

Counting cases that don't count in the Supreme Court

Since the historic press conference held by four senior judges of the Supreme Court (SC), certain problems arising from the discretionary powers of the Chief Justice of India (CJI) are now out in the open. However, the listing of sensitive cases is only the tip of the iceberg. The CJI determines the listing priorities of the SC and these priorities determine the court's ability to dispense justice. It seems that the listing practice followed by CJIs over the last few years has jeopardized the SC's ability to protect constitutional rights.

Most CJIs declare a reduction in the backlog of cases as a primary goal of their tenure. This influences how they exercise their discretion to decide which cases should be listed when. In 2016, the CJI even commissioned a study ranking judges by their rate of disposal. Notably, the study did not factor in the difference in nature and complexity of cases that each judge heard. A focus on disposal rates alone could imply an inclination to list matters that get disposed of faster. As it happens, the court spends most of its working hours disposing of cases that take the least amount of time. These cases are called miscellaneous cases.

Miscellaneous cases are essentially preliminary applications that seek the court's permission to file a case before the SC. This permission is needed because the SC is not an ordinary court of appeal. The high courts are the final arbiters in civil and criminal cases. The SC only admits an appeal against the decision of a high court if the case involves a substantial question of law that must be answered for the benefit of the public. Even for cases that can be filed directly before the SC like constitutional cases, the court first decides whether it will hear the case. Thus, miscellaneous cases are heard only to examine if they involve a substantial question of law. If yes, the court eventually grants "leave" and the case is converted to a "regular" case and joins the back of the long line of pending cases. Else, the case is dismissed and is counted as a "disposed of" case. It is important to note that a majority of miscellaneous cases do not involve substantial questions of law but are appeals filed by parties dissatisfied with the decision of the high courts and are therefore dismissed.

Typically, miscellaneous cases finish in about 2-10 minutes. By contrast, important constitutional cases and appeals take about two-three weeks as they involve lengthy arguments by various stakeholders. CJIs have been allotting an increasing amount of time to miscellaneous cases. Earlier, Mondays and Fridays were dedicated to miscellaneous cases. Over the last few years, almost half of Tuesdays are also being consumed in hearing miscellaneous cases. This means that the court is spending 11-11.5 of its 22.5 working hours on miscellaneous cases. We must pause and think about the bigger picture. By spending more time on miscellaneous cases, the SC is spending more time sifting through haystacks of frivolous petitions than on the cases it has already deemed necessary for hearing.

One may argue that by listing miscellaneous cases, the backlog of 55,259 cases is being reduced to create room for important cases. However, the SC's annual report reveals that the number of cases being filed annually has increased over the years, and closely trails the number of cases being disposed of annually. The net reduction of pendency is therefore not significant. We must consider whether the increase in filing is linked to the amount of attention the court devotes to miscellaneous cases. Easy access to the SC can encourage parties to keep filing appeals against every other interim order of a lower court to try and stall proceedings at that level. Indeed, most miscellaneous cases are frivolous and are listed only to be dismissed in one hearing. It seems that the SC is stuck in a vicious cycle of its own making.

The court is then left with only two and a half days a week to actually hear the 23,099 cases it has admitted. Even between admitted cases, some cases take longer than others, depending on their

complexity. Moreover, constitutional cases usually require a bench of five or more judges, while criminal and civil appeals usually require benches of two or three judges. Thus, one constitutional case has an opportunity cost of numerous simpler cases that could be heard by judges sitting in benches of two. As a result, constitutional cases slip lower down the priority list. Consider for instance, the constitutional challenge to Aadhaar. The case was filed in 2012, but multiple requests for listing had to be made before three CJIs until a nine-judge bench was finally constituted in July 2017. By contrast, a nine-judge bench was proactively constituted to hear the constitutionality of entry tax legislation in 2016. Interestingly, the SC's annual report of 2015-16 declares that this move resulted in the disposal of 1,240 related cases pending in the SC. Assessment of impact in terms of pendency alone pays short shrift to constitutional rights. After all, a lone case like the challenge to Aadhaar has an impact on every citizen in the country and is indeed more important than the 32,160 miscellaneous cases pending before the court today.

This month, the CJI released a list of eight constitutional cases to be heard in succession. While this is encouraging, all of these cases will be heard by only one bench of five judges for two and a half days a week. This suggests that constitutional cases are still being accommodated, rather than being treated as the main priority of the SC. Further, given that the numerical strength of the SC is meant to represent a cross-section of diverse viewpoints, it does not seem fair that the fate of every important constitutional case is left in the hands of only five individuals. Reportedly, discussions regarding reform of the system of assignment of cases are currently underway in the collegium. During the press conference, Justice J. Chelameswar put it to the people to decide what should happen next. Now might be a good time for us to encourage the collegium to consider an overhaul of the listing system so that miscellaneous days are reduced and important cases are given priority.

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