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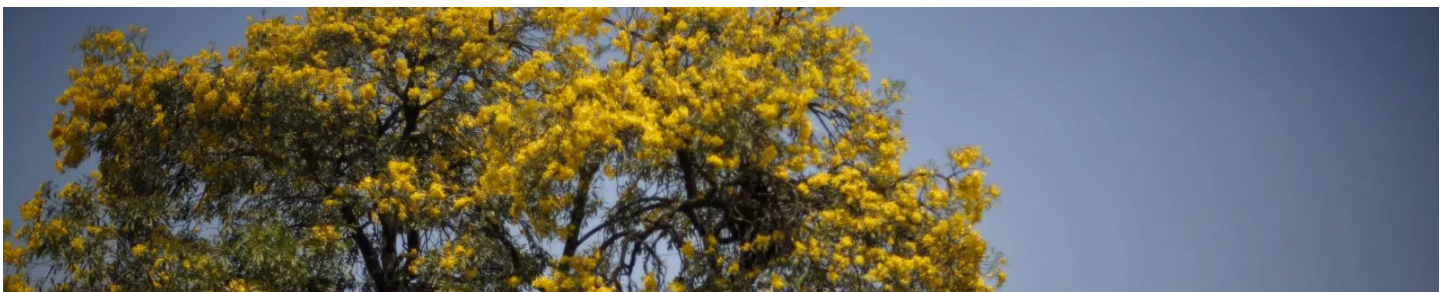
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FIRST AMONG EQUALS

A super elite club of lawyers dominates India's justice system. How long will it rule?

Shubhankar Dam | 5 hours ago | Quartz India





📷 An unequal brotherhood. (Reuters/Adnan Abidi)

An oligarchy rules India's courtrooms. It dons fancy robes and bills premium fees. Still, litigants desire it, junior lawyers suffer it, and judges respect it. It is the oligarchy of senior advocates.

That oligarchy shall continue, India's supreme court recently decided. But key changes are afoot. Achieving seniority, until now, meant threading a black box. Few understood how the system worked and why.

Not anymore.

Now, advocates aspiring to an elevated status have an open, orderly path to it. This is a big bang reform. A new cast of counsels may sprint to prominence, altering how long-litigating Indians access legal services.

Caste of lawyers

Courtrooms in India are populated with two types of unequal lawyers: advocates and senior advocates. Engraved in the Advocates Act, 1961, this Indian hierarchy has a very British history.

In its early days, the legal profession in Britain only distinguished attorneys from pleaders. Attorneys negotiated the bureaucracy of legal paperwork, and pleaders mastered the art of oral advocacy. Soon, a super-selective class of

pleaders emerged: serjeants. But their fortunes fell as crown law officers, a class of government lawyers, rose. A new band of barristers followed, the king's and queen's counsels (QCs), and this category still endures.

QCs are an elite caste. Graduating into it demands professional eminence. In return, the title offers prestige, and catapults barristers to the privileged echelons of the British legal universe. Just about 10% of all barristers in Britain are QCs.

India's senior advocates are like QCs, only rarer. A 2013 report of the Bar Council of India suggested that less than 1% of all enrolled lawyers are senior advocates. Only the supreme court and 24 high courts may ordain lawyers into seniority. Eligibility depends on the counsels' "ability, standing at the Bar, or special knowledge or experience in law." Advocates may apply directly, or judges may invite them.

This is a super-elite club, and the law treats members fittingly. Senior advocates enjoy a suite of privileges and few restrictions. They have a right of pre-audience in courtrooms: judges must hear them first. They do not file cases or handle legal paperwork; they only argue. And the law bars them from entertaining litigants directly. Instead, clients come through briefing counsels who act as go-betweens.

Profits of priesthood

Seniority magnifies a lawyer's social capital. It brings contacts, experience, and honour. In courtrooms, judges may indulge seniors more. Outside of courtrooms, the media and the public do the same.

Naturally, the veneration has consequences.

Engaging senior advocates accelerates—sometimes almost doubles—the odds of winning certain types of cases in the supreme court, according to a 2015 analysis by the Viddhi Centre for Legal Policy, a Delhi-based think-tank. Senior advocates

demand premium fees for good reason, and clients hanker after them for that very reason.

They enjoy other perks, too. Courts, for instance, allow lawyers to seek out-of-turn hearings. Last month, a junior counsel in the supreme court protested senior advocates hogging all the time set aside for such pleas. He never had a chance to plead his urgency, he exasperated. His complaint has changed things. Now, senior advocates are barred from raising such pleas.

But senior counsels do more than just devour special slots—they devour entire lists of cases pending in courts. A handful of senior advocates are said to dominate the business of litigation. They take on more matters than they can deal with. But they can't be everywhere every time. So, postponements are sought—and frequently granted. The result? A system of ministering justice that pampers a minority of lawyers over the masses of litigants.

The pyramid—this separation of senior and junior advocates—casts an unsavoury shadow on Indian courtrooms. Indira Jaisingh, and the National Lawyers Campaign for Judicial Transparency and Reforms, petitioned the supreme court against the pyramid. Grouping lawyers into classes violates the fundamental right to equality, the latter argued. And the Advocates Act, it claimed, is unconstitutional.

Recall the basis on which judges classify lawyers: “ability,” “standing,” “knowledge,” or “experience.” These are vague terms. They drip with discretion. And their abuse is too easy, and common. Judges, some allege, have at times graduated unfit ones into seniority.

In 2004, burdened by whispers of corruption, the UK (temporarily) suspended the system of appointing QCs. Would India's supreme court adopt a similar approach? It turns out not.

The court shot down the Campaign's talking points. Why?

A clumsy defence of seniority

Classifying lawyers has a rationale to it. Not all advocates serve their profession equally. Some do better than others—and the elevation rewards that. Judges may now and again err in measuring counsels' worthiness. But these errors don't invalidate the power to classify, the court reasoned. It only means that the power is at times misused.

Consider an analogy. The police are authorised to make arrests. They make wrongful arrests at times. Does that invalidate the very power to arrest? Surely not. The police still have it.

Anyway, law isn't the only profession that labels its practitioners. Medicine does it, too. There are "consultants" and "senior consultants," "surgeons" and "senior surgeons." So, classifying advocates isn't new or unique, the court intoned.

These are anaemic reasons—they can hardly stand scrutiny.

Reconsider the arrest analogy. When the police err, they are hauled up in courts. Victims have a remedy. But with senior advocates? Imagine judges elevate an undeserving advocate. Who should challenge it? And against whom—the same judges who bestowed the lawyer with senior-hood? It doesn't make sense, and has hardly ever happened. The court's administrative power to confer seniority is unlike any. Its misuse has no real remedy.

The parallel with medical practice is suspect, too. The law makes a provision for seniority in legal practice. Courts confer it. It's effectively a public (state) title. But medical designations are different. Doctors and their employers decide on them. The law doesn't meddle.

For now, the legal fraternity in India shall remain divided between a smattering of royals and a sea of plebeian lawyers. But things won't be the same. The court has promised to make the process of seniority less of a black box. The royals must earn their coronets more fairly.

A more democratic royalty

Criteria for seniority, until now, varied across courts. Some courts emphasised age, experience, and expertise. A few demanded specific income levels, too. All vested judges with the power to designate seniority.

The court has waved away the variations. Now a set of common guidelines shall apply. Only experience and expertise matter, not age or income. And a new method is in place.

The supreme court and all high courts shall house a “permanent committee for designation of senior advocates,” alongside a secretariat, the court decided. The committee shall consist of the chief justice and two senior-most judges of the relevant court, the attorney (or advocate) general, and an invited member of the Bar. The secretariat will process applications, prepare dossiers, and, in a radical move, upload all formatted data online. The public is free to comment on it. The committee shall quiz applicants and, in addition, score them on experience, expertise, and publications. Names of shortlisted candidates will be forwarded to the full court—i.e. the collegium of all judges in a court. It shall award seniority by a majority vote polled in secret.

The procedure is refreshingly nuanced. It has a democratic flavour to it, something the black box didn't have. Those barred from the old boys' club now stand a better shot at seniority, especially women and younger lawyers.

Much will depend on those who sit on these committees and how they work it. The three senior-most judges in most high courts are men. So are most advocate generals in the states. Introducing gender diversity in the committees may mean proactively recruiting women lawyers to represent the Bar.

But that is a first step. Diversifying the current roster of senior advocates may mean encouraging women advocates and those belonging to the lower castes to apply for seniority. This is critical. Among practicing lawyers, only senior

advocates are earnestly considered for judgeship. So, a diversified bench of judges can only come from a diversified roster of senior advocates.

A collective not always given to candidness has introduced a system of orderly vetting. Feisty local lawyers and global practices helped the supreme court to this moment. It is a welcome move. Still, procedures are as good as the people who apply them. We have a procedure. Now, people who matter must work on it. If applied less in letter and more in spirit, the new system will serve the Bar, bench, and the idea of justice in India better than it now does.

We welcome your comments at ideas.india@qz.com.