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A BRIEF INTRODUCTION TO THE INDIAN JUDICIAL SYSTEM AND COURT HIERARCHY

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ISSN 2203-5753 (PRINT)
ISSN 2203-5761 (ONLINE)
2019

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A BRIEF INTRODUCTION TO THE INDIAN JUDICIAL SYSTEM AND COURT HIERARCHY

ABSTRACT

This paper provides an introduction to the Indian judicial system and court hierarchy, outlining the jurisdiction of constitutional and statutory courts and tribunals and the appointment, tenure and removal of judges. It describes forms of alternative dispute resolution that have emerged in recent decades, partly to combat delays in the court system, and informal dispute resolution bodies that mediate family disputes, such as Sharia courts. The paper concludes by discussing the contentious issues of delay in the court system, public interest litigation, and appointments to the Supreme and High Courts of India.

MARY KOZLOVSKI



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A BRIEF INTRODUCTION TO THE INDIAN JUDICIAL SYSTEM AND COURT HIERARCHY

MARY KOZLOVSKI¹

THE INDIAN COURT SYSTEM

SUPREME COURT OF INDIA

Highest court in India and final court of appeal, located in India's capital city New Delhi

HIGH COURTS OF INDIA

Highest courts in the States and Union territories

DISTRICT AND SUB-DISTRICT COURTS

Civil courts and criminal/sessions courts at the District and Sub-District levels in States and Union territories

SPECIALISED COURTS AT DISTRICT LEVEL

E.g. Commercial Courts; Family Courts

1 I thank Professor Pip Nicholson, Associate Professor Tarunabh Khaitan and Associate Professor Farrah Ahmed for their comments on earlier drafts. Any errors are mine alone.

ALTERNATIVE DISPUTE RESOLUTION

LOK ADALATS ('COURTS OF THE PEOPLE') <ul style="list-style-type: none">• Constituted by State, District, Sub-District or Court Legal Services Committees• Settle cases that are pre-litigation or pending in court system	TRIBUNALS <ul style="list-style-type: none">• Administrative tribunals and other tribunals, e.g. National Green Tribunal• Appeals from decisions may lie to the courts	GRAM NYAYALALAS <ul style="list-style-type: none">• 'Grassroots' courts in rural areas set up by States in consultation with High Courts• Adjudicate civil and criminal matters• Can be mobile courts
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INDIAN JUDICIAL SYSTEM SINCE INDEPENDENCE

Though India's legal system stretches back centuries,² its modern judicial system is shaped by the *Constitution of India* ('Constitution'), which was promulgated after India became independent from British rule in 1947. The Indian Constituent Assembly debated and drafted the Constitution, which was adopted on 26 November 1949 and came into effect on 26 January 1950.³ The Constitution established the Republic of India: a Union of States with a federal government – known as the Union or Central Government – State governments and Union territories.⁴ There are no State constitutions in India, except for the State of Jammu and Kashmir, which has a special position under article 370 of the Constitution and its own State Constitution.⁵

The Constitution created three branches of government at the federal level: the Executive,

2 For a brief history of the Indian legal system prior to independence, see Rakesh Kumar Shrivastava, Versha Shah and Megha Srivastava (2014) 'Update: A Guide to India's Legal Research and Legal System', *Hauser Global Law School Program, New York University School of Law*, April <http://www.nyulawglobal.org/Globalex/India_Legal_Research1.html>.

3 *The Constitution of India*, entered into force 26 January 1950, amended 14 January 2019 ('The Constitution of India'). A copy of the *Constitution* is available at: <<http://legislative.gov.in/constitution-of-india>>.

4 Under art 239(1) of the Constitution, the President administers Union territories through an appointed administrator.

5 *The Constitution of India*, art 370.

often called the Union or Central Government; the Parliament; and the Judiciary, referred to in the Constitution as the Union Judiciary. The judiciary is unified. The highest court in the judicial system, and the final appellate court, is the Supreme Court of India ('Supreme Court'). The States and Union territories have High Courts, with civil courts, criminal/sessions courts and various tribunals operating under them.

In drafting the Constitution, the Constituent Assembly drew on India's own legal history and on foreign constitutional experiences, as the drafters of the Australian Constitution did in the late 19th century. The post-independence Indian legal system retained some features of British legalism, including the common law and the principle of *stare decisis*, while guaranteeing individual constitutional rights that are enforceable by Indian courts. Today the Indian judiciary presides over a busy court system in which people face severe delays in having their cases heard (see below).

This paper focuses primarily on the formal system of courts and tribunals established under the Constitution and various statutes. It describes forms of alternative dispute resolution that have emerged in recent decades, partly to combat delays in the court system, and informal dispute resolution bodies dealing with particular issues or parties. The paper concludes by outlining three contentious legal issues in India: (1) delays in the formal court system; (2) public interest litigation; and (3) appointments to the Supreme and High Courts.

INDIAN COURT HIERARCHY

SUPREME COURT OF INDIA

The Constitution establishes the Supreme Court,⁶ whose head is the Chief Justice of India. The Supreme Court generally sits in New Delhi, but the Chief Justice can specify other locations with the approval of the President of India ('President').⁷ Supreme Court proceedings are conducted in English.⁸

The Supreme Court is a court of record, with the power to punish for contempt of itself.⁹ Supreme Court judgments are binding on all courts,¹⁰ and must be delivered in open court,¹¹

6 *The Constitution of India*, art 124(1).

7 *The Constitution of India*, art 130.

8 *The Constitution of India*, art 348(1)(a).

9 *The Constitution of India*, art 129.

10 *The Constitution of India*, art 141.

11 *The Constitution of India*, art 145(4).

with the concurrence of a majority of judges who heard the case.¹² Supreme Court decisions are also binding on smaller or equal-sized Supreme Court benches.¹³ As the Supreme Court generally sits in a minimum required two-judge bench to cope with its workload, small benches determine a wide range of matters, and their extensive number has led to inconsistent jurisprudence and uncertain precedent.¹⁴

Jurisdiction

The Supreme Court has extensive jurisdiction and powers, specified in multiple sources including the Constitution, statutes and case law:¹⁵ (1) original jurisdiction, including jurisdiction to enforce constitutional rights, known as ‘writ jurisdiction’; (2) appellate jurisdiction; (3) advisory jurisdiction; and (4) transfer jurisdiction. Parliament can extend Supreme Court jurisdiction and powers in certain areas and circumstances.¹⁶

Original Jurisdiction

The Supreme Court has original jurisdiction in disputes between: (1) the Government of India and one or more States; (2) the Government of India and any State or States on one side, and one or more States on the other side; and (3) two or more States.¹⁷ Disputes must involve a question of law or fact ‘on which the existence or extent of a legal right depends’.¹⁸ The Supreme Court has jurisdiction in disputes over the election of a President or Vice-

12 *The Constitution of India*, art 145(5). Judges may deliver dissenting judgments.

13 Nick Robinson (2016) ‘Judicial Architecture and Capacity’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 338-39, citing Rajeev Dhavan (1978) *The Supreme Court Under Strain: The Challenge of Arrears*. Bombay: NM Tripathi 36; *Union of India v Raghbir Singh* (1989) 2 SCC 754 [27]; *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673 [12].

14 Nick Robinson (2016) ‘Judicial Architecture and Capacity’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 339-40.

15 This paper does not exhaustively describe all sources of Supreme Court jurisdiction. There is a table outlining these sources in Madhav Khosla and Ananth Padmanabhan (2017) ‘The Supreme Court’, in Devesh Kapur, Pratap Bhanu Mehta and Milan Vaishnav (eds), *Rethinking Public Institutions in India*. New Delhi: Oxford University Press 104, 115.

16 Articles on the Supreme Court’s jurisdiction and powers are mostly found in Chapter IV of Part V of the Constitution on The Union Judiciary. A key exception is the jurisdiction to enforce constitutional rights, which is in Part III of the Constitution.

17 *The Constitution of India*, art 131. This jurisdiction is subject to the Constitution.

18 *The Constitution of India*, art 131.

President.¹⁹

The Supreme Court does not have jurisdiction in disputes arising out of a treaty, agreement, covenant, engagement, *sanad* or similar instrument executed before the Constitution commenced, and which either continues to operate or provides that the Supreme Court has no jurisdiction over such disputes.²⁰ A 1956 law excludes the Supreme Court's jurisdiction over disputes related to inter-State rivers.²¹

Writ jurisdiction

People can move the Supreme Court to enforce their constitutional rights,²² such as the right to equality before the law.²³ The Supreme Court can issue directions, orders or writs, including *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, to enforce them.²⁴ The right of people to move the Supreme Court to enforce their fundamental rights cannot be suspended, except as constitutionally permitted.²⁵ Parliament can empower the Supreme Court to issue directions, orders or writs for purposes other than the enforcement of fundamental rights.²⁶

Though writ jurisdiction is a form of original jurisdiction, it is often categorised separately due to its significance in public life and the emergence of public interest litigation. Public interest litigation is discussed in greater detail below.

19 *The Constitution of India*, art 71.

20 *The Constitution of India*, art 131. The term *sanad* has different meanings. The Oxford English Dictionary defines *sanad* as 'a deed of grant; a charter, patent or warrant'. Merriam-Webster Dictionary describes a *sanad* as 'an Indian government charter, warrant, diploma, patent or deed' and 'a letter having the force of an edict or ordinance in India'. A *sanad* is the term given to a legal practising certificate.

21 *The Constitution of India*, art 262; *Inter-State Water Disputes Act 1956* (Ind) s 11.

22 *The Constitution of India*, art 32(1). In the Constitution, these rights are called 'fundamental rights'.

23 *The Constitution of India*, art 14. The fundamental rights are listed in Part III of the Constitution.

24 *The Constitution of India*, art 32(1)–(2).

25 *The Constitution of India*, art 32(4).

26 *The Constitution of India*, arts 139, 32(2).

Appellate Jurisdiction

The Supreme Court has jurisdiction to hear: (1) appeals involving a question of constitutional interpretation; (2) civil appeals; (3) criminal appeals; and (4) appeals by special leave.²⁷ Some cases can be appealed to the Supreme Court as of right, while others require High Court certification (see below). Appeals comprise about 80 per cent of the Supreme Court's docket, contributing substantially to its heavy workload.²⁸

Constitutional appeals

The Supreme Court hears appeals from High Court judgments, decrees or final orders if the High Court certifies that the case involves a 'substantial question' of constitutional interpretation.²⁹ A party can argue that a constitutional question was wrongly decided.³⁰ At least five Supreme Court judges must determine such cases, but this requirement is often ignored.³¹ For example, the constitutional challenge to the criminalisation of sodomy was decided by a two-judge bench.³² The Supreme Court has given little guidance on what constitutes a 'substantial question of constitutional law'.³³

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- 27 Raeesa Vakil (2016) 'Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 368.
- 28 Raeesa Vakil (2016) 'Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 368, citing Nick Robinson (2013) 'A Quantitative Analysis of the Indian Supreme Court's Workload', 10(3) *Journal of Empirical Legal Studies* 570; Rajeev Dhavan (1978) *The Supreme Court under Strain: The Challenge of Arrears*. Bombay: NM Tripathi.
- 29 *The Constitution of India*, art 132(1). See also art 134A of the Constitution regarding certificates for appeal to the Supreme Court.
- 30 *The Constitution of India*, art 132(3).
- 31 *The Constitution of India*, art 145(3); Nick Robinson et al (2011) 'Interpreting the Constitution: Supreme Court Constitution Benches Since Independence', 46(9) *Economic and Political Weekly* 27, 27-28.
- 32 *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1. On the impact of the bench structure on quality of decision-making, see Tarunabh Khaitan (2015) '*Koushal v Naz*: Judges Vote to Recriminalise Homosexuality', 78(4) *Modern Law Review* 672.
- 33 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 340.

Civil appeals

The Supreme Court hears civil appeals from High Court judgments, decrees or final orders if the High Court certifies that there is ‘a substantial question of law of general importance’ the Supreme Court must determine.³⁴ Parties can urge as a ground of appeal that a substantial question of constitutional interpretation was wrongly decided.³⁵ The Supreme Court cannot hear civil appeals from decisions of single High Court judges, unless permitted by statute.³⁶

Criminal appeals

In its criminal appellate jurisdiction, the Supreme Court has a crucial role in appeals against death sentences. Indian courts can impose the death penalty for a range of criminal offences. Appeals lie to the Supreme Court from High Court judgments, final orders or sentences that: (1) reversed an acquittal on appeal and sentenced a defendant to death; or, (2) withdrew a case from a subordinate court for trial before itself, and convicted and sentenced a defendant to death.³⁷

Beyond capital cases, the Supreme Court has jurisdiction where a High Court certifies that a case is ‘fit’ for appeal to it.³⁸ Parliament can confer power on the Supreme Court to hear criminal appeals from High Court judgments, final orders or sentences.³⁹ For example, a 1970 law conferred appellate jurisdiction on the Supreme Court where a High Court: (1) reversed an acquittal on appeal and sentenced a defendant to imprisonment for life, or not less than 10 years; or (2) withdrew a case from a subordinate court for trial before itself, convicted a defendant and sentenced them to imprisonment for life or not less than 10 years.⁴⁰

34 *The Constitution of India*, art 133(1). See also art 134A of the Constitution regarding certificates for appeal to the Supreme Court.

35 *The Constitution of India*, art 133(2).

36 *The Constitution of India*, art 133(3).

37 *The Constitution of India*, art 134(1)(a)–(b).

38 *The Constitution of India*, arts 134(1)(c), 145(1). This is subject to Supreme Court rules and High Court conditions. Under art 145(1) of the Constitution, the Supreme Court can make rules regulating its practice and procedure, subject to statute and presidential approval. See also art 134A of the Constitution regarding certificates for appeal to the Supreme Court.

39 *The Constitution of India*, art 134(2).

40 Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 368, 370, n13; *Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970* (Ind) s 2.

Special leave appeals

The Supreme Court has an ‘overriding and extensive’ jurisdiction to grant special leave to appeal from any ‘judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal’,⁴¹ except military courts or tribunals.⁴²

Despite their ‘special’ character, these appeals constitute the bulk of the Supreme Court’s docket.⁴³ The Supreme Court has not developed clear jurisprudence to guide its discretion to grant or refuse special leave.⁴⁴ In 2016, the Supreme Court held that it was better ‘in the interest of justice’ to exercise its discretion ‘with circumspection, rather than to limit the power forever’.⁴⁵

Advisory Jurisdiction

The President can refer a question of law or fact to the Supreme Court if it is ‘of such a nature and of such public importance that it is expedient’ to do so.⁴⁶ At least five Supreme Court judges must hear a reference.⁴⁷ After holding any hearings it thinks appropriate, the Supreme Court can report its opinion to the President.⁴⁸ Opinions must be delivered in open court.⁴⁹ A majority of judges present must concur with the opinion, but a judge can dissent.⁵⁰

As of 2016, Presidents had referred questions to the Supreme Court fourteen times, and the

41 *The Constitution of India*, art 136(1). H M Seervai (1996) *Constitutional Law of India: A Critical Commentary*. Vol 3. 4th edition. Mumbai: Universal Law Publishing, 2647, 2694.

42 *The Constitution of India*, art 136(2).

43 Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 373, citing Nick Robinson, ‘A Quantitative Analysis of the Indian Supreme Court’s Workload’ (2013) 10(3) *Journal of Empirical Legal Studies* 570, 587.

44 Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 371-72.

45 *Mathai v George* (2016) 7 SCC 700 [6], cited in Madhav Khosla and Ananth Padmanabhan (2017) ‘The Supreme Court’ in Devesh Kapur, Pratap Bhanu Mehta and Milan Vaishnav (eds), *Rethinking Public Institutions in India*. New Delhi: Oxford University Press 104, 124.

46 *The Constitution of India*, art 143(1).

47 *The Constitution of India*, art 145(3).

48 *The Constitution of India*, art 143(1).

49 *The Constitution of India*, art 145(4).

50 *The Constitution of India*, art 145(5).

Supreme Court had reported opinions in twelve, declined to render an opinion in one, and was still seized of one question.⁵¹

Despite article 131 of the Constitution, the President can refer a dispute to the Supreme Court arising out of a treaty, agreement, covenant, engagement, *sanad* or similar instrument executed before the Constitution commenced, and which either continues to operate or provides that the Supreme Court has no jurisdiction.⁵²

Transfer Jurisdiction

The Supreme Court can dispose of cases involving substantially similar legal questions that are either before the Supreme Court and one or more High Courts, or two or more High Courts, provided they involve ‘substantial questions of general importance’.⁵³ It can dispose of the cases: (1) on its own motion; (2) on an application by the Attorney-General of India; or (3) on a party’s application.⁵⁴ The Supreme Court can return a withdrawn case to a High Court to determine in line with its judgment.⁵⁵

The Supreme Court can and does transfer cases from one High Court to another, if it is expedient to do so, for the ends of justice.⁵⁶ It can also transfer: (1) civil proceedings in a High Court or other civil court in one State, to a High Court or civil court in another State;⁵⁷ (2) criminal cases from one High Court to another;⁵⁸ and (3) cases from a criminal court subordinate to one High Court, to a criminal court of equal or superior jurisdiction subordinate to another High Court.⁵⁹

51 Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 367, 374.

52 The Constitution of India, arts 131, 143(2). H M Seervai (1996) *Constitutional Law of India: A Critical Commentary*. Vol 3. 4th edition. Mumbai: Universal Law Publishing, 2625.

53 *The Constitution of India*, art 139A(1).

54 *The Constitution of India*, art 139A(1).

55 *The Constitution of India*, art 139A(1).

56 *The Constitution of India*, art 139A(2).

57 *Code of Civil Procedure 1908 (Ind)*, s 25 (‘Code of Civil Procedure’).

58 *Code of Criminal Procedure 1973 (Ind)*, s 406 (‘Code of Criminal Procedure’).

59 *Code of Criminal Procedure*, s 406.

Other Supreme Court Powers

Powers of review

The Supreme Court can review its own judgments and orders, subject to statute and Supreme Court rules.⁶⁰

Power to do ‘complete justice’

The Supreme Court can pass decrees or make orders ‘necessary for doing complete justice’ in matters before it, which are enforceable throughout India.⁶¹ It has used these powers widely, particularly in the enforcement of fundamental rights.⁶² The Supreme Court can make orders to secure attendance in court, discover or produce documents, and investigate or punish contempt of itself, subject to statute.⁶³

Power of Parliament to Alter Supreme Court Jurisdiction and Powers

In addition to enlarging the Supreme Court’s criminal appellate jurisdiction, Parliament can confer further jurisdiction and powers on the Supreme Court in: (1) matters specified in the Union List;⁶⁴ and (2) matters the Government of India and a State government agree to confer upon it.⁶⁵ It has exercised the former power widely, passing statutes providing for appeals to the Supreme Court from various courts and tribunals.⁶⁶ Parliament can also

60 *The Constitution of India*, art 137. See art 145 of the Constitution regarding the Supreme Court’s power to make rules regulating its practice and procedure. For a discussion of limitations on the Supreme Court’s power of review, see Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 379-80.

61 *The Constitution of India*, art 142(1). This is prescribed by Parliament, or by presidential order if Parliament has not made such provision.

62 Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 367, 380-81.

63 *The Constitution of India*, art 142(2).

64 *The Constitution of India*, art 138(1). There is a list of areas in the Indian Constitution in which the Federal Parliament exclusively legislates. This is called the ‘Union List’, located in schedule VII of the Constitution.

65 *The Constitution of India*, art 138(2).

66 Raeesa Vakil (2016) ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press, 367, 368, n 11. A table listing these statutes can be found in Madhav Khosla and Ananth Padmanabhan (2017) ‘The Supreme Court’ in Devesh Kapur, Pratap Bhanu Mehta and Milan Vaishnav (eds), *Rethinking Public*

confer ‘supplemental powers’ that are ‘necessary or desirable’ to enable the Supreme Court ‘more effectively to exercise’ its jurisdiction, provided such laws are not inconsistent with the Constitution.⁶⁷

Personnel

Judicial Appointments

The Supreme Court has a Chief Justice and 30 other judges, but Parliament can prescribe a larger number.⁶⁸ They must be Indian citizens, and: (1) have been a High Court judge for five successive years; (2) have been an advocate at a High Court for 10 successive years; or (3) be, in the President’s opinion, ‘a distinguished jurist’.⁶⁹ The President appoints Supreme Court judges,⁷⁰ but under the controversial ‘collegium’ system developed in Supreme Court jurisprudence during the 1980s and 1990s, the Supreme Court heavily influences those appointments (see below). Judges swear an oath or affirmation before the President, or a person the President appoints.⁷¹

Supreme Court judges hold office until the age of 65.⁷² Seniority is the key unwritten factor in judicial appointments.⁷³ Chief Justices are usually the longest-serving judges on the Supreme Court at the time of their appointment, meaning they typically serve for just over a year.⁷⁴ The current Chief Justice, the Hon. Mr Justice Ranjan Gogoi, was appointed on 3

Institutions in India. New Delhi: Oxford University Press 104, 115.

67 *The Constitution of India*, art 140.

68 *The Constitution of India*, art 124(1). There were originally seven Supreme Court judges. The figure has been gradually increased over the years since independence: see generally *Supreme Court (Number of Judges) Act 1956* (Ind).

69 *The Constitution of India*, art 124(3).

70 *The Constitution of India*, art 124(2).

71 *The Constitution of India*, art 124(6). See Schedule III, Oath/Affirmation IV, of the Constitution for the current form of the oath or affirmation for Supreme Court judges.

72 *The Constitution of India*, art 124(2).

73 Abhinav Chandrachud (2014) *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*. New Delhi: Oxford University Press 11.

74 Nick Robinson (2016) ‘Judicial Architecture and Capacity’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 342-43, 346. There have been five exceptions to this practice: see Abhinav Chandrachud (2012) ‘Supreme Court’s Seniority Norm: Historical Origins’, 47(8) *Economic and Political Weekly* 26-30, 29 n1, cited in Abhinav Chandrachud (2014) *The Informal Constitution: Unwritten Criteria in*

October 2018 and will retire on 17 November 2019.⁷⁵ He is the 46th Chief Justice since the Constitution came into effect in 1950. Between 1985 and 2010 the average Supreme Court judge was appointed to a High Court at the age of 45, and to the Supreme Court at the age of 59, serving an average of six years.⁷⁶

The President can appoint a Supreme Court judge to perform the Chief Justice's duties if the office is vacant or the current Chief Justice is unable to do so.⁷⁷ If there is an insufficient number of judges to hold or continue a session the Chief Justice can ask a qualified High Court judge to sit as an *ad hoc* judge, with the President's consent and after consultation with the High Court.⁷⁸ *Ad hoc* judges have the jurisdiction, powers and privileges of Supreme Court judges, and must attend all required sittings.⁷⁹

Former Supreme Court judges cannot plead or act in a court, or before any authority.⁸⁰ The Chief Justice can ask a qualified former Supreme Court, Federal Court or High Court judge to sit as a Supreme Court judge, with the President's consent.⁸¹ Such judges have the jurisdiction, powers and privileges of Supreme Court judges, and are entitled to allowances set by the President.⁸² Nevertheless, they are not considered a Supreme Court judge.⁸³ As a matter of convention, the Supreme Court does not appoint retired Supreme Court and High Court judges on an *ad hoc* basis for disposal of arrears.⁸⁴

Selecting Judges for the Supreme Court of India. New Delhi: Oxford University Press 12.

75 Supreme Court of India (2017) 'Chief Justice & Judges' <<http://www.supremecourtindia.nic.in/chief-justice-judges>>. There is a list of current and former Chief Justices and Supreme Court judges and their dates of appointment and retirement on this website.

76 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 342, citing Abhinav Chandrachud (2011) 'An Empirical Study of the Supreme Court's Composition' 46(1) *Economic and Political Weekly* 71, 72.

77 *The Constitution of India*, art 126.

78 *The Constitution of India*, art 127(1).

79 *The Constitution of India*, art 127(2).

80 *The Constitution of India*, art 124(7).

81 *The Constitution of India*, art 128. The Federal Court of India no longer exists.

82 *The Constitution of India*, art 128.

83 *The Constitution of India*, art 128.

84 Madhav Khosla and Ananth Padmanabhan (2017) 'The Supreme Court' in Devesh Kapur, Pratap Bhanu Mehta and Milan Vaishnav (eds), *Rethinking Public Institutions in India*. New Delhi: Oxford

Resignation and Removal of Judges

Supreme Court judges can resign, or the President can remove them from office for ‘proved misbehaviour or incapacity’.⁸⁵ The removal process requires each House of Parliament to address the President supported by: (1) a majority of its total membership; and (2) a majority of at least two-thirds of the members present and voting, in the same session.⁸⁶

The process for removing judges is complex.⁸⁷ Since independence, there have been attempts to remove seven sitting Supreme and High Court judges, with the first in 1991, and the remaining attempts all occurring in the years since 2011.⁸⁸ So far, no judges have been successfully removed. The most recent attempt occurred in April 2018, when members of the Rajya Sabha (Council of States) – India’s upper house of Parliament – unsuccessfully sought the removal of then Chief Justice Dipak Misra.⁸⁹

HIGH COURTS OF INDIA

Each State must have a High Court.⁹⁰ India has 29 States and 7 Union territories,⁹¹ including the National Capital Territory of Delhi (‘NCT’) where New Delhi is located. Parliament can establish a High Court for two or more States, or two or more States and a Union territory.⁹² There are currently 25 High Courts, with all Union territories sharing a High Court with one or more States except the NCT, which has its own High Court in New Delhi. High Court

University Press 104, 122.

85 *The Constitution of India*, art 124(2)(a)-(b), (4).

86 *The Constitution of India*, art 124(4).

87 See generally *Judges (Inquiry) Act 1968*; *The Constitution of India*, art 124(5).

88 *Times of India* (2018) ‘6 Sitting Judges Faced Action But None Formally Removed So Far’, 21 April <<https://timesofindia.indiatimes.com/india/6-sitting-judges-faced-action-but-none-formally-removed-so-far/articleshow/63852839.cms>>. For information on the removal process, see Meera Emmanuel (2018) ‘Impeachment of Judges: A Rigorous Process and a History of Fruitless Attempts’, *Bar and Bench*, 29 March <<https://barandbench.com/impeachment-judges-rigorous-process/>>.

89 *Times of India* (2018) ‘Rajya Sabha Chairman Venkaiah Naidu Rejects Opposition Notice for Removal of Chief Justice Dipak Misra’, 23 April <<https://timesofindia.indiatimes.com/india/vice-president-venkaiah-naidu-rejects-opposition-notice-to-impeach-chief-justice-dipak-misra/articleshow/63875690.cms>>.

90 *The Constitution of India*, art 214.

91 *The Constitution of India*, sch I.

92 *The Constitution of India*, art 231.

proceedings are generally conducted in English.⁹³ With the President's consent, State Governors can permit Hindi or other official State languages in High Courts, except in judgments, decrees and orders.⁹⁴

Jurisdiction

High Courts have jurisdiction and powers in a number of areas: (1) original jurisdiction, including writ jurisdiction to enforce constitutional rights; (2) appellate jurisdiction; and (3) transfer jurisdiction to withdraw cases from subordinate courts that involve a 'substantial question' of constitutional interpretation; and (4) inherent jurisdiction under the *Code of Criminal Procedure*. Additionally, High Courts have superintendence over subordinate courts and tribunals in their territorial jurisdictions.⁹⁵

Original Jurisdiction

High Courts can issue directions, orders or writs to any person or authority within their territorial jurisdictions, including writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, for: (1) the enforcement of fundamental rights; and (2) any other purpose.⁹⁶ High Courts can also exercise extraordinary civil or criminal original jurisdiction at their discretion.⁹⁷

Appellate Jurisdiction

High Courts hear certain civil and criminal appeals from lower courts and tribunals. In criminal cases, a person convicted at trial by a Sessions Judge or Additional Sessions Judge, or by any other Court which imposed a sentence of over seven years' imprisonment, can appeal to a High Court.⁹⁸ In civil cases, an appeal generally lies to a High Court from a lower court appellate decision if the case involves a 'substantial question of law'.⁹⁹ A question of law is substantial if it is 'of general public importance or ... directly or substantially affects the

93 *The Constitution of India*, art 348(1)(a).

94 *The Constitution of India*, art 348(2).

95 For a brief overview of India's lower courts, or 'subordinate' courts as they are referred to in the Constitution, see the section of this paper on 'District and Sub-District Courts'.

96 *The Constitution of India*, art 226(1). An 'authority' may include 'governments in appropriate cases'.

97 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 335, citing *The Constitution of India*, art 226.

98 *Code of Criminal Procedure*, s 374(2).

99 *Code of Civil Procedure*, s 100.

rights of the parties', and is unsettled or controversial.¹⁰⁰

Transfer Jurisdiction

High Courts can withdraw and determine cases from subordinate courts that involve a 'substantial question' of constitutional interpretation.¹⁰¹

Inherent Jurisdiction

High Courts have inherent jurisdiction to give effect to any order under the *Code of Criminal Procedure*, 'to prevent abuse of the process of any Court' or to 'otherwise to secure the ends of justice'.¹⁰²

Superintendence

High Courts have superintendence over subordinate courts and tribunals within their territorial jurisdictions,¹⁰³ except military courts and tribunals.¹⁰⁴ They can exercise this superintendence on their own motion.¹⁰⁵ Using this power, High Courts can call for returns from courts and tribunals, and make rules for their practice and procedure, among other things.¹⁰⁶ The power is limited to certain circumstances, such as cases involving want of jurisdiction, errors of law, and gross violations of natural justice.¹⁰⁷

Power of Parliament to Alter Jurisdiction of High Courts

Parliament can extend the jurisdiction of a High Court to a Union territory, and exclude the jurisdiction of a High Court from a Union territory.¹⁰⁸

100 *Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd* (1962) Supp (3) SCR 549, cited in R Prakash (2003) 'Scope of High Court's Jurisdiction Under Section 100 of the Civil Procedure Code' 5 SCC (Jour) 27, 29.

101 *The Constitution of India*, art 228.

102 See *Code of Criminal Procedure*, s 482.

103 *The Constitution of India*, art 227(1).

104 *The Constitution of India*, art 227(4).

105 H M Seervai (1996) *Constitutional Law of India: A Critical Commentary*. Vol 3. 4th edition. Mumbai: Universal Law Publishing, 2973-74.

106 *The Constitution of India*, art 227(2)-(3).

107 P M Bakshi (2015) *The Constitution of India*. New Delhi: Universal Law Publishing, 13th edition. 238.

108 *The Constitution of India*, art 230(1).

Personnel

Judicial Appointments

High Courts must have a Chief Justice and other judges who are appointed by the President.¹⁰⁹ Judges must be Indian citizens who have: (1) held a judicial office in India for ten years; or (2) been an advocate of a High Court for ten successive years.¹¹⁰ Judges are appointed by the President after consultation with the Chief Justice of India, the State Governor and, where a judge other than the Chief Justice is being appointed, the Chief Justice of the High Court.¹¹¹ Judges swear an oath or affirmation before the State Governor, or a person the Governor appoints.¹¹² They hold office until the age of 62.¹¹³ As in the Supreme Court, the most senior High Court judge is typically appointed Chief Justice.¹¹⁴ Under the ‘collegium’ system, the Supreme Court and Chief Justices of the High Courts influence judicial appointments and transfers in the High Courts (see below).

The President may appoint a High Court judge to be Chief Justice when the office is vacant, or the Chief Justice is unable to perform her or his duties.¹¹⁵ If there is a temporary increase in business or a backlog in a High Court, the President can appoint qualified people as additional judges for up to two years.¹¹⁶ If a High Court judge other than the Chief Justice is absent, unable to perform duties or temporarily appointed Chief Justice, the President can appoint a qualified person as a judge until the permanent judge has returned.¹¹⁷

Former permanent High Court judges can plead or act before the Supreme Court and High

109 *The Constitution of India*, art 216.

110 *The Constitution of India*, art 217(2).

111 *The Constitution of India*, arts 217(1), 224(3).

112 *The Constitution of India*, art 219. See Schedule III, Oath/Affirmation VIII, of the Constitution for the current form of the oath or affirmation for High Court judges.

113 *The Constitution of India*, art 217(1).

114 Abhinav Chandrachud (2014) *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*. New Delhi: Oxford University Press 11-12.

115 *The Constitution of India*, art 223.

116 *The Constitution of India*, art 224(1).

117 *The Constitution of India*, art 224(2).

Courts,¹¹⁸ but they traditionally do not practice in the High Courts.¹¹⁹ The Chief Justice can ask a former High Court judge to sit as a judge.¹²⁰ They have the jurisdiction, powers and privileges of High Court judges, and are entitled to allowances set by the President, but are not otherwise considered High Court judges.¹²¹

Transfer, Resignation and Removal of Judges

The President can transfer a High Court judge to a different High Court, after consulting with the Chief Justice of India.¹²² A High Court judge can vacate their office if they are appointed to the Supreme Court, or transferred to another High Court.¹²³ High Court judges can resign, or be removed from office in the same manner as Supreme Court judges (see above).¹²⁴

ENFORCEMENT OF FUNDAMENTAL RIGHTS IN OTHER COURTS

Parliament can empower other courts to exercise the Supreme Court's writ jurisdiction within their own jurisdictions.¹²⁵

DISTRICT AND SUB-DISTRICT COURTS

Indian States and Union territories are divided into districts. Each District has a District Court, and may have Sub-District Courts.¹²⁶ District and Sub-District Courts are divided into civil courts, and criminal, or sessions, courts. Specialised courts operate at the District level, such as Commercial Courts and Family Courts (see below). High Courts control and superintend

118 *The Constitution of India*, art 220.

119 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 347.

120 *The Constitution of India*, art 224A. The Chief Justice requires the President's consent.

121 *The Constitution of India*, art 224A.

122 *The Constitution of India*, art 222.

123 *The Constitution of India*, art 217(1)(c).

124 *The Constitution of India*, arts 217(1), 218, 124(4)-(5).

125 *The Constitution of India*, art 32(3).

126 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 333.

subordinate courts in their territorial jurisdictions.¹²⁷

Generally speaking, the subordinate civil judiciary has three levels: (1) District Judges (Additional District Judges); (2) Civil Judges (Senior Division); and (3) Civil Judges (Junior Division).¹²⁸ The subordinate criminal judiciary has three levels: (1) Sessions Judges (Additional Sessions Judges and Assistant Sessions Judges); (2) Judicial Magistrates Class I and, in metropolitan areas, Metropolitan Magistrates (Chief and Additional Judicial Magistrates); and (3) Judicial Magistrates Class II.¹²⁹

Before independence, District Magistrates appointed by the executive could both prosecute and judge criminal matters.¹³⁰ A longstanding demand of the independence movement was the separation of these executive and judicial functions.¹³¹ In 1973, the *Code of Criminal Procedure* created separate Judicial Magistrates, but kept Executive Magistrates, who are drawn from the administrative service and perform administrative and executive functions, such as granting and suspending licences, hearing tax disputes and sanctioning prosecutions.¹³² State governments appoint Executive Magistrates for districts and metropolitan areas.¹³³

While the District and Sub-District judiciaries are broadly similar across India, there are variations between different States and territories and between metropolitan and rural areas. For instance, Junior Civil Judges are sometimes called *Munsifs*, and in metropolitan areas Magistrates are not split into classes but referred to collectively as Metropolitan

127 *The Constitution of India*, arts 227, 235.

128 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 333.

129 See generally *Code of Criminal Procedure*, chs 2-3, which outline the constitution and powers of criminal courts. Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 333.

130 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 335 (citations omitted).

131 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 335 (citations omitted)..

132 *Code of Criminal Procedure*, s 6(iv). Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 335 (citations omitted).

133 *Code of Criminal Procedure*, ss 6(iv), 20-23.

Magistrates.¹³⁴ Though the two sides are distinct, in practice the same judges often preside over both civil and criminal courts at the Sub-District level.¹³⁵

In most States, original jurisdiction for civil and criminal matters begins in the subordinate courts.¹³⁶ On the criminal side, a Sessions (Criminal) Court can try offences under the *Indian Penal Code 1860* (Ind) ('*Penal Code*'), subject to the *Code of Criminal Procedure*.¹³⁷ Other criminal courts can try offences under the *Penal Code* as specified in the *Code of Criminal Procedure*.¹³⁸ Certain criminal courts can also try offences under other laws where: (1) they are permitted under a law to do so; or (2) a law does not stipulate a court and they are permitted to do so under the *Code of Criminal Procedure*.¹³⁹

The *Code of Criminal Procedure* stipulates that:

- A Sessions Judge or Additional Sessions Judge can pass any sentence authorised by law, but a death sentence is subject to High Court confirmation, while an Assistant Sessions Judge can pass a sentence of up to ten years' imprisonment.¹⁴⁰
- A Chief Judicial Magistrate can pass a sentence of up to seven years' imprisonment.¹⁴¹
- A Magistrate of the First Class can pass a sentence of up to three years'

134 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 334. Metropolitan areas are areas with a population of at least one million that are designated as metropolitan areas under s 8 of the *Code of Criminal Procedure*.

135 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 333-34.

136 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 334.

137 The *Code of Criminal Procedure* applies across India. *Code of Criminal Procedure*, s 26(a)(ii).

138 *Code of Criminal Procedure*, s 26(a)(iii). See the First Schedule of the *Code of Criminal Procedure* for detailed tables of offences and the courts in which they can be tried.

139 *Code of Criminal Procedure*, s 26(b), sch I. This is subject to the *Code of Criminal Procedure*.

140 *Code of Criminal Procedure*, s 28(2)-(3).

141 *Code of Criminal Procedure*, s 29(1).

imprisonment, or a fine of up to 10,000 rupees (AU\$206), or both.¹⁴²

- A Magistrate of the Second Class can pass a sentence of up to a year's imprisonment, or a fine of up to 5,000 rupees (AU\$103), or both.¹⁴³

There is more variation in the civil jurisdiction as States have their own civil courts statutes, in which jurisdiction to hear a case depends on the monetary amount at stake.¹⁴⁴

Personnel

The State Governor appoints District judges in consultation with the High Court.¹⁴⁵ A person who is not already in the service of the Union or a State is only eligible to be appointed a district judge if they have been an advocate or pleader for at least seven years and the High Court recommends them.¹⁴⁶ The State Governor makes other judicial appointments.¹⁴⁷ The High Courts 'control' subordinate courts in their jurisdictions, including the posting and promotion of, and granting of leave to, members of the judiciary below the level of District judge.¹⁴⁸

COMMERCIAL COURTS AND DIVISIONS

The *Commercial Courts Act 2015* ('*Commercial Courts Act*') provides for the establishment of: (1) Commercial Divisions in High Courts; (2) Commercial Appellate Divisions in High Courts; (3) Commercial Courts at District level; and (4) Commercial Appellate Courts at District level. These courts and divisions adjudicate a wide range of commercial disputes, from construction contracts to partnership agreements.¹⁴⁹ The value of the dispute must be at least three *lakh*

142 *Code of Criminal Procedure*, s 29(2). Exchange rate at 5 May 2019.

143 *Code of Criminal Procedure*, s 29(3). Exchange rate at 5 May 2019.

144 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 334.

145 *The Constitution of India*, art 233(1).

146 *The Constitution of India*, arts 233(1)-2), 236(a). H M Seervai (1996) *Constitutional Law of India: A Critical Commentary*. Vol 3. 4th edition. Mumbai: Universal Law Publishing, 2975.

147 *The Constitution of India*, arts 234, 236(b). These judges are appointed in accordance with rules made by the Governor in consultation with the State Public Service Commission and the High Court.

148 *The Constitution of India*, arts 235-36.

149 *Commercial Courts Act*, s 2(1)(c), which defines commercial disputes that may be adjudicated.

rupees (AU\$6,187).¹⁵⁰ The *Commercial Courts Act* permits the transfer of certain pending commercial cases to Commercial Courts and Divisions.¹⁵¹ Parties must attempt mediation before they can come before a Commercial Court or Division, provided they are not seeking urgent relief such as an injunction.¹⁵²

Commercial Divisions in High Courts

The Chief Justice of a High Court can constitute a Commercial Division with one or more single-judge benches.¹⁵³ Commercial Divisions determine commercial disputes, and hear applications or appeals arising out of certain arbitrations involving a commercial dispute, with a value of at least three *lakh* rupees.¹⁵⁴ The Chief Justice nominates High Court judges experienced in dealing with commercial disputes to be Division judges.¹⁵⁵ No appeal lies from orders or decrees of the Commercial Division except as specified in the *Commercial Courts Act*.¹⁵⁶

Commercial Appellate Divisions in High Courts

The Chief Justice of a High Court must constitute a Commercial Appellate Division once there is a Commercial Division of a High Court or a Commercial Court at District level.¹⁵⁷ The Chief Justice nominates High Court judges experienced in dealing with commercial disputes to be judges of the Appellate Division.¹⁵⁸ Parties can appeal to the Appellate Division within sixty days of a judgment or order of a Commercial Court at District level or Commercial Division of a High Court.¹⁵⁹

150 *Commercial Courts Act*, s 2(1)(c). A *lakh* is 100,000 in India's numbering system. Exchange rate at 5 May 2019. See also s 12 of the *Commercial Courts Act*, which explains how the 'specified value' of a dispute is determined.

151 *Commercial Courts Act*, s 15.

152 *Commercial Courts Act*, s 12A.

153 *Commercial Courts Act*, s 4(1).

154 *Commercial Courts Act*, ss 2(1)(c), 7, 10(1)-(2). See generally *Arbitration and Conciliation Act 1996* (Ind) ('*Arbitration and Conciliation Act*').

155 *Commercial Courts Act*, s 4(2).

156 *Commercial Courts Act*, s 13(2).

157 *Commercial Courts Act*, s 5(1).

158 *Commercial Courts Act*, s 5(2).

159 *Commercial Courts Act*, s 13(1A).

Commercial Courts at District Level

State governments can constitute Commercial Courts at District level after consulting with the High Court.¹⁶⁰ States can specify territorial and pecuniary limits, but the pecuniary limit cannot be less than three *lakh* rupees.¹⁶¹

Commercial Courts can adjudicate disputes arising out of the territory of a State over which they have been given jurisdiction.¹⁶² They hear applications or appeals in certain arbitrations that involve a commercial dispute with a value of at least three *lakh* rupees.¹⁶³ State governments can appoint people, at District level or below, who are experienced in dealing with commercial disputes to be Commercial Court judges, with the agreement of the Chief Justice of the High Court.¹⁶⁴ No appeal lies from orders or decrees of the Commercial Court except as specified in the *Commercial Courts Act*.¹⁶⁵

Commercial Appellate Courts at District level

After consulting with the High Court, State governments can establish Commercial Appellate Courts at District level, in areas where High Courts do not have ordinary original civil jurisdiction.¹⁶⁶ Parties can appeal to Commercial Appellate Courts within sixty days of a judgment or order of a Commercial Court.¹⁶⁷

ALTERNATIVE DISPUTE RESOLUTION IN INDIA

Indian authorities have established alternative dispute resolution ('ADR') mechanisms to facilitate access to dispute resolution and relieve pressure on the formal court system.

Tribunals

Tribunals have existed in India since the colonial period, but a 1976 constitutional amendment inserted a new Part XIV, which consisted of two articles on the creation of tribunals:

160 *Commercial Courts Act*, s 3(1).

161 *Commercial Courts Act*, ss (3)1, 1A, (2).

162 *Commercial Courts Act*, ss 6, 2(1)(c), (i).

163 *Commercial Courts Act*, ss 2(1)(c), 10(3). See generally *Arbitration and Conciliation Act*.

164 *Commercial Courts Act*, s 3(3).

165 *Commercial Courts Act*, s 13(2).

166 *Commercial Courts Act*, ss 3A, 13(1).

167 *Commercial Courts Act*, s 13(1).

(1) art 323A titled ‘Administrative Tribunals’; and (2) art 323B titled ‘Tribunals for Other Matters’.¹⁶⁸ Former judges are often appointed to tribunals. For instance, the chairperson of administrative tribunals must be a current or former High Court judge.¹⁶⁹ Depending on the tribunal, decisions can be appealed to appellate tribunals and/or courts.

Article 323A

Parliament can permit administrative tribunals to adjudicate disputes and complaints about the recruitment and conditions of people in public services and posts connected with: (1) the Union; (2) States; (3) local or other authorities in India; (4) local or other authorities under the control of the Union Government; or (5) corporations owned or controlled by the Union Government.¹⁷⁰

These laws can, among other things: (1) establish an administrative tribunal for the Union, and a separate tribunal for each State or for two or more States; (2) specify their jurisdiction, powers and authority; (3) outline their procedure; and (4) exclude the jurisdiction of courts in cases adjudicated by tribunals, except the Supreme Court’s special leave jurisdiction under article 136 of the Constitution.¹⁷¹

Clauses ousting the jurisdiction of courts have been heavily litigated, leading to several constitutional cases questioning their validity on the basis that they exclude the writ jurisdiction of the Supreme and High Courts.¹⁷² The first major decision was *SP Sampath Kumar v Union of India* in 1986,¹⁷³ which ignored earlier Supreme Court jurisprudence that the High Courts’ writ jurisdiction was part of the ‘basic structure’ of the Constitution.¹⁷⁴ Then in 1993, the High Court of Andhra Pradesh – a State on India’s southeastern coast – held that art 323A(2)(d) was unconstitutional to the extent that it permitted Parliament to oust the writ

168 *The Constitution of India*, arts 323A-B. Arun K Thiruvengadam (2016) ‘Tribunals’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 418-19.

169 *Administrative Tribunals Act 1985* (Ind), s 6(1) (‘*Administrative Tribunals Act*’).

170 *The Constitution of India*, art 323A(1).

171 *The Constitution of India*, art 323A(2)(a)-(d).

172 Arun K Thiruvengadam (2016) ‘Tribunals’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 420.

173 *SP Sampath Kumar v Union of India* (1987) 1 SCC 124.

174 Arun K Thiruvengadam (2016) ‘Tribunals’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 422.

jurisdiction of the High Courts.¹⁷⁵ Finally, in 1997, the Supreme Court held in *L Chandra Kumar v Union of India* that the Supreme and High Courts' power of judicial review over legislative action could not be ousted, but did not concur with the High Court of Andhra Pradesh that art 323A(2)(d) was unconstitutional for enabling the creation of tribunals.¹⁷⁶ After *L Chandra Kumar*, the judiciary appeared to accept the legitimacy of India's tribunal system, and earlier calls that tribunals be abolished gave way to calls for their effective functioning.¹⁷⁷

Article 323B

Parliament and State legislatures can establish tribunals to adjudicate disputes, complaints or offences in a range of areas, provided they can legislate in those areas.¹⁷⁸ Such laws may, among other things: (1) establish a hierarchy of tribunals; (2) specify their jurisdiction, powers and authority; (3) outline their procedure; and (4) exclude the jurisdiction of courts in cases adjudicated by tribunals, except the Supreme Court's special leave jurisdiction under article 136 of the Constitution.¹⁷⁹ The *Administrative Tribunals Act* authorised the creation of the Central Administrative Tribunals and Administrative Tribunals for States.

National Green Tribunal

Parliaments have established tribunals to adjudicate particular types of cases. A prominent example is the National Green Tribunal ('NGT'). The NGT hears civil cases involving a 'substantial question' relating to the environment arising out of certain statutes, including enforcement of legal rights relating to the environment.¹⁸⁰ It can order: (1) relief and compensation for victims of pollution and other environmental damage; (2) restitution of damaged property; and (3) restitution of the environment.¹⁸¹ The NGT can entertain appeals

175 *Sakinala Harinath v State of Andhra Pradesh* (1993) 3 ALT 471, cited in Arun K Thiruvengadam (2016) 'Tribunals' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 424.

176 *L Chandra Kumar v Union of India* (1997) 3 SCC 261, cited in Arun K Thiruvengadam (2016) 'Tribunals' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 424, 425.

177 Arun K Thiruvengadam (2016) 'Tribunals' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 425.

178 *The Constitution of India*, art 323B(1)-(2).

179 *The Constitution of India*, art 323B(3)(a)-(d).

180 *National Green Tribunal Act 2010* (Ind) preamble, ss 3, 14(1) ('National Green Tribunal Act'). The relevant statutes are listed in Schedule I of the *National Green Tribunal Act*.

181 *National Green Tribunal Act*, s 15(1).

against certain decisions by State governments and other authorities.¹⁸² It applies the principles of sustainable development, polluter pays and the precautionary principle in its decision-making.¹⁸³ The NGT's orders, decisions and awards can be appealed to the Supreme Court.¹⁸⁴

Lok Adalats ('Courts of the people')

Lok Adalats are a form of ADR at which cases that are pre-litigation or pending in the court system are settled.¹⁸⁵ Lok Adalats can be organised by: (1) State Legal Services authorities; (2) District Legal Services authorities; (3) the Supreme Court Legal Services Committee; (4) High Court Legal Services committees; and (5) Taluk Legal Services committees.¹⁸⁶ Broadly speaking, these authorities seek to facilitate the provision of legal aid.¹⁸⁷ There are no court fees in Lok Adalats.¹⁸⁸

Lok Adalats can settle cases pending before, or falling within the jurisdiction of, courts for which the Lok Adalat is organised.¹⁸⁹ 'Court' is defined broadly as 'a civil, criminal or revenue court' and 'any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions'.¹⁹⁰ Decisions are final and binding.¹⁹¹ Lok Adalats can consist of serving or retired judicial officers, and other people specified by the body that organises them.¹⁹²

182 *National Green Tribunal Act*, s 16.

183 *National Green Tribunal Act*, s 20.

184 *National Green Tribunal Act*, s 22.

185 National Legal Services Authority (2016) 'Lok Adalats', *National Legal Services Authority* <<http://nalsa.gov.in/lok-adalat>>.

186 *Legal Services Authorities Act 1987* (Ind) s 19(1) ('*Legal Services Authorities Act*'). A 'taluk' is an administrative division below the District level in India.

187 Article 39A of the Constitution declares that the State shall 'provide free legal aid ... to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.

188 National Legal Services Authority (2016) 'Lok Adalats', *National Legal Services Authority* <<http://nalsa.gov.in/lok-adalat>>.

189 *Legal Services Authorities Act*, s 19(5).

190 *Legal Services Authorities Act*, s 2(1)(aaa).

191 *Legal Services Authorities Act*, s 21.

192 *Legal Services Authorities Act*, s 19(2).

Central and State legal services authorities can establish Permanent Lok Adalats to exercise jurisdiction respecting public utilities.¹⁹³ A party can apply to a Permanent Lok Adalat for settlement before a dispute is brought before a court, with some exceptions.¹⁹⁴ Permanent Lok Adalats consist of: (1) a chairperson who is, or has been, a District Judge, Additional District Judge, or has held a judicial office higher than a District Judge; and (2) two other people with adequate experience in public utilities.¹⁹⁵

Gram Nyayalalas

Historically, Panchayats are units of self-government that operate at the village level. The State must take steps to organise Panchayats and give them authority and powers to enable self-government.¹⁹⁶ Every State must constitute Panchayats at the village, intermediate and district level for rural areas.¹⁹⁷

Gram Nyayalalas are courts established for Panchayats at the village and intermediate levels in rural areas. Gram Nyayalalas have headquarters, but are also mobile courts that travel within their territories to adjudicate civil and criminal matters. Gram Nyayalalas operate alongside other courts.¹⁹⁸ The *Gram Nyayalalas Act 2008* (Ind) ('*Gram Nyayalalas Act*') aims to establish Gram Nyayalalas at the grassroots level to provide access to justice to citizens 'at their doorstep', and ensure that justice is not denied to citizens because of social, economic or other disabilities.¹⁹⁹

State governments can establish: (1) one or more Gram Nyayalalas for every Panchayat at intermediate level, or for a group of contiguous Panchayats at intermediate level in a district; or, (2) where there is no Panchayat at intermediate level, for a group of contiguous Gram Panchayats.²⁰⁰ A 'Panchayat at intermediate level' is an institution of self-government at the

193 *Legal Services Authorities Act*, ss 22A(a); 22B(1).

194 *Legal Services Authorities Act*, s 22C(1).

195 *Legal Services Authorities Act*, s 22B(2).

196 *The Constitution of India*, art 40. In this provision, 'the State' refers to the Government and Parliament of India, the Government and Legislature of each of the States, and all local or other authorities in India or under the control of the Government of India: see also arts 12 and 36 of the Constitution.

197 *The Constitution of India*, arts 243(c)-(d), 243B. The 'intermediate' level is between the village and district levels, as specified by each State Governor. Panchayats may not be constituted at the intermediate level in a State with a population lower than twenty *lakh*, or two million.

198 *Gram Nyayalalas Act*, s 3(3).

199 *Gram Nyayalalas Act*, preamble.

200 *Gram Nyayalalas Act*, s 3(1). States establish Gram Nyayalalas in consultation with the High Court.

intermediate level in rural areas.²⁰¹ A ‘Gram Panchayat’ is an institution of self-government at the village level in rural areas.²⁰²

State governments specify the territorial jurisdiction of Gram Nyayalalas,²⁰³ and appoint a Nyayadhipari to preside over them.²⁰⁴ A Nyayadhipari must be eligible to be a Judicial Magistrate of the first class.²⁰⁵ Representation is given to members of the Scheduled Castes, Scheduled Tribes, women and other classes and communities State governments specify.²⁰⁶

Gram Nyayalalas exercise criminal and civil jurisdiction.²⁰⁷ They try some offences under the *Penal Code* including offences not punishable with death, life imprisonment or imprisonment for over two years, and certain cases of theft and stolen property.²⁰⁸ They hear specified civil proceedings, including rights to purchase property, disputes between partners in land cultivation, and wage claims under some statutes.²⁰⁹ Union and State governments can amend this jurisdiction in certain areas.²¹⁰

If a Nyayadhipari has an interest, is otherwise involved, or is related to a party in proceedings before them, they must refer the case to the District Court or Court of Sessions for transfer to another Nyayadhipari.²¹¹ Nyayadhiparis must visit villages within their jurisdictions and conduct proceedings in close proximity to where the parties reside, or the cause of action

201 *Gram Nyayalalas Act*, s 2(f). ‘Panchayats at intermediate level’ are established under art 243B of the Constitution.

202 *Gram Nyayalalas Act*, s 2(b). ‘Gram Panchayats’ are established under art 243B of the Constitution.

203 *Gram Nyayalalas Act*, s 3(2). Territorial jurisdiction is determined in consultation with the High Court.

204 *Gram Nyayalalas Act*, ss 2(e), 5.

205 *Gram Nyayalalas Act*, s 6(1).

206 *Gram Nyayalalas Act*, s 6(2). ‘Scheduled Castes’ and ‘Scheduled Tribes’ are terms recognised in Part XVI of the Constitution. The terms refer to various groups of people that have been historically, and in most cases are currently, disadvantaged in India.

207 *Gram Nyayalalas Act*, ss 11-13.

208 *Gram Nyayalalas Act*, s 12(1)(a); sch I, pt I.

209 *Gram Nyayalalas Act*, s 13(1)(a), sch II, pt I.

210 *Gram Nyayalalas Act*, s 14.

211 *Gram Nyayalalas Act*, s 8.

has arisen.²¹² Gram Nyayalalas must publicise the dates and locations of mobile courts,²¹³ and State governments must provide them with facilities for holding mobile courts, such as vehicles.²¹⁴

High Courts can specify the civil pecuniary limits of Gram Nyayalalas, in consultation with State governments.²¹⁵ For example, in November 2016 the District Court of Pathanamthitta in the southern Indian State of Kerala announced the creation of two Gram Nyayalalas with pecuniary limits of 50,000 rupees (AU\$1,031).²¹⁶

District Courts and Courts of Session can transfer pending civil or criminal cases before subordinate courts to Gram Nyayalalas if they are competent to hear them.²¹⁷ Gram Nyayalalas can either retry or continue such cases.²¹⁸

Criminal appeals can be made to the Court of Session, except where an accused has plead guilty and been convicted, or a Gram Nyayalala has sentenced a person to a fine of up to 1,000 rupees (AU\$21).²¹⁹ Civil appeals can be made to the District Court,²²⁰ except where a decision was reached with the parties' consent, the amount at stake was up to 1,000 rupees (AU\$21), or the amount at stake was up to 5,000 rupees (AU\$103) and there was no question of law.²²¹ There are no appeals from these decisions, but a person can seek enforcement of their fundamental rights in the High Court or Supreme Court.²²²

212 *Gram Nyayalalas Act*, s 9(1).

213 *Gram Nyayalalas Act*, s 9(1).

214 *Gram Nyayalalas Act*, s 9(2).

215 *Gram Nyayalalas Act*, s 13(2).

216 District Court of Pathanamthitta (2016) 'Two Gram Nyayalalas Inaugurated in the District', 19 November <<http://ecourts.gov.in/pathanamthitta/gram-nyayalaya-inauguration>>. The pecuniary limit was announced in the Kerala Gazette: Government of Kerala (2014) *Kerala Gazette* <www.egazette.kerala.gov.in/pdf/2014/47/part_3/Judicial%20141-144.pdf>. Exchange rate at 5 May 2019.

217 *Gram Nyayalalas Act*, s 16(1). The High Court must approve these transfers.

218 *Gram Nyayalalas Act*, s 16(2).

219 *Gram Nyayalalas Act*, s 33(2)-(3). Exchange rate at 5 May 2019.

220 *Gram Nyayalalas Act*, s 34(1).

221 *Gram Nyayalalas Act*, s 34(2). Exchange rate at 5 May 2019.

222 *Gram Nyayalalas Act*, ss 33(7), 34(6). See also *The Constitution of India*, arts 32, 226.

ARBITRATION AND CONCILIATION

The *Arbitration and Conciliation Act* regulates domestic arbitrations, international commercial arbitration, the enforcement of foreign arbitral awards and conciliations. It includes provisions on: (1) judicial authorities referring parties before it to arbitration, where the matter is subject to an arbitration agreement;²²³ (2) composition and jurisdiction of arbitral tribunals;²²⁴ (3) conduct of arbitral proceedings;²²⁵ (4) the making and enforcement of, and appeals against, arbitral awards;²²⁶ (5) the enforcement of foreign arbitral awards;²²⁷ and (6) regulation of certain conciliations.²²⁸

ADJUDICATION OF FAMILY DISPUTES

There are two main bodies that deal with family disputes in India: (1) family courts; and (2) informal religious ADR bodies.

Family Courts

Jurisdiction

State governments must establish a Family Court for every area with a city or town that has a population exceeding one million, and any other area the governments think necessary.²²⁹ They must specify the courts' territorial jurisdiction.²³⁰

Family Courts hear a range of family disputes, including dissolution of marriage and guardianship matters.²³¹ They have the jurisdiction exercisable by District courts, or subordinate civil courts, in relation to those disputes, and are deemed to be such courts when

223 *Arbitration and Conciliation Act*, ss 8, 45, 54; see generally pt I.

224 *Arbitration and Conciliation Act*, pt I, chs 3-4.

225 *Arbitration and Conciliation Act*, pt I, ch 5.

226 *Arbitration and Conciliation Act*, pt I, chs 6-9.

227 See generally *Arbitration and Conciliation Act*, pt II.

228 See generally *Arbitration and Conciliation Act*, pt III.

229 *Family Courts Act 1984* (Ind), s 3(1) ('*Family Courts Act*'). State governments consult with the High Court on establishing family courts.

230 *Family Courts Act*, s 3(2).

231 *Family Courts Act*, s 7(1)–(2).

exercising that jurisdiction.²³² An appeal lies to the High Court from Family Court decisions,²³³ except where a decision is reached with the parties' consent.²³⁴

Personnel

State governments appoint Family Court judges.²³⁵ Family Court judges must: (1) have held judicial office, been a Tribunal member or held a Union or State post requiring legal knowledge for at least seven years; (2) have been an advocate of a High Court, or two or more such Courts in succession, for at least seven years; or (3) possess other qualifications prescribed by the Union Government, with the agreement of the Chief Justice of India.²³⁶ Efforts must be made to ensure that Family Court judges are committed to protecting and preserving marriage and promoting child welfare, and experienced in promoting dispute resolution by conciliation and counselling.²³⁷ Family Court judges must be under the age of 62,²³⁸ and preference is given to women.²³⁹

Personal Law and Alternative Dispute Resolution Bodies

Indian law regulates certain family matters, including marriage, divorce, adoption and succession, through the application of 'personal laws' to people identified as belonging to particular religious groups.²⁴⁰ Personal laws vary across religious groups, but are often gender-differentiated.²⁴¹ They derive from diverse sources, including religious texts and their commentaries, case law interpreting religious doctrine, and statutes that either codify personal laws or affect situations in which personal law will apply.²⁴²

232 *Family Courts Act*, s 7(1).

233 *Family Courts Act*, s 19(1).

234 *Family Courts Act*, s 19(2).

235 *Family Courts Act*, s 4(1). The High Court must agree to the appointment.

236 *Family Courts Act*, s 4(3).

237 *Family Courts Act*, s 4(4)(a).

238 *Family Courts Act*, s 4(5).

239 *Family Courts Act*, s 4(4)(b).

240 Farrah Ahmed (2016) *Religious Freedom Under Personal Law Systems*. India: Oxford University Press, 18.

241 Farrah Ahmed (2016) *Religious Freedom Under Personal Law Systems*. India: Oxford University Press, 18.

242 Farrah Ahmed (2016) *Religious Freedom Under Personal Law Systems*. India: Oxford University Press,

While family disputes between people in religious groups and other societies may be heard in courts and tribunals, there are alternative dispute resolution bodies that mediate such disputes outside the formal judicial system. These include religious dispute resolution bodies such as Sharia courts and caste-based village councils called *khap panchayats*.²⁴³ Generally, their decisions have no legal status.²⁴⁴

KEY ISSUES IN THE JUDICIAL AND COURT SYSTEMS

Delays in the Court System and the Creation of Tribunals

A longstanding issue in the Indian court system is the extensive backlog of cases, which has led to delays in hearing cases. On 1 May 2019 there were 58,168 matters pending before the Supreme Court,²⁴⁵ which has generally been better than other courts at handling its docket.²⁴⁶ On 5 May 2019, there were 30,367,853 cases pending in district and taluka courts in India and 4,324,877 cases pending in High Courts.²⁴⁷

Common explanations for these issues are a shortage of judges, poor judicial management of cases, procedural complexity, a 'promiscuous' appellate system and the rarity of plea-bargaining in criminal cases.²⁴⁸ The Supreme Court and High Courts hear a relatively large number of cases, with litigants seemingly bypassing the lower courts, creating a 'top-heavy' judicial system that more closely resembles 'an isosceles trapezoid than a pyramid'.²⁴⁹

18. Ahmed provides a table of the sources of personal law in Appendix A of her book, at 198–99.

243 Farrah Ahmed (2016) *Religious Freedom Under Personal Law Systems*. India: Oxford University Press, 38, 171–72.

244 Farrah Ahmed (2016) *Religious Freedom Under Personal Law Systems*. India: Oxford University Press, 38, 171–72.

245 Supreme Court of India (2019) 'Statistics' <<http://supremecourtofindia.nic.in/statistics>>.

246 Arun K Thiruvengadam (2016) 'Tribunals' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 414.

247 National Judicial Data Grid (2019) <<http://njdg.ecourts.gov.in>>. Figures on the National Judicial Data Grid (NJDG) are updated daily. For some background on the NJDG, see The Hindu (2015) 'Supreme Court Launches Portal to Track Cases Pending at District Courts', 19 September <<http://www.thehindu.com/news/national/supreme-court-launches-portal-to-track-cases-pending-at-district-courts/article7668677.ece>>.

248 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 336.

249 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford:

Between 2005 and 2011, the number of cases disposed of by the High Courts increased by about 33.4 per cent, those appealed to the Supreme Court increased by 44.8 per cent and the number of cases the Supreme Court accepted for hearing increased by 74.5 per cent, while the number of cases disposed of by the subordinate courts grew by about 7.8 per cent.²⁵⁰

Wealthier litigants and governments are better placed to have their cases heard in superior courts, partly because they can hire lawyers who ensure that judges accept matters and issue interim orders, which are significant when it can take years for cases to resolve.²⁵¹

Indian authorities have created ADR bodies, particularly tribunals, as part of an attempt to mitigate these delays.²⁵² The creation of new tribunals has been criticised, including by members of the legal profession, for permitting judicial functions to be controlled by the executive.²⁵³ Such critiques have largely failed to offer solutions to the issue of delay in courts, including delays caused by the legal profession itself.²⁵⁴

Public Interest Litigation

Broadly speaking, public interest litigation ('PIL') is a type of litigation in which an individual or group asks the Supreme Court or a High Court in their writ jurisdiction to determine a matter of public interest.²⁵⁵ PIL is challenging to define as it has evolved through Supreme

Oxford University Press 330, 336-37.

250 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 336-37, citing Nick Robinson (2013) 'A Quantitative Analysis of the Indian Supreme Court's Workload', 10(3) *Journal of Empirical Legal Studies* 570.

251 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 337.

252 Jayanth K Krishnan (2015) 'Legitimacy of Courts and the Dilemma of their Proliferation: The Significance of Judicial Power in India', in Jiunn-rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context*. Cambridge: Cambridge University Press 269, 270-71.

253 Arun K Thiruvengadam (2016) 'Tribunals' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 412, 430.

254 Arun K Thiruvengadam (2016) 'Tribunals' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 412, 412, 430-31 (citations omitted).

255 Shyam Divan (2016) 'Public Interest Litigation' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 662, 664.

Court and High Court jurisprudence beginning in the 1970s,²⁵⁶ and its features can vary across different cases.²⁵⁷ A common feature of PIL, however, is expanded rules of standing. Individuals or groups can petition courts as representatives of underprivileged people, or in their own right ‘as a member of the citizenry to whom a public duty is owed’.²⁵⁸ Courts have also relaxed procedural rules in PIL, such as by accepting letters and other documents as valid petitions.²⁵⁹

Legal and political factors contributed to the development of PIL, including: (1) the development of the concepts of judicial review and substantive due process in Indian jurisprudence; (2) the role of the Supreme Court during the Emergency period;²⁶⁰ (3) executive interference in judicial appointments; (4) and reports on legal aid that highlighted the inaccessibility of the legal system to many indigent and poor people.²⁶¹

PIL has been influential in developing certain areas of law. The Supreme Court has enunciated key principles of environmental law in PIL, including the right of people to a healthy environment, and the principle of sustainable development.²⁶² In another case, the Supreme

256 For accounts of PIL from former Chief Justices of India, see P N Bhagwati (1984–85) ‘Judicial Activism and Public Interest Litigation’, 23 *Columbia Journal of Transnational Law* 561; Konakuppakatil Gopinathan Balakrishnan (2009) ‘Singapore Academy of Law Annual Lecture 2008: “Growth of Public Interest Litigation in India”’, 21 *Singapore Academy of Law Journal* 1.

257 Shyam Divan (2016) ‘Public Interest Litigation’ in Sujit Choudhry, Madhav Khosla and Pratap Banu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 662, 664-65.

258 Shyam Divan (2016) ‘Public Interest Litigation’ in Sujit Choudhry, Madhav Khosla and Pratap Banu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 662, 669-71.

259 Ashok H Desai and S Muralidhar (2000) ‘Public Interest Litigation: Potential and Problems’ in B N Kirpal (2000) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford University Press 159, 164-65.

260 The Emergency was a 21-month period from 25 June 1975 to 21 March 1977 during which then Prime Minister Indira Gandhi maintained a nationwide state of emergency. The emergency provisions are located in Part XVIII of the Constitution.

261 Ashok H Desai and S Muralidhar (2000) ‘Public Interest Litigation: Potential and Problems’ in B N Kirpal (2000) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford University Press 159, 159-62.

262 Shyam Divan (2016) ‘Public Interest Litigation’ in Sujit Choudhry, Madhav Khosla and Pratap Banu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 662, 676, citing *Subhash Kumar v State of Bihar* (1991) 1 SCC 598; *Vellore Citizens’ Welfare Forum v Union of India* (1996) 5 SCC 647. See also Ashok H Desai and S Muralidhar (2000) ‘Public Interest Litigation: Potential and Problems’ in B N Kirpal (2000) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford University Press 159, 171-74.

Court specified 'guidelines' concerning sexual harassment of women in the workplace, in the absence of legislation addressing that issue.²⁶³

Though PIL has achieved some popularity with the Indian public,²⁶⁴ it has generated many concerns, including over the appropriate constitutional divide between the judiciary on the one hand, and parliament and the executive on the other.²⁶⁵ Some commentators have argued that PIL may have been detrimental to the protection of civil liberties, as it shifted the judicial focus from a countermajoritarian duty to a form of populism.²⁶⁶

Judicial Appointments and Transfers: The 'Collegium' System

Originally under the Constitution, the President appointed Supreme Court and High Court judges in consultation with members of those courts.²⁶⁷ In the 1980s and 1990s, the Supreme Court developed jurisprudence for the appointment and transfer of Supreme Court and High Court judges, in reaction to perceived improper influence by the executive over the judiciary before and during the Emergency.²⁶⁸

Under this jurisprudence, a 'collegium' of the Chief Justice of India and the four most senior other judges recommend appointments to the Supreme Court, while High Court judges are appointed on the recommendation of the Chief Justice of India, the two most senior other Supreme Court judges and the Chief Justice of the High Court.²⁶⁹ The Chief Justice initiates

263 *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

264 Ashok H Desai and S Muralidhar (2000) 'Public Interest Litigation: Potential and Problems' in B N Kirpal (2000) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford University Press 159, 183.

265 Ashok H Desai and S Muralidhar (2000) 'Public Interest Litigation: Potential and Problems' in B N Kirpal (2000) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford University Press 159, 176-79.

266 See generally Anuj Bhunia (2016) *Courting the People: Public Interest Litigation in Post-Emergency India*. Cambridge: Cambridge University Press.

267 See arts 124(2) and 217 of the Constitution.

268 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 345. The key Supreme Court decisions on judicial appointments and transfers and the collegium system are known collectively as the 'Three Judges Cases': *SP Gupta v Union of India* (1981) Supp SCC 87; *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441; *Re Special Reference No 1 of 1998* (1998) 7 SCC 739.

269 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 346.

judicial transfers in consultation with the four most senior Supreme Court judges and any Supreme Court judges familiar with the relevant High Court.²⁷⁰ Until recent rejections by the current government of Prime Minister Narendra Modi,²⁷¹ these recommendations were almost always followed.²⁷²

In 2014, Parliament attempted to amend the Constitution to establish the National Judicial Appointments Commission, which would include members of the judiciary and executive and replace the collegium system.²⁷³ A five-judge bench of the Supreme Court struck down the amendment in 2015, leaving the collegium system in place.²⁷⁴

270 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 346.

271 Press Trust of India (2016) 'Rejected 43 High Court Judges Due to Adverse Intelligence Reports: Govt', *The Times of India*, 25 November <<https://timesofindia.indiatimes.com/india/Rejected-43-high-court-judges-due-to-adverse-intelligence-reports-Govt/articleshow/55621969.cms>>; *Outlook*, 'Centre Rejects SC Collegium Recommendation for Elevation of Indu Malhotra, K.M. Joseph: Report', *Outlook*, 31 January <<https://www.outlookindia.com/website/story/centre-rejects-elevation-of-indu-malhotra-km-joseph-as-supreme-court-judges-repo/307612>>.

272 Nick Robinson (2016) 'Judicial Architecture and Capacity' in Jurisdiction' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press 330, 346. For examples of 'collegium resolutions', see Supreme Court of India (2017) 'Resolutions of Collegium' <<http://supremecourtindia.nic.in/collegium-resolutions>>.

273 See *Constitution (Ninety-Ninth Amendment) Act 2014*; *National Judicial Appointments Commission Act 2014*.

274 *Supreme Court Advocates-on-Record Association v Union of India* (2016) 5 SCC 1.

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The Constitution of India, entered into force 26 January 1950, amended 14 January 2019.

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