



# Docket Control in the Apex Court Exercising Constitutional Review

B Muthu Kumar\*

## Abstract

Globally, there was a dramatic and disproportionate increase in caseloads in the second half of the twentieth century due to the expansion of human rights jurisprudence and legal awareness among citizens. This in turn, affected the quality of justice in the Apex Court of every country involved in the process of constitutional review. It was found that there cannot be any generalization in designing a Constitutional Court and it all depended on the constitutional and legal history of that particular nation. In many countries, the legislature and executive brought timely reforms to keep the Apex Court free from backlogs, but some countries, even today, are reeling under the pressure of unresolved cases. India is one among them and of late, the discussion about the National Court of Appeal (NCA) as a solution to this problem has gained momentum. This paper analyses the feasibility of establishing the NCA, along with measures that can be adopted by India, in tackling the mounting arrears of cases in Courts, following the American model of review such as U.S., Canada, Japan, and Brazil.

**Keywords:** American Model of Review, Comparative Constitutional Law, Docket control, Law Commission of India, National Court of Appeal

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\* SRM School of Law, SRM University, Tamilnadu, India; [drbmuthukumar@gmail.com](mailto:drbmuthukumar@gmail.com)

## I. Introduction

The litigation explosion is the biggest problem faced by all the courts (from Lowest to Highest Court) in many countries. The steady growth of caseload affects the quality of judicial services, such as delay in disposing off the cases and the manner of adjudication. The problem of growing caseload poses a great challenge to the Apex Court of different countries, and simultaneously, they are also adopting various strategies and measures to adjust with the situation<sup>1</sup>. The general presumption is that the specialized Courts, meant for constitutional adjudication, have no control over its dockets, but the Courts in diffused model exercising the power of judicial review, have the substantial power of docket control. This presumption seems to be true because the Apex Court of various countries has a discretionary docket, and only a few have a mandatory docket. The decision not to hear a case can be more harmless than hearing it. Further, if a Court decides many cases, then the decision will be less convincing, i.e., quantity is inversely proportional to quality<sup>2</sup>. In this regard, the functioning of the Indian Supreme Court and its docket control has been very abysmal since the 1960s. The Supreme Court of India, following the American model of constitutional review, is heavily burdened with cases ranging from high profile constitutional matters to sundry appeals under different appellate jurisdictions. The total backlog in the Supreme Court as on Nov. 01, 2017 was 55,259, which includes Constitution Bench matters<sup>3</sup>. The National Court of Appeal ("NCA") has been proposed to revamp the structure of the Supreme Court in such a way so as to reduce the backlogs and make the appellate Court litigant friendly. As per the proposal, the NCA acts as a final appellate Court for civil and criminal matters, whereas, the Supreme Court acts as a

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<sup>1</sup> HECTOR FIX-FIERRO, COURTS, JUSTICE AND EFFICIENCY - A SOCIO-LEGAL STUDY OF ECONOMIC RATIONALITY IN ADJUDICATION 9-10 (2003).

<sup>2</sup> David Fontana, *Docket Control and the success of constitutional courts*, in COMPARATIVE CONSTITUTIONAL LAW 624, 631 (Tom Ginsburg and Rosalind Dixon eds. 2011).

<sup>3</sup> See <http://supremecourtfindia.nic.in/statistics> (last visited Nov. 6, 2017).

Constitutional Court hearing Constitutional matters and issues related to public importance. However, the matter relating to the establishment of NCA is pending before the Supreme Court's Constitution Bench. Undoubtedly, if an institution is functioning amidst great stress and strain, it is indispensable to compare it with other similar systems. Thus, this paper is a descriptive study and adopts the comparative law approach to analyze the structure and functioning of the few Apex Courts of the diffused model. It is a fact-finding investigation, so it aims to throw light on the unique features of the Courts dealing with constitutional review. It will also pave the way for reforming the Supreme Court of India and analyze whether it is feasible to adopt the NCA as an intermediate Court between the Supreme Court and the High Court.

## II. Models of Constitutional Courts

Constitutional Courts have different dimensions, and it varies according to the social and political structure of that State. The varied dimensions are: (1) Jurisdiction and powers; (2) Parties who have access to those Courts; (3) Mode of appointment of Judges and their tenure; (4) The effect of unconstitutionality; (5) Amending the Constitution to dilute the effect of the Constitutional Court decisions.

The primary task of a Constitutional Court is judicial review. Judicial Review has spread across the globe through three waves<sup>4</sup>. The first wave was that of the United States, although the concept of judicial review was initiated in the United Kingdom through *Dr. Bonham's case*<sup>5</sup>. Sir Edward Coke, the Chief Justice of the Court of Common Pleas sows the seed for the birth of judicial review in U.K., where there is no written Constitution and Parliament is supreme. It was held that the legislation passed by the English Parliament is subordinate to the common law decisions made by trial and appellate court judges and any Statute contrary to 'common right and reason' must be declared void. However, this

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<sup>4</sup> TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES - CONSTITUTIONAL COURTS IN ASIAN CASES 90 (2003).

<sup>5</sup> In *Thomas Bonham v. College of Physicians*, [77 Eng. Rep. 638] (1610).

principle could not gain root in the U.K. soil and has been decisively rejected.

The United States Supreme Court is the precedent setter in recognizing as well as establishing the concept of judicial review in the Constitutional system<sup>6</sup>. They utilized this doctrine to keep the organs of the Government and the federating States within their ambit and powers. Nevertheless, later it was extended to enforce human rights through the Bill of Rights<sup>7</sup>. The American model of constitutional review is exercised using ordinary judicial hierarchy, with a single Supreme Court at the apex<sup>8</sup>. Some States such as Canada, Australia, Japan, and India have followed the American model of Constitutional Court. Although judicial review was adopted by a couple of European politics like Norway and Finland, it gained momentum only after Hans Kelsen conceptualized the constitutional review in the early twentieth century. This is termed as the second wave of judicial review and it spread broadly only after Second World War<sup>9</sup>. It is evident that many nations in Europe devised a Court similar to the Court designed by Hans Kelsen<sup>10</sup>. The third wave of judicial review has been the most recent adoption of judicial review in the post-communist World and other new democracies. The communist countries of Central and Eastern Europe have developed a similar structure and it was soon followed by some southeast Communist Asian countries. However, the structure of these Courts, as well as functions, did not reflect as adequately as intended by Kelsen. Anyhow, the application of Kelsenian model in each country had confirmed to local situations. The three waves have been categorized into two main broad categories (1) American System of Constitutional Courts (Diffused Model) and (2) European System (Kelsenian Model).

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<sup>6</sup> MAURO CAPPELLETTI AND WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* 3 (1979).

<sup>7</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>8</sup> WATER F. MURPHY, *CONSTITUTIONAL DEMOCRACY - CREATING AND MAINTAINING A JUST POLITICAL ORDER* 262 (2007).

<sup>9</sup> *Id.* at 263.

<sup>10</sup> Victor Ferreres Comella, *The European model of Constitutional Review of Legislation: Toward Decentralization?*, 2(3) I.CON. 461, 462 (2004).

### II.I. Diffused Model of Review

This model is also referred to as the American model. The Supreme Court of United States is a self-created Constitutional Court. As mentioned earlier, judicial review in U.S. was established through judicial dictum and the Supreme Court is empowered to nullify any legislation or executive action to the extent that it is inconsistent with the Constitution<sup>11</sup>. It acts as a Constitutional Court as well as an ordinary Court that resolves disputes. The Court under this model is diffused in its structure, which means that the ordinary Courts can engage in judicial review, i.e., they can declare any Statute as unconstitutional, and there is no specialized Court exclusively to deal with constitutional adjudication and review. With respect to the application of judicial review, it is posteriori, i.e., Ex Post review. Courts can exercise judicial review after an act has been implemented or taken effect. The judicial review occurs only in real cases or controversies, i.e., Concrete Review. Litigants, who are engaged in a real case or controversy, bring disputes for determination to Courts only when they have a personal and real stake in the outcome<sup>12</sup>. Many countries which follow American system of constitutional review are facing the problem of docket explosion, and India is being one among them<sup>13</sup>.

### III. Continental Model of Review

It is otherwise known as Austrian model or Kelsenian model. Many European nations followed this model and created Constitutional Court according to their needs. After the advent of judicial review in the U.S. by the eventual creation of its Supreme Court, many Constitutions have drawn this idea by expressly providing the power of judicial review<sup>14</sup>. Hans Kelsen created a Constitutional Court for Austria's second Republic in the year

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<sup>11</sup> *Marbury v. Madison*, 5 U.S. 137 (1803)

<sup>12</sup> Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017, 1033-38 (1970).

<sup>13</sup> *Id.* at 1019.

<sup>14</sup> Mark Tushnet, *Marbury v. Madison around the World*, 71 TENN. L. REV. 274, 251-274 (2004).

1920<sup>15</sup>. He argued that the legal system needs a Constitution to serve as a higher law enforceable only by a 'Court-like' body. Under his theory, the Judges of regular Courts are directed to apply the law passed by the Parliament, and consequently, they are subordinate to the political institution. Due to a strict hierarchy of laws, constitutional review is unsuitable to the work of an ordinary Court. Hence, only an extrajudicial organ can effectively discharge the power of constitutional review. The body, conventionally called as 'Constitutional Court', operates as a negative legislator<sup>16</sup>. After the Second World War, the Constitutional Court spread throughout the Europe very quickly. It sometimes acts as a positive legislator, either as a counterweight against the parliamentary majority or as a substitute if no majority exists for any party in the Parliament<sup>17</sup>. It also depends on the country's political structure. Thus, Kelsenian type Courts exercising constitutional review can be found in most civil law countries of the European Union, with the Netherlands and Scandinavian countries as exceptions<sup>18</sup>. The primary characteristics of the European system of Constitutional Courts are: it is centralized, i.e., only a single Court, generally called as 'Constitutional Court' and can exercise constitutional review. Other Courts are barred from applying it, but they can refer the constitutional questions to the Constitutional Court. The constitutional review occurs as 'A Priori' (sometimes called Ex Ante) and 'A Posteriori', even in some cases, both. They exercise abstract and concrete constitutional review, i.e., most Constitutional Courts can use the review in the absence of a real case or controversy. Further, the Court is not confined only to the citizen who has become a litigant. It is open to governmental actors, including executives and members of the legislature, who can approach the Court for clarification of constitutional doubts<sup>19</sup>.

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<sup>15</sup> Comella, *Supra* note 10, at 461.

<sup>16</sup> The notion of a 'negative legislator' as defined by Kelsen as 'one who cannot make law freely because the Constitution determines the decision making.' [ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 34 (2000)].

<sup>17</sup> *Id.* at 27.

<sup>18</sup> Comella, *Supra* note 10.

<sup>19</sup> Cappelletti, *Supra* note 12, at 1045-1051.

#### **IV. Countries that have adopted the American Model**

There are certain Courts which adopt the American model of constitutional review and interpretation. They hear constitutional matters brought to them as lawsuits, although they differ in structure, jurisdiction, and mode of appointment of judges. The docket explosion is not confined to a particular legal system and is found both in common and continental legal systems as well as Constitutions with unitary or federal features. Hence the researcher has chosen few Apex Courts in different legal systems, which follow the American model of review, to analyze the litigation explosion and measures adopted in combating it. It is indispensable to discuss the Supreme Court of United States of America, since the doctrine of constitutional review was established through it in the federal Constitutional system. The State of Japan has a unitary feature with constitutional monarchy, and its laws have been initially based on the Civil Law of Germany and France. Nonetheless, after the World War II, the country's legal system drastically changed based on American Legal System. It has a blend of Continental and Anglo-American Legal system<sup>20</sup>. Like India, the Japanese Constitution was drafted just after the Second World War, and the powers and functions of the Supreme Court are based on the American model. Brazil is a civil law country with federal Constitution. Like India, Brazil also faces docket explosion in the Apex court due to its size and population. Thus, the researcher would like to analyze the docket explosion and control thereof in the Apex Court of the above-mentioned States covering the different Constitutional and legal systems.

##### **IV.1 The Supreme Court of USA**

The Supreme Court of United States has two primary jurisdictions: original and appellate<sup>21</sup>. Unlike India, it precludes from tendering advisory opinions even at the request of the president and on every form of pronouncement on abstract, contingent, or hypothetical

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<sup>20</sup> Takaaki Hattori, *The Role of the Supreme Court of Japan in the field of Judicial Administration*, 60 WASH. L. REV. 69, 71-73 (1985).

<sup>21</sup> U.S. CONST. art.III, §1.

issues<sup>22</sup>. In consonance with the Constitutional provisions, the Congress provides that the Supreme Court shall have both original and exclusive jurisdiction over all controversies between two or more States. It has original and exclusive jurisdiction in all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign States are parties. Additionally, it entertains all controversies between the United States and a State and all actions or proceedings by a State against the citizens of another State or aliens. It is evident from the words of the provision that controversies in which a State shall be a party, are broad enough to include suits brought by individuals against their State or another State. Appeals also arise from the decision of the State High Courts and other federal Courts, certification, and petitions for writ of certiorari, but they are all subject to regulation by the Congress<sup>23</sup>. It has no appellate jurisdiction in ordinary civil and criminal cases, and its jurisdiction is confined to constitutional matters<sup>24</sup>. The appellate jurisdiction is regulated by the Judiciary Act, 1925. Besides these appeals, the Supreme Court may by issuing the writ of *certiorari*, bring up cases from the State Courts in specified cases but will not interfere with the decision of the State Courts relating to non-federal matters<sup>25</sup>. The *Writ of certiorari* mounts on the Court's docket and Craig R Ducat observed that the Congress had converted the Supreme Court into virtually an all *certiorari*-tribunal<sup>26</sup>. Moreover, the Constitution provides power to the Congress to modify the appellate jurisdiction of the Supreme Court but not the original jurisdiction. The judicial power of the Supreme Court has been extended to review all cases but confined only to legal issues and not a political question.

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<sup>22</sup> MASSEY, AMERICAN CONSTITUTIONAL LAW - POWERS AND LIBERTIES 70 (2nd ed. 2005).

<sup>23</sup> U.S. CONST. art. III, §2, cl.2.

<sup>24</sup> 5 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 5675 (8th ed. 2009).

<sup>25</sup> *Id.* at 5651-5652.

<sup>26</sup> CRAIG R DUCAT, CONSTITUTIONAL INTERPRETATION 30 (8th ed. 2002).

The Supreme Court sits *en banc*, i.e., all the judges decide a case by sitting together<sup>27</sup>. The Court is open to the Public to witness the proceedings. However, behind the doors refers to the discussions, exchanges of views by memoranda and the drafting that precedes the judgments, which is called 'The Supreme Court's conference'<sup>28</sup>. It has been pointed out that the conference of the Supreme Court is secret. However, the Court's work in public sessions does not get affected in anyway due to the closed meetings. The public records of the Court contain the details of the disposal of each petition or application in every single case presented to the Court<sup>29</sup>. By law, the term of the Court starts on the first Monday in October of every year and continues till the first Monday in October of the next year. Approximately 7000-8000 new cases are filed with the Court every term. This was substantially larger than the filing four decades ago. In 1975 term, the Court received only 3,940 cases<sup>30</sup>.

The U.S. Supreme Court has a greater degree of control over its docket, but it is not so in the late 19<sup>th</sup> century. When it started functioning in 1789, it had a limited number of cases at its disposal. The normal hearing was just 24 cases a year between 1801 and 1806, and it remained controllable till the 1850s<sup>31</sup>. After the civil war, the Court went into distressing years because of increasing backlog, fuelled by a growing population and active reconstruction of the federal government and legislation enlarging the Court's jurisdiction<sup>32</sup>. It had a backlog of 1816 cases in the year 1890, with 623 cases filed with the Court, and it was expected that it would take three to four years to clear, subject to no new cases being

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<sup>27</sup> Robert H. Jackson, *The Supreme Court in the American System of Government*, in VIEWS FROM THE BENCH 19, 21 (Mark W. Cannon and David M. O'Brien).

<sup>28</sup> *Id.*

<sup>29</sup> William H. Rehnquist, *The Supreme Court's Conference*, in VIEWS FROM THE BENCH 75, 75 (Mark W. Cannon and David M. O'Brien).

<sup>30</sup> See <https://www.supremecourt.gov/about/courtatwork.aspx> (last visited Nov. 6, 2017).

<sup>31</sup> Felix Frankfurter, *The Business of the Supreme Court of the United States – A Study in the Federal Judiciary II. From the Civil War to the Circuit Courts of Appeals Act*, 39 HARV. L. REV. 35, 81 (1925).

<sup>32</sup> Willam Strong, *The Needs of the Supreme Court*, 132 N. AM. REV. 437 (1881).

filed<sup>33</sup>. It is notable that every case filed before the Court was heard until the end of the 19<sup>th</sup> century because the Judiciary Act, 1789 provides the 'writ of error', where the Court has to hear all these appeals that come under it. The Judiciary Act of 1891 created a court of appeals in each circuit and relieved the justices from circuit riding duties and gave the Supreme Court discretionary powers in hearing cases. The replacement of 'writ of certiorari' for 'writ of error' had an immediate effect. By 1892, the number of petitions drastically reduced to just 275, which is over half the previous year's docket<sup>34</sup>. However, the broad jurisdiction under 'writ of certiorari' made the number of cases mount up in the Court again. The Judiciary Act authorized the Supreme Court to decline to review cases where a State Court had refused a federal claim<sup>35</sup>.

The Judiciary Act, 1925 helped the Court to gain control over its docket by allowing the filing of petitions for 'writ of certiorari' with the grant of leave by the courts of appeals<sup>36</sup>. Although the Court receives around 8,000 cases every term, it hears an average of 150 cases both with and without plenary review<sup>37</sup>. The other important aspect is the Court's internal administration. The petition of 'writ of certiorari' was taken up for hearing after scrutinized and recommended by the United States justices' law clerks, who are graduated from law school just a few years before. It is termed to be a 'junior court' over certiorari petitions<sup>38</sup>. Further, a vote of four out of nine justices is required to hear a case. The Court can just deny any case from hearing without adducing reasons or explanations. The accepted cases will be allowed to argue within exactly half an hour allocated to each side. A white light signals an arguing attorney reminding him the last five minutes and the time

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<sup>33</sup> RUSSELL WHEELER AND CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 16 (1994).

<sup>34</sup> Frankfurter, *Supra* note 31.

<sup>35</sup> Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33[J] S. CT. HIST. 1, 7 (2008).

<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Supra* note 30.

<sup>38</sup> ARTEMUS WARD AND DAVID WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 23 (2007).

is up when it turns red. Thus, the argument is strictly controlled<sup>39</sup>. Recently, they framed a rule making the electronic filing system mandatory with exemptions for certain cases, which has been in operation since Nov. 13, 2017. This new system will enable the public and legal community to access all documents of new cases without any cost<sup>40</sup>.

#### **IV.2 The Supreme Court of Japan**

The Constitution of Japan with a unitary system of Government vests the whole judicial power in the Supreme Court. It is the highest court in the land and is composed of fifteen justices. It functions like U.S. Supreme Court but is structurally different as it sits in fragmented Benches. The Court consists of fifteen Justices, at times, the Grand Bench includes *en banc* or by one of the three Petty Benches, each composed of five Justices. Nine or more Justices of the Grand Bench and three or more Justices on each Petty Bench constitute a quorum to decide any cases. It has original jurisdiction in the matters of impeachment of commissioners of the National Personnel Authority. It has final appellate jurisdiction against a decision as provided specifically in the codes of procedure. An appeal can lie to the Supreme Court in the following circumstances: (1) an appeal can be filed against the decision in a civil matter or a domestic relations case on the ground either on the constitutional violations or with the leave of the High Court when the Court deems fit that the case involve an significant issue concerning the interpretation of laws and regulations, and (2) a special appeal can be filed on the grounds of constitutional violation or if it conflicts with judicial precedents against an order in a criminal case to which no ordinary appeal is permitted in the Code of Criminal Procedure or an appeal filed against an order of an intermediate appellate court in a juvenile case.

In civil and administrative cases, the conclusive reasons which are mentioned in the Code of Civil Procedure for lodging a final appeal

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<sup>39</sup> Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61, AM. J. COMP. L. 173, 192 (WINTER 2013).

<sup>40</sup>See [https:// www.supremecourt.gov/ filingandrules/ electronicfiling .aspx](https://www.supremecourt.gov/filingandrules/electronicfiling.aspx) (last visited Nov. 6, 2017).

to the Supreme Court are either on the grounds of violation of constitutional provisions or grave procedural impropriety by the lower Courts. However, the Supreme Court may entertain a case as a final Court of appeal when it opines that the issue is significant and involves interpretation of laws and regulations. It entertains criminal cases also, if there is any violation of the Constitution or if the Court deems fit that it involves any grounds, which is similar to the civil and administrative cases mentioned above. The primary duty of the Supreme Court is to determine the question of law and dispenses justice after the thorough scrutiny of all documents. Nonetheless, the Supreme Court may dismiss an appeal for want of sufficient grounds, even without proceeding to oral arguments. In any case, if one of the three Petty Benches finds that the case involves a constitutional issue, i.e., Constitutionality of any law, order, rule, or disposition - it shall refer the matter to Grand Bench subject to the absence of precedent. In addition to the power of judicial review, the Supreme Court is the highest authority of judicial administration. It is empowered with the management of judicial affairs by prescribing the rules of judicial procedure, the internal discipline of the Courts, and the matters connected with the attorneys. However, they can do only after the Judicial Assembly deliberates and approves the proposed rules formulated by the Committee's report<sup>41</sup>.

Like India, the Japanese Supreme Court acts both as a Constitutional Court and a court of the last resort for ordinary appeals. It did not exercise considerable control over its docket till 1998. The aggrieved parties' have a right to second appeal to the Supreme Court and it extends to all cases. However, it is subject to a certificate from a High Court. However, the right to appeal to the Supreme Court was restricted through the amendment in the Civil Procedure Code in 1998<sup>42</sup>. Before this amendment, the Supreme Court handled approximately over 4000 cases each year, and in 1995, it heard around 3500 cases. It is because of the lack of discretionary control over appeals in civil matters and extensive

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<sup>41</sup> See [http://www.courts.go.jp/english/judicial\\_sys/Court\\_System\\_of\\_Japan/index.html#02](http://www.courts.go.jp/english/judicial_sys/Court_System_of_Japan/index.html#02) (last visited Nov. 6, 2017).

<sup>42</sup> LAWRENCE W. BEER AND HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, 66 (1996).

appeal rights to the litigants, which results in little or no control over its docket. The amendment in the Civil Procedure Code retains the right to appeal in certain constitutional cases and in cases involving procedural errors as set out in the Code. Other appeals are discretionary with the Supreme Court. Since 1998, the Japanese Supreme Court exercises some control over its docket and able to reduce the number of cases. In 2002, it was accepted and rendered its opinion only in 85 cases and declined to review 2300 cases<sup>43</sup>. The Court is not in complete control over its docket because the High Courts may certify some classes of cases to be heard on appeal by the Supreme Court<sup>44</sup>. Thus, the extensive appeal rights resulting in flooding of cases in the Supreme Court.

### **IV.3 The Supreme Federal Court of Brazil**

Brazilian Constitution was adopted in the year 1988 after twenty-one years of military rule. The Supremo Tribunal Federal or Supreme Federal Court is the highest body of the judicial branch. The Constitution endowed the Supreme Federal Court (SFC) to conduct judicial review with a high level of independence. The design and organization of the Brazilian constitutional adjudication has a combination of both abstract and concrete models of judicial review. It has original jurisdiction of centralized judicial review and has the final jurisdiction of the decentralized system of constitutional adjudication. Nowadays, constitutional adjudication has been characterized with the aim of testing the constitutionality of governmental actions and to ensure protection of fundamental rights through diversity of proceedings, such as the writ of mandamus, habeas corpus, habeas data (writ against legislative omission), class action and popular action<sup>45</sup>. This diversity of constitutional actions, which has the characteristic features of the diffused model and has been complemented by a variety of instruments aimed at exercising abstract judicial review by the

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<sup>43</sup> DANIEL H. FOOTE, *LAW IN JAPAN: A TURNING POINT*, 105 (2008).

<sup>44</sup> CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN*, 166 (2003).

<sup>45</sup> Gilberto Marcos Antonio Rodrigues, Marco Antonio Garcia Lopes Lorencini and Augusto Zimmermann, *The Supreme Court of Brazil: Protecting Democracy and Centralized Power*, in *COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 103, 125 (Nicholas Aroney and John Kincaid).

Brazilian Supremo Federal Tribunal, such as the direct action of unconstitutionality includes due to omission, the declaratory action of constitutionality and complaint about non-compliance of fundamental precept<sup>46</sup>. The Federal Constitution establishes the original jurisdiction of the SFC. It hears cases dealing with political crimes by ordinary appeals. It hears certain writs by appeals in the event of denial by the Superior Court. It can examine a fundamental precept derived from the Constitution when it does not comply. The primary source of cases that reach SFC is through the extraordinary appellate jurisdiction. This jurisdiction extends to (a) declaring an act contrary to a provision of the Constitution; (b) declaring a treaty or a federal law as one that violates the Constitution; (c) considering the validity of a law or act of a local government challenged under the Constitution; (d) considering the validity of a local law challenged in the light of a federal law. Further, many litigants try to enforce constitutional rights in their pleadings, which may end up in the SFC<sup>47</sup>. The structure of the Court is composed of eleven Judges (Ministros)<sup>48</sup>.

The Supreme Federal Court or Supremo Tribunal Federal must hear all cases that are appealed till 2004<sup>49</sup>. The Constitution (Forty-fifth) Amendment in 2004 provides a new requirement to have the SFC to receive the appeal, i.e., the appellant must show the *Repercussaogeral*, i.e., the general repercussion of the constitutional problem before the SFC. Under this rule, the SFC may refuse to hear a case, if a quorum of two-thirds of Justices agrees with it or through any procedure that has been defined by a Statute. Before this amendment, in 1963 itself, they created a device called 'Sumula of the Predominant Jurisprudence of the Supremo Tribunal Federal,' commonly known as *Sumula*. The *Sumula* is just a one sentence declaration of the judgment of the Court, which states the interpretation of rules and the Constitution. The *Sumula* prevents

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<sup>46</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102§I cl.d (Braz.).

<sup>47</sup> *Id.* art.102 §III.

<sup>48</sup> *Id.* art. 101

<sup>49</sup> Tom S. Clark, Aaron B Strauss, *The implications of High Court Docket Control for Resource Allocation and Legal Efficiency*, 22 [J] THEOR. POL., 247, 248 (2010).

the Court from considering the cases of similar nature that burden the SFC. The object of *Sumula* is to state the decisions of SFC on the most controversial questions over which the Court has already taken a firm position repeatedly. Even though the *Sumula* is persuasive, it is understood to be an instrument to rationalize the internal proceedings and to access further to SFC jurisprudence. However, due to non-application of the principle of *stare decisis*, the *sumula* did not work properly, and the cases were overloaded in SFC on same legal issues which have been decided already<sup>50</sup>. The issue relating to *sumula* was also addressed through the 45<sup>th</sup> amendment, where the amendment introduced the *sumulavinculante* (binding enunciation), i.e., application of the doctrine of precedent, which binds all judiciary and executive branches to a Supreme Court ruling, by filing a claim for failure to comply with its judgment<sup>51</sup>.

After 2007, i.e., since the introduction of the 45<sup>th</sup> amendment, the number of cases filed and heard by the Court has substantially decreased. From 2007 to 2008, there was 40.8% reduction in the number of cases accepted by the SFC, followed by a 36.1% falloff in 2009. In 2010, the variation with 2009 was only 4.0%, which together with a 7.1% decrease in 2011, may indicate stabilization in the number of cases accepted, after the initial impact of the amendment concerned. To put it plainly, the number of filings in 2001 and 2002 were 110,771 and 160,453, respectively and 89,574 and 87313 cases were accepted<sup>52</sup>. The data shows that in 2010 and 2011, the number of cases filed was 71,670 and 64,018 and in those, 41,014 and 38,109 were taken up by the Court<sup>53</sup>. Of late, the Brazilian Supreme Federal Court has been able to control the docket better than the past decade because of the adherence to the doctrine of precedent.

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<sup>50</sup> Maria Angela, Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOB. STUD. L. REV. 100, 101-02 (2006).

<sup>51</sup> Rodrigues et al., *Supra* note 45, at 115.

<sup>52</sup> Maria Angela, Jardim de Santa Cruz Oliveira, Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT'L L. REV. 555 (2012).

<sup>53</sup> *Id.* at 569-70.

#### IV.4 The Supreme Court of India

The Supreme Court of India is at the apex of the judicial structure. Its jurisdictions are very wide and more potent than any other Court of a similar stature in any part of the world. It has original jurisdiction to decide both vertical and horizontal federal disputes<sup>54</sup>, enforcement of fundamental rights<sup>55</sup>, and to hear disputes regarding election of the President and Vice-president<sup>56</sup>. It has appellate jurisdiction in civil and other matters when it involves a substantial question of law as to the interpretation of the Constitution<sup>57</sup>. However, it has mandatory jurisdiction in criminal appeals when the High Court has confirmed the sentence of ten years or more<sup>58</sup>. It exercises discretion under extraordinary appellate jurisdiction by granting special leave to appeal from any judgment or Order made by any court or tribunal<sup>59</sup>. Further, it can do complete justice to the parties by its activist approach<sup>60</sup>. It can review its judgments<sup>61</sup> and also has the power to cure its Order under certain circumstances<sup>62</sup>. It can tender advice to the head of the State on the question of law or fact<sup>63</sup>. The jurisdiction of the Supreme Court is not the same as it was at the time of its inception. Like U.S., it has undergone certain changes periodically. Besides the Court's expansion of its jurisdiction by its activist approach, the Parliament also extended by providing appeal remedy from the Tribunal or Commission by enacting specific Statutes<sup>64</sup>. There are almost twenty Parliamentary Statutes which provide appeal directly to the Supreme Court from the Tribunal or Commission by ousting the jurisdiction of the High Court. For instance, the appeal against the Order of the Appellate Tribunal of the Competition Act,

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<sup>54</sup> INDIA CONST. art. 131.

<sup>55</sup> *Id.* art. 32.

<sup>56</sup> *Id.* art.71 §1

<sup>57</sup> *Id.* arts. 132, 133, 134 §1

<sup>58</sup> *Id.* art. 134 §2.

<sup>59</sup> *Id.* art. 136.

<sup>60</sup> *Id.* art. 142.

<sup>61</sup> *Id.* art. 137.

<sup>62</sup> *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388. *See* The Supreme Court Rules, 2013, O. XLVIII.

<sup>63</sup> INDIA CONST. art. 143.

<sup>64</sup> *Id.* art. 138.

Companies Act, the Pension Fund Regulatory, and Development Authority Act; Judgment or Order from the Contempt of Courts Act, Consumer Protection Act and Special Court from Trial of offences relating to Transactions in Securities Act do not require sanction or leave of that particular Commission, Tribunal and Court to file an appeal to the Supreme Court and they can file their appeal to the Supreme Court as a matter of right. The burgeoning jurisdiction of the Supreme Court has been addressed in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Limited*<sup>65</sup>. In this case, the Court observed that conferring direct appeals to the Supreme Court by excluding the High Court may affect the balance required to be maintained by the highest Court of giving priority to cases of national importance, for which larger benches may be necessary to be constituted. The Court directed the Law Commission to look into the matter with the involvement of all the stakeholders and requested to report possibly within one year and listed the matter in November 2017 before a suitable three-Judge Bench<sup>66</sup>.

The Law Commission of India promptly submitted its report<sup>67</sup> within one year i.e. Oct. 27, 2017. The Commission opined that the object of establishing Tribunal is to reduce the burden of Courts particularly the High Court. The Commission strongly viewed that every order arising from the Tribunal or its appellate Tribunal attains finality. The Commission has made two suggestions to free the burden of Supreme Court in hearing appeals directly from the Statutory Tribunals. Firstly, the Statutes establishing Tribunal without providing any Appellate Tribunal, then the appeal from the Tribunal shall lie to the Division Bench of the High Court. Secondly, the Statutes providing for an appellate Tribunal to decide an appeal from the Tribunal, then the decision of such appellate Tribunal shall be treated on par with the High Court. In such circumstances, providing an appeal to the High Court against the decision of the Appellate Tribunal will defeat the purpose of

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<sup>65</sup> (2016) 9 SCC 103.

<sup>66</sup> *Id.* at 133.

<sup>67</sup> LAW COMMISSION OF INDIA, REPORT ON THE ASSESSMENT OF STATUTORY FRAMEWORKS OF TRIBUNALS IN INDIA, 272, OCT. 2017, available at, <http://lawcommissionofindia.nic.in/reports/Report272.pdf>.

establishing Tribunals. Further, the Statute should not provide direct appeal to the Supreme Court, or with leave of the Tribunal, against the decision of the appellate Tribunal. The decision of the Appellate Tribunal can be challenged before the Supreme Court only on the grounds of National or Public importance.<sup>68</sup>

The Parliament has brought certain changes in the jurisdiction of the Supreme Court based on few Law Commission recommendations. The pecuniary jurisdiction was removed in civil cases through the Constitution (Thirtieth Amendment) Act, 1970. Unfortunately, the Parliament passed Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and extended the Criminal appellate jurisdiction of the Supreme Court to the cases where a sentence of ten years or more has been imposed by way of punishment by the High Court under certain conditions. But, in all circumstances, the civil appeals outnumbered the criminal appeals regardless of the above amendments<sup>69</sup>. The Supreme Court also made some internal reforms in the original jurisdiction, i.e., enforcement of fundamental rights of a citizen. It happened in 1987 when Justice E.S. Venkataramiah in *P.N. Kumar v. Municipal Corporation of Delhi*<sup>70</sup>, referred the writ petitioner to High Court under Art. 226 and not to approach the Supreme Court directly under Article 32 stating the mounting arrears and regular filing of cases burdening the Supreme Court. It became a routine affair for the Supreme Court in relegating the writ petitioner to the High Court without analyzing whether any fundamental rights were violated or not<sup>71</sup>. Nevertheless, the significant number of the cases comes to the Supreme Court through the extraordinary appellate jurisdiction. In 2014, 80% of the total docket of the Supreme Court

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<sup>68</sup> *Id.* at 85.

<sup>69</sup> RAJEEV DHAVAN, THE SUPREME COURT UNDER STRAIN - THE CHALLENGE OF ARREARS, 38 (1978).

<sup>70</sup>(1987) 4 SCC 609.

<sup>71</sup> For instance, *Kanubhai Brahmabhatt v. State of Gujarat*, (1989) Supp (2) SCC 310. See also *K.K. Venugopal, For Proximate and Speedy Justice*, THE HINDU, April 30, 2010, <http://www.thehindu.com/opinion/lead/For-proximate-and-speedy-justice/article16297745.ece>.

has been occupied by the petitions under the Special Leave Jurisdiction<sup>72</sup>.

The liberal attitude of the Supreme Court in exercising the discretionary power to entertain the cases under special leave jurisdiction was addressed before the two-Judge Bench of the Supreme Court in the case of *Mathai @ Joby v. George and another*<sup>73</sup>. The Division Bench observed that 'the Supreme Court as the Apex Court in the country was meant to deal with important issues like constitutional matters, questions of law of public importance or where grave injustice had been done. It noted that if the Supreme Court entertains all kinds of sundry matters, it will soon be flooded with a huge amount of cases and will not be able to deal with important questions for which it was meant under the constitutional scheme<sup>74</sup>. The Court held that the time has come authoritatively to lay down guidelines for the exercise of discretion judiciously and referred the matter to the Constitution Bench. In 2016, the Constitution Bench<sup>75</sup> refused to revisit the scope of Art. 136 or lay down guidelines regulating the power. The Court, after appraising various cases relating to the exercise of discretionary powers under Art.136, observed that no effort should be made to restrict the power of the Supreme Court under Art. 136 and ruled that there could not be a straitjacket approach in the exercise of discretionary powers under Art. 136 and it would vary from case to case.

Unfortunately, the Indian Supreme Court has not undergone any major reforms as like U.S. and Brazil. The Federal Apex Court in U.S. and Brazil had accepted certain reforms by the legislature either through Statutes or Constitutional amendment to enable the institution to have control over its dockets. Moreover, the Courts themselves had brought certain internal changes, but the problem

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<sup>72</sup> Alok Prasanna Kumar, Faiza Rahman, Ameen Jauhar, NitikaKhaitan, *Towards An Efficient and Effective Supreme Court: Addressing issues of Backlog and Regional Disparities in Access*, VIDHI CENTRE FOR LEGAL POLICY, (Feb. 9, 2016), <http://www.vidhilegalpolicy.in/reports/2016/2/8/towards-an-efficient-and-effective-supreme-court>.

<sup>73</sup> (2010) 4 SCC 358.

<sup>74</sup> *Id.* at 363.

<sup>75</sup> *Mathai @ Joby v. George and another*, (2016) 7 SCC 100.

persists both in India and Japan because of the lack of interest on the part of the legislature to bring reformative steps or inability of the Judges to apply certain doctrinal tools to reduce the caseloads. Nevertheless, the latter is in a better position than the former because the Supreme Court of Japan exercises its discretion sparingly in admitting the appeals. The Legislature as well as the Executive in India did not give due regard to the recommendations of the Law Commission of India. The Law Commission had suggested to streamline the oral arguments similar to the model of U.S. Supreme Court<sup>76</sup> and advised to utilize the services of retired judges,<sup>77</sup> which is acknowledged in Indian Constitution<sup>78</sup>. The retired judges are assets because of their expertise in different litigations and experiences in the art of adjudication. The services of retired judges can be used similar to the practice of 'junior court' in U.S. The Supreme Court of India is striving for paperless Court in the lines of U.S. Supreme Court, which is evident from the farewell speech of former CJI Hon'ble Justice K.S. Khehar<sup>79</sup>. If the Supreme Court can make the digitization of Courts a reality, then it would be a phenomenal achievement and as a result, the cases can be disposed in a swift manner. The Supreme Court of India can adopt the process and procedure similar to Brazil, in delivering short judgments, focusing only on the facts at the backdrop of settled law and bring necessary amendments in the Supreme Court rules to make it legally binding. This will save enormous time for the Court.

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<sup>76</sup> LAW COMMISSION OF INDIA, REPORT ON ORAL AND WRITTEN ARGUMENTS IN THE HIGHER COURTS, 99, APRIL 1984, available at, <http://lawcommissionofindia.nic.in/51-100/Report99.pdf>.

<sup>77</sup> LAW COMMISSION OF INDIA, REPORT ON THE SUPREME COURT – A FRESH LOOK, 125, MAY 1988, available at, <http://lawcommissionofindia.nic.in/101-169/Report125.pdf>.

<sup>78</sup> INDIA CONST. art. 128.

<sup>79</sup> PTI, CJI JS Khehar hopes paperless court becomes reality, praises bar, THE INDIAN EXPRESS, AUG. 25, 2017, <http://indianexpress.com/article/india/cji-khehar-hopes-paperless-court-becomes-reality-praises-bar/>.

## V. Feasibility of establishing NCA

Many social litigation lawyers filed Public Interest Litigation (“PIL”) petitions in the Supreme Court itself to restructure it, not only to reduce the burden of the Court but also to make it appellant-friendly. In 2016, a PIL petition<sup>80</sup> was filed in the Supreme Court for setting up of NCA with regional benches to act as the final Courts in the matter of criminal and civil cases, and the Supreme Court to act as a Constitutional Court. It was filed based on the observation made by the Supreme Court’s Constitution Bench in the case of *Bihar Legal Support Society v. Chief Justice of India & Another*<sup>81</sup>. In this case, Chief Justice Bhagwati, on behalf of the Constitution Bench, pointed out that ‘this Court was never intended to be a regular court of appeal against orders made by the lower Courts. It was created as an Apex Court for the purpose of laying down the law for the entire country.’ Further, the Hon’ble Judge suggested that ‘it would be desirable to set up a NCA, which would be in a position to entertain appeals by special leave from the decisions of the High Courts and Tribunals in the country in civil, criminal, revenue and labor cases and so far as the present Apex Court is concerned, it should concern itself only with entertaining cases, involving questions of constitutional law and public importance’<sup>82</sup>.

The three-Judge Bench finally referred the PIL petition to a Constitution Bench after hearing the contentions of the learned *amicus curiae*, Shri K.K. Venugopal and the then Attorney General, Shri Mukul Rohatgi. There are totally eleven questions framed by the Court for the consideration of the Constitution Bench<sup>83</sup>, in which six questions relate to the desirability and feasibility of setting up of NCA. They are: (1) Can the division of the Supreme Court into a Constitutional wing and an appellate wing be an answer to the problem? (2) Has the Supreme Court of India been exercising jurisdiction as an ordinary court of appeal on facts and law, in regard to routine cases of every description? (3) Is the huge

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<sup>80</sup> *Infra* note 83.

<sup>81</sup> 1987 SCR (1) 295.

<sup>82</sup> *Id.* at 299.

<sup>83</sup> *V. Vasanthakumar v. H.C. Bhatia and Others*, (2016) 7 SCC 686.

pendency of cases in the Supreme Court, caused by the Court not restricting its consideration, as in the case of the Apex Courts of other countries, to Constitutional issues, questions of national importance, differences of opinion between different High Courts, etc.? (4) Is there a need for having Courts of Appeal, with exclusive jurisdiction to hear and finally decide the vast proportion of the routine cases, as well as petitions under Art. 32 of the Constitution? (5) As any such proposal would need an amendment to the Constitution, would the theory of 'basic structure' of the Constitution be violated? (6) In view of cases pending in various courts including the Supreme Court, would it not be the duty of the Supreme Court to examine through a Constitution Bench and to recommend its opinion to the Government on the proposal for establishing four Courts of Appeal, so that the Supreme Court may regain its true status as a Constitutional Court?

It is significant to mention that the creation of NCA and conferring final appellate jurisdiction will not serve any purpose until the special leave jurisdiction of the Supreme Court is curtailed. The majority of cases come under Special Leave Petition ("SLP"), and the Court takes more time in deciding the admission of SLP. Further, if the discretion is used compassionately by our Supreme Court after establishing NCA (presumably), then the NCA will become another High Court. Further, the potential litigants will not stop with the NCA, they may go up to the Supreme Court to exhaust all the remedies available although they have no case on their side. The establishment of the NCA is a cumbersome process and requires so many changes in the Constitution and the relevant Statutes concerned, which is difficult to achieve immediately. The determination of a Constitutional question is a delicate mechanism because each and every case, in one way or other touches on the fundamental rights, or arbitrariness of the Government violating equality, etc. So, overlapping of jurisdiction may occur between the NCA and the Supreme Court. In such circumstances, it is difficult to reconcile the powers and functions of the NCA and the Supreme Court.

## VI. Conclusion

The comparability of the different constitutional systems is an interesting phenomenon. It is evident from the above analysis that there cannot be any generalizations in designing a Court meant for constitutional review, and each Constitution has no single and best way to structure a Constitutional Court because the role depends on the political process underlying the construction of the Constitution and the legal culture behind it. The examination of the various Apex Courts' provides insight as to how the Court addresses the problem of the litigation explosion and its various controlling measures. The docket size among these Courts is astonishingly diverse because of the discretionary power of the Court in entertaining cases. In India, the Parliament and the Government turned a deaf ear to many of the recommendations of the Law Commission, which aimed to lessen the burden of the Supreme Court. Nonetheless, they did certain piecemeal reform, such as abolition of the pecuniary jurisdiction in civil appeals. Further, it is expected that the Government would consider the suggestions of the 272<sup>th</sup> report of the Law Commission relating to the appellate jurisdiction of the Supreme Court from Statutory Tribunals and make necessary reforms.

The Court also adopted certain internal changes under the purview of Art. 32, and not under Art.136, which occupies 80% of the total docket. Of late, the creation of National Court of Appeal (NCA) has gained momentum, but it is not an appropriate remedy to break all shackles. At present circumstances, the establishment of NCA is a Herculean task, which cannot be achieved shortly. Nonetheless, the Court can bring internal reforms through its rulemaking power under Article 145 of the Constitution. It can impose self-limitations in entertaining SLPs and streamline the oral arguments by stipulating the time as like U.S., and encourage the written arguments with the word limit, etc. Further, they can screen the SLPs separately by utilizing the services of retired judges of the Supreme Court as like screening 'Writ of Certiorari' by the Junior Court in U.S. Further, the Indian Supreme Court should adopt e-filing in all its benches. Like Brazil, they can also adopt the method of '*Sumula*', to shorten their judgments and Orders when there is an established precedent available in that matter. To give preference to

the Constitutional matters, the Supreme Court can have a permanent specialized division for constitutional adjudication by splitting the existing Court itself. Thus, the Supreme Court requires a strong will to restructure itself without depending on the other organs.