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Active After Sunset: The Politics of Judicial Retirements in India*

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Abstract

Indian judges retire, but not into inactivity. Many pursue careers in government-appointed roles. Scaffolded around the concept of institutional corruption, this article interrogates the history, law and politics of the retirement careers of judges in India. Three questions take centre stage in this analysis: What types of careers do retired judges pursue? Why do they pursue them? How do judges' post-retirement ambitions impact their pre-retirement decisions? The cumulative analysis suggests that the Supreme Court of India, not specific judges, benches or decisions, is institutionally corrupt. The system of post-retirement jobs cycles like an economy of influence that is weakening the institution's effectiveness, especially its capacity for impartial adjudication in matters that involve governments. But the Indian court's performance and its public reception also reveal unique attributes that can enrich our general understanding of institutional corruption and separate the concept's essential features from its auxiliary ones.

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I Introduction: The Chief Justice Who Became A Lawmaker

A few months after he retired from the Indian Supreme Court in mid-November 2019, Ranjan Gogoi, the forty-sixth Chief Justice of India ('CJI'), became a member of Parliament.[1] The Narendra Modi government invited him to the Rajya Sabha, the Upper House of the Indian Parliament. The 250-member House includes 238 (indirectly) elected and 12 (government) nominated members.[2] Appointed for their knowledge of — or experience in — 'literature, science, art, and social

1. Arunachalam Vaidyanathan, 'Former Chief Justice Ranjan Gogoi Nominated To Rajya Sabha By President', *NDTV* (online, 17 March 2020) <www.ndtv.com/india-news/former-chief-justice-ranjan-gogoi-nominated-to-rajya-sabha-by-president-kovind-2195802>.
2. *Constitution of India art* 80(1) (*'Indian Constitution'*).

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service', nominated MPs are often dismissed as political cronies. On 24 March 2020, livid opposition benches walked off crying 'Shame! Shame!' just as the former CJI began reciting his (new) oath of office.[3]

The nomination unleashed a maelstrom of criticism. Critics alleged two types of wrongs. One group suggested that Gogoi, as CJI, had sold out. He delivered decisions favourable to the Modi administration in return for a post-retirement job.[4] In other words, it alleged that the CJI had been corrupt in the classic sense: he abused his public office for private gain. Most legal systems classify such conduct as crimes.[5] The former CJI punched back, brashly defending himself in a series of interviews.[6] His judgments, he reminded his audience, involved other judges. Because two or more judges congregate to hear cases in the Supreme Court, (illicit) deals with ministers could work only if a majority of judges agreed to them. If he was 'corrupt', then so were the judges who shared benches and decisions with him. He also mocked the idea of a deal because the alleged pay off — a nominated seat in Parliament — was too piddly. If his seat in Parliament had been some kind of post-retirement package, Gogoi asked, 'Would I have settled for membership of the Rajya Sabha?'[7] He demanded that journalists grant him 'a better sense of proportion'.[8] His new post offered meagre emolument: 'Your package is less or equivalent to the post-retirement [pension] package of a CJI, correct?' he said. 'You get accommodation which is four stages below what you got as the CJI. Give me some credit', he told a journalist.[9]

Another group asserted a different type of wrong. Perhaps the former CJI had delivered lawful and impartial decisions. But accepting a nominated seat invited misgivings about them.[10] It prompted doubts about judges' integrity and the independence of the judicial process.[11] Awarding judgments in favour of a government and then settling on its payroll post retirement risked damaging the court. CJI Gogoi's actions, in other words, this group alleged, harmed the judiciary, especially the Supreme Court.

Notice how the two groups differed. One — the former — cast Gogoi as venal: a judge who traded his decisions for a retirement post. His victims were litigants who (unjustly) lost in his court. The second group cast Gogoi as honourable and upright, it neither doubted his decisions nor alleged any injury to litigants in his court, instead, it focussed on the harm, a loss of trust, his actions had inflicted on the Supreme Court (and the judiciary in general). The first claim is undeniably an

3. TNN, 'Ranjan Gogoi takes Rajya Sabha Oath amid "shame on you" chant from opposition', *The Times of India* (online, 20 March 2020) <www.timesofindia.indiatimes.com/india/ranjan-gogoi-takes-rajya-sabha-oath-amid-shame-on-you-chant-from-opposition/articleshow/74721236.cms>.
4. The Wire Staff, 'In Unprecedented Move, Modi Government Sends Former CJI Ranjan Gogoi to Rajya Sabha', *The Wire* (online, 16 March 2020) <https://thewire.in/law/cji-ranjan-gogoi-rajya-sabha-nomination>.
5. *The Prevention of Corruption Act 1988* (India) (49 of 1988), s 7.
6. Raj Chengappa and Kaushik Deka, 'If I wanted a sinecure for my judgments, why would I ask for just a Rajya Sabha seat?', *India Today* (online, 27 March 2020) <www.indiatoday.in/magazine/interview/story/20200406-if-i-wanted-a-sinecure-for-my-judgments-why-would-i-ask-for-just-a-rajya-sabha-seat-1660091-2020-03-27>.
7. Shubhankar Dam, 'Second Innings' (February 2021) *The Caravan* 62, 67 ('Second Innings').
8. Ibid.
9. 'Ex CJI Ranjan Gogoi: My Nomination is service to the country, not a post retirement package', *LatestLaws.com* (online, 22 March 2020) <www.latestlaws.com/latest-news/ex-cji-ranjan-gogoi-my-nomination-to-rajya-sabha-is-a-service-to-the-country-not-a-post-retirement-package/>.
10. Liz Mathew, 'Ex CJI Gogoi has "compromised principles of independence, impartiality of judiciary": Justice Kurian Joseph', *The Indian Express* (online, 22 March 2020) <https://indianexpress.com/article/india/ex-cji-ranjan-gogoi-rajya-sabha-kurian-joseph-6318957/>.
11. Y K Kalia, 'Why post retirement jobs for judges is a bad idea?', *Tehelka* (online, 30 March 2020) <http://tehelka.com/why-post-retirement-jobs-for-judges-is-a-bad-idea/>.

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allegation of *individual* corruption. Is the second claim — actions that reduce trust and render the court less effective — symptomatic of some *other* type of corruption?

This article is about the politics of judicial retirements in India. Supreme Court judges retire at the age of 65, but they rarely disrobe into inactivity.[12] Instead, most busy themselves in new jobs: the market offers them an olio of options. One analysis suggests that, since 1999, 70 per cent of retired Supreme Court judges — 73 out of 103 — settled into a variety of government jobs.[13] CJI Gogoi's retirement post, in other words, did not breach any norm. Instead, his appointment illustrated a regular practice. How does this regularity — this *system* of jobs for retired judges — impact judicial decision-making in India? Are such jobs lures that governments dangle to entice judges? Have they affected judges' ability to decide cases faithfully? I deploy the frame of 'institutional corruption' to interrogate the Indian judiciary's retirement practices. The analysis does not fixate on individual judges, specific jobs, or odd judgments. Instead, it focuses on the chronic pattern of post-retirement jobs and its systemic influence on judges' pre-retirement decisions.

I posit two claims. One, the Indian Supreme Court is *institutionally corrupt*. Anecdotal and econometric evidence suggest that the lure of retirement government jobs has made the court vulnerable to state capture. Two, the Indian experience can assist in enriching the general theory of institutional corruption by sharpening the divide between its essential and auxiliary features. These two claims unfold in five parts. Part II outlines the idea of institutional corruption and how it originated in the United States. Part III introduces a typology of retirement careers for Supreme Court judges in India. It catalogues what retired judges do — how they strive — and explains why some post-retirement ambitions provoke more disquiet than others. Part IV investigates India's early anxieties over retired judges in public life. The Constituent Assembly, the body that drafted the *Indian Constitution* ('*Constitution*'),[14] deeply engaged with the issue but settled in favour of letting them hold retirement posts. After the *Constitution* came into effect in 1950, MPs pressed the government to revisit that original pact. Indeed, I suggest that the idea of institutional corruption is of Indian vintage. Decades before American scholars defined the concept, a crew of Indian legislators articulated its broad outlines to justify banning retirement jobs for judges. Part V excavates how the practice crystallised into a norm in India, and marshals anecdotal and empirical evidence to demonstrate the harm it has wrought. Part VI reveals how the Indian account can enrich the broader scholarship on institutional corruption both in law and allied disciplines.

II What is Institutional Corruption?

In 1995, Dennis Thompson coined the term 'institutional corruption' to explain how (parasitic) external influences had compromised the US Congress and made it systematically deviate from its proper purpose.[15] Lawrence Lessig expanded the idea, initially defining it as 'an economy of

12. *Indian Constitution* (n 2) art 124(7).
13. Apoorva Mandhani, 'Ranjan Gogoi RS seat made big news in 2020. But he is among 70% SC judges with retirement gigs', *The Print* (online, 4 January 2021) <https://theprint.in/judiciary/ranjan-gogoi-rs-seat-made-big-news-in-2020-but-he-is-among-70-sc-judges-with-retirement-gigs/576154/> ('Gogoi RS Seat'). Judges who do not secure government post-retirement jobs pursue several other options. See Part II of this analysis.
14. *Indian Constitution* (n 2).
15. Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution Press, 1995) ('*Ethics in Congress*'). See also Dennis Thompson, 'Mediated Corruption: The Case of the Keating Five' (1993) 87(2) *American Political Science Review* 369.

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influence that weakens the effectiveness of an institution, especially by weakening public trust of that institution'.[16] Later, he articulated a thicker account, describing it as the result of

> a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.[17]

Three elements are central to Lessig's version of institutional corruption. One, purpose: only institutions with purposes can be corrupted. But Lessig does not specify what purposes institutions must have or how to identify them.[18] His definition is an agnostic one: If some institutions do not have purposes, they cannot be corrupted in this sense of the term.[19] Two, influences: only systemic — 'regular and predictable' — and strategic influences can produce institutional corruption.[20] Other influences do not count. Third, impact: institutions stand corrupted when systemic and strategic influences undermine their proper purposes and render them ineffective. Crucially, Lessig's definition recognises shades of ineffectiveness. Some types of deviations may *weaken* institutions' ability to achieve their purposes while others may render them impossible.[21] So the definition accommodates the possibility of in-between cases: institutions may be simultaneously clean (with respect to some purposes) and corrupt (with respect to other purposes). Lessig highlights one specific impact: loss of institutional trust. 'Some institutions, such as the institution of public health, require that the public trust its recommendations. Influences that make it more difficult to trust the recommendations of the institution are therefore corruptions of it'.[22]

The idea of institutional corruption stands in contrast to *personal* corruption.[23] The latter focuses on specific individuals, wrongs and punishments. Criminal law is closely associated with this type of corruption. In contrast, the former obsesses with systemic incentives and patterns. Thompson deployed his version of institutional corruption to 'look for reforms that change structures and incentives rather than increase punishments and denunciations of individuals'.[24] Also, it focuses on behaviour that is 'legal, or even currently ethical'.[25] Both Thompson and Lessig are more interested in the structures and incentives that enable otherwise good people to do harm without any 'sinning'.[26] This is a key distinction: of the two types, only the field of personal corruption deals with conduct that is illicit.

16. Memorandum by Lawrence Lessig, 'Request for Proposals for the Lab "Project on InstitutionalCorruption"', Harvard University 3 (12 Nov 2010) (on file with author); Lawrence Lessig, 'Institutional Corruptions' (2013) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233582> ('*Institutional Corruptions*').
17. Lawrence Lessig, 'Forward: "Institutional Corruption" Defined' (2013) 41(3) *Journal of Law, Medicine & Ethics* 553, 553 ('Institutional Corruption Defined').
18. Ibid 554.
19. Lessig, 'Institutional Corruption Defined' (n 17) 554.
20. Ibid 553.
21. Ibid 554.
22. Ibid.
23. For an account of the conceptual distinctions between the two approaches see Jacob Eisler, 'Conceptualising Corruption and the Rule of Law' (2021) 85(2) *Modern Law Review* <https://doi.org/10.1111/1468-2230.12694>.
24. Dennis Thompson, 'Two Concepts of Corruption' (2013) *SSRN Electronic Journal* 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304419> ('Two Concepts').
25. Lessig, 'Institutional Corruption Defined' (n 17) 553.
26. Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress — And A Plan To Stop It* (Twelve, 1st ed, 2011) ('*Republic, Lost*').

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First Thompson and then Lessig developed their analyses to account for corruption in the US Congress. For Thompson, a legislature lapses into institutional corruption if it is subject to 'patterns of political influence' that are 'clearly irrelevant to any process of deliberation'.[27] He regards catering to such influences 'improper'.[28] Legislators are 'independent' of improper influences if they consider policies on their merits or whatever they reasonably understand the merits to be. Lessig adopts a different approach. He brands a legislature institutionally corrupt if it does not debate or enact laws that are consistent with the public's expressed policy preferences.[29] In *Republic, Lost*, he surveyed a host of policy agendas and their current reception in Congress: eradicating subsidies on corn (and corn syrup);[30] taxing carbon pollution;[31] firing inept public-school teachers;[32] regulating the banking and financial sector.[33] Despite widespread support among voters, these issues do not feature on Congress' legislative agenda.[34] Instead, the body spends time debating issues ('agenda distortion') and enacting outcomes ('substantive distortion') that deviate from the voters' documented wishes.[35] Lessig brands these distortions institutional corruption: a state of affair lobbyists have cultivated through their systemic influence over the legislative process.[36]

Lessig's account of institutional corruption has inspired a wave of scholarship on the subject. Researchers have deployed the concept to analyse corruption in both public and private settings including political parties,[37] arms manufacturers,[38] consulting firms,[39] financial institutions,[40] rating agencies,[41] think tanks,[42] medical research,[43] pharmaceuticals[44] and beyond. This expansive application has also invited criticisms. Some have suggested that the concept's distinctiveness lies in applying it only to institutions with 'obligatory purposes', that is, purposes for which institutions *must* conduct activities in order to avoid wronging others.[45] Obligatory

27. Thompson, '*Ethics in Congress*' (n 15) 20−1.
28. Ibid 25.
29. Lessig, '*Republic, Lost*' (n 26) 151–2.
30. Ibid 42–52.
31. Ibid 53–60.
32. Ibid 61–6.
33. Ibid 67–86.
34. See, eg, Martin Gilens, 'Inequality and Democratic Responsiveness' (2005) 69(5) *Public Opinion Quarterly* 778; Martin Gilens, 'Preference Gaps and Inequality in Representation' (2009) 42(2) *PS, Political Science & Politics* 335.
35. Lessig, '*Republic, Lost*' (n 26) 151–2.
36. Ibid 89–171.
37. See, eg, Timothy Winters, 'Political Finance in the United Kingdom' (2013) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317505>.
38. Alexandra Gliga, 'US Defense and Institutional Corruption' (2014) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534079> ('US Defense').
39. Jay Youngdahl, 'Investment Consultants and Institutional Corruption' (2013) *SSRN Electronic Journal* <http://ssrn.com/abstract=2255669>.
40. Jamus Jerome Lim and Terence Tan, 'Endogenous Transactions Costs and Institutions in the 2007/08 Financial Crisis' (2015) *SSRN Electronic Journal* <http://ssrn.com/abstract=2606295>.
41. Justin O'Brien, 'Culture Wars: Rate Manipulation, Institutional Corruption, and the Lost Underpinnings of Market Conduct Regulation' (2013) *SSRN Electronic Journal* <http://ssrn.com/abstract=2277172>.
42. J H Snider, 'Think Tanks' Dirty Little Secret: Power, Public Policy, and Plagiarism' (2013) *SSRN Electronic Law Journal* <http://ssrn.com/abstract=2307250>.
43. Barbara K Redman, 'Are the Biomedical Sciences Sliding Toward Institutional Corruption? And Why Didn't We Notice It?' (2015) *SSRN Electronic Journal*. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585141>.
44. Marc Rodwin, 'Independent Drug Testing to Ensure Drug Safety and Efficacy' (2015) 18 *Journal of Health Care Law & Policy* 45.
45. M E Newhouse, 'Institutional Corruption: A Fiduciary Theory' (2014) 23(3) *Cornell Journal of Law and Public Policy* 553 <http://scholarship.law.cornell.edu/cjlpp/vol23/iss3/2>.

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purposes are evident in fiduciary contexts. They involve persons or organisations ('agents') acting on others' behalf ('principals') by exercising discretion over 'critical resources' that belong to the latter.[46] Typical fiduciary relationships include lawyers and clients, doctors and patients, guardians and wards, corporate boards and shareholders, trustees and beneficiaries. Fiduciaries must commit to purposes that principals set. And institutional corruption manifests when systemic and strategic influences — not honest mistakes or errors in judgment — cause fiduciaries to breach those commitments.[47]

I extend this framework to the Indian judiciary, especially its Supreme Court.[48] Judiciaries are fiduciaries, as judicial power is a form of public trust.[49] Judges promise to

> bear true faith and allegiance to the Constitution of India … [and] duly and faithfully and to the best of [their] ability, knowledge and judgment perform the duties of … office without fear or favour, affection or ill-will and that [they] will uphold the Constitution and the laws.[50]

Deciding cases faithfully without fear or favour 'according to' the Constitution and the laws — acting independently — is their obligatory purpose. As Lessig puts it, judicial independence requires a specific form of *dependence*, that is judges must be 'dependent upon the law'.[51] He adds: 'Dependence in this sense can be productive, if it binds the incentives of a person or an institution to the right sort of focus, and staunches that person or institution against the wrong sort of focus'.[52] I investigate how retirement practices in India have facilitated a 'wrong sort of focus' and incentivised judges, especially Supreme Court judges, to generate legal interpretations and outcomes that pander to governments. Avenues for post-retirement jobs, I argue, act as a systemic and strategic influence that is weakening the court's ability to achieve its obligatory purpose. The Indian Supreme Court, in that sense, satisfies the conditions of institutional corruption.

III Sunset Options: A Typology of Retirement Careers

India has a unitary judicial system. The Supreme Court and the 26 High Courts constitute the higher judiciary; these constitutional bodies command powers to issues writs and punish for contempt of courts.[53] Positioned below them in the hierarchy is a web of trial courts, civil courts, revenue courts and tribunals.[54] Together, they constitute India's lower (or subordinate) judiciary. These statutory bodies are usually regulated by the states. This analysis only concerns retirement practices of Supreme Court judges. But the structure of incentives described here applies, to a large degree, to the High Court and lower court judges, too.

46. Smith Gordon, 'The Critical Resource Theory of Fiduciary Duty' (2002) 55(5) *Vanderbilt Law Review* 1399, 1404.
47. Michael Pierce, 'Divided Loyalties: Using Fiduciary Law to Show Institutional Corruption' (2013) *SSRN Electronic Journal* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313321>.
48. For an international perspective, see Eduardo Gusmão Alves de Brito Neto, 'The Suspension of Preliminary Injunctions in Brazil: An Example of Institutional Corruption' (2014) *SSRN Electronic Journal* <http://ssrn.com/abstract=2534092>.
49. See, eg, *Central Public Information Officer, Supreme Court of India v Subhas Chandra Agarwal* (2020) 5 SCC 481 (Chandrachud J. para 250).
50. *Indian Constitution* (n 2) sch 3.
51. Lessig, 'Institutional Corruptions' (n 16) 13.
52. Ibid.
53. *Indian Constitution* (n 2) art 32(1).
54. Ibid art 227(1).

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Upon retirement, a buffet of career options awaits India's Supreme Court justices.[55] Some judges pick careers in academia and authorship. Judicial training institutions — the National Judicial Academy and its state clones — employ them as experts, and law universities also hire them.[56] Others attempt monographs, textbooks and annotated commentaries. The monographs, mostly on constitutional law, can fill a library, but only a handful are classics of legal scholarship.[57] Commercial publishers also market retired judges as editors of law textbooks and practitioner commentaries.

A second crop of superannuated judges remain with the court. Article 128 of the *Indian Constitution* authorises the CJI, with the President's consent, to 'request any person who has held the office of a Judge of the Supreme Court' to return to the post on an ad hoc basis.[58] In its sunrise years, the Court rehired a few retired judges for brief periods — including Justices Chandrasekhara Aiyar, Vivian Bose and Venkatarama Ayyar. Judge Aiyar, for instance, retired on 24 January 1953 but returned to the bench on 5 September 1955. He retained his office till 11 May 1956 except for a short break in November 1955.[59] Now, though, Article 128 is effectively dead. Since the 1990s, the Supreme Court has not invoked the provision.

Instead, the Court has invented other ways to enlist retired judges. In some cases, it involves them in matters under litigation. In 2016, for example, the Court appointed Vikramjit Sen, a former judge, to settle a complex series of claims between property developers and home buyers.[60] In 2021, as an interim measure in another matter, the Court appointed an 'Overseeing Committee' under BN Srikrishna, a retired judge, to administer the Gokarna Mahabaleshwar Temple in the state of Karnataka in Southern India.[61] In other instances, the Court commissions judges to proffer policy advice or monitor the conduct of certain parties. In 2012, a surgeon named S Rajaseekaran petitioned the Supreme Court to act against one of India's giant public assassins — roads.[62] Archaic laws, he alleged, were strewing Indian streets with needless bodies. The Supreme Court instituted a committee on road safety led by KPS Radhakrishnan, a retired judge, to audit the corpus of motor-vehicle laws in India.[63] The mandates of other such committees have included improving the capital's savage air pollution,[64] disinfecting the administration of the Medical Council of India

55. A version of this typology was first presented in Shubhankar Dam, 'Commissions of Untruth: The Politics of India's ad-hoc Judicial Inquiries', *The Caravan* (online, 1 August 2021) <https://caravanmagazine.in/politics/judicial-commission-inquiry-judges-independence> ('Commissions of Untruth').
56. Examples include Rajendra Babu (MK Nambiar Chair on Constitutional Law, National Law School of India University, Bengaluru); Ruma Pal (Ford Foundation Chair Professor on Human Rights, National University of Juridical Sciences, Kolkata).
57. See, eg, Mohammad Hidayatullah, *Democracy in India and the Judicial Process* (Asia Publishing House, 1966); Koka Subba Rao, Some Constitutional Problems (University of Bombay, 1970); Janardan Raghunath Mudholkar, Press Law (Eastern Law House, 1975); Jayantilal Chhotalal Shah, *The Rule of Law and the Indian Constitution* (NM Tripathi, 1972).
58. *Indian Constitution* (n 2) art 128.
59. George Gadbois, J*udges of the Supreme Court of India: 1950–1989* (Oxford University Press, 2011) 34 ('Judges 1950–1989').
60. *Okhla Enclave Plot Holders Welfare Association v Union of India* (2016) SCC OnLine SC 1844. See also *Okhla Enclave Plot Holders Welfare Association v Union of India* (2019) 9 SCC 572.
61. NA, 'SC Orders Handing Over of Mahabaleshwar Temple Management to Panel Headed by Ex-Judge', *Outlook* (New Delhi, 19 April 2021) <https://www.outlookindia.com/newsscroll/sc-orders-handing-over-of-mahabaleshwar-temple-management-to-panel-headed-by-exjudge/2067609> accessed on 9 November 2021.
62. S. *Rajaseekaran v Union of India* (2014) 6 SCC 36.
63. Ibid [35].
64. Krishnadas Rajagopal, 'Stubble Burning | Former Supreme Court Judge Madam Lokur, Aided by Students, to Save Delhi — NCR', *The Hindu* (online, 16 October 2020) <https://www.thehindu.com/news/national/sc-appoints-ex-judge-mb-lokur-as-one-man-panel-to-prevent-stubble-burning/article32870489.ece>.

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(especially the approval process for establishing new medical colleges),[65] and revamping the administration of the Board of Control for Cricket in India.[66]

A third cohort of judges pursue lucrative careers in private consulting. (A few engage in human-rights activism and advise NGOs.) Such consulting takes two main forms — providing chamber advice (written opinions for a fee) and conducting arbitrations. Among retired Supreme Court judges, rates for chamber advice vary between USD7,000 and 14,000 per opinion.[67] Among retired CJIs — a more exclusive club, rates range between USD14,000 and 28,000 per opinion.[68] Corporate houses and public-sector units voraciously consume such chamber advice. Also, litigants append these opinions to their case briefs, eager to impress sitting judges about the correctness of their arguments. Occasionally, this practice has attracted the Court's ire. In January 2012, Grenadiers Association, the petitioner in a case annexed chamber advice from four retired CJIs to bolster its arguments.[69] Judges hearing the matter castigated the litigant's conduct and directed the registry to decline petitions with similar annexures in the future.[70]

Then there is arbitration, a dispute-resolution method commercial houses deploy to bypass India's arduous legal system. The roster of the Indian Council of Arbitration, a leading agency, lists over 30 former Supreme Court judges among its empanelled arbitrators.[71] But arbitral career graphs vary wildly, as some judge-arbitrators relish astounding success while others stare at empty desks. What explains the contrast? The back alleys are thick with rumours of enterprising judges and lawyers courting one another.[72] In 2010, Common Cause, a New Delhi-based NGO, petitioned the Delhi High Court to proscribe retired judges from providing chamber advice and conducting arbitrations under specific circumstances. The Court dismissed the matter with mild directions to the central government to develop rules for regulating post-retirement activities of judges.[73]

A fourth set of former judges resume public service on tribunals — specialised bodies with simpler procedures than the courts, but with similar functions. Today, they form an entire menagerie: the Armed Forces Tribunal, the Central Administrative Tribunal, the Food Safety Appellate Tribunal, the Industrial Tribunal, the National Green Tribunal, the Telecom Disputes Settlement and Appellate Tribunal, and many more.[74] In 1976, Parliament amended the *Constitution*, adding

65. *Modern Dental College and Research Centre v Union of India* (2016) 7 SCC 353. The court set up a three-member committee that includes former Chief Justice of India, RM Lodha, and two retired judges, Ashok Bhan and RV Raveendran. Ironically, the committee's functioning attracted criticisms and it disbanded itself a year after its formation. See Rama Lakshmi, 'Lodha Committee on Medical Education Shut Shop Days Before Govt Snub' *The Print* (online, 8 June 2007) <https://theprint.in/report/lodha-committee-on-medical-education-shut-shop-days-before-govt-snub/1183/>.
66. *Board of Control for Cricket in India v Cricket Association of Bihar* (2015) 3 SCC 251.
67. Dhananjay Mahapatra, 'A Retired SC Judge Can Get Paid More in 2 Hours Than a Serving One in One Month', *The Times of India* (online, 11 July 2021) <https://timesofindia.indiatimes.com/india/a-retired-sc-judge-can-get-paid-more-in-2-hours-than-a-serving-one-in-a-month/articleshow/84307245.cms>.
68. Ibid.
69. 'Apex Court Upset at Former Judges Giving Opinion on Matters', *Deccan Herald* (online, 29 January 2012) <https://www.deccanherald.com/content/222885/apex-court-upset-former-judges.html>.
70. Ibid.
71. 'Panel of Arbitrators-As on 27.09.2021', *Indian Council of Arbitration*, (Web Page) <https://www.icaindia.co.in/oct-15-2021/New-JUDGES.pdf>.
72. See Sudhanshu Ranjan, *Justice Versus Judiciary: Justice Enthroned or Entangled in India?* (Oxford University Press, 2019) 298–99 ('*Justice Versus Judiciary*').
73. *Common Cause v Union of India* (2015) SCC OnLine 14003.
74. For an introduction to the tribunal system in India, see VIDHI Centre for Legal Policy, *Reforming the Tribunals Framework in India: An Interim Report* (Report, 11 June 2018) <https://vidhilegalpolicy.in/research/2018-6-11-reforming-the-tribunals-framework-in-india-an-interim-report-1/>.

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Articles 323A and 323B to authorise an elaborate system of tribunals in India.[75] Its original promise was to deliver fast and friendly justice beyond overburdened courtrooms. But governments have kept tribunals in a stranglehold, closely monitoring their workings and appointments to them.[76] This clash continues. In a series of decisions, the Supreme Court has outlined its approach to tribunals and ordered a set of procedures meant to ensure greater independence.[77] The Modi government responded with a new law — the *Tribunals Reforms Act 2021* — ignoring the Court's directions.[78] The legislative changes, once again, are under challenge.[79] But the system of tribunals and the culture of appointing superannuated judges to them continue. Of the 100 or so Supreme Court justices who retired between 2000 and 2020, almost 40 resettled in tribunals.[80] These appointments are symbiotic, as they prolong judges' public careers and lend the forums a measure of judicial legitimacy.

A fifth corps of retired judges savour a buffet of discretionary positions. Some are political or advisory while others are constitutional. Prime Minister Jawaharlal Nehru inaugurated the practice of inviting judges to this banquet. In 1952, he appointed Sir Saiyid Fazl Ali, one of India's original Supreme Court justices, as the governor of the state of Orissa.[81] Sir Saiyid was still a judge when Nehru announced his decision, and ethics enthusiasts grumbled about the indiscretion. But Nehru persisted, feting Sir Saiyid and others with a bevy of post-retirement jobs. He made them governors and ambassadors, placed them in university administrations and tasked them with running advisory commissions and investigative ones. These early retirees did it all: reorganise states into linguistic units (Sir Saiyid), settle boundary disputes among states (MC Mahajan), probe ministerial malfeasance (SR Das), interrogate bureaucratic bungling (SK Das), investigate corporate corruption (Vivian Bose) and tender policy recommendations (Venkatarama Aiyyar).[82] The trend has only accelerated. Prime Minister Nehru's inaugural practice is now the republic's abiding habit.

A final squadron of former judges fight political — electoral — battles in their retirement years. Former CJI K Subba Rao was among the first lot of Supreme Court judges to attempt a post-retirement career in electoral politics.[83] CJI Rao abruptly resigned on 11 April 1967 and became the anti-Congress opposition's candidate for the presidency of India.[84] He lost to Prime Minister Indira Gandhi's Congress nominee Zakir Hussain. In the 1970s, other judges followed Rao's precedent. In 1977, KS Hedge, a Supreme Court judge who had resigned in 1973 to protest Prime Minister Gandhi's meddling in judicial affairs, contested elections as part of an anti-Congress coalition.[85] He won, and served as the Speaker of the Lower House between 1977 and 1979. Hans Raj Khanna, another Supreme Court judge who had also resigned from office, became the Union Minister of

75. *The Constitution (Forty-Second Amendment) Act 1976* (India) s 46.
76. See Arvind P Datar, 'Tribunals: a Tragic Obsession' *Seminar Magazine* (online, February 2013) <https://india-seminar.com/2013/642/642_arvind_p_datar.htm>.
77. See *Union of India v R. Gandhi* (2010) 11 SCC 1; *Madras Bar Association v Union of India* (2014) 10 SCC 1; Madras Bar Association v Union of *India* (2015) 8 SCC 583; *Madras Bar Association v Union of India* (2020) 6 SCC 247.
78. *Tribunals Reforms Act 2021* (India) Act No 33 of 2021.
79. Arpan Chaturvedi, 'Jairam Ramesh Case: Tribunals Issue Reaches the Supreme Court, Again', *BQ Prime* (online, 26 August 2021) <https://www.bloombergquint.com/law-and-policy/jairam-ramesh-case-tribunals-issue-reaches-the-supreme-court-again>.
80. Mandhani, 'Gogoi RS Seat' (n 13).
81. Gadbois, 'Judges 1950–1989' (n 59) 22.
82. Dam, 'Second Innings' (n 7) 57.
83. Gadbois, 'Judges 1950–1989' (n 58) 77−8.
84. Ibid.
85. Ibid 131−2.

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Law, Justice and Company Affairs in the Charan Singh government.[86] He quit after 3 days in office. In 1982, Khanna stood as the united opposition's candidate for the presidency of India, but lost to the Congress party's nominee Zail Singh.[87] Other judicial names on electoral rolls include Bahrul Islam (elected to the Upper House as a Congress party candidate) and VR Krishna Iyer (the anti-Congress opposition's nominee for the presidency of India — a contest he lost).[88]

These six pathways — academia, court assignments, arbitration, tribunals, discretionary appointments and electoral politics, offer retired judges an eclectic suite of options. But they are not exclusive; often judges do several things at once. Our focus is on the link, if any, between judges' post-retirement ambitions and their pre-retirement decisions from the bench. Some careers, especially academia or court assignments, do not raise alarm; they seem innocuous. Still, questions remain. Why does the Court engage some retired judges with assignments, not others? Consider retired judge BN Srikrishna's appointment as the head of the 'Overseeing Committee' of the Gokarna Mahabaleshwar Temple. Why was he entrusted with this assignment? Srikrishna is a Karnataka native, but rarely resides in the state. Active in the international commercial arbitration circuit and involved in several government panels, he already commands a hectic retired career.[89] Yet, the Court appointed him. What made him especially suitable for such an appointment? We do not know. The Supreme Court rarely justifies its ad hoc appointments. Other post-retirement careers, especially government appointments to tribunals and political offices, incite frequent storms of commentary.[90] Some welcome them. Appointing retired judges, they insist, guarantees tribunals a measure of functional independence. But others are less sanguine. They regard the system of judicial post-retirement appointments as a lure. Governments, they argue, entice sitting judges with the prospect of retiral jobs to decide in their favour.[91]

This is an old debate. When — at what age — Supreme Court judges should retire and what careers, if any, they should pursue attracted intense scrutiny during the framing of the *Indian Constitution*. The next section analyses India's founding debate on post-retirement careers of judges and excavates the political origins of the republic's obsession with retired judges.

IV Retirement Anxieties: Provisions, Practices, Politics

On 24 May 1949, the Constituent Assembly debated provisions concerning India's future Supreme Court.[92] Two matters — age of retirement and post-retirement careers — attracted acrimonious exchanges. An early retirement age, especially without a guaranteed pension, risked tempting judges into post-retirement careers. Conversely, delaying the age of retirement coupled with generous pension could deliver judges from financial insecurities in their sunset years. The draft Constitution, one the Assembly debated, attempted to balance the competing concerns. On retirement age, it suggested that '[E]very Judge of the Supreme Court shall … hold office until he attains the age of sixty-five years'.[93] On post-retirement careers, it proposed that '[N]o person who

86. Ibid 173.
87. Ibid 173–4.
88. Ibid 216.
89. Apurva Vishwanath, 'What Makes Srikrishna Every Government's Favourite Retired Judge', *The Print* (online, 29 July 2018) <https://theprint.in/india/governance/what-makes-srikrishna-every-governments-favourite-retired-judge/89558/>.
90. Dam, 'Commissions of Untruth' (n 55) 60.
91. Ibid.
92. Constituent Assembly of India, *Constituent Assembly Debates (Proceedings-Volume VIII)*, 16 May 1949–16 June 1949, 220 ('CAD').
93. Ibid.

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has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India'.[94] These proposals and their implicit balance riled some in the Assembly. Disgruntled members pitched three groups of amendments on each topic, eager to strike a different balance.

A *Original Concerns: The Idea of Retirement Jobs as Temptations*

The debate on retirement age centred around three models. Some members — Bahadur Pocker Sahib is a prominent example — suggested raising the retirement age to 68 years.[95] He argued that compulsorily retiring Supreme Court judges at 65 would deprive India of the service of fit and able judges.[96] Besides, judges of the (then functioning) Federal Court — India's highest court, and the chief justices of the various High Courts, in a memo to the Assembly, had recommended 68 as the appropriate retirement age.[97] Sahib supported their stand.

Other members — Jaspat Roy Kapoor is a leading example — advocated reducing the retirement age to sixty.[98] In 1949, public servants in India retired at 55. The age of 60, Kapoor pointed out, gave judges additional years in service.[99] Crucially, he believed that anyone 'who … [had] earned handsomely from the Government up to the age of sixty years should be prepared to retire and serve the society thereafter in an honorary capacity'.[100] That approach was consistent with ideas of renunciation in Hinduism, and Kapoor wanted India's future judges to emulate those ideals.[101]

Lastly, a few members — Kushal Talaksi Shah is the chief example — championed abandoning any retirement age for judges. Inspired by life-term appointments of federal judges in the United States, Shah proposed an alternative to the draft provision:

> Every judge of the Supreme Court shall be appointed by the President … and shall hold office during good behaviour or until he resigns … [and] be entitled to such pension as may be allowed under the law passed by the Parliament of India for the time being in force.[102]

Such appointments, unlimited by term or time, he insisted, would 'secure the absolute independence of the judiciary'.[103] And a guaranteed provision for pension, he added, would obviate retired judges' need to resume 'ordinary practice at the bar' or pursue occupations incompatible 'with a judicial mentality' or out of 'tune with their perfect independence and integrity'.[104]

Another member — PK Sen, a retired High Court judge — supplemented Shah's proposal on pension with his own amendment. Enabling judges to resign on health grounds 'free from fear or temptation' and free from 'executive or political allurements' was crucial, he emphasised.[105]

94. Ibid.
95. CAD (n 92) 232.
96. Ibid 233.
97. Memorandum representing the views of the Federal Court and of the chief justice representing all the Provincial High Courts of the Union of India (March 1948); B Shiva Rao et al., *The Framing of India's Constitution, Select Documents*, vol IV (The Indian Institute of Public Administration 1966) 195.
98. CAD (n 92) 236.
99. Ibid.
100. Ibid 237.
101. Ibid.
102. Ibid 235.
103. Ibid.
104. Ibid.
105. Ibid 238.

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A failure to guarantee such pension, he warned, 'will affect [a judge's] attitude of mind while he is out of office and retired, *but it is bound to affect his attitude while he is in office, because he will try and look for something which he may get for the purpose of saving him from penury*'.[106] The spectre of poverty in post-retirement years, Sen feared, would affect judges' pre-retirement decisions.

This concern soon became the topic of a direct, animated debate. The draft provision had proposed to ban ex-judges only from pleading or acting in 'any court or before any authority in the territory of India'. Assembly members responded with three clusters of objections. One cluster recommended *expanding* the arc of the ban. Shah, for example, suggested a blanket restriction on retired Supreme Court and High Court judges holding 'any executive office under the Government of India or under that of any [state] unit'.[107] This, he underscored, would deny the executive avenues to tempt judges 'with greater emoluments or prestige' in their retirement years.[108] Kapoor supported Shah's idea, but advocated his own proposal: 'No judge of Supreme Court shall be eligible for further office of profit either under the Government of India or under the Government of any State after he has ceased to hold his office'.[109] His suggestion distinguished paid assignments from honorary ones. He only opposed the former. Consistent with his arguments about reducing the retirement age and encouraging pro bono service to society, Kapoor welcomed the idea of deploying retired judges in unpaid positions.[110]

Sen, the retired judge, joined this chorus with a suggestion to bar both sitting and retired judges from '*any* [other] office of emolument under the Government of India or a State'.[111] He narrated the

> the spectacle of a man … who [had] been a Judge of a High Court, then a Member of the Executive Council of the Governor-General of India, then back again to his province as a Member of the Executive Council of the Province, and further again transported to the Bench of the High Court.[112]

Independent India, he demanded, should disallow such judicial promiscuity. Some members — BD Das and BT Chand, for example — lent his idea enthusiastic support. Chand, also a retired justice, lamented the behaviour of some British judges, reminding the Assembly of an occasion in which a Federal Court judge — the highest court in India then — assumed political and diplomatic roles as a member of the War Cabinet and 'carried on propaganda of a highly communal character'.[113]

A second cluster of objections suggested *limiting* the arc of the ban. K Santhanam's proposal is instructive here. A complete ban on retirement opportunities for judges, he felt, was unfeasible. Because retired judges 'may be the fittest persons' to hold enquiry or other commissions, he urged a ban on ex-judges from holding 'offices of profit' without the President's approval. 'I want to prevent Supreme Court Judges from taking office in private companies such as Chairman of the Board of Directors etc', Santhanam said.[114] He added: 'This is absolutely essential if we want to keep our judiciary beyond all possibility of temptation'.[115] MA Ayyangar, Santhanam's colleague, supported

106. Ibid 239 (emphasis added).
107. Ibid 239–40.
108. Ibid 240.
109. Ibid.
110. Ibid 241.
111. Ibid (emphasis added).
112. Ibid 239.
113. Ibid 265.
114. Ibid 244–5.
115. Ibid.

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this bid, and urged the Assembly to deprive future judges any opportunity of 'selling' justice.[116] He was against the idea of judges deciding 'in favour of a particular person and then [joining] his service'.[117]

A final cluster of objections recommended *abolishing* the proposed ban on retirement opportunities. Mohammed Tahir's claim is a good example. Enacting a Constitution which makes judges 'with enough ability and capacity … unable to do what [they] want to do', he reasoned, was 'quite unjustified'.[118]

Shah, Sen, Santhanam and others marshalled anecdotes and analogies to nudge the Constituent Assembly into banning retirement jobs for judges. They crowded around the idea of *temptation*: Public and private entities dangling retirement jobs before judges and diminishing their ability to decide cases independently. Shah and Sen feared governments tempting sitting judges with sunset jobs; Santhanam feared corporate houses doing the same.

Bhimrao Ambedkar, the chairman of the Constitution's Drafting Committee, dismissed these concerns.[119] He said: 'The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government'.[120] So the chances of a government influencing the conduct of a judge, Ambedkar concluded, were 'very remote'.[121] Besides, the Constitution, he added, should not forbid governments from employing judicial talent in specialised forms — presumably referring to tribunals and investigative commissions.[122] His influence prevailed. When put to vote, the Constituent Assembly rejected all amendments altering the suggested age of retirement. The original proposal — retirement at the age of sixty-five — stood confirmed. Similarly, amendments altering the ban on post-retirements jobs also failed. Draft Article 103(7) became Article 124(7) of the *Indian Constitution*: 'No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India'.

The precise limits of Article 124(7) stayed undiscussed. Its words — especially the idea of pleading *before* any authority — conjures up mental images of judges standing in front of an authority, seeking relief. A hierarchy is central to these images: judges on a lower ground pleading before a higher authority. This approach suggests that Article 124(7) only prohibits retired judges from appearing as counsels — as supplicants — in courts or elsewhere. Former judges, in other words, cannot plead like lawyers; they can do everything else. We can call this the 'expansive' approach to Article 124(7). But a different reading is also plausible. Notice that the provision bars ex-judges from pleading or *acting* 'in any court or before any authority within the territory of India'. 'Acting' has a wide import: it goes far beyond pleading as lawyers. Adjudicating in a tribunal or convening a commission of inquiry entails 'acting' in courts or court-like forums. Here, the reigning mental images are of equality: of judges acting in *judge-like roles*. This approach to the provision would bar former Supreme Court judges from acting as counsels or in judge-like roles (unless allowed specifically). We can call it the 'restricted' approach to Article 124(7). So, implementing the ban on post-retirement jobs for judges entailed choosing between the expansive and restricted

116. Ibid 255.
117. Ibid.
118. Ibid 244.
119. Ibid 257–60.
120. Ibid 259.
121. Ibid.
122. Ibid.

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approaches. Which one would governments and judges choose once the provision came into effect? I turn to this question next.

B *The Great Bloom: Retired Judges, National Assets*

In September 1951, Sir Saiyid Fazal Ali became India's first Supreme Court judge to retire from office. CJI HJ Kania coaxed him back to the bench for another stint under Article 128. He retired a second time in May 1952.[123] By then, Prime Minister Nehru had appointed him Governor of Orissa. In India, governors are politically-appointed (formal) heads of states.[124] They wield discretionary powers in some areas, but in other respects, act on the aid and advice of the (elected) chief ministers and their councils.[125] So, overnight, Sir Saiyid relocated from the judicial branch to the executive arm. This was just his first retiral post. Two other positions followed. In May 1954, Nehru established the States Reorganisation Commission ('SRC') to realign India's internal borders and entrusted the assignment to Sir Saiyid.[126] Then in May 1956, he dispatched the judge to India's troubled north-eastern frontiers, this time as the Governor of Assam.[127] Sir Saiyid held the post until his death in August 1959.

These appointments coalesced into a damaging precedent. Sir Saiyid's multiple rendezvous with the executive lent retired judges an inflated esteem in national affairs. Soon, the script became a universal template. By 1959, after a decade in action, the Supreme Court had a roster of thirteen ex-judges. Four of them — CJI Kania and Judges BK Mukherjea, Ghulam Hasan and P Govinda Menon — died without reaching retirement age.[128] The nine others enjoyed elaborate post-retirement careers. Three judges held academic (university) posts. Judge MC Mahajan retained his long-held ties with Punjab's DAV College; Judge SR Das became the Vice-Chancellor of Rabindranath Tagore's Vishwa Bharati University; Judge NH Bhagwati became the Vice-Chancellor of Banaras Hindu University. Three judges in addition to Sir Saiyid — NC Aiyar, Vivian Bose and Venkatarama Aiyyar — returned to the Supreme Court under Article 128 for varying terms.[129] A few — Mahajan and Bose, for example — also conducted arbitrations.[130] But almost all judges landed a bevy of discretionary political appointments. Some probed alleged wrongs or grievances through commissions of inquiry: Mahajan (Banaras Hindu University Enquiry Committee); Das (Sikh agitation in Punjab); and Bose (corruption charges in Nehru's government, especially its Finance Ministry, and later against a big corporate house).[131] On other occasions, ex-judges chaired commissions to recommend policies including Mahajan (commission to settle a boundary dispute between states); Aiyar (Delimitation Commission to identify or revise electoral constituency boundaries); and B Jagannadhadas (as a member of the Pay Commission to recommend salary hikes for government employees).[132]

123. Gadbois, 'Judges 1950–1989' (n 59) 22.
124. *Indian Constitution* (n 2) art 153.
125. On the discretionary powers of governors: see Shubhankar Dam, 'The Executive' in Sujit Chaudhury, Madhav Khosla and Pratap Mehta (eds), *Oxford Handbook on the Indian Constitution* (OUP Oxford, 2016) 311–13.
126. Gadbois, 'Judges 1950–1989' (n 59) 23.
127. Ibid.
128. Dam, 'Second Innings' (n 7) 58.
129. Gadbois, 'Judges 1950–1989' (n 59) 22.
130. Ibid 34, 36, 47.
131. Ibid 27, 33, 36–7.
132. Ibid 28, 47, 46.

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These appointments masked three agendas. First, Nehru strategically deployed retired judges to resolve India's early political frictions — internal boundary disputes, differences over pay, parliamentary delimitation, etc. His approach exploited and reaffirmed judges' (supposedly) apolitical halo. Hostile factions could trust the latter's recommendations: They were unadulterated by partisan politics. This romantic belief kindled a mantra: When in doubt, seek out a judge. In the coming decades, India would religiously turn to sitting and retired Supreme Court judges to settle its stubborn disagreements. Today, this idea of former judges as apolitical sages is among the last few unifying features of Indian politics.[133] Second, retired judge-led commissions of inquiries signalled Nehru's affinity for the 'expansive' approach to Article 124(7). Former judges could not appear as counsels in court; they could do everything else. Third, recall the six sunset options outlined earlier. By 1959, ex-judges had cultivated legacies in four areas: academia, court assignments, arbitration and discretionary appointments. Only two boxes — tribunal appointments and electoral careers — remained vacant. The 1970s would change that.

In November 1976, Prime Minister Indira Gandhi's Congress party muscled a ferocious package of amendments into the Constitution.[134] Swaran Singh, Gandhi's Minister of External Affairs, had articulated the proposals in a report he submitted to the government a few months earlier.[135] The *Forty-Second Constitution (Amendment) Act 1976* expanded the Constitution's Preamble, altered the balance between the (enforceable) fundamental rights and the (unenforceable) directive principles, added a list of fundamental duties, enhanced the powers of the Prime Minister's Office, restricted the Supreme Court's jurisdiction, amplified the emergency provisions and restored Parliament's *unlimited* power to amend the *Constitution*.[136] The amendment also introduced Articles 323A and 323B, enabling legislatures to create administrative tribunals with exclusive authority to decide cases involving government employment, tax, foreign exchange, industrial and labour disputes, elections, urban properties, land reforms and other incidental matters.[137]

Tribunals, and the demand for more tribunals, predated the Swaran Singh Committee Report. In January 1941, an Income Tax Appellate Tribunal began hearing appeals against tax authorities in British India.[138] In 1958, the Fourteenth Law Commission of India Report proposed a system of tribunals, especially for government employees, to ease India's monstrous backlog of cases.[139] The 1966 Administrative Reforms Commission, the 1969 High Court Arrears Committee, the 1970 Wanchoo Committee Report and the 1974 Fifty-eighth Law Commission of India Report echoed that early proposal.[140] Eventually, the Swaran Singh Committee adopted those recommendations, and the constitutional amendment distilled it into Articles 323A and 323B.

In 1980, Parliament, invoking this new constitutional mandate, established the Customs and Excise and Gold (Control) Appellate Tribunal.[141] Some 5 years later, it created the Central

133. Dam, 'Commissions of Untruth' (n 55) 56.
134. Granville Austin, *Working of a Democratic Constitution* (OUP Oxford, 2003) 350–365 ('Democratic Constitution').
135. Committee for amendment of the Constitution, Parliament of India, *Swaran Singh Committee Report* (Report, May 1976). For commentary, see Upendra Baxi, 'Constitutional Changes: An Analysis of the Swaran Singh Committee Report' [1976] (2) *Supreme Court Cases* 17, 28.
136. Austin, 'Democratic Constitution' (n 134) 356–62.
137. Two provisions of the *Forty-Second Amendment Act 1976* (India) ss 4, 5, respectively, were declared unconstitutional. See *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.
138. *Income Tax Act* 1922 (India) Act No 11 of 1922, s 5A, repealed in 1962.
139. Law Commission of India, *Reform of Judicial Administration* (Report No 14, September 1958), 45–6 ('LCI 14th Report').
140. For a summary of the proposals, see Law Commission of India, *Assessment of Statutory Frameworks of Tribunals in India* (Report No 272, October 2017) 34–42.
141. *Customs Act 1962* (India) Act No 52 of 1962 s 129, as amended by Finance (No 2) Act 1980 (India) Act No 44 of 1980.

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Administrative Tribunal ('CAT') with *exclusive* authority to decide employment-related disputes between governments and their employees.[142] Cases pending in all High Courts and the Supreme Court stood transferred to the CAT.[143] The Act empowered the President to appoint three types of officers to adjudicate cases: a chairman, a vice-chairman and additional members.[144] Under the law, a sitting or retired High Court judge *or* a high-ranking civil servant could become a CAT chairman and vice-chairman. And sitting or retired High Court judges *or* anyone eligible for High Court appointments *or* civil servants could become CAT members. The government, in other words, could constitute a CAT bench with only bureaucrats as judges.

Immediately, the Supreme Court objected. In *SP Sampath Kumar v Union of India & Ors [No 1]*,[145] an interim order directed the government to reconstitute tribunals with a mix of 'judicial' and 'administrative' members.[146] Only those with knowledge of employment law and legal methods could function as judicial members. In contrast, administrative members needed bureaucratic experience. The government obliged: it promulgated an ordinance introducing these (and other) changes,[147] and later had it enacted in Parliament.[148]

But these changes proved inadequate. In *SP Sampath Kumar v Union of India & Ors [No 2]*,[149] the Supreme Court demanded further amendments. *Only* retiring or retired Chief Justices of High Courts or senior judges of 'proved ability', the Court decided, could become CAT Chairmen.[150] It justified this hoarding on legitimacy grounds: Indians trusted High Courts as 'unfailing protectors' of 'person, property and honour' because they were populated with 'disciplined, independent and trained' judges who function 'in an unattached and objective manner'.[151] To become 'worthy successors', tribunals needed to appear like High Courts.[152] That required equating the CAT Chairman's post with that of a High Court Chief Justice.[153] Judges acknowledged bureaucrats' 'candour, wisdom, [and] capacity to deal with intricate problems with understanding, detachment and objectiveness'.[154] But the Chairman's post, they insisted, needed '*judicial* discipline generated by experience and training in an adequate dose'.[155] Because bureaucrats lacked that, they could not become CAT Chairpersons, the court held.

This idea of reserving quasi-judicial jobs for retired judges was originally mooted in Parliament in 1956. Nirmal Chandra Chatterjee, a former Calcutta High Court Judge, and who later became an MP, suggested amending Article 220 to limit retired High Court judges' career options to a few areas. His proposal read: 'No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court … shall hold any office *other than* a judicial or quasi-judicial appointment'.[156] He defended the idea saying that retired judges should not hold executive posts, but the government could 'give an ex-judge a judicial post or a quasi-judicial post.

142. *Administrative Tribunals Act* 1985 (India) Act No 13 of 1985 ('ATA').
143. Ibid s 29.
144. Ibid s 6(4).
145. (1985) 4 SCC 458.
146. Ibid [3].
147. *Administrative Tribunals (Amendment) Ordinance 1986* (India) Act No 1 of 1986.
148. *Administrative Tribunals (Amendment) Act 1986* (India) Act No 19 of 1986.
149. (1987) 1 SCC 124 ('*Sampath Kumar [No 2]*').
150. Ibid [21] (Bhagwati CJ).
151. Ibid [18].
152. Ibid.
153. Ibid [21].
154. Ibid.
155. '*Sampath Kumar [No 2]*' (n 149) [21](emphasis added).
156. India, *Lok Sabha Debates*, House of the People, 5 September 1956, vol 6, col 5724–5 (emphasis added) ('*LS Deb*').

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[The government] can make him the chairman or the president of any tribunal or anything like that'.[157] Parliament rejected his proposal: Nehru's Congress party was eager to retain *both* executive and judicial options for retired judges. But 30 years later, in *Sampath Kumar [No 2]* the Supreme Court adopted a part of Chatterjee's scheme, reserving leadership roles in tribunals only for retired judges.

A Nehruvian logic scaffolded the Supreme Court's reasoning in *Sampath Kumar [No 2]*. Ranganath Misra J cast judges as uniquely disciplined, and thus better qualified than bureaucrats to hold leadership roles in quasi-judicial offices. In the 1950s, Nehru had deployed this idea to politically fractious matters. Indians, he suggested, could trust recommendations of retired judges because (only) they functioned with matchless objectivity. *Sampath Kumar [No 2]*, in 1986, extended this logic of objectivity to quasi-judicial posts.

Parliament agreed. In 1987, within a year of that decision, MPs amended the Administrative Tribunals Act and restricted the CAT Chairman's post to sitting or retired High Court judge (or a vice-chairman with at least 2-years of experience).[158] And this set a template. As tribunals mushroomed in the 1990s and the aughts, Parliament dutifully reserved the chairperson's post for retired Supreme Court and High Court judges. Only a sitting or retired Supreme Court judge could become the president of the National Consumer Dispute Resolution Commission.[159] Only a siting or retired High Court judge could become the chairman of the Railway Claims Tribunal.[160] Only a Supreme Court or High Court judge could become chairman of the Railway Rates Tribunal.[161] Only a sitting or retired Supreme Court judge or High Court chief justice could become president of the Securities Appellate Tribunal.[162] Similarly, chairperson posts in the Debt Recovery Appellate Tribunal,[163] National Human Rights Commission,[164] Income Tax-related Authority for Advanced Ruling,[165] Telecom Disputes Settlement and Appellate Tribunal,[166] Cyber Appellate Tribunal,[167] Competition Appellate Tribunal,[168] Ravi & Beas Water Disputes Tribunal,[169] Appellate Tribunal for Forfeited Property,[170] Appellate Tribunal for Foreign Exchange,[171] Armed Forces Tribunal,[172] Airport Economic Regulatory Authority Appellate Tribunal,[173] National Green Tribunal,[174] National Company Law Appellate Tribunal,[175] Appellate Tribunal for Benami Transactions,[176] and others were reserved for sitting or retired Supreme Court or High Court judges. (A few legislations recognised exceptions to this general rule).[177]

157. Ibid col 5705.
158. *Administrative Tribunals (Amendment) Act 1987* (India) Act No 51 of 1987, s 3.
159. *Consumer Protection Act 1986* (India) Act No 68 of 1986.
160. *Railways Claims Tribunal Act 1987* (India) Act No 54 of 1987.
161. *Railways Act 1989* (India) Act No 24 of 1989.
162. *Securities and Exchange Board of India Act 1992* (India) Act No 15 of 1992.
163. *Recovery of Debts Due to Banks and Financial Institutions Act 1993* (India) Act No 51 of 1993.
164. *National Human Rights Commission Act 1993* (India) Act No 10 of 1994.
165. *Finance Act 1993* (India) Act No 38 of 1993.
166. *Telecom Regulatory Authority of India Act 1997* (India) Act No 24 of 1997.
167. *Information Technology Act 2000* (India) Act No 21 of 2000.
168. *Competition Act 2002* (India) Act No 12 of 2003.
169. *Inter-State River Water Disputes Act 1956* (India) Act No 33 of 1956.
170. Prevention of Money *Laundering Act 2002* (India) Act No 15 of 2003.
171. *Electricity Act 2003* (India) Act No 36 of 2003.
172. *Armed Forces Tribunal Act 2007* (India) Act No 66 of 2007.
173. *Airports Economic Regulatory Authority of India Act 2008* (India) Act No 27 of 2008.
174. *National Green Tribunal Act 2010* (India) Act No 19 of 2010.
175. *Companies Act 2013* (India) Act No 18 of 2013.
176. *Benami Transactions (Prohibition) Amendment Act 2016* (India) Act No 43 of 2016.
177. See, eg, *Control of National Highways (Land and Traffic) Act 2002* (India) Act No 13 of 2003.

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This expansive universe of tribunals gave judges something to aspire to in retirement. Between 1999 and 2019, 40 per cent of judges who retired from the Supreme Court, one analysis suggests, landed post-retirement appointments in tribunals.[178] As mentioned earlier, this figure touches 70 per cent once discretionary appointments including governorships, investigative commissions and other posts are included.[179] In the Constituent Assembly, some members had anticipated this state of affairs. They pleaded for a ban on post-retirement appointments, fearing the government's will to lure sitting judges with retirement jobs or judges pandering to governments for them. Either way, they predicted a diminished state of judicial independence in India. But those members' pleas — and their proposed amendments — had failed then. Have their predictions materialised? I interrogate this question in the next section.

V Jobs as Baits: Anecdotal and Econometric Evidence

A *Judges in the Dock: Litigants, Legislators and Lawyers Allege Bias*

Controversy over jobs to retired judges erupted soon after the *Constitution* rolled into effect. In 1951, the state of Uttar Pradesh nationalised the road transport sector and private operators lost their business licenses.[180] Permit holders challenged the policy in the Supreme Court, and the matter was listed for final hearing on 15 September 1954. One of the litigants, Hira Lal Dixit, distributed an 18-page leaflet titled 'Our Transport Department' to a crowd that had gathered outside the court.[181] His essay recounted the 'harassment and indignity' the Transport Minister and his minions had heaped on Dixit, but also paid judges a sly compliment:

> The public has full and firm faith in the Supreme Court, but sources that are in the know say that the Government acts with partiality in the matter of appointment of those Hon'ble Judges as Ambassadors, Governors, High Commissioners, etc, who give judgments against [the] Government but this has *so far not made any difference in the firmness and justice of the Hon'ble Judges*.[182]

Supreme Court judges charged Dixit with contempt of court. He insisted that his sentiments were 'innocuous' and 'laudatory'.[183] But Das J rejected that interpretation:

> The plain meaning of these words is that the Judges who decide against the Government do not get these high appointments. The necessary implication … is that the Judges who decide in favour of the Government are rewarded … with these appointments … [The] purpose [of these words] cannot but be to raise in the minds of the reader a feeling that the Government, by holding out high hopes of future employment, encourages the Judges to give decisions in its favour.[184]

178. Dam, 'Second Innings' (n 7).
179. Mandhani, 'Gogoi RS seat' (n 13).
180. *Saghir Ahmad v State of UP* (1954) AIR 728.
181. *Re Hira Lal Dixit v Unknown* (1955) 1 SCR 677, [2].
182. Ibid (emphasis added).
183. Ibid [7].
184. Ibid.

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The words, their timing and place of publication — on the court premises with hearings underway, judges concluded, 'tended to hinder or obstruct the due administration of justice'.[185] They found Dixit in contempt and sentenced him to prison for a fortnight.[186]

Within two years, opposition MPs were stridently echoing Dixit's sentiments. In September 1956, Parliament debated that the *Constitutional (Ninth Amendment) Bill* was meant to implement the recommendations of the SRC.[187] That commission, among other things, had proposed merging some High Courts and creating new ones.[188] This renewed the debate about superannuated judges and their careers. Opposition MPs castigated the Nehru administration's dalliances with retired Supreme Court judges. Anticipating Lessig's argument about institutional corruption by over five decades, Frank Anthony, an MP, explained his objections to executive positions for retired judges thus: '[it] is completely corrupting from every point of view. It corrupts the public; it corrupts the Judges'.[189] A judge may deliver an honest judgment, he said, but the bar or the litigant public would see it differently. They may ask 'do you know why [the judge] passed a judgment in favour of the Government? He hopes to become a Lieutenant Governor, a Governor or even an Ambassador in some outlandish place'.[190] Such talk had become common and 'the whole bar [was] being brought into contempt', Anthony underscored.[191] 'Have not you got enough people outside the ex-judges to adorn the Governorship', he pointedly asked ministers.[192]

Thakur Das Bhargava, a member of Nehru's Congress party, too, emphasised why appearance mattered — a central feature of institutional corruption. Judges may do the right thing, Bhargava said: 'but we must see that the confidence of the public in the Judge remains unimpaired'.[193] A judge may make 'an ideal' governor, 'but how [would] the public think about him', he posed.[194] 'They will think that this man, while acting as a Judge, [was] looking to [the] Government' for a job.[195] So, he advocated an 'absolute rule' against judges holding executive offices to avoid incentivising them while on the bench.[196]

Other MPs insisted that judges had already begun looking forward to such jobs. Chatterjee, the former High Court judge, bemoaned the spectacle of justices sneaking round government corridors for jobs, trying to 'get hold of some people who [knew] Ministers or Deputy Ministers or Parliamentary Secretaries'.[197] He suggested three changes to limit these transgressions: a higher retirement age for High Court judges, a larger pension, and a parliamentary pronouncement 'that no judge shall be given an executive appointment'.[198] Another MP, HV Kamath, demanded that governments stop dangling 'baits' of executive offices as 'proverbial carrots' before judges.[199]

185. Ibid.
186. Ibid [11].
187. *The Constitution (Ninth Amendment) Bill 1956* (India) Bill No 29 of 1956 <http://164.100.47.4/billstexts/lsbilltexts/asintroduced/29_1956_Eng_LS.pdf>.
188. S Fazl Ali, Ministry of Home Affairs of India, Report of the State Reorganisation Commission (Report, 1955), 79 [286].
189. *LS Deb* (n 156) col 5740.
190. Ibid col 5741.
191. Ibid.
192. Ibid.
193. Ibid col 5734.
194. Ibid col 5735.
195. Ibid.
196. Ibid.
197. Ibid col 5713.
198. Ibid col 5714.
199. Ibid col 5756.

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These baits, he suspected, 'had corrupted insidiously, [even if] subtly, the judiciary'.[200] And Hiren Mukherjee, a member of the Communist Party of India, lamented how 'perfectly independent' judges on the bench later behaved like 'supplicants for jobs' in tribunals and elsewhere.[201]

Unlike members in the Constituent Assembly, these MPs did not just convey their fears. They highlighted actual instances to underscore how the anticipated corruption had begun to blossom. But Nehru's government, the obvious beneficiary of the alleged corruption, would not relent. Responding to the debates, Minister BN Datar insisted that there was no cause for alarm. The government had made 'hardly one or more [such] appointment', he said, and MPs had generalised from that.[202] Rather than enacting a stricter ban on retired appointments, Datar adjured MPs 'not to generalise in the way they [had done] to the needless prejudice of … Judges as well as the Government'.[203]

Three years later, in September 1958, Attorney General Motilal Setalvad and a galaxy of legal experts submitted the Fourteenth Law Commission of India Report.[204] Its findings concluded that jobs for retired judges were a cause for alarm. The Law Commission adopted Anthony's approach and outlined an argument that Lessig and others would later craft as institutional corruption. The government was one of the largest litigants in the Supreme Court, and judges keen on retired appointments could give 'the average citizen' the 'impression' that they do 'not bring to bear on [their] work that detachment of outlook which is expected of [judges] in cases in which the government is a party'.[205] The Commission, in other words, framed the citizens' loss of trust in the court as its central concern — a key feature of institutional corruption. It proposed banning retired judges from *any* government employment — a rule that already applied to the Chairman of the Union Public Service Commission and the Comptroller and Auditor General of India.[206] Once again, Nehru's government ignored the warning signs.

Immediately after the Law Commission submitted its report, one of its members, MC Chagla, the Chief Justice of the Bombay High Court, headed to Washington DC as the Indian ambassador to the United States.[207] Nehru had offered Chagla the post in July 1958 — one that he accepted promptly.[208] The Commission was finalising its report around this time, including the proposal to ban judges from executive posts. In the report, Chagla had supported the idea unreservedly.[209] This duplicity rankled Setalvad, the chairman of the Law Commission. He later described the judge as someone 'keen to get into politics' and his actions 'characteristic of the self-seeking attitude of many of [India's] leading men'.[210]

Chagla protested, calling it a 'malicious attack'.[211] He never canvassed for the post, he said. Instead, it was 'the Prime Minister's desire that [he] should serve the country in [that] capacity', and Chagla apparently 'always thought that if your Prime Minister called upon you to do a job of work, it

200. *LS Deb* (n 156) 5756.
201. Ibid col 5760.
202. Ibid col 5771.
203. Ibid.
204. 'LCI 14th Report' (n 139).
205. Ibid 46.
206. *Indian Constitution* (n 2) art 319, 148(4).
207. M C Chagla, *Roses in December: An Autobiography* (Bharatiya Vidya Bhavan, 2nd ed, 1974) 248 ('*Roses in December*').
208. Ibid.
209. 'LCI 14th Report' (n 139) vol II, 1226. Members who disagreed with any part of the Commission's finding penned their separate notes.
210. Motilal C Setalvad, *My Life: Law and Other Things* (NM Tripathi, 1971) 261.
211. Chagla, 'Roses in December' (n 207) 250.

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is your duty to respond if it is in your power to do so'.[212] A canny lawyer, he also dusted off an English precedent — Chief Justice Lord Reading as Britain's envoy to the United States in 1914 — to justify his action.[213] And he recounted his pecuniary sacrifices — abandoning a lucrative practice at the bar to become a judge, resigning from Indira Gandhi's cabinet — to burnish his self-professed principles.[214] But these anecdotes barely exonerate Chagla. He never explained why he endorsed the Commission's analysis only to renounce it with his actions.

B *What the Judges Say and the Data Reveals: Econometric Evidence About Bias*

By 1960, some key groups — constitutional framers, MPs, litigants, lawyers and jurists — had settled into a conviction that jobs for retired judges was corrupting the judicial process. In the 1970s and 1980s, judges, the ultimate insiders, joined that club. In interviews (and letters) to George Gadbois, an American political scientist, CJIs YV Chandrachud and PN Bhagwati, for example, revealed how bias had adulterated the courts' interpretative choices.[215] They spoke of judges pleasing governments with favourable outcomes and elbowing into retirement jobs.[216] Another CJI, RS Pathak, commented about judges with shorter tenures delivering more pro-government decisions.[217] He linked this to their eagerness for retirements posts in due course. Another Supreme Court judge, HR Khanna, also noticed a similar trend during his years on the bench. Writing about his judicial experiences in the 1970s, Khanna J noticed a 'change in the approach of the Court with a view to give tilt in favour of upholding the orders of the Government'.[218]

Often, judges' financial plight induced them to haggle with governments for post-retirement posts.[219] Several judges confided in Gadbois their sunset struggles to live in reasonable comfort and dignity.[220] Some lamented their paltry pensions. Others grieved about the abrupt loss of perks: furnished rent-free accommodation, servants and allowances. Post-retirement assignments, many admitted, restored those benefits.[221] This mattered in particular, to judges from outside New Delhi with no ancestral address in the city. Former CJI YV Chandrachud, for example, openly admitted to writing to the 'prime minister [for] help with the allotment of something like a [government-owned] flat on [a] priority basis'.[222] These vignettes illustrate the demand and supply side concerns that stoke temptations for post-retirement jobs. Judges are eager to remain in Delhi — and relevant in public life. But their relatively poor pay and pension provisions, at least relative to the market rates of lawyers and law firm partners, also contribute to this state of affairs.[223]

212. Ibid.
213. Ibid.
214. Ibid.
215. Abhinav Chandrachud, *Supreme Whispers: Conversations with Judges of the Supreme Court of India, 1980-1989* (Penguin Random House, 2018) 172 ('*Supreme Whispers*').
216. Ibid.
217. Ibid.
218. Hans Raj Khanna, *Neither Roses Nor Thorns* (Eastern Book Company, 1986) 65.
219. Despite hikes in recent years, pay and pension for Supreme Court judges, compared to market rates, remain meagre. These matters are regulated by the *Supreme Court Judges Salaries and Conditions of Service Act 1958* (India) Act No 41 of 1958.
220. Gadbois, 'Judges 1950–1989' (n 59) 371.
221. Chandrachud, *Supreme Whispers* (n 215) 172.
222. Shekhar Gupta, 'Judges cannot be fully absolved from the responsibility for delays: Y.V. Chandrachud', *India Today* (online, July 31, 1985) <https://www.indiatoday.in/magazine/interview/story/19850731-judges-cannot-be-fully-absolved-from-the-responsibility-for-delays-y-v-chandrachud-770278-2013-12-26>.
223. Chandrachud, *Supreme Whispers* (n 215) 95–100.

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Several judges have acknowledged these concerns in their extra judicial writings and speeches. VR Krishna Iyer, a retired Supreme Court judge, wrote about governments holding out 'carrots' to 'deflect judicial performance from the path of rectitude'.[224] He added: '[j]udicial afternoons and evenings are sensitive phases, the incumbent being bothered about post-retiral prospects. The Executive plays upon this weakness to bend the integrity or buy the partiality of the elderly brethren'.[225] Similarly, former CJI Verma underscored the 'need for constitutional safeguards to insulate [judges] from possible executive influence through temptations in subtle ways'.[226] He added: '[o]ne such method to penetrate the resolve of even a few of the best is the temptation of lucrative post-retiral benefits given by the executive to a favoured few'.[227] He advocated enacting 'constitutional prohibitions' because such post-retirement activities were 'attracting public disapproval, even if voiced privately'.[228] Kemal Pasha, a Kerala High Court judge, echoed these sentiments, explaining the modalities of such temptations thus:

> [t]he government is the major litigant before the courts of law, especially before the High Court. When a judge is expecting a post-retirement job from the government, he will be in a position not to invite displeasure from the government, at least in the year of his retirement.[229]

Other judges continue to articulate similar concerns.[230]

Arun Jaitley, India's one-time Minister of Law and Justice, captured these apprehensions when he suggested that the 'desire of a post-retirement job influences pre-retirement judgments'.[231] Elsewhere, he added: there are 'two kinds of judges [in India] — those who know the law and those who know the law minister'.[232] Jaitley expressed these concerns in 2012 as a leader of the opposition. But between 2014 and 2019, he was involved in appointing several retired judges to tribunals and discretionary posts.

Econometric analysis has begun corroborating these vignettes. One study suggests that between 1999 and 2014, Supreme Court judges who retired long before general elections, disproportionately favoured the central government in salient cases.[233] Later on, these judges were more likely to secure post-retirement jobs.[234] The analysis suggests that a form of cognitive bias gripped judges

224. V R Krishna Iyer, *Justice at Crossroads* (Deep & Deep, 1992) 60 ('Crossroads').
225. Ibid 61.
226. J S Verma, 'Judicial Independence: Is It Threatened?', *Outlook* (online, 23 Feburary 2010) <https://www.outlookindia.com/website/story/a-set-of-honest-men/264422> ('Memorial Lecture').
227. Ibid.
228. Ibid.
229. TNM Staff, 'Only Competent Judges Should be Elevated: Kerala HC's Justice Slams Collegium', *The News Minute* (online, 25 May 2018) <https://thenewsminute.com/article/only-competent-judges-should-be-elevated-kerala-hc-s-justice-pasha-slams-collegium-81890>.
230. See, eg, Ritika Jain, 'Chelameswar Continues Crusade Post-Retirement, Says Every Govt Wants Tailor-Made Judiciary', *The Print* (online, 19 December 2018) <https://theprint.in/india/governance/chelameswar-continues-crusade-post-retirement-says-every-govt-wants-tailor-made-judiciary/165780/>.
231. N G R Prasad and K K Ram Siddhartha, 'Pre-Retirement Jobs and Post-Retirement Judgments Jobs', *The Hindu* (online, 23 April 2020) <https://www.thehindu.com/opinion/op-ed/pre-retirement-judgments-and-post-retirement-jobs/article31408953.ece>.
232. 'BJP for "Cooling Period" Before Judges Head Tribunals' *Outlook*, (online, 30 September 2012) <https://www.outlookindia.com/newswire/story/bjp-for-cooling-period-before-judges-head-tribunals/776850>.
233. Madhav S Aney, Shubhankar Dam and Giovanni Ko, 'Jobs for Justice(s): Corruption in the Supreme Court of India' (2021) 64(3) *Journal of Law and Economics* 479.
234. Ibid.

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who retired long before — at least 10 months before — the next general election.[235] Imagine a world where every case involving governments offers judges five competing interpretations (choices). Say options A and B favour governments. Option C is neutral: it neither favours nor disfavours governments. And options D and E disfavour governments. The statistical analysis suggests that judges who retired long before elections tended to choose options A or B. In other words, they were drawn to interpretations that favoured governments. In contrast, judges who retired shortly before the next election were more likely to choose options D or E, that is, interpretations that disfavoured governments. Crucially, judges who chose options A or B, consistent with intuitions of judges and lawyers, were more likely to secure post-retirement jobs. In May 1949, some members of the Constituent Assembly had precisely predicted this state of affairs.

VI Revisiting Institutional Corruption: India in a Global Context

An economy of influence (a system of post-retirement jobs) is undermining the Supreme Court (luring judges into the government's cognitive orbit) and weakening its ability to achieve its obligatory purpose (deciding cases without fear or favour). This, it appears, is a definite case of institutional corruption. And contemporary judicial behaviour reflects this anxiety. First, sitting justices have begun declaring their resolve to reject (government) jobs in their retirement years.[236] Several Supreme Court judges including SH Kapadia, RM Lodha, Jasti Chelameswar, TS Thakur and Kurian Joseph have taken this step.[237] In April 2018, three months before this retirement, Judge Chelameswar in an interview stated: 'I am saying it on record that after my retirement [in June], I will not seek any appointment from the government'.[238] Judge Joseph issued a similar statement six months before his retirement.[239] These bulletins are a strategic move: they fortify judges' (claim to) independence on the bench and insulate their legacies from later attacks. Second, judges have occasionally reversed their decisions to accept post-retirement jobs. In December 2018, the Modi government nominated Judge AK Sikri to the London-based Commonwealth Secretariat Arbitral Tribunal.[240] A row erupted after the matter became public a month later, and the judge withdrew his consent.[241] Both types of anxieties — judges pre-announcing their sunset plans or declining jobs because of public criticism — implicitly *concede* the wrongness of the system. Clearly, Supreme

235. Ibid.

236. Kanu Sarda, 'Retirement Roster: Should Judges opt for Post-Retirement Jobs?', *The New Indian Express* (online, 15 April 2018) <https://www.newindianexpress.com/thesundaystandard/2018/apr/15/retirement-roster-should-judges-opt-for-post-retirement-jobs-1801633.html>.

237. Ibid. See also Apurva Vishwanath, 'Would not have accepted (RS seat)… nobody would offer it to me: Justice Deepak Gupta', *The Indian Express* (online, 8 May 2020). <https://indianexpress.com/article/india/justice-deepak-gupta-interview-supreme-court-retired-judge-rajya-sabha-seat-6399464/>.

238. 'Post-retirement plans: Won't seek any employment from govt, says Justice Chelameswar', *The Indian Express* (online, 7 April 2018) <https://indianexpress.com/article/india/post-retirement-plans-wont-seek-any-employment-from-govt-says-justice-chelameswar-5127957/>; 'Don't Regret Going Public, This Is Why: Justice Chelameswar To NDTV', *NDTV* (online, 23 June 2018) <https://www.ndtv.com/india-news/on-his-last-day-at-supreme-court-justice-jasti-chelameswar-speaks-to-ndtv-full-transcript-1871856>.

239. Krishnadas Rajagopal, 'Will Reject Post-Retirement Jobs, says Justice Kurian Joseph', *The Hindu* (online, 10 April 2018) <https://www.thehindu.com/news/national/will-reject-post-retirement-jobs-says-justice-kurian-joseph/article23490476.ece>.

240. PTI, 'Justice Sikri Withdraws Consent to Government Offer to Nominate him to CSAT', *The Economic Times* (online, 13 January 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/justice-sikri-withdraws-consent-to-govt-offer-to-nominate-him-to-csat/articleshow/67515354.cms?from=mdr>.

241. Aneesha Mathur, 'Justice AK Sikri Turns Down Modi Government Offer After Controversy', *India Today* (online, 14 January 2019) <https://www.indiatoday.in/india/story/justice-ak-sikri-narendra-modi-govt-posting-commonwealth-tribunal-alok-verma-1430122-2019-01-13>.

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Court judges recognise the harm it is doing to themselves, the court and the idea of impartial justice. But the field on institutional corruption continues to grapple with several unresolved issues, and the Indian case study reflects that state of unease.[242] I will focus on two contested aspects: the locus of corruption and the role of trust within the field of institutional corruption.

Institutional corruption probes the relationship between funders and decisionmakers. Consider the American system of campaign finance. Research suggests that the organised donor class exerts a disproportionate influence on electoral and policy outcomes — something ordinary citizens and mass-based interest groups are unable to match.[243] This mismatch matters because the two groups harbour conflicting policy preferences, and the US Congress pays close attention to what the donor class prefers. Scholars characterise this capture of the legislative process as institutional corruption.[244] Who, though, is corrupt here: the donors, Congress, or the 'system' of campaign finance? Scholars disagree about this. Some regard the decisionmakers corrupt: they cause the Congress to deviate from its purpose.[245] Others attribute corruption to the donor class (in addition to the decisionmakers): their funding renders the institutional purpose ineffective.[246] But some others impute corruption to the 'system' — the web of regulations that enables relationships between funders and decisionmakers to exist.[247]

In the Indian context, an analogous disagreement exists about the locus of corruption. Most judges hold the government (the funders) responsible. Judge Krishna Iyer, in his extra-judicial writings, for example, mentioned *governments* 'holding out carrots' to tempt judges away from the path of judicial rectitude.[248] Similarly, CJI Verma spoke about the executive playing upon the integrity of judges.[249] Some members of the Constituent Assembly also identified with this locus of corruption: They feared *ministers* enticing judges with retirement jobs and weakening their resolve for impartial decisions.[250] In this framing, the state induces the interpretative biases and rewards judges for their compliance. Others, however, cast the responsibility on judges (the decisionmakers). Jaitley, the former minister, underscored judges' ambitions for this state of affairs: '[e]ven though there is a retirement age, judges are not willing to retire'.[251] And this unwillingness makes them pander to governments and increase their chances of securing post-retirement jobs. In the Constituent Assembly, PK Sen, the retired judge, had advanced a similar stand. He advocated a ban on post-retirement jobs and proposed a pension scheme for former judges. Concern about one's retirement years, he added, was 'bound to affect [a judge's] attitude while he is in office'.[252] This framing casts the responsibility on the court. Equally, one may allege that the 'system' — not

242. Elinor Amit et al, 'Institutional Corruption Revisited: Exploring Open Questions Within the Institutional Corruption Literature' (2017) 26(3) *Southern California Interdisciplinary Law Journal* 447.
243. Martin Gilens and Benjamin Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12(3) *Perspectives on Politics* 564.
244. Lessig, 'Institutional Corruption Defined' (n 17).
245. Ibid 554.
246. Donald Light, 'Strengthening the Theory of Institutional Corruptions: Broadening, Clarifying, and Measuring' (2013) *SSRN Electronic Journal* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236391> accessed on 10 November 2021 ('Strengthening the Theory').
247. Lee Drutman, 'Enough about our "Corrupt Campaign Finance System" Already. Let's Talk Equality'. *Vox* (online, 5 February 2016) <https://www.vox.com/polyarchy/2016/2/5/10908722/hasen-plutocrats-united>.
248. Krishna Iyer, 'Crossroads' (n 224).
249. Verma, 'Memorial Lecture' (n 226).
250. 'CAD' (n 91) 234–36.
251. Janaki Fernandes, 'Judges' Verdicts are Influenced by Post-Retirement Jobs: Arun Jaitley' *NDTV* (online, 1 October 2012) <https://www.ndtv.com/india-news/judges-verdicts-are-influenced-by-post-retirement-jobs-arun-jaitley-500640>.
252. 'CAD' (n 92) 236.

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governments or the Supreme Court — is corrupt. And this system is a co-creation: Political actors (beginning with Nehru) and judges (especially their insistence in *Sampath Kumar* (I) and *Sampath Kumar* (II) willed it into existence.

Another unresolved issue is the role of trust. Lessig's definition highlighted one specific outcome of institutional corruption: a loss of trust. According to him, such corruption weakens 'either the public's trust in that institution or the institution's inherent trustworthiness'.[253] Again, scholars disagree about the relevance of trust in this context. Some scholars underscore loss of trust as a *necessary* feature of institutional corruption.[254] Others underplay it as a *sufficient* condition: loss of trust corrupts an institution even if the latter fulfils its fiduciary purposes.[255] But some others reject any link between institutional corruption and loss of trust. They regard the latter as neither necessary nor sufficient for such corruption to occur.[256]

I adopt the third approach. Trust has a relative dimension. When people repose trust in an institution, especially a public (state) institution, they do so in relation to other institutions. Suggesting that an institution commands premium trust only implies that it is trusted *compared to other institutions*. Also, external factors, including news reporting, contribute to shaping people's attitudes towards institutions.[257] Besides, in some instances — the military, for example, an institution's trust level may be unconnected to its actual performance.[258] These reasons explain why deviation from obligatory purposes and loss of trust are discrete processes: one does not always generate the other. Connecting the two — imposing a link — as a matter of definition misunderstands the properties of trust, and undermines the field of institutional corruption. Scholars may choose to focus their analytical lens on institutions with anaemic levels of trust. Indeed, both Thompson and Lessig outlined the field by studying how lobbying had introduced a dependency in the US Congress — an institution with low levels of trust among Americans.[259] But we must separate the two parts. An institution may command public trust despite systemically breaching its obligatory purposes; another institution may forfeit public trust without such a breach. So, breach of purposes and loss of trust are distinct matters, and we should keep them so as a matter of definition.

The status of the Indian Supreme Court exemplifies this argument. Members of the Constituent Assembly, MPs (especially in 1956), and the 1958 Law Commission report predicted two outcomes. One, a system of jobs for retired judges, they insisted, would lure judges into the government's cognitive orbit and impair judicial independence in India. This, both biographical notes and empirical evidence suggest, has materialised. Two, they predicted that such a system would discredit the court and inflame mistrust of judges. This, however, has not transpired. Instead, surveys indicate that the Supreme Court remains India's most trusted institution — unsurprisingly, second only to the military.[260] When asked 'how much trust do you have in the following (16) institutions?', a representative sample of respondents across 12 states in India reported a net 69 per cent trust in the

253. Lessig, 'Institutional Corruption Defined' (n 17) 553.
254. Thompson, 'Two Concepts' (n 24) 5.
255. Arjun Ponnambalam, 'The Power of Perception: Reconciling Competing Hypotheses about the Influence of NRA Money in Politics' (2013) *SSRN Electronic Journal* 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341790>.
256. Light, 'Strengthening the Theory' (n 246) 8.
257. On the role of the media in shaping institutional legitimacy, see James Gibson and Michael Nelson, 'The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto' (2014) 10 *Annual Review of Law and Social Science* 201, 215–16.
258. Gliga, 'US Defense' (n 38).
259. Gallup, 'Confidence in Institutions', *In Depth* (Data) <https://news.gallup.com/poll/1597/confidence-institutions.aspx>.
260. Azim Premji University, *Politics and Society Between Elections 2019* (Report, 2018) 197 ('*Politics and Society*').

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Supreme Court.[261] In comparison, they reported a net 80 per cent trust in the Indian National Army.[262] The net trust in the Supreme Court did not significantly vary by region,[263] literacy,[264] religion (except Muslim respondents who trusted the court *more* than the army),[265] or caste (except *Adivasis* or indigenous peoples who trusted the court *more* than the army).[266]

Notice that the survey was, in part, a comparative exercise. Respondents were asked to measure their trust in the Supreme Court in addition to 15 other institutions. Also, media reporting on the judiciary must have informed these results. An incredibly slight fraction of Indians are litigants in the Supreme Court or directly interact with its judges. The majority have no basis, except media reports, to develop an opinion about the court. These reasons may explain why the Supreme Court, even under conditions of institutional corruption, remains a highly trusted office.

But the 2019 survey also offered an insightful nuance to the court's overall trust level. Respondents had to rate the 'effectiveness and procedural fairness' of three institutions: police; government officials; and courts.[267] Regarding courts, respondents had to agree or disagree with four statements including: 'the decisions made by the court are unduly influenced by political parties/politicians'.[268] Interestingly, more than half of the respondents held a negative perception about effective and procedural fairness of the courts compared to only 21 per cent who held a positive view.[269] This negative view was widely shared. Over 40 per cent respondents in each of the 12 states reported a negative perception about the courts.[270] Some caution is needed in juxtaposing these findings against the data on overall levels of trust. The statements on effectiveness and fairness solicited respondents' views are about courts generally, not just the Supreme Court. On overall trust, however, respondents were asked to rate the Supreme Court, High Courts and district courts separately. Nonetheless, this second set of findings offers *some* evidence that Indians trust the Supreme Court and simultaneously believe that its decisions are at times 'unduly influenced by political parties/politicians'.[271] The Supreme Court, in other words, is both institutionally corrupt *and* trusted. This Indian example exemplifies why breach of obligatory purposes and loss of trust are distinct processes, and it serves the field of institutional corruption to treat them so.

VII Conclusion: A World Beyond Retired Judges?

Indian Supreme Court judges retire from the bench, but not from public life. Governments house them in statutory and discretionary roles or judges themselves seek those out. This system of jobs for retired judges cycles like an economy of influence — one that has damaged the court's ability to achieve its obligatory purpose. It is a form of institutional corruption. A chorus of demands to outlaw the system and unwind the economy of influence has gone unheard. Instead, its echo has deepened. This analysis probed how a system of retired judges in government jobs impacts adjudication in the Supreme Court. An analogous field of influence — retired judges embracing

261. Ibid.
262. Ibid.
263. Ibid 200.
264. Ibid 201.
265. Ibid 201.
266. Ibid 202.
267. Ibid 203.
268. Ibid 203.
269. Ibid 203.
270. Ibid 204.
271. Ibid 203.

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private roles and how that impacts adjudication — has attracted little public scrutiny and no academic analysis.[272] Together, these concerns about retired roles implicate issues of institutional design and civic culture. When, at what age and under what conditions, should judges retire? More than 70 years after the Constitution outlined a set of rules, the debate in India endures. And this debate, in turn, spotlights the centrality of retired judges, especially Supreme Court judges, in India's civic culture. This analysis attempted an archaeology of the political origins of that culture. But future public law scholarship should identify ways to enhance the legitimacy of other actors within the legal system and entrust them with roles that, for now, remain a monopoly of retired judges.

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272. For a preliminary argument, see Dam, 'Second Innings' (n 7) 7–10.

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