging of actions of Central Election Commission

A SC usually has 5 to 15 judges (the number can vary a lot like between 5 in Argentina and 125 in France). A low number of judges frequently increase administrative coordination of justice but results in high case loads and popular demand for increasing the number of judges. The SC is dependent on the executive for enforcement of a decision arrived at through adjudication. The maximum number of sitting judges is a constraint some countries with a federal setup like USA and Argentina. There are currently only nine seats on the US SC. The power to nominate Justices is vested in the President of the US and appointments are made with the advice and consent of the Senate. Thus, it is not at easy to increase the number of judges. India follows a contingent policy based on special and popular demands for increasing the number of judges. The

⁶ Source: [http://en.wikipedia.org/wiki/Supreme Court of Uganda](http://en.wikipedia.org/wiki/Supreme_Court_of_Uganda)

⁷ Source: [http://en.wikipedia.org/wiki/Supreme Court of Russia](http://en.wikipedia.org/wiki/Supreme_Court_of_Russia)

original Constitution of India (1950) provisioned for a Supreme Court with a Chief Justice and 7 lower-ranking Judges—leaving it to Parliament to increase this number. In the early years, a full bench of the Supreme Court sat together to hear the cases presented before them. As the work of the Court increased and cases began to accumulate, Parliament increased the number of Judges from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978, 26 in 1986 and 31 in 2008. As the number of the Judges has increased, they sit in smaller Benches of two and three (referred to as a *Division Bench*)—coming together in larger Benches of 5 and more only when required (referred to as a *Constitutional Bench*) to do so or to settle a difference of opinion or controversy. In France, there are quite a few (125) judges in the SC.

The SC seeks to minimize corruption by offering high compensation of judges and bringing high penalties like impeachment and imprisonment in force when corruption is detected. However, proven corruption cases are only few in number and disproportionately low relative to the actual global incidence of judicial corruption (see Report of the Transparency International (2007)). Political instability and frequent turnover of judges is another important welfare concern. In Argentina⁸ the administration of the SC was regularly disrupted by military coups and executive interference, which frequently led to dismissal or resignation of justices and inconsistency in rulings and instability in composition. In order to secure a stable position, a judge would always rule in favor of the executive. It was only in 2004 that judicial system got some independence and the executive and the legislature became effectively accountable to the public to

⁸ Source: <http://en.wikipedia.org/wiki/SupremeCourtofArgentina>

maintain democracy and not try to influence the judiciary.

However, safeguards have also been built to prevent arbitrary removals of judges. The American SC has successfully prevented impeachment in some cases. India is another important example. The Indian Constitution seeks to ensure the independence of Supreme Court Judges in various ways. A Judge of the Supreme Court cannot be removed from office, except by an order of the President passed after an address in each House of Parliament, supported by a majority of the total membership of that House, and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session, for such removal on the ground of proved misbehavior or incapacity.

Through suitable judicial review, the SC tries to uphold the Constitution against any arbitrary legislation by the legislature or any unconstitutional act by the executive. The SC of the United States has the powers of judicial review, first asserted in *Calder v Bull* (1798) by the dissenting opinion of Justice Iredell and later given binding authority by Justice Marshall in *Marbury v Madison* (1803). In the exercise of judicial review, the power of legislature over the SC is an important constraint since the legislature can bring about constitutional amendments. The legislature can also restrict the right of SC to overturn primary legislation. The power of judicial review of UK SC is limited: it can only overturn secondary legislation. However, through separation from the Legislative function, the court has increased its autonomy and effectiveness in challenging legislative wisdom. The Indian SC can take pride having delivered 24,000 reported judgments with

impeccable dexterity and authority, it has faced serious controversies also. The role of the SC has been questioned in a big way during the emergency proclaimed by Mrs. Gandhi. The SC has also been seen to oppose land reforms bill initiated in the Indian parliament to protect property rights of incumbent land holders. In the post 1980 period the Indian SC has been more proactive and assertive. The Supreme Court of the Republic of China is the Court of last resort in China though matters regarding the interpretation of the Constitution and unifying the laws and orders are entrusted to the Constitutional Court of the Judicial Yuan, which is a branch of the Government⁹. Thus, it can be clearly seen that the Chinese SC is not independent of the executive and is supervised by the Judicial Yuan. Unlike China, there is complete separation of powers in Japan where the Judiciary functions independently of the Legislature and the Executive. Appeals are entertained only if violation of the Constitutional Law, or conflict with judicial precedents are suggested.

The SC seeks to bring in efficient legal innovations through changes in legal procedure, reevaluation of legal precedents and adaptation of legal transplantation. The US SC has created many important landmarks which have served as precedents (with applicable Stare Decisis) for future cases. Some examples include cases on balance of power between states and the federal government, judicial independence, exclusivity of the SC jurisdiction, segregation, right of abortion, antitrust, affirmative action, substantive due process, campaign finance regulation and federalism¹⁰

⁹ Source: <http://en.wikipedia.org/wiki/SupremeCourtoftheRepublicofChina>

¹⁰ Source: www.supremecourt.gov, [http://en.wikipedia.org/wiki/Supreme Court of the United States](http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States), Abraham (1975)

It is the prerogative of the SC to set standards of appellate review and it tries to bring in efficiency of the allocation of time with respect to such standards. Some aspects of the French SC are quite special with respect to the process of appeals. When an appeal case is overturned, it is remanded to a second appellate court. Further, when no appeal is made, but the Government disagrees with the interpretation of the law by the lower court, it may order the Chief Prosecutor to bring an appeal to the SC in the interest of the law. Further, unlike common-law jurisdictions, there is no doctrine of binding precedent (Stare Decisis). The Japanese SC has a strict standard of review. When appeals come to the Japanese SC, written documents are examined first, and only if they indicate a proper ground of appeal, are oral arguments heard.

The SC is in charge of the administration and reorganization of the judiciary in order to improve efficiency of the justice system. The lack of effective supervisory control over lower courts serve as a constraint in the attempt to reform the entire judiciary organization countries like India or USA. In USA the SC is highly dependent on the Congress which confers rule making powers for the SC for procedures to be followed by the lower courts. UK and Japan are exceptions. The UK SC has the power to resolve disputes regarding devolution of jurisdiction across the judicial hierarchy. In addition to the exercise of judicial power, the Japanese SC also exercises rule making power with respect to matters related to attorneys, the internal discipline of the courts, and the administration of judicial powers.

Section 3. The Problems of the Legal Hierarchy

The first problem that we discuss is that of court delays¹¹ which renders the legal system costly and inefficient. Ietswaart (1990) makes an international comparison of delays in court cases in Europe. While there are cross country variations, delay in general is endemic. Evidence mainly from the USA suggests that caseloads in the SC tend to increase exponentially between decades (Jucewicz and Baum (1990), Casper and Posner (1974), etc.), rendering the problems of dealing with appeals, reducing backlogs¹² and timely and efficient delivery of justice by the Supreme Courts quite difficult to solve. In developed countries other than the USA, the problems of regulating complex human and institution interaction, guidance of the financial markets and corporate governance have put their systems legal under great pressure¹³. In emerging market countries such as India, there has been significant delay in the legal system as shown in the Appendix (Table 1).

¹¹ First, let us describe what exactly we mean by delays in the courts (Levin (1975) gives a similar account)). The delay, according to our description, involves two elements: the age of the case and the amount of court time per hearing devoted to it. The age of a case at any point of time is the number of rounds of hearing the case has proceeded. The second element refers to the amount of time that the judge (and clerks, administrators, litigants etc.) actually devotes to a particular case during a single round of hearing. However, in the present analysis, delay will be denoted by the average time taken to dispose of a case in a single round of hearing, while the age of the case will be denoted as an increasing function of the backlog or court congestion which we define next below.

¹² The Backlog or the Congestion Rate denoted as B , is defined as the fraction of cases filed which are undecided. In the multi stage game depicted here, backlogs are determined at the end of the game, while in a repeated game backlogs consist of appeals accumulated at the end of each of the stage games.

¹³ See in particular Milhaupt and Pistor (2008)

An important reason for delay and high caseload is the slow administration of justice. In the Indian context, several problems with regard to the supply side issues of court administration have been identified¹⁴, like high frequency of adjournments, high paperwork, inadequate number and productivity of judges, low autonomy and high cost for the lower courts, complexity of civil and administrative procedures etc. These factors are not special to the Indian case but applicable world-wide and especially in the developing economies and transition economies. It is recognized that supply side imperfections of the judicial machinery arise as necessary checks and balances so that the judicial process can secure justice in the best manner possible. However, there can be scope for reforms in the judicial processes that should certainly be carefully explored. The above mentioned problems at the top as well at the lower levels of the legal hierarchy are true for almost every developing country and the common practice is to combat these through supply side measures like simplification of procedural law, efficient legal innovations and prudential legal transplantation. In this connection, Buscaglia and Dakolias (1996) examine judicial reforms to combat delay in some Latin American countries. In each of these countries, committees on these matters have suggested legal reforms to speed up the administration of justice but with legal reforms have had little effectiveness in reducing delay and caseloads.

Much attention has been paid to the problems of excessive litigation and appeals at the top of the legal hierarchy throughout the world. Debate and discussion among the general

¹⁴ See Dhawan (1978, 1986), J. Shaha Committee Report (1972), Justice Satish Chandra Committee Report (1986), Justice V. Mallimath Committee Report (1990) and the Report No. 230 - Law Commission of India (2009).

public, influential mass media, and policy makers (law ministries, chief justices of SCs) have been going on regarding these issues ever since these problems arose to adequately alarming proportions in different countries at different times. Several explanations have been forthcoming as to why these problems are endemic and persistent and different policy measures have been suggested in different settings. It is noteworthy that despite substantial interest on the implications of workload and backlogs for the SC in the US and many other low-trust litigious societies (see Casson (1991)), the causes of high-frequency litigation are not completely understood. What can bring down frivolous law suits? Should legal fees be increased? The causes of delay are varied, and have elicited several explanations based on both theoretical and empirical investigations. Kessler (1996) identifies two basic sources of delay: the decision to litigate¹⁵ rather than try to settle a dispute and the decision regarding the late timing of settlement when it at all arises (pp. 432). The policy advice that follows as a corollary to this is to institutionalize cheap settlement and arbitration proceedings and give incentives to judges for faster disposition of cases (through monetary incentives as well as through peer pressure). But cheap and effective settlement and arbitration mechanisms do not work well in litigious societies where each litigant holds a high subjective probability of winning the case conditional on his information¹⁶ and possesses an adversarial personality (Casson (1991)).

¹⁵ However, this general observation applies to all forms of judicial institutions where such activities can be carried out and is not peculiar to the Supreme Court (hereafter, SC). It is possible nevertheless that the problems of court congestion, delays in justice and consequent rise in the proportion of poorer quality of decisions in the lower courts can spillover to higher courts, including the SC.

¹⁶ More recent models include the role of private information in decision-making (see, Cooter and Rubinfeld (1989) for a survey).

Controlling for supply side imperfections, litigation and appeals, the only remedy for decreasing the workload of the judges seems to be to distribute the workload among a higher number of judges. Why the number of judges are not substantially increased to increase the bench strength (By “bench strength”, we mean and denote the total number of judges in the SC and not the number of judges presiding over a single case in a particular occasion) at the SC level is also not well accounted for. One argument offered is that there is a lack of high quality judges at the lower courts who could be deemed suitable for promotion to the SC level, and that there exists lack of proper institutions for the training of judges. Further, the judges are, at least in principle, chosen with extreme caution, and only on the condition of their unquestionable integrity and efficiency, and this obviously reduces the number of potential candidates at any level of the judicial hierarchy and particularly at the SC level. Another reason is the following: it is widely known that appointments of SC judges are essentially political appointments, and like all political appointments, there are advantages in making the appointments strategically and selectively with the effect that supply is less than the effective demand for judges.

Corruption in the judiciary is another area of concern and it has been noted in many reports that such corruption has increased with the liberalization of the developing economies. In other emerging market economies in East Asia there has been significant corruption due to crony capitalism as revealed by the East Asian Crisis which have subverted the legal system and weakened the judiciary. In the Latin American countries there has been significant delay in judicial decision making and corruption within and

outside the courts. In Eastern Europe and Africa there has been little legal certainty and lack of the rule of the law and in places like Cambodia there have been informal reports of high incidence of corruption and little effective rule of the law. Although corruption can sometimes reallocate resources efficiently, corruption is also morally degrading, tends to cause social instability and externalities on future allocation of economic resources. As such, a strong anticorruption policy is required but it is not clear how it can be strategically implemented.

Judicial Review is another area of concern. Judicial review and a strong independent judiciary become necessary when majority power tends to subvert the minority interest or the reverse. It is always possible and certainly has been the case in numerous countries (particularly less developed countries) with powerful executive branch or a captured legislative branch of the government, for special interest groups to capture and leverage the democratic setups under such circumstances. Therefore, judicial review becomes a vitally important instrument in countries plagued by conflicts, corruption, lack of rule of law and weak democracies. Further, when, during emergencies, the power shifts from elected politicians to the president of a country, the judiciary must ensure through a proper review that such a transition is legal and constitutional and restore the proper democratic apparatus as soon as it can. However, the power of judicial review is vaguely defined in many constitutions thus creating strategic uncertainty in the battleground between the different arms of a government. This uncertainty is only gradually resolved the process of adjudication of adversarial legal proceedings and actions taken by the legislature or the executive. Frequently, this uncertainty creates a social welfare loss for

the country in question as decisions on important issues take considerable social time and costs to be decided. It should also be noted that non-federal states like England do not have the system of judicial review or have it imperfectly as in France and therefore have limited ability to tackle issues regarding legislative-judiciary conflict of interest and efficiency in the interpretation of the basic principles of law as found in jurisprudential thought over centuries. Judicial Review has also been imperfectly adopted in Europe where the separation of powers doctrine does not automatically guarantee it. In less developed countries, there are many such issues which are only partially resolved. In post world war Asia, Latin America and Africa the system of judicial review has been weak resulting in a movement away from “limited government” on many important socio-political and economic questions resulting in arbitrary actions of the executive, reduction in political and economic liberty through repressive legislation and economic stagnation and underdevelopment.

Legal innovations like changes in substantive law (e.g. law of negotiable instruments, commercial code, bankruptcy law, complex issues in property rights etc.) evolve spontaneously according to socio-economic changes but are slow when compared with legislative measures due to the history dependence created by important precedents. As discussed before, procedural law also tends to be complex and time consuming. An open minded approach on the importance of reinterpreting precedents with changing times and importing modern laws from outside to speed up the process of economic development is definitely warranted. Interestingly, Hammergren (2002) has noted that traditional institutional reforms imposed on the indigenous judicial system of some of the Latin

American countries have produced less than desirable results and have been counterproductive in some cases. Innovations insensitive to local demand and supply conditions can turn out to be ineffective most of the times. On the other hand, innovations adapted to local conditions stand a better chance of being successful. For example, Dakolias (1999) has reported that Peruvian justice administration improved considerably with the introduction of temporary courts.

The system of appellate review is not strict in most countries leading to high rate of appeals from lower courts being heard at the level of the SC. Furthermore, the system of review by the justices under the stress of high workload also raises doubts on the quality (Casper and Posner (1974) p. 343) and rate (Jucewicz and Baum (1990)) of review. As this paper argues, by maintaining a more high powered system of appellate review, the policy maker can reduce the caseload per judge and give him less excuse for delay as a result of which delay and backlogs fall and timely and quality wise administration of justice increases. It should also be noted that judges will have to spend less time in screening appeals because of the system of a strict standards of review. The social optimum is reached when a system is achieved such that: (a) legal errors in lower courts are reversed systematically in higher courts so as to minimize in turn the errors in the lower courts themselves and (b) correct decisions in lower courts have the lowest probability of reaching higher courts and those reaching higher courts are validated to the maximum extent. For this to happen, decision making in the entire judicial hierarchy has to be efficient and there should be efficient selection of appeals based on signals from litigation.

Suboptimal judicial decentralization has resulted in low jurisdictions for lower courts in many countries. On the other hand, excessive decentralization in some Federalist countries have seen some major litigation issue being decided locally rather than centrally. In India, the inordinate delay, high backlogs in courts, and other mentioned problems have persisted primarily due to ineffective decentralization of the judiciary organization. While specialized law tribunals deal with cases faster than the non-specialized courts, the rate of disposal of these tribunals can be increased further. The continuing delay and high backlogs in BIFR, the bankruptcy law tribunal of India, is an important example (see Appendix, Table 2). Also, the lower courts have less than the required autonomy leading to higher number of appeals and congestions at upper courts like the SC. The most important fact is that lower courts lack strong infrastructure, competent judges and adequate number of support staff. Further, the extent of jurisdiction is too limited in most cases.

The focus of this study is the SC principally because of the following reasons:

- The SC, through its use of policy instruments can improve court performance and reduction in the procedural problems of law at each level of the judicial hierarchy. The policy instruments at the SC level like bench strength (the number of sitting SC judges), compensation of judges, court fees at different tiers of the judicial hierarchy, the power of judicial review, legal innovations, standards of review¹⁷

¹⁷ The SC, unlike lower courts, is endowed with pure discretionary rights on the selection of cases, acted upon by the Justices themselves and face rare reversals of the appellate decisions (Posner (1993)).

and decentralization of the judiciary organization determine the SC performance and judicial system efficiency. The SC payoffs (in terms of social welfare as achieved by minimizing the problems of the legal system) are affected by the actions of litigants, judges, the legislator and the executive. This warrants that the SC takes strategic actions that internalize the reaction of other actors in this framework of socio-legal games. The SC can strategically use the instruments under its control. Caseloads, delay and appeals should fall with a prudent use of these instruments not only at the SC level but also at the level of the lower courts. Strong democracy and high compensation and threats of impeachment militate against corruption. Optimal separation of powers will result when judicial review is strategically used. Allocative efficiency will result when legal innovations are brought about. Improved allocation of time will result when standard of review are efficiently designed and implemented. A decentralization of the judiciary through empowerment and responsible lower courts can result in supply side efficiency of justice.

- The SC of a country sets the standards for the Judicial System. The case decisions, policy and use of judicial standards and instruments at the SC serve as benchmarks for litigation and decision making in lower courts.
- The litigants in the lower courts still have an opportunity to take it to the next level, which those seeking justice from the apex body do not have. The SC is the final resort for all litigants and very little can be done to overturn decisions in the SCs.

Section 4. Quantitative Policy Instruments

When the welfare objective is reduction in caseload and delay reduction (as Posner (2007) points out), or when the objective is to have a corruption proof SC, the legal cases that need to be judged can be allocated through two mechanisms: the price mechanism (court fees and the salary of a SC judge) and rationing (delay in adjudication and a lengthy appeals process). In what follows, we characterize both.

Section 4.1 Policy for tackling the Caseload Crisis

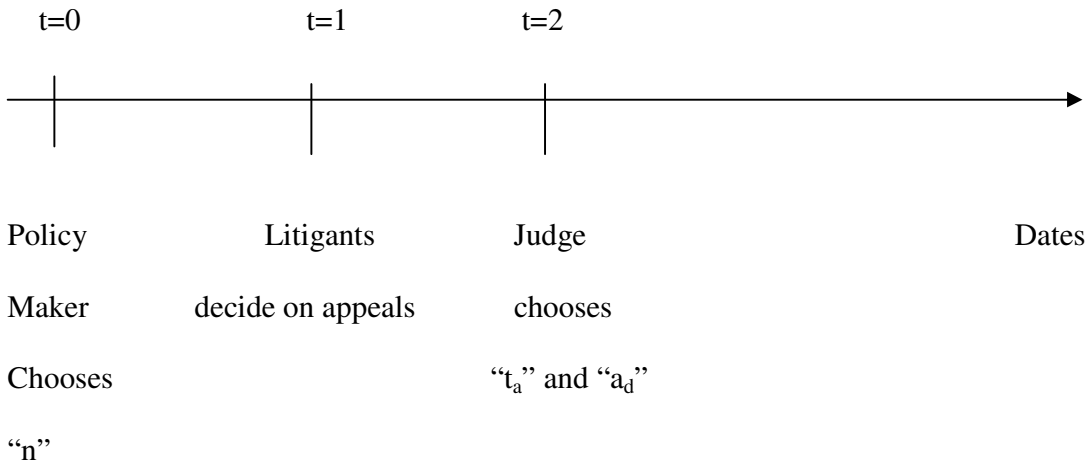
There are three types of agents in the SC. To start with, such an assumption precludes all possibilities of further referrals or re-appeals for any party involved and that all decisions made are final. In other words, this renders the alternative payoff available to all parties, zero. The individuals who are party to this optimization problem are namely a representative Judge of the Supreme Court, the litigants whose appeal to the Supreme Court and a social planner/policy maker (The Chief Justice of the SC in consultation with the Law Ministry, as discussed above) who decides on the socially optimal number of Supreme Court judges. While the optimizing decisions taken by the judge and the litigant are strictly functions of their own incentive compatible choices, the decision of the social planner has only normative implications.

The Judge intends to provide an efficient – time and quality wise – ruling on the cases he/she presides over, and the litigant wants to get a second (and the highest) decision by

spending more time (and fees) on the case which he/she has already fought once (or more) before in the lower courts.

The policy maker (the Supreme Court Chief Justice in consultation with the Law Ministry) decides on the number of judges. The litigants decide on appealing to the Supreme Court based on the information about the number of judges available and the decision trend on the review of cases filed. Finally, each judge decides on the time to be spent for settling (t_a) a case and the number of cases to be disposed (a_d) given the number of judges “ n ” and the number of appeals “ a ”. The sequence of events is depicted in the diagram (Fig. 1) below.

Fig. 1



Thus, we are ready to propose the individual decision making problems and solve the Subgame Perfect Nash Equilibrium (hereafter described as SPNE) of the game starting at

date $t = 1$ as well as the Social Optimum at date $t = 0$. We start to compute the values of the model by backward induction as follows:

- 1) we first compute the last stage ($t = 2$) optimizing choice of the judge $j(n,a)$
- 2) we next compute the SPNE of the game beginning at $t = 1$ with the choice of appeals $a(n, j(n,a))$
- 3) we then solve for n which maximizes social welfare function

Section 4. 1.1 Optimization problem of the Judge

The representative judge faces at the SC a time constraint in the disposition of cases as shown below in eqn (2). The representative judge faces a certain number of appeal cases, and given her/his time constraint, can only decide or dispose off a fraction of appeals depending on the average time given to each case. The judge gains in utility if she/he can give adequate time in hearing and deciding a case, this is captured in the first term of the utility function of the judge in eqn (1). However, the judge incurs utility loss (in terms of conscience, reputation etc.) the higher the time taken to decide a case. The utility loss is higher, the lower is the caseload per judge because there is delay despite the judge not being over-burdened. The utility loss is also higher, the lower the number of cases disposed. The first effect dominates for low value of average time taken to dispose of a case (t_a), and the second effect dominates for all values of t_a above a threshold level

$$\text{Max } U_J = \alpha_0 t_a - \frac{\beta_0}{C \cdot a_d} t_a^2 \quad (1)$$

$$\text{w.r.t. } (t_a, a_d)$$

$$\text{s.t. } a_d \cdot t_a = T \quad (2)$$

where, $C = \frac{a}{n}$ = Caseload per SC judge

a_d = Number of cases actually decided or disposed off by the representative SC judge

a = Total number of cases filed at the SC

n = Number of judges in the SC

T = Total Time available to the representative SC judge to decide appeal cases

t_a = Time spent by the judge in reaching a decision on each appeal case

α_0, β_0 = Parameters (with positive values)

$$F_L < f_L < F^U$$

The judge decides on what should be the optimal time spent per case (t_a^*) to reach a decision.

Thus, putting the value of a_d from (2) in (1), and by differentiating (1) with respect to t_a ,

we obtain the FOC:

$$U'_J = \alpha_0 - 2 \frac{\beta_0 n}{T \cdot a} t_a = 0, \text{ which solves for,}$$

$$t_a^* = \frac{\alpha_0 T a}{2 \beta_0 n} \quad (3)$$

Also, $U''_J < 0$ satisfying the SOC.

Note that equation (2) gives the optimal choice in the last stage (date $t = 2$) of the game.

This will be used in computing the optimal choice in the preceding stages and the

Subgame Perfect Equilibrium of the whole game in the way discussed below. Let us denote the optimizing choice of the judge as a function $j(n,a)$ as interpreted in equations (1) and (2).

Next, consider the following.

Section 4.1.2 Problem of the Litigant

$$U_L = \max[(P_i V - t_a f_L), 0] \quad (4)$$

where, P_i = Probability that the i^{th} litigant wins the case

f_L = Fee paid by the litigant while his/her case is being considered in SC ($f_L > 0$)

V = Pay-off if the litigant wins the case ($V > 0$).

Therefore, equation (3) implies that the “ i^{th} ” litigant compares the expected return from winning the case given the payoff from winning V and given the probability P_i and the expenditure during the time when the case is heard by the judge in reaching a decision (t_a). The alternative pay-off is clearly zero, when the case is turned down for further review in the SC. Thus, there exists a probability P_i^* , at which, a litigant is indifferent between filing and not filing the case. Litigants with P_i above P_i^* will have positive expected return from filing an appeal and will therefore file appeals while those below P_i^* will refrain from filing appeals. This in turn determines the total number of cases a^* , filed in the SC in the following way. Assume that the litigants are uniformly distributed over the probability of winning the case over the zero to one interval, i.e., $P_i \in [0,1]$ with probability density function (pdf) $f(P_i) = 1$ for all i . From equation (3) above, for the

litigant at the margin $(P_i V - t_a f_L) = 0$, such that,

$$P_i^* = \frac{1}{V}(t_a^* f_L), \text{ where, } t_a^* = \frac{\alpha_0 T a}{2\beta_0 n}$$

$$\text{or, } P_i^* = \frac{f_L}{V} \left(\frac{\alpha_0 T a}{2\beta_0 n} \right) \quad (5)$$

Given the uniform distribution of litigants on the probability of winning,

$$\int_0^{P_i^*} f(P_i) dP_i = P_i^* < 1. \text{ The litigants who are distributed in the zone where the probability}$$

of winning the case is at least P_i^* would be those who file the case with the SC. In other words, the total number of cases filed in the SC at any point in time is given by,

$$a^* = \int_{P_i^*}^1 f(P_i) dP_i = (1 - P_i^*) = 1 - \frac{f_L}{V} \left(\frac{\alpha_0 T a}{2\beta_0 n} \right), \text{ and using (5)}$$

$$a^* = \frac{2\beta_0 n V}{2V\beta_0 n + f_L T \alpha_0} \quad (6)$$

Let us denote the SPNE value $a^* = a(n, j(n, a))$ as interpreted in equations (4), (5) and (6).

We can now also calculate the SPNE values of the following:

Equation (5) can be used to find the optimal caseload per judge, since

$$C^* = \frac{a^*}{n} = \frac{2\beta_0 V}{2V\beta_0 n + f_L T \alpha_0} \quad (7)$$

Now that the judge knows the total volume of cases filed in the SC, he/she optimizes on his/her time spent for disposing each case satisfactorily based on a^* . Thus substituting

$$a^* \text{ in (2), we get, } t_a^* = \frac{T \alpha_0 V}{2V\beta_0 n + f_L T \alpha_0} \quad (8)$$

$$\text{Also, from (2) and (8), we get } a_d^* = \frac{(2V\beta_0 n + f_L T \alpha_0)}{\alpha_0 V} \quad (9)$$

Equations (6), (7), (8) and (9) give the values of the endogenous variables in the SPNE of the game starting at date $t = 1$ (starting with the choice of the litigants) with respect to the policy parameter “ n ” and other exogenous parameters of the model.

Section 4.2.3 Sensitivity Analysis of the SPNE

Now consider some changes in these equilibrium values with respect to the litigation cost f_L :

Proposition 1: *As the litigation fee f_L increases*

- (a) The caseload per judge falls*
- (b) The time taken to decide a case falls*
- (c) The number of cases appeals fall*
- (d) The number of cases disposed of per judge increases*
- (e) Proportion of appeals undecided falls*

The results follow directly from equations (6), (7), (8) and (9).

The intuition for Proposition 1 is as follows: as the litigation cost increases, more potential litigants find appeals suboptimal and the number of appeals fall. This reduces the caseload per judge. The judge now has less excuse to take a higher time per case and thus time taken to decide a case also falls. Given the time constraint of the SC judge, this

implies a higher number of cases disposed of per judge. It directly follows that the proportion of undecided cases also rises and backlogs fall.

Table 1. Solutions with respect to f_L

Serial No. of Problems of the Social Planner	Maximization Problem of the Social Planner (with social welfare functions indexed by the value P)	Solution	Condition
P = 1	$\text{Max } U_{sw}^1 = - a^*$	F^U	unambiguous
P = 2	$\text{Max } U_{sw}^2 = - C^*$	F^U	unambiguous
P = 3	$\text{Max } U_{sw}^3 = - t_a^*$	F^U	unambiguous
P = 4	$\text{Max } U_{sw}^4 = + a_d^*$	F^U	unambiguous
P = 5	$\text{Max } U_{sw}^5 = \frac{na_d^*}{a^*}$	F^U	unambiguous

The social welfare implication of proposition 1 is quite straightforward: litigation costs should be increased at the SC level through high court fees, attorney fees etc. However, litigation costs should not be so prohibitively excessive that those denied justice in lower courts cannot afford to appeal and litigate. For the poorer section of the society the ability to access justice should be explored more through temporary courts, consumer courts, tribunals, quasi-regulatory bodies etc. without making it necessary for them to approach the SC level. Table 1 summarizes the findings.

The next few exercises generate propositions regarding the effects of increasing the number of judges on the different dimensions of social welfare.

Proposition 2: *As the number of judges increase*

- (a) *The caseload per judge falls*
- (b) *The time taken to decide a case falls*
- (c) *The number of cases disposed per judge increases*

The intuition for (a) is as follows: since the number of appeals increases in less than proportion with respect to “n”, the caseload per judge falls. The intuition for (b) is as follows: as the increase in the number of judges reduces the caseload per judge, the representative judge finds delay more costly in terms of utility maximization and reduces the optimal time taken t_a^* . The interpretation for (c) follows directly from (a) and (b).

Next, let us investigate as to what happens to the equilibrium number of appeals if the number of judges increases, i.e., $\frac{\partial a^*}{\partial n}$. From (6),

$$\frac{\partial a^*}{\partial n} = \frac{\partial}{\partial n} \left(\frac{2\beta_0 n V}{2V\lambda\beta_0 n + f_L T\alpha_0} \right) = \frac{2\beta_0 \alpha_0 T f_L V}{[2V\lambda\beta_0 n + f_L T\alpha_0]^2} > 0 \quad (10)$$

Thus we have the following proposition:

Proposition 3. *An increase in the number of judges unambiguously raises the equilibrium number of litigants (appeals).*

The intuition for proposition 2 is as follows: since the time taken to decide an appeal falls with respect to “n”, a greater proportion of litigants find it optimal to litigate (as can be seen straightforwardly from the uniform distribution function of P_i).

Section 4.4 Problem of the Social Planner

Given the above solutions, the only choice variable whose optimum value remains to be determined from the system is n^* , which when substituted to the above solutions would determine the equilibrium for the entire system at the social optimum. The social planner (P) may have to choose from a number of social welfare (SW) policy goals depending on the type of the social planner:

- (a) The type $P = 1$ social planner wants to minimize the number of appeals
- (b) The type $P = 2$ social planner wants to minimize the per judge caseload
- (c) The type $P = 3$ social planner wants to minimize the average time taken by a judge in disposing of a case
- (d) The type $P = 4$ social planner wants to maximize the number of cases disposed per judge
- (e) The type $P = 5$ social planner wants to minimize the fraction of backlogs (or maximize the proportion of the total number of appeals disposed of).

The optimization problem is with respect to bench strength or the number of judges n^* and subject to the following constraint: $n_L \leq n \leq n^U$ where:

n_L is the minimum number of judges required for efficient functioning of the judiciary based on all procedural and substantive questions of law and administration, and

n^U is the maximum number of judges determined by the scarcity of efficient judges at the Supreme Court level as well as determined by administrative and cost factors. We now derive another proposition before we collect all our results about the problem of the Social Planner with respect to the optimal number of judges in a SC.

Proposition 4. *The rate of Backlogs or court congestion $B = 1 - \frac{na_d^*}{a^*}$ decreases with n and therefore minimizing court congestion requires setting $n = n^U$.*

The problem of the social planner is as follows: $Max U^5_{SW} = \frac{na_d^*}{a^*}$

w.r.t. (n)

$$\begin{aligned} U^5_{SW} &= \frac{na_d^*}{a^*} = \frac{(2\beta_0 nV + \alpha_0 T f_L)^2}{2\alpha_0 \beta_0 V^2} \\ &= \frac{4\beta_0^2 n^2 V^2 + \alpha_0^2 T^2 f_L^2 + 4\alpha_0 \beta_0 nV T f_L}{2\alpha_0 \beta_0 V^2} \\ &= 2\frac{\beta_0}{\alpha_0} n^2 + \frac{\alpha_0 T^2 f_L^2}{2\beta_0 V^2} + 2\frac{nTf_L}{V} \end{aligned}$$

The social welfare utility function is positive, increasing and convex in “n” starting with a positive intercept.

$$\frac{\partial U^5_{SW}}{\partial n} = 4\frac{\beta_0}{\alpha_0} n + 2\frac{Tf_L}{V} > 0$$

Hence $n = n^U$

From the Comparative Statics and Proposition 4, we get the following Proposition summed up in the tabular form:

Proposition 5. *The optimal bench strength will be at the lower or upper bound depending on the type of the social welfare function as follows:*

Table 2. Solutions with respect to n

Serial No. of Problems of the Social Planner	Maximization Problem of the Social Planner (with social welfare functions indexed by the value P)	Solution	Condition
P = 1	$\text{Max } U_{sw}^1 = - a^*$	n_L	unambiguous
P = 2	$\text{Max } U_{sw}^2 = - C^*$	n^U	unambiguous
P = 3	$\text{Max } U_{sw}^3 = - t_a^*$	n^U	unambiguous
P = 4	$\text{Max } U_{sw}^4 = + a_d^*$	n^U	unambiguous
P = 5	$\text{Max } U_{sw}^5 = \frac{na_d^*}{a^*}$	n^U	unambiguous

As Table 1, indicates, almost all social welfare policies (with respect to bench strength or the number of SC judges) are maximized by having as many judges as are feasible under the constraints on the scarcity of efficient judges at the Supreme Court level as well as determined by administrative and cost factors of hiring SC judges. The only exception

being the social welfare policy that tries to minimize appeals: it recommends keeping the number of judges as low in number as possible. When one considers a social welfare policy that tries to target all the problems (delay, workload, congestion, high litigation, excessive appeals, problems in the quality of justice etc. encountering the SC) at the same time, an obvious tradeoff arises. According to the weight placed on social welfare function 1 the number of the judges should be lowered, while the weights placed on other social welfare functions imply that they cannot be lowered too much. In other words, if all social welfare functions are assigned positive weights, we must have an interior solution for n : the solution n^* should have the property that $n_L < n^* < n^U$. The higher the weight placed on minimizing appeals, the lower should be n^* (while the converse is also true). Thus, if excessive appeals are to be discouraged by the SC, an increase in delay, workload, backlogs and low disposition of cases per judge may have to be tolerated. As mentioned before, delay or workload may not always be social evils but may turn out to be advantageous in societies with highly litigious propensities that need to restrict appeals through the legal hierarchy. Our theoretical and policy implications are borne out in Table A.1 in the Appendix. Over the years, increasing the number of judges in the Indian SC have contributed to lower caseloads and backlogs but have led to higher appeals.

Section 2.2 A Corruption Proof Strategy

In this section I consider only on corruption proof strategy.

Consider a two stage game where the policy maker moves first and then a SC judge determines his strategy regarding receiving a bribe.

In stage 1, the SC determines a compensation package for judges subject to a budget

constraint $T = n.C(sj)$ where

T is the budget (from taxation)

N is the number of judges

$C(sj)$ is the salary for a SC judge

Let b be the maximum amount of a bribe that can be given to a SC judge.

In stage 2 the judge decides whether to take the bribe. If he is indifferent then he does not take the bribe.

Let q be the probability of getting caught and let $m(i)$ be the money value of impeachment which is the disutility of getting caught. (It is assumed that the bribe is non-appropriable even if the judge is caught after taking the bribe).

Let T be the budget for salaries of SC judges and n the required number of judges.

Optimal compensation for a judge is $b - qm(i) = C(sj) = (T/n)$

(It is assumed that $b - qm(i) < T$)

Two observations are in order here:

- a) *The higher is b , the lower is n since average compensation increases.* Given the high value of stakes in a SC, it is no wonder that the salaries are quite high and the number of judges low. Realistically, it is also difficult to determine the maximum amount of a bribe that a litigant can offer since it not only involves the value of the law suit to each litigant but also the transaction cost incurred by each. A reasonable method of estimation is $b = \max [v(p) - tc(p), v(d) - tc(d)]$ where p stands for plaintiff and d for defendant. It is instructive to note that maximum

bribe can be reduced through reduction of the present value of the suit through lengthening the duration of the litigation.

b) *The higher is q , the higher is n*

Section 5. Qualitative Policy Instruments

In this section, we discuss the following: the effective use of other qualitative policy instruments in a strategic setting. The qualitative instruments we discuss are judicial review, legal innovations, standards of review, and decentralization of the judiciary organization. Let us briefly review each of them in turn.

The tasks of judicial review are essentially meant to uphold the Constitution on matters of substantive law in new legislation, check the legality of procedures and operations in the implementation of legislation and administrative actions, and protect the individual citizen of the state with respect to his or her fundamental property rights, contractual rights and tort claims as indicated by the Constitution. Generally, it is thought desirable for the judiciary to leave the fundamentals of strategic planning and execution (with respect to the economy and the polity) to the executive and the legislature as much as possible. Judicial review of the Executive and the Legislature by the Supreme Court is the most important power that SC has, and it should be used with utmost caution and prudence so as to keep the sanctity of the separation of powers and the allocative efficiency it entails. If a particular legislation or a statute or an action of the executive violates any aspect of the Constitution or goes against social welfare in an obvious way, then the SC can intervene and overturn such a decision or action. However, the SC can do

so if and only if, the matter reaches the SC as an appeal. To appreciate the strategic role that judicial review can play in maximizing social welfare, one has to understand the strategic interaction between the executive, the legislature and the judiciary in terms of governance with separation of powers (see Segal (1997) for an analysis how judicial review varies with different Congressional preferences in USA). The separation of powers involves conflict and competition (checks and balances), cooperation (without cooperation between these different arms of the government, the administration of a state comes to a standstill), as well as coordination (with a proper monitoring and allocation of tasks to achieve each goal and sub-goal of governance). It has been argued by a number of authors, that in USA, the Congress and the President hold a big power in overriding (Dahl (1957)) and circumventing (Epstein, Knight and Martin (2001)) court decisions. They can do so by virtue of being able to leverage certain critical strategic variables¹⁸, as documented by Rosenberg (1991). Therefore, as far as conflict and competition are concerned, in order to strengthen its position, the judiciary should signal that it is strong and therefore can take costly actions that cannot be mimicked by weak judiciaries, and pose credible (sub-game perfect) threats against unconstitutional, socially harmful legislation, statutes or government action which are contemplated. (However, as we have indicated earlier, the issue can only be decided by the SC if it reaches the SC as an appeal. Nonetheless, if the social or political issue under consideration is only partially resolved by executive action and / or legislation, we can reasonably expect that they become subject to lawsuits and reach the SC as appeals with very high probability.) The

¹⁸for example, to use the confirmation power of the senate in selection of judges, enact constitutional amendments, initiate appointment and impeachment of judges, reduce the appellate jurisdiction of SCs, require supermajorities by the court in declaring legislation unconstitutional and any other way to reduce the power of the court

judiciary should put all its weight in declaring them illegal and in committing to follow up on its threats through negative judgments, and if necessary hold the legislators liable, bring impeachment against the executives etc. The judges of the SC should be independent minded even if appointed by the executive and should evaluate each other on a regular basis of peer monitoring and peer pressure system. The judiciary should acquire a reputation of toughness by constantly challenging unconstitutional acts and legislations which raise the costs of rivals in legislatures and in the executive branch of the government. However, when the judiciary becomes dependent on the other branches of the government for the enforcement of laws pertaining to judicial review, it has to select its strategy subtly so that it has the backing of the public and some sections in each arm of the government. Yet, the judiciary should not be overzealous and remember that judicial self-restraint is an important virtue since judicial power is also of an “encroaching nature” and if stretched too much, may lead to lack of freedom of the citizen and inefficiency in governance. The principles of self restraint are given in the Appendix 3. keeping in mind that judicial review is a delicate and last resort action, must cooperate and coordinate with the other arms of government efficiently and fairly wherever and whenever socially desirable. Further, it must be remembered that a judiciary which generally practices self restraint, comes out strongly against a legislation or an executive action, then it gets a high attention and support from the public. So practicing self-restraint generally is also strategically optimal.

Legal innovation can occur through procedural simplification, a change in the interpretation of an important precedent or through filling a gap left by precedents or

through legal transplantation. Procedural simplification is usually designed for reducing court time of administration and trial time in adjudicating decisions and for facilitating the communication of judicial decisions. When excessive red tape, bureaucratic filters and rules clog the path of law and justice, simplification of procedures bring in efficiency gains. However, such simplification should still contain the system of checks and balances expected from any reasonable set of procedures. Court administration becomes better through more efficient paperwork processing, by court staff and communication of information and command within the administrative hierarchy. The time cost of trial falls with simple rules that reduce frequency of hearing the same case and with the reduction in the need of required protocols and paperwork. Sometimes the use of history and its weight needs to be re-judged in light of radically different circumstances. Such circumstances point to the needs of forward looking and consequentialist approach to judicial decisions that can be rendered by reinterpreting or reversing important precedents. Under stable socio-economic and political conditions, precedents should play the guiding hand in judicial process through systematic interpretation by judges. However, as the social, economic and political environment of a country or a region changes, the value of old precedents also changes and need reinterpretation. Examples can be found in the case of innovations in Tort Law which mitigates moral hazard problems by the provision of incentives. Moreover, sometimes old precedents may not guide the decision making in particular cases and leave gaps to be filled by creating new precedents (see Cardozo (1961)). This is the substance of indigenous legal innovation. Examples can be found in the fields of intellectual property rights and the law of telecommunications. Sometimes, a legal transplantation can also become an important

legal innovation. Though legal transplantations are brought about through legislation, the SC of the relevant country has an important and obvious role in it by demanding legal transplantation and preparing the legal system for change by adapting to new laws thus brought about from outside. When law needs to lead socio-economic and political change, the Benthamite project of supremacy of legislation over judge made law has to be invoked, and the SC has to demand such changes and play the role of catalyst as well reshape the new legal framework through proper adaptation and interpretation of such laws. Moreover, when social change outpaces possible innovations brought through adjudication, then regulation becomes the most effective weapon to deal with new demands and again common law is required only to interpret such regulations. When the effective legal innovations cannot be brought into the existing legal framework of a country, the SC of the country may demand that a legal transplantation be brought in through legislation. Legal transplantation should only be used when it suits the beneficial dynamics of law and the market economy of the country in question, and the efficient governance of institutions (Milhaupt and Pistor (2008)). Legal transplantation can be especially useful for a less developed country with underdeveloped public and commercial laws and / or a country that needs to harmonize its laws within its economic region for greater compatibility in trade and production. Also legal transplantations are useful to bring about effective rule of law whenever a legal system of a state has been deemed to offer a low protection for citizens, property rights and contracts (UN mediated effective rule of law in Cambodia in recent times is an example). However, SCs judges might find it hard to adapt to transplanted rules and precedents in the common law system and this might endanger higher workload, congestion and delay as well greater

number of appeals created through induced legal uncertainty and complexity. A solution can be to have special benches that have judges who are trained and empowered to decide on cases where the legal rules have been heavily transplanted. Attempts should be made to fit the imported laws to the existing demands for them and the country legal infrastructure.

Standard of review, in legal parlance, means the amount of deference that an appellate court like the SC, gives to an appeal from a lower court. A high powered standard of review at the SC level implies, that it shall not overturn a decision from a lower court like a high court unless the case was decided with some obvious error on the part of the judiciary at the lower court level in choosing a particular set of precedents and its constitutional interpretation to decide a case. This has an obvious implication on the process of appeals, the incentive to appeal and the manner in which an appeal will be screened at an appellate court like a SC. A high powered standard of review can reduce the incentive for appeals and the rate of appeals to a SC but it may also increase the probability that a judicial error at a lower court will not be detected or corrected. Strategic analysis of standards of review sheds light on the tension between the right to hear a legitimate appeal and the excessive accommodation to appeals. By maintaining a high powered system of standards of review, the policy maker can reduce the caseload per judge and give him less excuse for delay as a result of which delay and backlogs fall and timely and quality wise administration of justice increases. Surely, the rate of appeals will increase with reduced caseload per judge and lower litigation cost, but it should also be noted, that judges would have to spend less time in screening appeals because of the

system of a high powered standards of review. However, this system runs the danger of rejecting legitimate appeals from the lower courts and therefore an acceptable tradeoff has to be decided upon. An optimal strategy can be such as to show maximum deference to lower courts as and when the lower court decisions take into account the precedents created by higher courts like the SC. We call such a system a semi-strong standard of review.

The design of the judiciary organization is an extremely important issue and here also the SC together with the law ministry, plays an important role. The SC can recommend the degree of decentralization, delegation and the appropriate quasi-judicial and regulatory authorities to be formed and governed. At the same time, it must be remembered that the SC does not always have the power of administrative supervision and control of the lower courts (e.g. as in India, by Article 136 of the Indian Constitution). The caseload burden of the SC judges can be reduced by a prudential decentralization of the judiciary organization. Law tribunals can be set up to hear cases pertaining to company law, taxation, bankruptcy proceedings, industrial disputes, etc. and complemented by creating regulatory institutions with respect to stock exchange, public health, education, social welfare etc. Only appeals with specific merits from these tribunals and quasi-regulatory bodies may be tried at the SC level. Judges from different High Courts can be appointed specially to sit on these tribunals. Lower down the judicial hierarchy, the jurisdiction of District Courts and Consumer Courts should be increased. The Consumer Courts will hear petty disputes speedily and with low court fees to settle all kinds of problems regarding consumer protection and their verdicts will be final (appeals if any, will be

heard by the same courts). The poor will certainly benefit from this. Lower courts will thus have more jurisdiction at their levels. The High Courts and other appellate courts should also have similar increase in jurisdiction such that there will be less appeals to the SC level. The decentralization of the judiciary organization will thus reduce SC caseloads and appeals. However, the lower courts must have access to high quality judges and good infrastructure and must be able to address the problems of controlling judicial inefficiency, moral hazard and adverse selection problems. Further, the lower courts should be motivated by the rule of law.

Section 6. Conclusion

Our basic conclusions regarding the design of judiciary organization and instruments that cut across differences in legal and economic scenarios of different countries are quite simple and enumerated below:

- Improvement in substantive law can be brought about through legal innovations and legal transplantation according to the needs of the economy. Considerable exercise in interpretation should be done by the SC judges to in adapting the transplanted laws in the indigenous legal system. Improvements in procedural law should be brought about through streamlining procedures and reduction of necessary paperwork.
- When we consider the policy instrument like court fees at the SC level, we find that increasing litigation cost upto the feasible maximum generates the highest social welfare with respect to all the problems discussed. However, litigation

costs should be kept low in lower courts based on universal access to justice principle, even if this policy leads to excessive litigation and caseloads.

- With respect to the policy instrument of the number of judges, in each case we get an unambiguous solution, though in one case the solution is different. Essentially, we find, that increasing the number of judges increases the number of appeals to a SC since higher number of judges means a lower workload per judge which gives him less excuse for delay thereby reducing the litigation cost of appeals which in turn increases the number of appeals. However, increasing the number of judges in a SC reduces the magnitude of other problems like caseload, backlogs, and timely disposition of cases.
- A semi-strong standard of review which sets a high powered standard of review and only considers appeals when important precedents and Constitutional rules have been violated should be most suitable.
- A more rational organization of the judiciary should be based on the principle of decentralization (through quasi-judicial bodies that decentralizes the province of law and justice and with focus on speedy and low cost dispensation of justice at the lower levels of the judicial hierarchy). It should also be based on the principle of containment of appeals at each level of the legal hierarchy, through lower courts having more autonomy such that the caseload problem at the SC level falls. A suit originating at any level of the legal hierarchy should be discouraged to be taken up to the next level (particularly the SC) for rehearing via appeals. There should be focus on speedy and low cost dispensation of justice at the lower levels of the judicial hierarchy

- An efficient system of judicial review should be in place which keeps governance fair, efficient and stable and the judiciary being proactive when there is a possibility that it is deemed to be weak and practicing “self restraint” otherwise.

We now conclude by commenting how these goals and instruments can be achieved in different socio-economic and political settings.

In economically advanced, socio-politically stable and financially developed economies, legal and judicial reform has a long history. In most of them, the persistent problems discussed have been tackled by different measures but have met with varied and limited success due to transaction complexity of markets, contracts, institutions and networks and because of the of policy measures which have not taken into account the behavioral reactions of the public, litigants, attorneys, courts and judges to judicial reform policies. Our game theoretic approach should inform their policy and theoretical initiatives. Further, our approach can be suitably adapted as a response to the emerging problems in these economies like problems with respect to the new and continuing demands to human rights, corporate governance, accounting, information disclosure and new kinds of financial and political crises.

In emerging market economies and mixed economies with a long history of rich admixture of imported and indigenous commercial legal systems (take India as a prime example), the primary focus should be to create a more rational and decentralized organization of the judiciary. Innovations like high SC court fees and low court fees for

the poorer sections in the lower courts and legal transplantations and better standards of review at the SC level should also be introduced. In this connection, it should be mentioned that some special tribunals like BIFR (Bureau of Industrial and Financial Reconstruction) in India, that deals with restructuring bankrupt business enterprises, have accumulated too many undecided cases over the years (see Table A.2 in the Appendix), and is being considered for a complete overhaul through a new bill in the Parliament. Therefore, there is a need for a proper governance of quasi-judicial bodies as well, and part of the responsibility will have to be shared by legal policy makers of a country like the Law Ministry and the SC.

In underdeveloped economies with colonial legal, administrative and economic histories, the problem of any kind of reform is problematic in terms of opposition from different pressure groups and ideologies and traditions. Judicial reform attempted in such countries should be sensitive to these conditions and try to implement them in the framework of a comprehensive sustainable and inclusive development process with gradual approval of the public, the media and governments through debates, discussions and socially acceptable experiments. Policies that target indigenously based legal innovations stand better chance of success.

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Appendix 1. Case Disposal Rate at Supreme Court of India

Table A1. Absolute Number of Cases Filed and Disposed for the SC in India

Year	Filed	Total Number of Cases Disposed off by the Supreme Court	Total Bench Strength of the Supreme Court (NO. OF HON'BLE JUDGES)	0-2 years (excluding those taking 2 years)	2-5 years (including those taking 2 years and excluding those taking 5 years)	5-10 years (including those taking 5 years and excluding those taking 10 years)	10-25 years (including those taking 10 years and excluding those taking 25 years)	25 years and more
1981	31040	18690	15	8078	851	986	475	3
1982	43510	29112	14	12583	1326	1535	740	5
1983	55902	45824	17	19806	2087	2416	1165	8
1984	49074	35547	18	15364	1619	1874	904	6
1985	51592	51078	15	22077	2326	2693	1299	9
1986	27881	30700	14	13269	1398	1619	781	5
1987	28040	21807	16	9425	993	1150	555	4
1988	27721	19895	20	8599	906	1049	506	3
1989	27469	21400	22	9249	974	1128	544	4

1990	28488	25238	24	2103	221	515	16	1
1991	32501	35341	24	6971	940	1342	196	0
1992	26686	35847	24	13439	1437	2676	846	3
1993	21648	20884	23	15755	1656	2474	1778	0
1994	42046	47890	22	19671	2160	5159	2029	2
1995	51443	68337	23	23244	3118	9232	2500	1
1996	33406	46216	22	22817	3213	2837	3745	1
1997	32355	36569	23	20331	2047	2181	1532	16
1998	36559	35233	22	17316	1508	902	822	10
1999	34683	34707	23	17070	1534	1097	984	16
2000	37111	35300	24	16953	1902	873	508	8
2001	39419	38842	26	18614	1826	775	378	16
2002	44052	42439	25	20002	1691	1359	259	15
2003	50394	47979	24	20322	2345	1873	269	5
2004	58931	55530	25	21082	1720	1908	73	10
2005	46137	42841	22	20894	2143	900	55	3

Data Source: The Supreme Court of India (Office of the Registrar)

**Appendix 2. Performance of the Bureau of Industrial Financial Reconstruction
(India)**

Table A.2 Performance of BIFR

Year	Total Cases Regd. during the Year	Cases Disposed off during the Year				Bench Month *	cases disp in the year	cases undisp in the year	Cum Cases Reg	Cum cases disp
		Cases under Revival	Cases Revived	Winding up Recomended	Dismissed					
<i>1</i>	<i>2</i>	<i>3a</i>	<i>3b</i>	<i>3c</i>	<i>3d</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>	<i>8</i>
1987	311	0	0	0	8	24	8	303	311	8
1988	298	0	1	12	29	36	42	256	609	50
1989	202	0	1	31	78	42	110	92	811	160
1990	151	3	3	43	44	48	93	58	962	253
1991	155	4	4	47	28	42	83	72	1117	336
1992	177	8	7	30	42	36	87	90	1294	423
1993	152	9	13	64	59	36	145	7	1446	568
1994	193	10	37	79	48	45	174	19	1639	742
1995	115	22	25	64	29	48	140	-25	1754	882
1996	97	29	93	85	25	38	232	-135	1851	1114
1997	233	13	36	85	22	25	156	77	2084	1270

1998	370	13	21	50	36	11	120	250	2454	1390
1999	413	13	10	65	70	27	158	255	2867	1548
2000	429	10	37	153	158	36	358	71	3296	1906
2001	463	50	47	133	118	36	348	115	3759	2254
2002	559	74	34	143	252	36	503	56	4318	2757
TOTAL	3759	258	369	1084	1046	566				

Data Source: BIFR Website

Appendix 3. Principles of Judicial Self-Restraint

1. Before the Court will glance at a particular issue or dispute officially, a definite “case” or “controversy” at law or in equity between bonafide adversaries under the Constitution must exist, involving the protection or enforcement of valuable legal rights, or the punishment, prevention or redress of wrongs directly concerning the party or parties bringing the justiciable suit.
2. Closely related to the need for the presence of a case or controversy is the logical demand that the party or “parties” bringing suit must have “standing”.
3. The Court does not render advisory opinions, i.e. judicial rulings upon the constitutionality of government actions in the absence of a case or controversy requiring such a ruling for its disposition – nor do the lower federal constitutional courts.
4. Not only must the complainant if federal court expressly declare that he is invoking the constitution of the United States – but a specific live rather than a dead constitutional issue citing the particular provision on which he relies in that document must be raised by him; the Court will not entertain generalities.
5. The Court will not pass upon the Constitutionality of a statute or of an official action at the instance of one who has availed himself of its benefits, but then decides to challenge its legality anyway.
6. All remedies in the pertinent lower courts must have been exhausted, and prescribed lower court procedure duly followed, before making application to the Supreme Court for review.

7. Assuming it has been properly raised, the federal question at issue must be substantial rather than trivial; it must be the pivotal point of the case; and it must be part of plaintiff's case rather than part of his adversary's defense.

8. The Supreme Court will review only questions of law and not normally the questions of fact.

9. The Supreme Court will never be bound by its precedents.

10. The Supreme Court can defer certain actions to the legislature or the executive.

11. In the event of a validly challenged statute, the presumption of its constitutionality is always in its favor.

12. If a case or controversy can be decided upon any other than constitutional grounds – such as by statutory construction, which constitutes the greatest single area of the Court's work, or if it can rest on an independent state ground – the Court will be eager to do so.

13. The Court will not ordinarily impute illegal motives to the law makers.

14. If the Court does find that it must hold a law unconstitutional, it will usually try hard to confine to the holding to that particular section of the Statute which was successfully challenged on constitutional grounds, - provided such a course of action is feasible.

15. A legislative enactment – or an executive action – must be unwise, unjust, unfair, undemocratic, injudicious, - but still be constitutional in the eyes of the Court.

16. The Court is not designed to serve as a check against inept, unwise, emotional, unrepresentative legislators.

Source: Henry Abraham (1975) "The Judicial Process"