

THE DECISION IN KHODAY DISTILLERIES AND THE CURIOUS CASE OF SLP DISMISSALS

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ABSTRACT

This paper begins by quantitatively characterising the burgeoning docket of the Supreme Court, the disproportionate contribution therein by SLPs, and espouses the view that this problem is a consequence of its conscious choices. It traces the expanding scope of Article 136 of the Constitution since independence and its philosophical underpinnings across decades to understand the present crisis. In doing so, the paper reflects upon the failure of the Supreme Court to frame appropriate guidelines to check the rising docket. It also reflects upon the two divergent strings of jurisprudence vis-à-vis maintainability of review petitions upon the dismissal of an SLP.

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This paper argues that while J. Sikri's opinion in Khoday Distilleries lays down the procedurally accurate interpretation and resolves the specific conflict of maintainability of review petitions, it missed an opportunity to address the concern regarding indiscriminate filing of SLPs, lay appropriate guidelines vis-à-vis discretion under Article 136 or even balance procedural rights with judicial efficiency. The paper emphasizes on the need for the procedure established in Khoday Distilleries to be coupled with additional caveats. In pursuit of evaluating such caveats, this paper delves into some of the reforms suggested so far. Specifically, this paper argues that the proposed Court of Appeals would only exacerbate the existing docket crisis whereas regulating the discretion under Article 136 improves judicial efficiency and thereby better protects equity for the larger society and the SC's effort at being a People's Court.

Keywords: SLPs, Review, Merger, Maintainability, Docket

I. INTRODUCTION

Till January 1, 2024, an astonishing 80,221 cases were pending adjudication before the Hon'ble Supreme Court of India (**SC** or **Supreme Court**).¹ This figure speaks volumes about the brewing crisis before the Indian judiciary. However, the numbers missing in these reports expose an even more telling picture. Special Leave Petitions (**SLPs**) comprised 84.6% of the cases instituted before the SC.² Yet, the Supreme Court Annual Report(s) do not list the statistical data for SLPs separately.³ This is also reflective of its efforts towards handling the greatest contributor to its docket.

The framers of the Constitution envisaged the Supreme Court to perform three important functions: *first*, a constitutional court interpreting the Constitution; *second*, an appellate court with the power to choose appeals from any order in any court; and *third*, a final court

¹ Gauri Kashyap, '80,221 cases pending in Supreme Court in January 2024', (Supreme Court Observer, February 3, 2024) <https://www.scobserver.in/journal/80221-cases-pending-in-the-supreme-court-in-january-2024/> accessed 18 August 2025.

² Nick Robinson, 'A Quantitative Analysis of the Supreme Court's Workload', *Journal of Empirical Studies* 10 (2013) 570, 584; Alok Prasanna Kumar et al. 'Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access' (Vidhi Centre for Legal Policy, February 2016) 17-18 <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/TowardsanEffectiveandEfficientSupremeCourt.pdf> accessed 15 August 2025.

³ Supreme Court of India, *Indian Judiciary: Annual Report 2020-21*, 84-85, https://main.sci.gov.in/pdf/AnnualReports/12012022_114003.pdf accessed on 2 August 2025.

with the power to do “complete justice”.⁴ As we argue later in the paper, the Court’s inability to regulate its second role has impaired its ability to do justice to the other two functions. The article focuses on maintainability of review petitions after dismissal of SLPs and the interpretation of the doctrine of merger as differently interpreted by the Supreme Court, leading to varied interpretations causing various consequences impacting the ability of the court to perform its functions. The Article gives a broad overview of SLPs, its growth and its interrelation with public interest litigations. Post this, the article delves deep into the varied approaches adopted by the courts on maintainability of review petitions, which leads to a discussion on *Khoday Distilleries case*, where an attempt was made to put this discussion to an end. Yet the attempt leaves various questions unanswered, creating a need to reform the *status quo*.

The article begins with a quantitative examination of the Supreme Court’s expanding docket and disproportionate contribution of SLPs in this caseload. This is supported by a historical and philosophical analysis of evolution Article 136 of the Constitution and a review of it along with the current judicial crisis. Article 136 of the Indian Constitution has been described to confer an “untrammelled reservoir of power incapable of being confined by definitional bounds”⁵ and

⁴ Raeesa Vakil, ‘Jurisdiction’ in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta (eds.), *The Oxford Handbook of Constitution* (OUP 2016) 367-368.

⁵ *Kunhayammed v State of Kerala* (2000) 6 SCC 359 ¶ 14.

inept of being limited by lower courts or statute.⁶ The introduction traces the original intent of the drafters of the Constitution and analyses the trend of SLPs across decades. In doing so, it advocates the interlinkage between the rise of SLPs and the growth of Public Interest Litigation (**PILs**). After which, the introduction also highlights the persistent reluctance of the Supreme Court to frame guidelines vis-à-vis SLP jurisdiction.

II. ARTICLE 136: THE CONSTITUENT ASSEMBLY AND EARLY YEARS OF INDEPENDENCE

The framers of the Constitution were influenced by the comparative constitutionalism in the United Kingdom, the United States and Canada while framing the roles of the different organs of the Government.⁷ The Sapru Committee (1945) envisaged the highest court of the land to pose as a guardian of the Constitution.⁸ Shri H.V. Pataskar equated the Supreme Court akin to a King, describing it as a fountainhead of justice among individuals on all matters.⁹ Consequently, Article 136 (Article

⁶ *Raj Krushna Bose v Binod Kanungo* AIR 1954 SC 202; *Zahira Habibullah Sheikh v State of Gujarat* (2004) 5 SCC 221; *Columbia Sportswear Co v DIT* (2012) 11 SCC 224.

⁷ B. Muthu Kumar, *The Need for Special Treatment in Special Leave Petitions in Salman Khurshid, Lokendra Malik & Yogesh Pratap Singh* (eds.) *The Supreme Court and the Constitution: An Indian Discourse* (2020) 323 – 324.

⁸ *ibid.*

⁹ *Constituent Assembly Debates*, Vol. 8 (Lok Sabha Secretariat 1986) 639 (HV Pataskar).

112 of the Draft Constitution) granted wide discretion with the responsibility to regulate its own procedure.

However, the unfettered discretion granted under Article 136 was based upon one foundational assumption: that the Supreme Court would regulate itself.¹⁰ Article 136 provides that “*the Supreme Court may, in its discretion, grant special leave to appeal...*”. Moreover, article 136 (Article 112 in the draft constitution) was considered as a last resort,¹¹ as said by Mr. Naziruddin Ahmed in the Constitutional Assembly debate “*The question of possible congestion of work in the Supreme Court has included many honourable Members to oppose the provisions of these amendments...The fear of creating a serious congestion in that court and also the fear that we will have to employ more judges to deal with those cases is behind this opposition. I submit, however, that this fear is unjustified. So far as the question of law is concerned, it is only a ‘substantive question of law’ which will enable a party to successfully obtain a certificate of special leave.*”¹² This can be evidenced *first*, from the repeated disclaimer of restraint while granting leaves sparingly and *second*, to evolve principles that guide discretion under Article 136.¹³ Thereby, the warning bells of using such

¹⁰ *Raeesa Vakil* (n 4) 371.

¹¹ Special Leave Petitions and the Constituent Assembly Debates (Centre for Law & Policy Research, 9 May 2016) <<https://clpr.org.in/blog/special-leave-petitions-and-the-constituent-assembly-debates/>> accessed on 14 August 2025.

¹² Constitutional Assembly Debate dated June 14, 1949.

¹³ Constituent Assembly Debates, Vol. 8 (Lok Sabha Secretariat 1986) (**CAD Debate**) 856, 14 June 1949 (BR Ambedkar); CAD Debate 639, 6 June 1949 (Alladi Krishnaswamy Ayyar).

discretion only in cases of “serious breach” and “exceptional” cases were rung by Dr. Ambedkar as early as in 1949.¹⁴ In May 1950, the Supreme Court itself acknowledged this through a five-judge bench in *Pritam Singh v. The State*,¹⁵ that “on a careful examination of Article 136 along with the preceding Articles, it seems clear that the wide discretionary power with which the Court is invested under it, is to be exercised only in exceptional cases, where a substantial question of law is involved, or where the case is of such a nature that interference by this Court is necessary to remedy grave injustice.”

III. THE GROWTH OF PILS AND RISE IN SLP FILINGS

Since independence, the Court has consistently reiterated the standard of special circumstances to be exercised sparingly.¹⁶ The initial three decades post-independence saw this standard being somewhat maintained.¹⁷ However, this standard was relaxed in 1979 as the emphasis of the Court shifted towards rendering “meaningful and socially relevant” justice to uphold rule of law.¹⁸ In doing so, it

¹⁴ CAD Debate (Lok Sabha Secretariat 1986) 640 (BR Ambedkar).

¹⁵ *Pritam Singh v The State* AIR 1950 SC 169 ¶ 11.

¹⁶ *Pritam Singh v The State* AIR 1950 SC 169; *Subedar v State of UP* (1970) 2 SCC 445.

¹⁷ Rajeev Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (Indian Law Institute, 1978).

¹⁸ *State of Kerala v Kumari T.P. Roshana* AIR 1979 SC 765 ¶ 40.

assumed an error-correction role and undertook the duty beyond the mandate conferred by Article 136.¹⁹

It has been argued elsewhere that the expanding liberal standard adopted under SLPs coincided with the rise of the Public Interest Litigation (PIL) movement in India and employed strikingly similar language under Article 32 and Article 136 in its new avatar.²⁰ The consequences of this interpretation have been best substantiated through numbers.²¹ The number of SLPs instituted since 1975 witnessed a meteoric rise (*see below: Graph 1*) since the advent of the PIL jurisprudence and has remained unchecked since then.²² Jahnvi Sindhu and Vikram Aditya Narayan through their research argue that “*it is quite plausible that as the Court abandoned narrow interpretations of fundamental rights to do justice through PIL jurisprudence, it recognized a need to similarly abandon its narrow interpretation of Art. 136 so as to do justice to parties aggrieved by all*

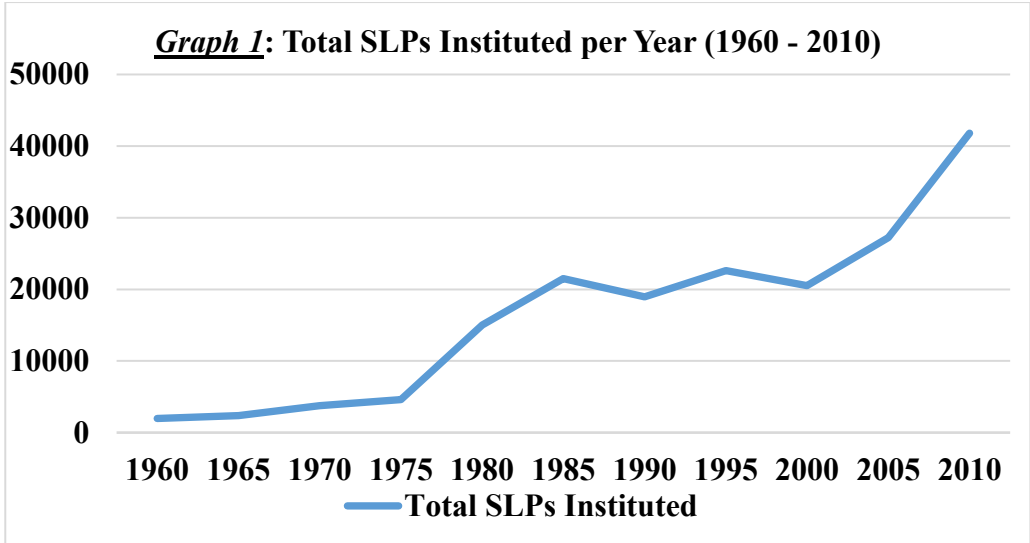
¹⁹ *Indira Kaur v Sheo Lal Kapoor* (1988) 2 SCC 488 ¶ 7; *Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai* (2004) 3 SCC 214.

²⁰ Jahnvi Sindhu & Vikram Aditya Narayan, ‘Institution Matters’ Law and Politics in Africa, Asia and Latin America, 2018, Vol. 51(3), Special Issue, “The Indian Supreme Court in Crisis?” (2018) 290-331.

²¹ Rajeev Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (Indian Law Institute, 1978); Nick Robinson (n 2) and Alok Prasanna Kumar, et al. ‘Towards an Efficient and Effective Supreme Court: Addressing Issues of Backlog and Regional Disparities in Access’ Vidhi Centre for Legal Policy (February 2016).

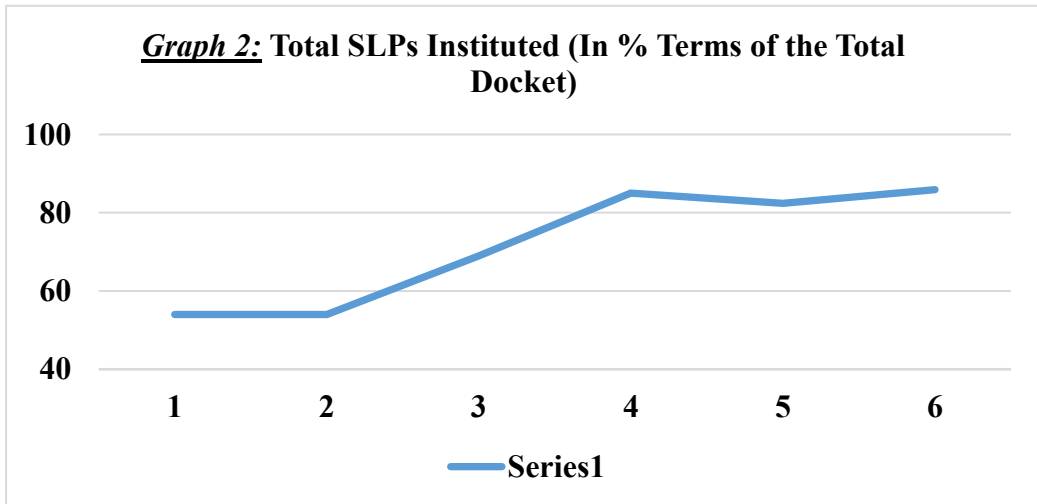
²² Jahnvi Sindhu & Vikram Aditya Narayan, ‘Institution Matters: A critical analysis of the role of the Supreme Court of India and the Responsibilities of the Chief Justice’, Law and Politics in Africa, Asia and Latin America, 2018, Vol. 51, No. 3, Special Issue, ‘The Indian Supreme Court in Crisis?’ (2018) pp. 290-331, p. 301, available at < <https://www.jstor.org/stable/10.2307/26630770>>.

sorts of errors made by lower courts.... The total number of SLPs filed in 1985 is 368% more than the total number of SLPs filed in 1975."²³



²³ *ibid* p 302.

This is not just a function of the total cases filed before the SC, and can be witnessed by the data in percentage terms (*see below: Graph 2 and Annexure I*).



From 1960 to 1975, the SLPs were kept in check and hovered around 54% in 1970 and increased to 69% in 1980. However, it saw an astounding increase to 85% in 1990. Barring two years, the percentage has remained over 80% since then.²⁴ The Supreme Court in *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*²⁵ held that “...in spite of the repeated pronouncements made by this Court declaring the law on Article 136 and repeatedly stating that this Court was a Court meant for dealing only with substantial questions of law....and that this Court was not meant for redeeming injustice in individual cases, the experience shows that such self-imposed restrictions placed as fetters

²⁴ Nick Robinson (n 2).

²⁵ *Jamshed Hormusji Wadia v Board of Trustees, Port of Mumbai* AIR 2004 SC 1815.

on its own discretionary power under Article 136 have not hindered the Court from leaping into resolution of individual controversies once it has been brought to its notice that the case has failed to deliver substantial justice or has perpetuated grave injustice to parties or is one which shocks the conscience of the Court or suffers on account of disregard to the form of legal process or with violation of the principles of natural justice....The practice and experience apart, the framers of the Constitution did design the jurisdiction of this Court to remain an extraordinary jurisdiction whether at the stage of granting leave or at the stage of deciding the appeal itself after the grant of leave. This Court has never done and would never do injustice nor allow injustice being perpetuated just for the sake of upholding technicalities.” This indicates the shift in jurisdiction interpretation by the Supreme Court, as what was earlier to be reserved for “special circumstances”, was now being invoked more frequently.²⁶

IV. THE RECENT DECADE: A MISSED OPPORTUNITY

In 2010, a Division Bench of the Supreme Court in *Mathai v. George* finally recognized the widening departure from the initial conception of Article 136 and its practice and referred the interpretation of Article 136 to a Constitutional Bench.²⁷ However, in 2016, the Constitutional Bench, consistent with its past approach, employed vague terminology

²⁶ *Jahnvi Sindhu & Vikram Aditya Narayan* (n 22).

²⁷ *Mathai v George* (2010) 4 SCC 358 ¶ 3, 26-29.

such as “*use the said power with circumspection*” and refused to frame any guidelines or restrict powers conferred under Article 136.²⁸ This fosters inconsistent standards across benches, and therefore contributes significantly to the massive backlog of SLPs. The argument that the Court should issue self-binding procedural rules, such as through the approach that formulated the Curative Petition in *Rupa Ashok Hurra v. Ashok Hurra*,²⁹ under Article 142 to do “complete justice”, remains compelling. The success of Curative Petitions, which introduced specific and mandatory checks (such as certification by a Senior Counsel) shows that effective, judicially-crafted regulation can prevent any unintended abuse of extraordinary jurisdiction. While the Supreme Court’s uneasiness to restrict discretion under Article 136 is understandable, the lack of any guidelines whatsoever exacerbates the problem of judicial backlog. Presently, the admission rate of SLPs is higher, subsequently resulting in higher litigation costs on parties and the system.³⁰

V. EVALUATING REVIEW-JURISDICTION JURISPRUDENCE POST SLP DISMISSAL

²⁸ *Mathai v George* (2016) 7 SCC 700 ¶ 6.

²⁹ *Rupa Ashok Hurra v Ashok Hurra* AIR 2002 SC 177.

³⁰ Tarunabh Khaitan, ‘The Indian Supreme Court’s identity crisis: a constitutional court or a court of appeals’ *Indian Law Review* (2020) ¶ 7-8.

*Khoday Distilleries Ltd. v. Shri Mahadeshwara Sahkara Karkhane Ltd.*³¹ (***Khoday Distilleries***) turned out to be a watershed moment in determining the maintainability of review petitions vis-à-vis interpretation of Article 136 of the Indian Constitution as it resolved the procedural chaos sparked by two parallel strands of jurisprudence. We classify these two approaches, standing in stark contrast as, *first*, the decisions sanctifying “judicial discipline”, and *second*, the decisions “balancing substantive merits and judicial propriety”. While resolving these differences, the three-judge Bench in *Khoday Distilleries* affirmed the hair-splitting analysis undertaken in *Kunhayammed v. State of Kerala (Kunhayammed)*³². We argue that while the approach in *Khoday Distilleries* accurately resolved the procedural question before it, the indiscriminate filings of SLPs and its ripple effect on the Supreme Court’s larger role have not been adequately dealt with.

A. The “Judicial Discipline” Jurisprudence

The first line of reasoning is founded upon eulogizing the notion of “judicial discipline” and an expanded notion of the doctrine of merger and the principle of *res judicata*. This reasoning seeks to restrict the scope of review following the dismissal of an SLP, viewing any subsequent attempt to invoke review jurisdiction as “vexatious

³¹ *Khoday Distilleries Ltd. v Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd* (2019) 4 SCC 376.

³² *Kunhayammed v State of Kerala* (2000) 6 SCC 359.

litigation” or an abuse of the process of the court.³³ The leading authority for this interpretation is the three-judge bench decision of the Supreme Court in *Abbai Maligai v. K. Santhakumaran (Abbai Maligai)*, wherein the Court held that the exercise of review jurisdiction after the dismissal of an SLP was “not proper” and “subversive of judicial discipline.”³⁴

The extent of judicial discipline is exemplified at its peak wherein dismissals of SLP *in limine* also operated as final order and acted as *res judicata* between parties before all courts in India, notwithstanding any pending adjudication.³⁵ In a latter case, the Supreme Court held that doctrine of merger is applicable if any reasons, howsoever meagre, are provided with a very limited exception where an SLP is dismissed without giving any reasons whatsoever.³⁶ Thus, the doctrine of merger would apply even if the dismissal is merely by writing “we find no merits”. This strand of view has been subsequently criticized for its failure to realize that SLP admission is a “*discretionary*” power exercised by the Supreme Court and not an “*adjudicatory*” function wherein the court sits in an appellate role.³⁷

B. “Not All Dismissals” Shift in Approach

³³ *Abbai Maligai v K. Santhakumaran* (1998) 7 SCC 386 ¶ 4; *State of Maharashtra v Shri Prabhakar Bhikaji Ingle* 1996 INSC 357 ¶ 3.

³⁴ *ibid.*

³⁵ *Sree Narayana Dharma-Sangam v Swami Prakasananda* (1997) 6 SCC 78.

³⁶ *Gangadhara Palo v Revenue Division Officer* (2011) 4 SCC 602 ¶ 6.

³⁷ *Abbai Maligai* (n 33) ¶ 23.

The extreme approach of complete bar expounded in *Abbai Maligai* was partly lifted by the other strand of jurisprudence. In *Meghmala v. G. Narsimha Reddy (Meghmala)*, the court permitted adjudication of review petitions filed prior to the dismissal of SLPs, but petitions filed after the dismissal of SLPs were not maintainable.³⁸ While this approach recognizes the discretionary role under SLPs, it incentivizes the filing of a review petition out of an abundance of caution and thereby contributes to the larger judiciary's docket. This approach found favour in the subsequent detailed analysis undertaken in *Kunhayammed*.

C. Kunhayammed and J. Sikri in Khoday Distilleries

J. Lahoti in *Kunhayammed* (speaking for the three-judge bench of the Supreme Court) painstakingly detailed the process adopted in Article 136 and divided it into a two-step process: *first*, admissibility of SLP wherein the Court is exercising its discretionary power and *second*, the hearing stage wherein the Court is exercising its appellate jurisdiction.³⁹ The analysis undertaken in *Kunhayammed* found unequivocal acceptance in J. Sikri's opinion in *Khoday Distilleries*. They clarify that when an SLP is dismissed, whether through a speaking or a non-speaking order, would not attract doctrine of merger.⁴⁰ It would merely mean that the case did not merit intervention on grounds of "exceptional" or "special circumstances". This was in

³⁸ *Meghmala v G. Narsimha Reddy* (2010) 8 SCC 383 ¶ 25.

³⁹ *Abbai Maligai* (n 33) ¶ 14.

⁴⁰ *Kunhayammed* (n 32) ¶ 26.2.

sharp contrast to the earlier approach to limit such exceptions to *in limine* orders.

On the other hand, once an SLP is admitted, it results in merger and the Supreme Court assumes an appellate role. Consequently, the review jurisdiction of the High Court is lost. Unlike the first approach,⁴¹ this procedure satisfactorily enforced the effect of speaking orders given during dismissal of petition by holding that such reasons would only be the ‘declaration of law by the Supreme Court’ under Article 141.⁴² Thereby, *Khoday Distilleries* resolved the conflict between *Kunhayammed* and *Abbai Maligai* and solidified the applicability of the doctrine of merger. Furthermore, on the question of whether review petitions are only maintainable if they are filed prior to the dismissal of the SLP, *Khoday Distilleries* supported the view in *Kunhayammed* that review can be filed even after dismissal of SLP in light of Order 47 Rule 1 of CPC.⁴³ Hence, the timing of when such review is filed is immaterial for evaluating the doctrine of merger.

D. Khoday Distilleries: Correct but Ineffective?

While *Khoday Distilleries* lays down the procedurally correct interpretation of the law, it has three major shortcomings: *first*, it fails to address the indiscriminate filings of SLPs that have plagued the judicial docket; *second*, its failure on the first front compromises its performance in its constitutional role, arguably its most important role

⁴¹ *Gangadhara Palo v Revenue Division Officer* (2011) 4 SCC 602.

⁴² The Constitution of India, art 14; *Kunhayammed* (n 32) ¶ 26.2.

⁴³ *Abbai Maligai* (n 33) ¶ 37.

and *third*, the inconsistency post-Khoday *Distilleries* goes against the very value the jurisprudence at its earliest intended to cherish i.e. judicial discipline.

b) *Burgeoning Docket of SLPs*

Khoday Distilleries presented the most opportune moment to regulate the indiscriminate filings of SLPs since 2016.⁴⁴ While it may be argued that the specific question of law referred was with regard to maintainability of review petitions, the interpretation of a narrow doctrine of merger effectively contributes towards such docket. In an empirical study, it was observed that the average time from filing of an SLP to a decision on admission is 71 days (*table given in Annexure-II*).⁴⁵ Therefore, it would not have been unrelated to deal with the indiscriminate filings of SLPs. This is especially given that a similar flexibility in the 1980s led to a rising spurt of SLPs that remain unchecked today.⁴⁶ It may also be argued that the subsequent inconsistency (as later argued) may also be owing to this concern.

c) *Dereliction of Constitutional duty due to Appellate Docket*

Due to the overwhelming SLP docket, the Supreme Court is time-starved and impaired of its ability to perform its constitutional

⁴⁴ *Mathai* (n 28).

⁴⁵ *Tarunabh Khaitan* (n 30).

⁴⁶ *Jahnavi Sindhu & Vikram Aditya Narayan* (n 17).

functions.⁴⁷ It does not just come at the cost of its constitutional function but in violation of its mandate under Article 145(3).⁴⁸ To substantiate this impairment through an instance, Tarunabh Khaitan depicts the Supreme Court's handling of its constitutional role in *Naz Foundation* as an example of its abdication.⁴⁹ The exploding SLP docket perpetuates a vicious cycle resulting in poor quality of reasoning, oral arguments not being recorded, poor quality of prayers and violation of *stare decisis*.⁵⁰ Important constitutional matters that go to the very root of our democracy await adjudication due to the disproportionate attention to SLP disputes.⁵¹

d) *Post Khoday Distilleries Inconsistency vis-à-vis Doctrine of Merger*

The third shortcoming is not much of its own doing as much as it is inability of the court to adhere to the doctrine of *stare decisis*.⁵² This is

⁴⁷ Rishad Ahmed Chowdhury, 'Missing the Wood for the Trees: The Unseen Crisis in the Supreme Court' (2012) 5 NUJS L Rev 351, 360.

⁴⁸ The Constitution of India, art 145(3); *Rishad Ahmed Chowdhury* (n 39) 351, 374.

⁴⁹ *Tarunabh Khaitan* (n 30) 7-8.

⁵⁰ Chintan Chandrachud, 'Constitutional Interpretation' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

⁵¹ Apoorva 'Substantial questions of law in cold storage? 35 Constitutional Bench matters pending before Supreme Court' (Vidhi Centre for Legal Policy, 1 February 2022) <<https://vidhilegalpolicy.in/blog/substantial-questions-of-law-in-cold-storage-35-constitution-bench-matters-pending-before-supreme-court/>> accessed on 12 August 2025.

⁵² Upendra Baxi, 'The Travails of Stare Decisis in India' in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (Butterworths 1983) 38; Shrutanjaya Bharadwaj & Ayush Baheti, 'Precedent, stare decisis and the Larger Bench Rule:

symptomatic of the larger problem plaguing the adjudication of SLPs by a “polyvocal court”.⁵³ Despite the detailed analysis in *Khoday Distilleries*, another three-judge bench in *T.K. David v. Kuruppampady Service Cooperative Bank Ltd. (T.K. David)* read the doctrine of merger differently.⁵⁴ In *T.K. David*, SLP was dismissed after which the petitioner filed a review petition before the High Court, which was also dismissed through a speaking order and on merits. The petitioners challenged the order dismissing the review petition and filed an SLP. Interestingly, the Court held that the challenge to the review petition must fail because the main judgment became final due to the earlier dismissal of SLP.⁵⁵ This stands in contrast with *Khoday decision* which held that dismissal of SLP at its discretionary stage does not result in merger and review petition can be filed even after such dismissal. But *T.K David* held that the SLP has to be mandatorily rejected because the “main judgment of the High Court cannot be affected in in any manner”, and the Court does not “entertain a special leave petition in which no relief can be granted”.⁵⁶

Judicial Indiscipline at the Indian Supreme Court’ *Indian Law Review* Vol. 6(1), 58-83.

⁵³ Andrew Green and Albert H Yoon, ‘Triaging the Law: Developing the Common Law on the Supreme Court of India’ (2017) 14 *Journal of Empirical Legal Studies* 683, 700.

⁵⁴ *T.K David v Kuruppampady Service Cooperative Bank* (2020) 9 SCC 92.

⁵⁵ *Rajeev Dhavan* (n 17).

⁵⁶ *Pritam Singh* (n 15).

This position was reiterated in *Sudarshan Budek v. State of Odisha*⁵⁷ wherein the court held that the appellant can only challenge the main judgment and not the order dismissing the review petition. While this inconsistency is pronounced, it is not surprising as the consequences of repeated rounds of litigation owing to the narrow interpretation of merger was warned earlier.⁵⁸ This approach blurs the distinction between the discretionary and appellate function of the Supreme Court yet again and the general inconsistency creates ambiguity in the process dealing with the largest contributor to the Supreme Court's docket. Ironically, this jurisprudence was initiated with ethos of *judicial discipline* and preventing *abuse of process*.

The law established by *Khoday Distilleries* case is much affirmed by the subsequent decisions. The High Court of Delhi in *National Highways Authority of India v. Gurugayoor Infrastructure Pvt. Ltd.*⁵⁹, on October 16, 2024, reiterated the applicability of *Khoday Distilleries case*, without even giving any obiter on revamping the existing framework. The Delhi High Court had to determine if SLP has been dismissed by the Hon'ble Supreme Court against an earlier interim order, whether the subsequent application for modification can be sustained? The Delhi High Court held that “*if an order of dismissal of*

⁵⁷ SLP (Civil) Diary No(s). 43363/2019 arising out of the impugned final judgment and order dated 11-09-2019 in RP No. 204/2019 passed by the High Court of Odisha at Cuttack, available here: <https://www.livelaw.in/pdf_upload/sudarshan-budek-vs-state-of-odisha-11-2021-sc-151-390339.pdf> accessed on 2 August 2025.

⁵⁸ *B. Muthu Kumar* (n 7) 336.

⁵⁹ *National Highways Authority of India v Gurugayoor Infrastructure Pvt. Ltd* 2024 SCC OnLine Del 7222.

the SLP is a non-speaking order and no reasoning has been given by the Hon'ble Supreme Court for the same, then the review of the order challenged is permissible."⁶⁰ In this case, the SLP filed by the respondent was dismissed *in limine*, therefore the doctrine of merger was not applicable. The non applicability of the doctrine of merger meant that, the Delhi High Court could modify or clarify its earlier interim order, and it decided to determine the issues raised on merits.

VI. PROPOSED REFORMS AND ITS CHALLENGES

The procedure laid down in *Khoday Distilleries* might worsen, if not keep the same, the ever-expanding SLP docket. Thereby, it needs to be combined with urgent reforms. This section deals with the radical changes suggested and the challenges associated with them. This section argues that there is an urgent need to regulate the discretion under Article 136 given its disparate use, while arguing against establishing a Court of Appeals. Furthermore, it also advocates the exploration of a specialised board to filter cases taking a cue from the United States example.

A. Regulating the Discretion under Article 136

The Supreme Court has expressed extraordinary reluctance to restrict its powers or frame any guidelines in exercising its discretion under Article 136 of the Constitution. The only requirement is that “exceptional and special circumstances exist, that substantial and grave

⁶⁰ *ibid.*

injustice has been done”.⁶¹ It frequently employs vague phrases such as “grave injustice” and “shook the conscience of the court” as threshold for such discretion. However, as Seervai succinctly puts it, “to coin a phrase is not to indicate a standard”.⁶² Given the polyvalent nature of the court, such unguided discretion especially leaves itself vulnerable to the emotional subjectivity of individual judges.⁶³

Simultaneously, the court has enthusiastically assumed an error-correction role, diluting the standard established for such extraordinary discretion.⁶⁴ Even if the adopted standard is to be accepted, it inclines more towards the potential injustice to a party, rather than the normative importance of such cases i.e. error-correction over norm-correction.⁶⁵ Further, the concerns raised by the Supreme Court in 2010 fell in deaf years despite the court seemingly adopting a “reasonable prospect of success” standard as opposed to the “exceptional circumstances” required under Article 136.⁶⁶ This begets the urgent requirement to guide the discretion under Article 136. Such attempts have been undertaken somewhat successfully in other domains (for instance, *Lalita Kumari* vis-à-vis registration of FIR(s),⁶⁷ *Arnesh*

⁶¹ *Pritam Singh v The State* 1950 SCR 453 ¶ 8.

⁶² HM Seervai, *Constitutional Law of India: A Critical Commentary*, Vol. 3 (4th edn, 2002) 2641; cited in Raesa Vakil, ‘(n 4) 371.

⁶³ Justice Ruma Pal and Samaraditya Pal (eds) MP Jain’s *Indian Constitutional Law*, Vol. 1 (6th edn, LexisNexis 2013) 318.

⁶⁴ Aparna Chandra, William H J Hubbard and Sital Kalantry, ‘The Supreme Court of India: A People’s Court?’ (2017) 1 *Indian Law Review* 145, 148-49.

⁶⁵ *Tarunabh Khaitan* (n 30) 6.

⁶⁶ *ibid.*

⁶⁷ *Lalita Kumari v State of Uttar Pradesh* (2014) 2 SCC 1.

Kumar pertaining to arrests⁶⁸). One of the ways to guide such discretion may be to identify types of cases that are to be excluded from Article 136.⁶⁹ This is also required to balance the need of individual rights with judicial efficacy that is interlinked to the larger public interest.

B. The National Court of Appeals

In 2016, the Supreme Court admitted an application seeking the establishment of a National Court of Appeal in different regions of India.⁷⁰ However, such an idea remains *firstly*, difficult to achieve and *secondly*, an undesirable objective. It is difficult to achieve as the establishment of such a court of appeal is a legislative function, as opposed to an internal procedure of the Supreme Court.⁷¹ Furthermore, it is an undesirable objective, as Chowdhury argues, as Supreme Court remains one of the few public institutions that enjoys public confidence, and hence, its ingrained characteristic of its unifying nature may be compromised through such a proposal.⁷² Moreover, given the

⁶⁸ *Arnesh Kumar v State of Bihar* (2014) 8 SCC 373.

⁶⁹ *Jahnavi Sindhu & Vikram Aditya Narayan* (n 17) 304.

⁷⁰ *V Vasanthakumar v H.C. Bhatia* (2016) 7 SCC 686.

⁷¹ Rishad Ahmed Chowdhury, 'Missing the Wood for the Trees: A Critical Exploration of the Supreme Court of India's Chronic Struggle with its Docket' Dissertation, The Faculty of Law, Chicago, Illinois (June 2016) 168; Harsh Tiwari, 'Beyond Jugaad: A Proposal for a National Court(s) of Appeal, *Law School Policy Review* (16 July 2019), available at <https://lawschoolpolicyreview.com/2019/07/16/beyond-jugaad-a-proposal-for-a-national-courts-of-appeal-part-i/> accessed on 2 December 2022.

⁷² *Ibid* 170-71.

Court's established reluctance to part with its powers under Article 136, it would only increase the overall docket of the Indian judiciary.⁷³

A variant of this proposal has been to establish regional benches of the Supreme Court itself without changing its characteristic roles.⁷⁴ While such a proposal may fulfill other goals (such as access to justice), it would only exacerbate the crisis of lowering the threshold under Article 136 and lead to varying jurisprudence between different benches, a problem identified with the polyvocal functioning of the court. Similarly, the division of powers between a Constitutional Court and a Courts of Appeal would result in similar, if not greater, problems being witnessed in the Supreme Court's error-correction intervention of the High Courts' decisions. This cannot be resolved by establishing a higher threshold of intervention, as has been the experience with the general jurisprudence under Article 136. Hence, the authors argue that a compositional change in the Supreme Court's structure may assist in realizing other objectives, however, exacerbates the SLP docket crisis.

*C. Specialised Benches, Proposed Board of SLPs and Other
Proposals*

The idea of specialized benches has found overwhelming support from practitioners as well as the research undertaken in other jurisdictions.⁷⁵

⁷³ Alok Prasanna Kumar *et al* (n 2) 23.

⁷⁴ Law Commission of India, 'Report No. 229: Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai' (2009).

⁷⁵ Alok Prasanna Kumar *et al* (n 2) 30-32.

The idea suggests allocating specialized benches for hearing SLPs categorized by subject matters: service matters, criminal matters, land laws, etc.⁷⁶ The Round Table Conference by Vidhi Centre for Legal Policy also advocated the engagement of subject-area experts in a structured manner (as *amicus curiae*) to assist in adjudication of disputes in specialized subject areas.

The Conference also suggested that the duration of oral hearings should be reduced.⁷⁷ While such a measure would be a step in the right direction, we believe it would be largely ineffective, as the existing time spent on oral hearing is already less and such a step would be difficult to implement, given the overarching influence and impact of Senior Advocates on admission of SLPs.⁷⁸ Amongst other suggestions, it has also implored the idea of dispensing oral hearings in certain matters, putting a page limit and formulating a National Litigation Policy (for government bodies).⁷⁹ All these changes could have been considered in *Mathai* and *Khoday Distilleries* and in the future, ought to be adopted by the Supreme Court to regulate its docket.

Taking a cue from the United States, greater engagement from young practitioners can benefit the Supreme Court in adjudicating greater number of SLPs. The Supreme Court of the United States (**SCOTUS**)

⁷⁶ Aparna Chandra, William H.J. Hubbard, and Sital Kalantry, 'The Supreme Court of India: An Empirical Overview of the Institution' Public Law and Legal Theory Working Papers, No. 660 (2018) 10.

⁷⁷ *B. Muthu Kumar* (n 7) 340-42.

⁷⁸ *Tarunabh Khaitan* (n 30); *Aparna Chandra et al* (n 54).

⁷⁹ *Alok Prasanna Kumar et al* (n 2).

appoints law clerks with the judges, whose opinion is relied upon by the judges. At least four out of nine judges need to agree to permit a review and may dismiss without reasons.⁸⁰ A similar model in the Indian context has been proposed wherein a Body would first receive the SLPs filed before the Supreme Court and ensure procedural compliance and render a preliminary opinion to the Court.⁸¹ Such a body is proposed to be established through the Supreme Court Rules and may comprise of retired Supreme Court judges, akin to the power conferred by Article 128 of the Indian Constitution and industry experts.⁸² Even if not an exact replication of the model, greater participation of young law students helps in fighting the backlog. While the Supreme Court judges may not be required to rely entirely upon the analysis of such law clerks, their analysis can lower the burden of the judiciary by effectively bringing out the crux of the case, and clarifying the underlying legal questions, so that all the ground-work is concluded. Consequently, the Supreme Court judges can apply their judicial mind to reach a conclusion. In order to ensure success of this mechanism, law clerks can be incentivized by offering competitive incentives.⁸³

⁸⁰ *B. Muthu Kumar* (n 7) 342.

⁸¹ Arthad Kurlekar & Jaimini Vyas, 'Special Leave Petitions, an Impediment to Justice: Need for Structural Changes to Ensure Efficient Time Allocation of the Court' (2014) 3 *Nirma U LJ* 87, 94.

⁸² *ibid* 95.

⁸³ *Alok Prasanna Kumar et al* (n 2) 24-25.

VII. CONCLUSION

At the heart of the dispute lies the question: equity for whom, the individual litigant or society at large?⁸⁴

The Supreme Court's disparate eagerness to perform the error-correction role has compromised its performance as a Constitutional Court. The concurrent spurt of SLP filings and the PIL jurisprudence depict a conscious role assumed by the Supreme Court and as data elicits, at the cost of its constitutional duty. The stubborn reluctance of the Supreme Court to frame guidelines in the exercise of its discretion under Article 136 has exacerbated the docket crisis.

While *Khoday Distilleries* resolves the specific conflict of maintainability of review petitions after the dismissal of an SLP by accurately siding with *Kunhayammed*, its narrower conception of doctrine of merger has a few consequences: it increases, if not keeps the same, the judicial docket and thereby, does not assist in the performance of the constitutional role. Moreover, the inconsistency post *Khoday Distilleries* has muddied the waters and brings forth the repeated cycles of litigation warned after the decision. This necessitates such interpretation to be coupled with a strict regulation under Article 136 and establishment of a National Court of Appeals or regional benches is not an appropriate substitute for such guidelines. Furthermore, this can be coupled with greater engagement of young

⁸⁴ Rishad Ahmed Chowdhury (n 39) 362; *State of Karnataka v Uma Devi* (2006) 4 SCC 1 ¶ 3.

practitioners, industry experts, specialized benches and regulation of oral and written submissions.

Lastly, as of now, the decision of *Khoday Distilleries case* is applicable as reiterated by the Delhi High Court in *National Highways Authority of India v. Guruvayoor Infrastructure Pvt. Ltd.*⁸⁵, that *Khoday Distilleries*, being the later judgment than *Deepak Khosla v. Montreaus Resorts Pvt. Ltd.*⁸⁶, and lays down the applicable law on determining the maintainability of any application once an SLP has been dismissed by the Hon'ble Supreme Court. In order to answer the question: equity for whom, the individual litigant or society at large, it must be realized that the attempt of the Supreme Court to perform error-correction role has compromised its performance as a constitutional court. Thus, the path to judicial efficiency and true systematic justice is not through any radical changes, but through regulation in exercise of discretionary powers under Article 136.

As Robert Frost would say,

*“Two roads diverged in a wood, and I—
I took the one less travelled by,
And that has made all the difference.”*

This difference can be achieved by taking the road less travelled i.e. by resolving procedural ambiguity, coupled with urgent, systematic

⁸⁵ *National Highways Authority of India v Guruvayoor Infrastructure Pvt. Ltd* 2024 SCC OnLine Del 7222.

⁸⁶ *Deepak Khosla v Montreaus Resorts Pvt. Ltd.* 2014 SCC OnLine Del 1301.

caveats to regulate the floodgates, along with the procedures laid down in *Khoday Distilleries*. The Supreme Court should maintain statistical reporting of SLPs, and ensure data driven transparency, as this would transfer the vague standard of ‘circumspection’ into a verifiable metric, providing a standard against which the Supreme Court can determine its efficiency in ensuring justice for all.

Thus, we conclude with the much-needed caveat that “while it is a mistake to deny a deserved SLP, it is a gross and inexcusable mistake to grant an undeserved SLP”.⁸⁷ Proper screening of SLP applications on pre-determined metric can ensure that judicial resources are preserved for the resolution of such constitutional and normative questions that will truly evolve the shape of our democracy in the years to come. This needs to be adopted as the standard and philosophy to deal with the docket crisis, in light of the existing jurisprudence.

⁸⁷ *B. Muthu Kumar* (n 7) 344.

ANNEXURE – I**TOTAL SLPs & PERCENTAGE OF SLPs AS PART OF TOTAL DOCKET****Data for Graph 1: Total SLPs Instituted per Year⁸⁸ (1960 – 2010)**

YEAR	TOTAL SLPs INSTITUTED
1960	1971
1965	2366
1970	3749
1975	4588
1980	15014
1985	21486
1990	18962
1995	22614
2000	20528
2005	27240
2010	41800

Data for Graph 2: SLPs as Per Cent of Supreme Court Docket⁸⁹ (1960 – 2010)

⁸⁸ Jahnavi Sindhu & Vikram Aditya Narayan, “Institution Matters: A critical analysis of the role of the Supreme Court of India and the Responsibilities of the Chief Justice”, Law and Politics in Africa, Asia and Latin America, 2018, Vol. 51, No. 3, Special Issue, The Indian Supreme Court in Crisis?” 301.

⁸⁹ ibid 302.

YEAR	TOTAL SLPs INSTITUTED (IN % TERMS)
1960	54
1970	54
1980	69
1990	85
2000	82.4
2010	85.9

ANNEXURE – II

TIME DURATION FOR SLPs

(Source: Tarunabh Khaitan)⁹⁰

TYPE	SAMPL E SIZE	MINIMUM (IN DAYS)	MEAN (IN DAYS)	MEDIAN (IN DAYS)	MAXIMU M (IN DAYS)
T2 – T1	1088	0	71	334	4227
T3 – T1	186	0	1602	1681	6338

T2 – T1 → Time taken from institution of SLP to decision on admission

⁹⁰ Tarunabh Khaitan (n 30).

T3 – T1 → Time taken from institution of SLP to final disposal, where such SLPs were admitted