

APPROACHES TO
JUSTICE IN INDIA

A Report by

DAKSH



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First Edition, 2017

₹ 495.00



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Typeset and Produced by:

EBC Publishing Pvt. Ltd.

34-A, Lalbagh, Lucknow – 226 001

U.P., India

Website: www.ebc.co.in E-mail: sales@ebc-india.com

Contents

List of Tables	ix
List of Figures	xiii
Table of Cases	xxiii
Introduction	xxvii
<i>Shruti Vidyasagar</i>	
<i>Ramya Sridhar Tirumalai</i>	

SECTION ONE

JUSTICE, ACCESS, AND THE NATION'S APPROACHES

1. A Sense of Justice: Our Role in Creating and Improving Perceptions	3
<i>Ashwin Mahesh</i>	
2. Paths to Justice: Surveying Judicial and Non-judicial Dispute Resolution in India	9
<i>Padmini Baruah</i>	
<i>Shruthi Naik</i>	
<i>Surya Prakash B.S.</i>	
<i>Kishore Mandyam</i>	
3. Saddharma Nyaya Peetha: The Role of Taralabalu Math in Resolving Disputes	39
<i>Shivamurthy Shivacharya Mahaswamiji</i>	
4. The Mediation Gap: Where India Stands and How Far It Must Go	43
<i>Tara Ollapally</i>	
<i>Annapurna Sreehari</i>	
<i>Shruthi Ramakrishnan</i>	
5. Manpower Malady: Managing Legal Aid Institutions	53
<i>Shruthi Naik</i>	

6. Bail and Incarceration: The State of Undertrial Prisoners in India . . 67
Aparna Chandra
Keerthana Medarametla
7. Gandhi's Jurisconscience: Evolution of His Ideas of Justice 79
Sudarshan Iyengar

SECTION TWO

RULE OF LAW PROJECT

1. Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts 91
Arunav Kaul
Ahmed Pathan
Harish Narasappa
2. Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts 117
Harish Narasappa

SECTION THREE

PROBING PENDENCY AND PERFORMANCE OF COURTS

1. Promise to Pay: An Analysis of Cheque Dishonour Cases 125
Ramya Sridhar Tirumalai
2. Performance Indicators: Working of Magistrates' Courts in India . 137
Arunav Kaul
3. Diversification and Efficiency: A Case Study of the Karnataka Appellate Tribunal 149
Amulya Purushothama
Padmini Baruah
4. Government Litigation: A Study of Tax Appeals in Karnataka and Gujarat 163
Alok Prasanna Kumar

5. California's Courts: Judicial Administration and Case Flow Management	173
<i>Leah Rose-Goodwin</i>	

SECTION FOUR

ACTORS IN THE JUSTICE SYSTEM

1. One Dispute, Many Cases: Overcoming the Numbers Game in Litigation	189
<i>P.N. Prakash</i>	
2. Beyond Reasonable Doubt: A Prosecutor's Views on the Criminal Justice System	195
<i>Jude Angelo</i>	
3. Trusting the Police: Challenges of Criminal Investigation and Trials in India	201
<i>R. Sri Kumar</i>	
4. Judicial Tenure: An Empirical Appraisal of Incumbency of Supreme Court Judges	209
<i>Rangin Pallav Tripathy</i>	
<i>Gaurav Rai</i>	
5. Judicial Budgets: From Financial Outlays to Time-bound Outcomes	225
<i>Avanti Durani</i>	
<i>Rithika Kumar</i>	
<i>Neha Sinha</i>	
About the Editors and Authors	235
Index	239

List of Tables

PART ONE

Chapter 4

TABLE 1

City and State-Wise Referral of Cases to Mediation and Disposal Rates	47
---	----

Chapter 6

TABLE 1

Number and Percentage of Undertrial Prisoners for More than Five Years and Less than One Year (2001–2015)	69
---	----

TABLE 2

Percentage of Undertrial Prisoners Acquitted (2006–2015)	73
--	----

TABLE A1

Undertrial Prisoner Population	76
--------------------------------------	----

TABLE A2

Occupancy Rate in Prison	76
--------------------------------	----

TABLE A3

Rates of Arrests for All Cognisable Offences under the IPC	77
--	----

TABLE A4

Rates of Arrest for Theft	77
---------------------------------	----

TABLE A5

Rates of Arrest for Cruelty by Husband and Relatives	77
--	----

TABLE A6

Undertrial Prisoners Released Each Year (2006–2015)	78
---	----

PART THREE

Chapter 1

TABLE 1

Details of Cases Analysed	128
---------------------------------	-----

TABLE 2

Top 20 Petitioners Filing the Most Cases	131
--	-----

Chapter 3

TABLE 1

New Cases Filed in KAT between 2012 and 2017	152
--	-----

TABLE 2

Number of Cases Disposed by KAT between 2013 and 2017	153
---	-----

TABLE 3

Cases Pending in KAT between 2012 and 2017	154
--	-----

TABLE 4

Disposal Rate of KAT between 2013 and 2017	155
--	-----

TABLE 5

Appeal Rate of KAT in 2014	157
----------------------------------	-----

TABLE 6

Reversal Rate for Appeals from KAT to High Court of Karnataka in 2014	159
--	-----

Chapter 4

TABLE 1

Comparison of Appeals Filed by Revenue and Assesseees in the High Courts of Karnataka and Gujarat in Income Tax Cases	168
---	-----

TABLE 2

Comparison of Appeals/Revision Petitions filed by State Governments and Assesseees under VAT Laws in the High Courts of Karnataka and Gujarat	169
---	-----

TABLE 3	Comparison of Pendency of Appeals in Income Tax Cases	170
---------	---	-----

TABLE 4	Comparison of Pendency of Appeals in VAT Cases	171
---------	--	-----

PART FOUR

Chapter 1

TABLE 1	Details of Cases Heard by Author between 1 February 2016 and 30 April 2016	190
---------	---	-----

Chapter 4

TABLE 1	Supreme Court Judges Who Resigned from Office	211
---------	---	-----

TABLE 2	Supreme Court Judges Who Died in Office	211
---------	---	-----

TABLE 3	Longest Completed Tenures in Supreme Court	216
---------	--	-----

TABLE 4	Shortest Completed Tenures in Supreme Court	216
---------	---	-----

TABLE 5	Longest High Court Tenures of Supreme Court Judges	219
---------	--	-----

TABLE 6	Shortest High Court Tenures of Supreme Court Judges	220
---------	---	-----

List of Figures

PART ONE

Chapter 2

FIGURE 1	
Age	15
FIGURE 2	
Gender	15
FIGURE 3	
Education	16
FIGURE 4	
Occupation	16
FIGURE 5	
Religion	17
FIGURE 6	
Caste	17
FIGURE 7	
Annual Income	17
FIGURE 8	
Where People Go for Information about Their Dispute	18
FIGURE 9	
Whom People Would Not Approach if They Had a Dispute	18
FIGURE 10	
Police Complaints	19
FIGURE 11	
FIRs Filed during the Course of the Dispute	20

FIGURE 12	
Reasons for Not Registering the FIR—Based on the Nature of Dispute	20
FIGURE 13	
Disputes in the Last Five Years	21
FIGURE 14	
Nature of Disputes Faced in the Last Five Years	22
FIGURE 15	
Nature of Land Disputes	22
FIGURE 16	
Income of People with Disputes Involving Agricultural and Non-Agricultural Land	23
FIGURE 17	
Disputes Faced by People of Different Religions	24
FIGURE 18	
Religion Matrix of Survey Respondents against their Opposite Party .	24
FIGURE 19	
Resolution of the Dispute	25
FIGURE 20	
Disputes that People Do Not Want to Resolve	26
FIGURE 21	
Reasons for Not Resolving the Dispute: Tamil Nadu, Bihar, and Punjab	26
FIGURE 22	
Caste-wise Distribution of Respondents Who Did Not Want to Resolve Their Dispute	27
FIGURE 23	
Resolution of Disputes: Court and Non-court Mechanisms	28
FIGURE 24	
Reasons for Not Going to Court	28
FIGURE 25	
Non-court Methods People Tried	29

FIGURE 26	
Non-court Methods That Helped Resolve the Dispute	29
FIGURE 27	
Use of Non-court Methods in Resolving Crimes	30
FIGURE 28	
Nature of Disputes	31
FIGURE 29	
Problems Resulting from the Dispute	31
FIGURE 30	
Problems Faced by People Going to Court: Top Four States	32
FIGURE 31	
Problems Faced by People Who Used Non-court Mechanisms: Top Three States	32
FIGURE 32	
Previous Court Experience and Impact on Use of Courts	33
FIGURE 33	
Previous Non-court Experience and Impact on Use of Courts	33
FIGURE 34	
Previous Court Experience and Impact on Use of Non-court Methods	34
FIGURE 35	
Previous Non-court Experience and Impact on Use of Non-court Mechanisms	34
FIGURE 36	
Prior Experience of Respondents Who Went to Court	35
FIGURE 37	
Prior Experience of Respondents Who Used Non-court Methods . . .	35
FIGURE 38	
Costs of Participating in the Dispute Resolution Process	36
FIGURE 39	
Average Cost of Participating in the Dispute Resolution Process . . .	36

FIGURE 40	
Daily Cost of Attending Proceedings	37
FIGURE 41	
Experience with Bribes	37

Chapter 5

FIGURE 1	
Organogram of Legal Services Authorities and Committees	54
FIGURE 2	
Subordinate Judiciary Pendency, Judge Strength, and Legal Service Officials	58

Chapter 6

FIGURE 1	
Percentage of Undertrial Prisoners (2001–2015)	68
FIGURE 2	
Occupancy Rate in Prisons (2001–2015)	69
FIGURE 3	
Rates of Arrest	72
FIGURE 4	
Number of Undertrial Prisoners Released (2006–2015)	73

PART TWO

Chapter 1

FIGURE 1	
Summary of the DAKSH Database	92
FIGURE 2	
Average Pendency in All High Courts and Subordinate Courts	92
FIGURE 3	
Number of Pending Cases in Subordinate Courts of the States and Union Territories	93

FIGURE 4	
Number of Pending Cases in Subordinate Courts of Districts in Karnataka	94
FIGURE 5	
Average Pendency in High Courts	95
FIGURE 6	
Average Pendency in Subordinate Courts	96
FIGURE 7	
Average Pendency of Civil, Criminal, and Writ Cases in High Courts	97
FIGURE 8	
Average Pendency of Civil and Criminal Cases in Subordinate Courts	98
FIGURE 9	
Proportion of Pending Cases in High Courts	99
FIGURE 10	
Proportion of Pending Cases in Subordinate Courts	100
FIGURE 11	
Proportion of Civil and Criminal Cases in Subordinate Courts	100
FIGURE 12	
Judicial Workload of Subordinate Courts Categorised by Types of Cases	101
FIGURE 13	
Average Pendency and Disposal in Subordinate Courts	101
FIGURE 14	
Stage-wise Distribution of Hearings in Cases in Subordinate Courts.	102
FIGURE 15	
Time Taken from First Hearing to Evidence in Subordinate Courts .	103
FIGURE 16	
Time Taken from Evidence to Final Judgment in Subordinate Courts	103

FIGURE 17	
Factors Affecting Pendency	104
FIGURE 18	
Relationship between Case Clearance Rate and Judges' Strength	105
FIGURE 19	
Case Clearance Rates in Civil and Criminal Cases	106
FIGURE 20	
Percentage of Population Involved in Civil and Criminal Litigation in India	107
FIGURE 21	
Impact of Gross Domestic Product on Civil Litigation	108
FIGURE 22	
Average Pendency and Disposal of Execution Cases	109
FIGURE 23	
Average Pendency of Execution Cases	109

PART THREE

Chapter 1

FIGURE 1	
State-wise Representation of Average Pendency of Cheque Dishonour Cases	129
FIGURE 2	
Districts with Highest Average Pendency	130
FIGURE 3	
Districts with Lowest Average Pendency	130
FIGURE 4	
Current Stages of Cases	131

Chapter 2

FIGURE 1	
Percentage of Civil and Criminal Cases in Subordinate Courts	138

FIGURE 2	
Number of Cases Pending in the Chosen Courts	139
FIGURE 3	
Distribution of Cases Pending with Judges	140
FIGURE 4	
Comparison of Cases Pending with the CJM/CMM	141
FIGURE 5	
Comparison of Cases Pending with CMM Calcutta with other States/UTs	142
FIGURE 6	
Pending Cases Filed Prior to 2000	143
FIGURE 7	
Average Pendency of Certain Case Types	144
FIGURE 8	
Case Clearance Rate	145

Chapter 3

FIGURE 1	
New Cases Filed in KAT between 2012 and 2017	152
FIGURE 2	
Number of Cases Disposed by KAT between 2013 and 2017	153
FIGURE 3	
Cases Pending in KAT between 2012 and 2017	154
FIGURE 4	
Disposal Rate of KAT between 2013 and 2017	155
FIGURE 5	
Percentage of Cases Appealed from KAT in 2014 by Case Type	157
FIGURE 6	
Types of Challenges to KAT's Orders	158

FIGURE 7	
Grounds for Appeal from KAT to High Court of Karnataka in 2014	159
FIGURE 8	
Grounds for Appeal in Orders from KAT in 2014 Reversed by High Court of Karnataka	160

Chapter 4

FIGURE 1	
Comparison of Ratio of Government to Assessee Appeals in the High Courts of Karnataka and Gujarat	168
FIGURE 2	
Comparison of Ratio of Government to Assessee Appeals in the High Courts of Karnataka and Gujarat	170

Chapter 5

FIGURE 1	
California's Court System	175
FIGURE 2	
Ten-year Trends in Criminal Filings	180
FIGURE 3	
Felony Dispositions for Fiscal Year 2016–2017 by Type of Disposition	183

PART FOUR

Chapter 4

FIGURE 1	
Average Supreme Court Tenure	212
FIGURE 2	
Average Supreme Court Tenure and Parent High Courts	213
FIGURE 3	
Average Supreme Court Tenure and Appointing Authority	214

FIGURE 4	
Average Supreme Court Tenure: Percentage of Reduction	215
FIGURE 5	
Average Supreme Court Tenure: Percentage of Increase	215
FIGURE 6	
Average High Court Tenure of Supreme Court Judges:	
Parent High Court	217
FIGURE 7	
Average High Court Tenure of Supreme Court Judges:	
Appointing Authority	218
FIGURE 8	
Average High Court Tenure of Supreme Court Judges:	
Percentage of Increase	218
FIGURE 9	
Average High Court Tenure of Supreme Court Judges:	
Percentage of Reduction	219
FIGURE 10	
Continuous Uninterrupted Period of Representation of	
Parent High Courts (in Years)	221
FIGURE 11	
Period of Non-representation of Parent High Courts in	
Supreme Court (in Days)	221
FIGURE 12	
Percentage of Non-representation of Parent High Courts in	
Supreme Court	222

Chapter 5

FIGURE 1	
Budget Allocation for DOLJ of Maharashtra, 2016–2017	227
FIGURE 2	
Budget Allocation for District and Sessions Courts of Maharashtra,	
2016–2017	228

Table of Cases

A

Abdul Rehman Antulay <i>v.</i> R.S. Nayak, (1992) 1 SCC 225	122
Afcons Infrastructure Ltd. <i>v.</i> Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24	50
Akhtari Bi <i>v.</i> State of M.P., (2001) 4 SCC 355	122
All India Judges' Assn. (1) <i>v.</i> Union of India, (1992) 1 SCC 119	147
Anita Kushwaha <i>v.</i> Pushap Sudan, (2016) 8 SCC 509	135
Arnesh Kumar <i>v.</i> State of Bihar, (2014) 8 SCC 273	78

B

Bhim Singh <i>v.</i> Union of India, (2010) 5 SCC 538	122
Bhim Singh <i>v.</i> Union of India, (2015) 13 SCC 603	78

C

Chunilal V. Mehta and Sons Ltd. <i>v.</i> Century Spg. and Mfg. Co. Ltd., AIR 1962 SC 1314	172
---	-----

G

Gian Singh <i>v.</i> State of Punjab, (2012) 10 SCC 303	193
---	-----

H

Hussainara Khatoon (3) <i>v.</i> State of Bihar, (1980) 1 SCC 93	122
Hussainara Khatoon (4) <i>v.</i> State of Bihar, (1980) 1 SCC 98 : (1979) 3 SCR 532	78
Hussainara Khatoon (7) <i>v.</i> Home Secy., (1995) 5 SCC 326	135
Hussain <i>v.</i> Union of India, (2017) 5 SCC 702	122

I

Imtiyaz Ahmad <i>v.</i> State of U.P., (2012) 2 SCC 688	122
Indian Bank Assn. <i>v.</i> Union of India, (2014) 5 SCC 590	135
Inhuman Conditions in 1382 Prisons, re, (2016) 3 SCC 700	78

J

Joginder Kumar <i>v.</i> State of UP, (1994) 4 SCC 260	78
--	----

K

K.K. Saxena <i>v.</i> International Commission on Irrigation & Drainage, (2015) 4 SCC 670	172
K.N. Govindan Kutty Menon <i>v.</i> C.D. Shaji, (2012) 2 SCC 51	134

L

Lalita Kumari <i>v.</i> Govt. of UP, (2014) 2 SCC 1	78, 193
---	---------

P

Pradeep Kumar Biswas <i>v.</i> Indian Institute of Chemical Biology, (2002) 5 SCC 111	172
--	-----

R

R.D. Upadhyay <i>v.</i> State of AP, (1996) 3 SCC 422	78
---	----

S

Salem Advocate Bar Assn. (2) <i>v.</i> Union of India, (2005) 6 SCC 344	50, 122, 147
Salem Advocate Bar Assn. <i>v.</i> Union of India, (2003) 1 SCC 49 : 2002 Supp (3) SCR 353	50
Sangeetaben Mahendrabhai Patel <i>v.</i> State of Gujarat, (2012) 7 SCC 621 ...	134
Shaheen Welfare Assn. <i>v.</i> Union of India, (1996) 2 SCC 616	78
Shankra <i>v.</i> State (Delhi Admn.), 1995 SCC OnLine Del 399	78
Special Reference No. 1 of 1998, re, (1998) 7 SCC 739	224
S.P. Gupta <i>v.</i> Union of India, 1981 Supp SCC 87	224

Supreme Court Advocates-on-Record Assn. <i>v.</i> Union of India, (1993) 4 SCC 441	224
Supreme Court Advocates-on-Record-Assn. <i>v.</i> Union of India, (2016) 5 SCC 1	224
Supreme Court Bar Assn. <i>v.</i> Union of India, (2007) 4 SCC 353 : AIR 2007 SC 1670	65
Supreme Court Legal Aid Committee <i>v.</i> Union of India, (1994) 6 SCC 731	78

T

Thana Singh <i>v.</i> Central Bureau of Narcotics, (2013) 2 SCC 590	78, 122
---	---------

Introduction

Shruti Vidyasagar

Ramya Sridhar Tirumalai

Science begins with counting. To understand a phenomenon, a scientist must first describe it; to describe it objectively, he must first measure it.

Siddhartha Mukherjee,
The Emperor of All Maladies

These words, written by Mukherjee in his seminal biography of cancer, aptly characterise the principal purpose of DAKSH's Rule of Law Project, which is to understand the justice-delivery system in India using a data-driven approach.

In 2016, DAKSH released a report, titled *State of the Indian Judiciary (SoJR)*, in which we focused on the most visible face of the justice-delivery system in India—the judiciary. In evaluating the work of the judiciary, we considered its primary challenge—pendency in the courts—as a means to understand how delays in the progress of cases affect citizens and the economy. We also presented findings from our pioneering survey on access to justice, which recorded litigants' perceptions of, and experiences within, the judicial system.

As we pondered on the composition of DAKSH's second report, we decided to retain the two principal aspects of the *SoJR*—delays in the judicial system and access to justice—as the fulcrum of this year's report also, but examine them both more deeply and broadly. While the *SoJR* explored the systemic issues of administration and accountability in the judiciary, this year's report is an in-depth scrutiny of the performance of courts, with an emphasis on their workload, case flow, and efficiency. While the *SoJR* reflected on access to justice, and in particular, its institutional dimensions (mainly relating to the judiciary), this year, we consider 'justice' more

expansively—in terms of its underlying ideas, its administration and delivery by non-judicial bodies, as well as the various approaches to it in India.

JUSTICE, ACCESS, AND THE NATION'S APPROACHES

The quest for justice is a millennia-old pursuit that is deeply entrenched in mythology, philosophy, and human consciousness. Today, justice is considered a key tenet of any society, and particularly in a democracy.

Justice, and how it is delivered, is central to DAKSH's work. In a nation as vast and heterogeneous as India, there are at least as many paths to justice as there are problems or disputes. Therefore, we broadened our enquiry on the question of access to justice, by viewing justice through a wider prism and examining non-judicial means of dispute resolution in this year's report, which we have entitled *Approaches to Justice in India*.

IDEAS OF JUSTICE

What are peoples' ideas of justice? How are these conceptions formed? What are their perceptions of the justice system? Contributors reflect on these and other questions in the opening section of the report.

Ashwin Mahesh, in a thought-provoking chapter, deliberates on the common expectation of justice amongst citizens. He notes that notions of fairness, standards of justice, actors in the system, and related institutions are all intertwined in how citizens feel and understand justice, and its administration. Mahesh advises citizens themselves to

take the lead in the effort to improve perceptions of administration of justice, for then, citizens can shape the justice system, becoming producers (and not merely consumers) of the system they desire and expect.

This call to the community as a whole, to participate in moulding a system in which laws are accepted through the processes approved by citizens themselves, seems to echo the approach practised by Mahatma Gandhi, who believed that laws of the land may acquire force through institutions, but for them to gain acceptance, they must involve citizens at the grass-root level. As Sudarshan Iyengar explains in his layered chapter, 'Gandhi's Jurisconscience: Evolution of His Ideas of Justice', the development of Gandhi's idea of justice in the context of jurisprudence (law of the land) and jurisconscience (natural law) began when he was a student and continued during his civil disobedience movement in the face of institutional atrocities, both in South Africa and India. Gandhi's convictions are based on looking inward, both when one has done wrong and when one has suffered wrong. In the former case, one must develop the moral courage to not only accept one's own fault and feel remorse, but also to accept punishment as one's due. In the latter case, the first step is to forgive the wrongdoer—through *ahimsa* (non-violence), the highest form of forgiveness—to correct the wrongdoer.

Forgiveness, in the context of dispute resolution, involves the eschewal of ego. For, as Shivamurthy Shivacharya Mahaswamiji points out in 'Saddharma Nyaya Peetha: The Role of Taralabalu Math in Resolving Disputes', in his experience (spanning several decades) of resolving people's disputes, 'ego, hatred, and selfishness' of parties are the main obstacles in reaching a settlement. In Swamiji's view, which he clarifies is one he holds a religious leader, justice means alleviation of people's pain, hardship, and suffering, and its

essential purpose is to enable people to live with dignity, peace, and happiness.

PATHS TO JUSTICE

DAKSH interviewed Swamiji as part of its project on judicial and non-judicial means of dispute resolution. The Saddharma Nyaya Peetha ('open court session') conducted by the Taralabalu Math in Sirigere is an age-old practice of mediation, which has now been modernised by the Swamiji by documenting proceedings, providing procedural structure, and incorporating the use of technology. From Swamiji's succinct responses, a picture emerges of the religious institution taking up a social responsibility to provide its followers a means of settling disputes amicably. More tellingly, the number of cases that Swamiji sees in a year—about 1,200—shows that people value the sense of agency, control, and transparency that this process allows them.

Mediation as an alternative dispute resolution (ADR) process has found legislative sanction in India, as Tara Ollapally, Annapurna Sreehari, and Shruthi Ramakrishnan point out in 'The Mediation Gap: Where India Stands and How Far It Must Go'. However, there are several infrastructural hurdles to implementing mediation as an effective ADR method, not least of which is that the ambiguous wording of the statutory amendment to the Civil Procedure Code, which enables disputes to be referred to mediation, leads to more problems than solving any. In their discussion on the Indian legal landscape and frameworks with respect to mediation, Ollapally, Sreehari, and Ramakrishnan recommend steps that need to be taken to develop a more conducive ecosystem for mediation to flourish as an effective dispute resolution process, accepted not only by litigants but also amongst the judiciary.

ACCESSING JUSTICE

It is well documented that in resolving disputes, Indian society has constantly developed alternative means to suit local needs and changing circumstances. To understand this better, DAKSH conducted a survey earlier this year to understand the various modes of dispute resolution used in India (including, but not limited to, courts), and the experiences of people who used these methods. The findings of the household survey, undertaken across India, in which we collected more than 45,000 responses, are set out in the chapter titled, 'Paths to Justice: Surveying Judicial and Non-judicial Dispute Resolution in India'. Here, Padmini Baruah, Shruthi Naik, Surya Prakash B.S., and Kishore Mandyam present key results from the survey, including the kinds of disputes people face, modes of dispute resolution they choose, reasons why some people prefer *not* to resolve their disputes, peoples' experiences with the police, and costs of resolving their disputes. The survey presents a stark picture of the extent of people's confidence in justice-delivery systems—both judicial and non-judicial—as well as their reasons for reposing that trust and faith. The findings also reiterate a crucial fact—financial costs not only constitute a significant barrier to accessing justice, but also determine people's choice of method (or institution) to resolve their disputes.

This brings home the irrefutable fact that provision of legal aid is vital in ensuring access to justice. In India, currently, administering the legal aid system is the responsibility of serving members of the judiciary, unlike in several other nations, where that duty has been transferred to professional managers. Shruthi Naik, in the chapter titled, 'Manpower Malady: Managing Legal Aid Institutions', carefully assesses the amount of work involved in running the legal aid system in India. She finds that judges must make time from their busy schedules

(court work with considerable caseloads, as well as administrative activities) to supervise the day-to-day functioning of legal services authorities. After evaluating legal aid administration models followed internationally, Naik proposes a solution to ensure a balance between reducing the work of an overburdened judiciary and the efficient administration of legal aid. She suggests the setting up of a separate unit for delivery of legal aid, comprising people with the knowledge of India's socio-economic realities, experience in running welfare programmes, and strong managerial credentials, that is in charge of everyday operations of legal services authorities and implementation of legal aid programmes, while the judiciary is the monitoring agency, with the authority to make high-level policy decisions.

While changes to existing policies or framing new policies is essential to keep pace with changing circumstances, for any measure—regardless of whether it originates from the legislature, executive, or judiciary—to bear fruit, it must be implemented in a sustained manner and become institutionalised. Failure to do this will mean a failure of the policy itself. This is exemplified in the chapter titled, 'Bail and Incarceration: The State of Undertrial Prisoners in India', written by Aparna Chandra and Keerthana Medarametla, who find, after studying data from the past 15 years on the incarceration of undertrial prisoners in India, that despite various reform measures by the legislature and judiciary, not only is the extent and duration of incarceration of undertrial prisoners on the rise, but also that it has a disproportionate impact on the most socio-economically vulnerable sections of our society. Chandra and Medarametla find that judicial interventions on bail law have focused on 'one-off' measures and therefore suffered from want of sustained and systematic follow-up, while legislative changes have not been implemented consistently, meaning that both efforts have had little ameliorative impact.

ASSESSMENT OF COURT PERFORMANCE

In the *So/R*, we had pointed out several problems with the organisation of data available on the websites of the High Courts and subordinate courts, as well as the e-courts system. The main criticism was that owing to their design and maintenance as repositories of data to provide information to litigants/lawyers on their cases, they are useful only to that extent—with people's interactions with these websites being essentially of a transactional nature—it enabled them to access only *individual case*-related information. Little thought seemed to have been given to an equally (if not more) important aspect—collection, organisation, and maintenance of, and access to, data in a way as to facilitate and indeed, encourage, analysis of courts' work beyond individual cases. We had commented that data must be made available in a form capable of systemic analysis. That, we had said, was the real test of the usefulness of such repositories—how much of their data could be converted to information?

DAKSH's Rule of Law Project sought to fill this gap, by creating one single database containing case and hearing information from High Courts and subordinate courts on an analysable platform. This database has been continuously updated, and as of August 2017, contained information on approximately 1.13 crore cases filed in courts across India.

In this report, two sections are dedicated to showcasing the various kinds of analyses that can be carried out using case-related data, testifying to the utility of the data-driven approach in assessing court performance.

The chapter titled, 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts', by Arunav Kaul, Ahmed Pathan, and Harish Narasappa, makes use of data from DAKSH's database and the National Judicial

Data Grid (NJDG)—a government website containing summaries of case-related data from district courts—to carry out complex analyses to measure courts' pendency, efficiency, and workload, as well as the progress of cases in the High Courts and subordinate courts. They also use various parameters, including internationally accepted norms such as case clearance rates, in their analyses of cases from a particular territory (Delhi) and those belonging to a specific category (execution cases). Significantly, Kaul, Pathan, and Narasappa find a positive correlation between a state's gross domestic product (GDP) and the level of civil litigation in that state, indicating that states which contribute more towards India's GDP have a higher percentage of civil cases pending in the country (the exception is Uttar Pradesh). This is borne out by the findings from our survey (conducted earlier this year) on access to justice too, where we found a relationship between the income level of people and the mode they choose for dispute resolution, that is, the higher a person's income, the more likely she is to approach a court, rather than a non-judicial institution, to resolve her dispute.

In 'Promise to Pay: An Analysis of Cheque Dishonour Cases', Ramya Sridhar Tirumalai examines a significant and ubiquitous cause of congestion in subordinate courts—cheque dishonour cases. Tirumalai notes how, despite explicit Supreme Court guidelines on dealing expeditiously with 'cheque bounce' cases, not even one amongst the 144 districts (across 21 states)—from whose courts she collected and reviewed cases—had an average pendency of less than two years. Tirumalai identifies the stages at which most cases remain pending, as well as complainants who file cases most frequently. She recommends interventions in court processes to free up court time and mitigate delays, and also suggests that banks and financial institutions (as frequent complainants), come up

with a system to blacklist repeat offenders to avoid new cases from being filed.

Alok Prasanna Kumar's chapter, 'Government Litigation: A Study of Tax Appeals in Karnataka and Gujarat', focuses on government litigation, which is often blamed for the large pendency of cases in courts. Noting that precise figures are elusive to support or belie this claim, he studies a specific type of government litigation, namely, tax appeals in High Courts, to assess the government's litigiousness. In particular, he considers whether any patterns emerge from the data to suggest that perverse incentives contribute to the approaches of the governments. Kumar compares the number of income tax appeals in the High Courts of Karnataka and Gujarat (in which the union government is a party), with sales and value added tax appeals before the High Courts of Karnataka and Gujarat (where the state governments of Karnataka and Gujarat, respectively, are involved). He finds that the central government seems far more litigious than the state governments when it comes to tax appeals, and concludes that it immediately needs to rethink its approach to tax litigation.

In 'Performance Indicators: Working of Magistrates' Courts in India', Arunav Kaul studies in depth the functioning of the magistrates' courts, which form the foundation of the criminal justice system in India. Given the high number of criminal cases pending in the subordinate courts, it is important to understand the manner in which magistrates' courts handle case flow. In this chapter, Kaul studies the top 10 magistrates' courts in India, with the most number of pending cases, and evaluates their workload, distribution of pendency in cases, rate at which cases are being disposed, ageing and backlog, as well as case clearance rates.

Tribunals are quasi-judicial institutions established to solve the problems of pendency

and delay by reducing the workload of courts. Amulya Purushothama and Padmini Baruah, in 'Diversification and Efficiency: A Case Study of the Karnataka Appellate Tribunal', conduct an empirical study to examine the efficiency and efficacy of the Karnataka Appellate Tribunal (KAT), to understand whether it has fulfilled these goals. They evaluate whether the KAT works efficiently by disposing of cases, as well as whether it acts as an effective court of appeals and thus reduces the caseload of the High Court of Karnataka.

INTERNATIONAL ILLUSTRATION

To understand how other jurisdictions deal with court administration and case flow management, we invited Leah Rose-Goodwin, manager of the Office of Court Research at the Judicial Council of California, the central policymaking and administrative agency of the California state court system, to contribute to the report. In her chapter, 'California's Courts: Judicial Administration and Case Flow Management', Rose-Goodwin discusses how California's court system, despite being one of the largest in the world, has to deal with several challenges in implementing trial court unification and case flow management, owing to lack of centralised data, severe loss of funding due to national recession, and an emphasis on local decision-making rather than statewide standards. She says however that despite these difficulties, the California Judicial Branch is inclined towards using data and analytics to measure and report case flow management indicators, which are critical to better understanding court workload, the need for judges, and funding requirements of branches.

Thus, every court system has challenges; what is important however is that in order to overcome them, we need not only plans and programmes,

or merely the will and wherewithal to implement them, but professional personnel with the spirit and commitment to persevere.

MEASURES FOR IMPROVEMENT

In addition to closely studying delay in the disposal of cases by courts, and the backlog faced by the judiciary as a consequence, members of the DAKSH team have interacted extensively with several judges—both from the higher judiciary and the subordinate judiciary, as well as registrars, court clerks, and other administrative staff of courts. Given the various problems with the current system of court administration and case flow management, particularly in the subordinate judiciary, Harish Narasappa, in his chapter, 'Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts', identifies essential measures that must be put in place at the earliest, so tackling delay and pendency can begin. He says that creating a cadre of dedicated administrative personnel, managing cause lists, and using technology are critical to reducing uncertainty of hearings and maximising judicial time.

Our discussions have also led us to question the anachronistic budgeting systems followed by the judiciary in India, and ask how they may be improved so that the considerable resources at the judiciary's disposal may be allocated and managed more soundly and with better results. In their chapter titled, 'Judicial Budgets: From Financial Outlays to Time-bound Outcomes', Avanti Durani, Rithika Kumar, and Neha Sinha, reiterate the point made by Surya Prakash B.S. in the *SoJR*, that budgets for the judiciary have been based on recurring historical expenses rather than a scientific planning process, and have thus failed to provide for capacity building or targeting desired outcomes. Durani,

Kumar, and Sinha suggest a shift to a time-bound ‘outcome’-based approach from an ‘outlay’-oriented budget, through a framework of performance indicators, in order to improve judicial efficiency.

PERSONNEL AND PROCESSES

The report also contains contributions from two essential actors in the criminal justice system—the police and the prosecutor. This year, along with experiential narratives of what it means to be part of the criminal justice system, the contributors also discuss various problems in the system, which not only affect their work but also undermine the system. They suggest reforms to improve the system, both inherently and in terms of efficiency.

In ‘Trusting the Police: Challenges of Criminal Investigation and Trials in India’, R. Sri Kumar, former DGP & IGP of Karnataka and an ex-member of the Vigilance Commission, highlights the difficulties of the police during investigation and trial of criminal cases. Using his own experiences as examples, he recommends changes to processes and procedures, so that the police can work with other actors to improve the efficiency of the criminal justice system.

In ‘Beyond Reasonable Doubt: A Prosecutor’s Views on the Criminal Justice System’, Jude Angelo, a public prosecutor working in Tamil Nadu’s subordinate courts, shares her experiences and understanding of the criminal justice system. Angelo takes note of the various nuances of the system, as well as its successes and failures. She also discusses the daily challenges that prosecutors face in bringing the accused to book. While she proposes some measures for reform, Angelo is confident that processes, which are already in place, need only greater clarity and proper application, for them to achieve efficiency.

SYSTEMIC TRANSFORMATION

Justice P.N. Prakash, a sitting judge in the High Court of Madras, was admittedly inspired by the *So/R* to contribute a chapter to this report. He begins with a brief empirical study of cases that appeared in his court during a three-month period when he was posted to the Madurai Bench. Looking at the list of frivolous cases that he had to contend with, Justice Prakash laments that a constitutional court has been reduced to deciding which of the factions in a municipality has the right to use the microphone during festival days. He also paints a vivid picture of litigants playing the numbers game by filing multiple cases in relation to the same dispute, demonstrating how such a practice not only adds to the court’s list of pending cases, but also to the culture of frivolous litigation. To overcome this, Justice Prakash emphasises the need for systematically collecting data on cases, to find methods and allocate resources to prevent such filings. Failure to do this, he warns, will weaken the judiciary and imperil democracy.

In examining the work of judges, some relevant questions arise: Does the length of judges’ tenure have any effect on the disposal rate of cases they handle? Does length of tenure have any effect on judicial behaviour? Is there a connection between the tenure of judges and the types of cases they are assigned to adjudicate? How often are judges with shorter tenures involved in the Constitution Benches? Does the uninterrupted presence of judges in the Supreme Court from the parent High Court of a state have any implications on litigants originating from such states? These, and other questions, are raised by Rangin Pallav Tripathy and Gaurav Rai, in the chapter titled, ‘Judicial Tenure: An Empirical Appraisal of Incumbency of Supreme Court Judges’, adding a new dimension to the discussion on appointment of judges to the Supreme Court.

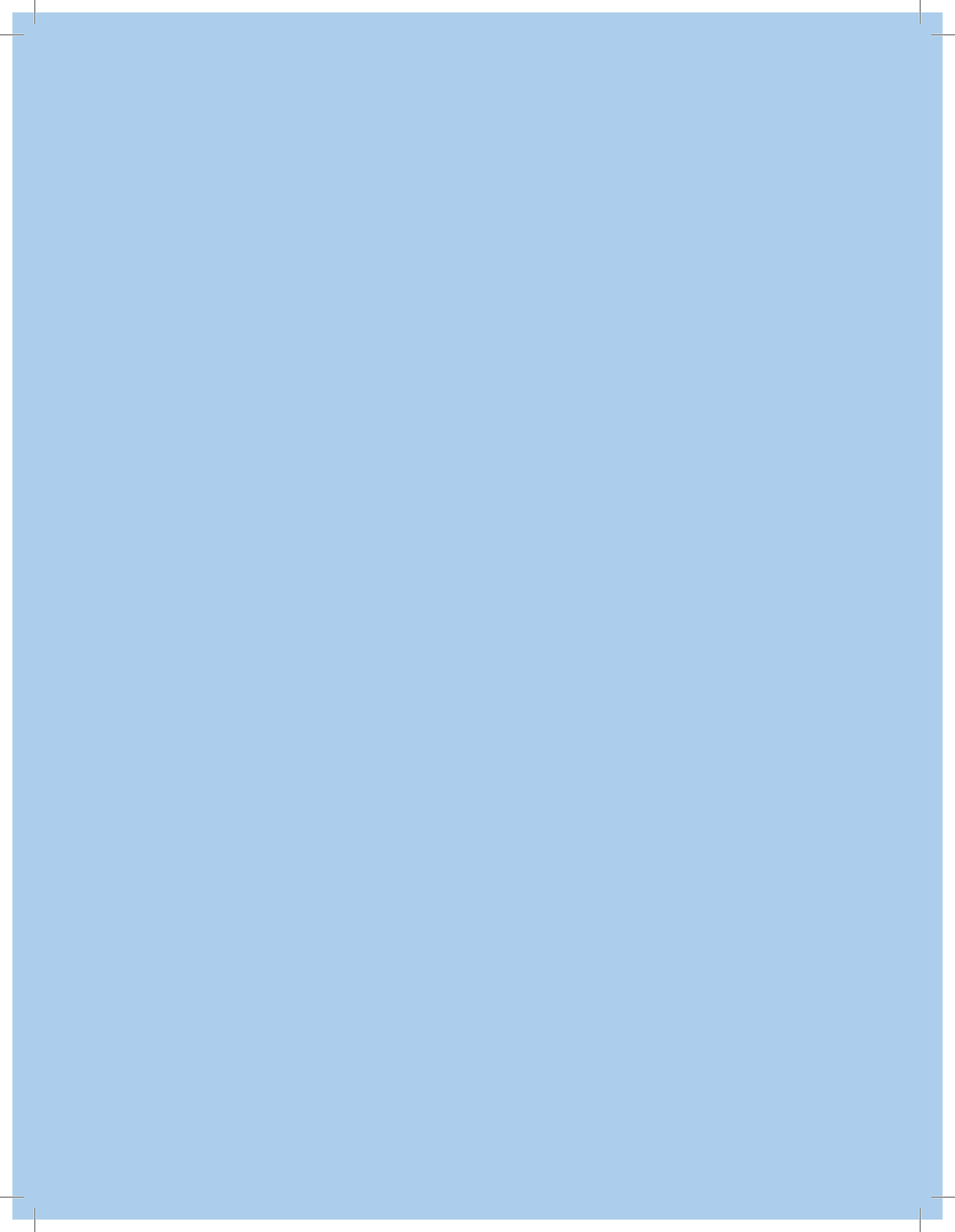
With the objective of introducing a more objective layer to what they call a subjective and value-laden debate surrounding judicial appointments, Tripathy and Rai tabulate the tenure of Supreme Court judges and their tenure in the High Courts before being appointed to the Supreme Court. They compare the tenures of judges appointed by the executive and the collegium, and note the representation of parent High Courts in the Supreme Court based on the regularity and duration of representation of judges from those High Courts in the Supreme Court. This analysis of tenures does reveal some unquestionable historical disparities, but Tripathy and Rai opine that this kind of empirical study should only be the beginning of a more sustained inquiry on the institutional impact of the tenure of judges.

QUEST FOR JUSTICE

Through the ages, the idea of justice has been tied to notions of fairness, virtue, morality, and law, in the consciousness of both individuals and society. Today, as we seek to balance competing interests—not only amongst individuals, but also individuals vis-à-vis society, community, and the environment—the prevalence of these ideas remain exceedingly relevant. They drive our enduring search for justice through means and methods that embody empathy, certainty, and transparency, so we can build institutions that offer us agency and dignity as individuals, and empower us as a society.

SECTION ONE

**JUSTICE, ACCESS,
AND THE NATION'S
APPROACHES**



A Sense of Justice: Our Role in Creating and Improving Perceptions

Ashwin Mahesh

Abstract

In this chapter, the author deliberates on a key characteristic of a liberal democratic society—a common expectation of justice. The author begins by examining citizens' perceptions of the justice system that governs their lives, noting how notions of fairness, standards of justice, actors in the system, and other related institutions are all intertwined in how justice (and its administration) is felt and understood by citizens. He proposes that citizens themselves take the lead in efforts to improve perceptions of administration of justice, and suggests initial measures for how this may be done. He concludes that in doing so, citizens can shape the justice system, becoming producers (and not just consumers) of the system they desire and expect.

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One of the things that distinguishes a liberal democratic society from others is a common expectation of justice. In other forms of government, such as monarchies, dictatorships, and even some illiberal democracies that grant special rights to some people and not to others, people accept intuitively that they should not have any rational expectation of being treated uniformly and fairly. They recognise that systems of dispensing justice are not rational, and their arbitrariness can inflict harsh outcomes upon various people.

This difference, therefore, is an important metric of the success of a democracy. Do ordinary people feel that the system of justice that governs their lives is accessible and fair? Do they believe that governments exist partly to provide them protections through due processes, and are they confident that these protections are available to them, personally?

In asking these questions, we must make four important distinctions.

The first is between the professed standards of the justice system and the actual ones, because the perception of the system is much more connected to the latter, and even the strongest defence of the former is no substitute for the latter. People may very well be ignorant of how a justice system ought to function, and yet have an opinion of it based on what they experience and observe.

The second is that the lines of separation between different parts of the machinery of justice, such as the police, the courts, and the correctional facilities may all blur in the minds of the public, so that quite often their perceptions of the justice system may, in fact, be more accurately their perceptions of other institutions and processes.

The third is that the actors in the justice system, namely, the judges, lawyers, and litigants, not only experience the system but also represent it to others. And therefore, their perception of the justice system is particularly relevant to any effort to shape the opinion of the public.

The fourth is that justice is a very large word, and is deeply connected to notions of fairness, as a result of which the perception of unfairness in any aspect of life—for instance, an accident that involves a victim who is too poor to afford rapid care, and therefore suffers irreparable harm—can often lead, correctly or otherwise, to a perception of injustice too.

To these caveats, it must be added that the justice system itself has not made any visible attempt to discern for itself how either the public that it serves or members of its own fraternity perceive it. That, nonetheless, is the terrain in which we must carry out our exploration.

WHAT SHAPES OUR PERCEPTIONS?

Our journey can take advantage of the many others that have asked such questions before. These remind us that the broad contours of the perceptions of justice span at least the following, and may be much more:

1. A deliberately inclusive recruitment process for positions in justice administration that recognises that the confidence of the public results in part from believing that they themselves could belong among the administrators.
2. An active programme of soliciting the views of the public and the key actors in the justice system about its functioning.
3. A parallel programme of measurement of the efficacy of the system, a third programme to publicise—and thereby acknowledge and accept—the findings of such surveys routinely.
4. A fourth programme to identify the gaps that must be closed to improve the administration of justice.
5. To top these off, a participatory system of addressing the deficits in which many stakeholders place faith not only because it is thorough, but especially because it includes them.

I believe it is fair to say that none of these exists meaningfully in India today. The word ‘meaningfully’ is especially pertinent here, because one of the failures of governance throughout the 70 years of our independent existence has been the repeated claim of governments that many things are being done, but without the accompanying acknowledgement that very little of them is being done.

The failure, however, begins well before any of these. Precisely because the perception of justice correlates to perceptions of fairness, the battle of perceptions cannot be won without first focusing on fairness. For the public, in particular, this is most important; the perceptions of lawyers or litigants may be shaped more strongly by their direct experiences within the halls of justice administration, but for many others, it is, in fact, their perception of fairness that substantially determines how they view the administration of justice.

Why is that? Can the justice system be really held responsible for perceptions beyond those caused by its direct actions? Emphatically, the answer is yes. For the simple reason that any system is judged not only by its acts of commission but equally by many others that are acts of omission as well. Arguably, in weak justice systems, negative perceptions among the public result far more frequently from acts of omission than from acts of commission. A weak system, after all, does less of what it is supposed to.

Omission is in fact everywhere and is all the more reason why its impact on perceptions is stronger. If an accident leads to police processes that citizens feel afraid to engage in, if the force of social hierarchies is oppressive and strong, if poverty limits the opportunities of a child, then it is inevitable that people will feel the absence of law as a protective force in their lives. Their encounters with unfairness may be outside the courts, but surely they are wont to ask, where is the protection of the courts against these unfair things? Is justice to be only inside a few halls, with only an insufficient measure of it outside?

Nor has the judicial response to evident maladministration in the executive been any comfort to the public. It is plainly evident to most citizens that the political system is in dire need of cleansing, and yet the overwhelming majority of those indulging in corruption appear to do so with impunity, even

despite being hauled before the courts on many occasions. There is simply no way for the common man, who suffers countless indignities as a result of corruption, to square these observations without concluding that the justice system too, and not only the executive, is short-changing him. Surely the courts must do more, he would contend.

This, in turn, suggests that the best hope for a stronger system of administration of justice lies in adding to its list of functions, despite the widespread view that it is poor at doing the things it already does. The way forward, it seems, is in accepting the full burden of responsibilities that citizens place upon a justice system; choosing only a subset of those to focus on, however well-intended, is itself counterproductive.

WHOSE RESPONSIBILITY?

It is natural to presume that the omissions must be attended to by either the governments, both at centre and state, or by the judiciary. But that only tells us that the buck must stop with one of these institutions; it does not tell us how we might decide which one. Moreover, a particularly keen tussle of late between the executive and the judiciary on other matters has brought about a situation where even deciding this is not easy.

Will the judiciary look upon a government's efforts to reform the administration of justice as a positive step, or as an unwarranted interference upon its sphere? Will the judiciary itself take up the task, then, or will it persist with the refrain that judges cannot be compelled either by law or by public opinion to take such steps until they themselves decide it is appropriate to do so? Somewhere in the cracks between the answers to these questions, the omissions persist.

There is, however, a way out of this logjam. Perhaps the citizens could take upon themselves the task of setting the course for higher accountability from the justice system.

In recent years, we have witnessed a dramatic shift in politics; whereas representative government was considered the right arrangement for the country at the time of independence and for many decades thereafter, now there is an increasing chorus for a more participatory alternative. Beginning with a small number of people taking responsibility for civic actions, this movement has grown to now seek new goals for governance itself, including in particular an emphasis on direct decision-making.

Let us cast our minds back to that most oft-cited description of democracy, that it is a system of government of the people, for the people, and by the people, and ask again whether this implies that while there are many things we wish our representatives in government to do for us, and still others that those who are employed in government must do, beyond these two lies another set of things that citizens must themselves do. Even more precisely, our performance of these things should be seen as acts of 'self-governance', and not merely matters of civic pride or community service.

Some have argued that there are limits to what the people can do, and that representative systems are necessary to keep governance from descending into chaos. Yes and no, those limits may well be the result of the fact that thus far the embrace of participatory democracy has been marginal. It is conceivable that if we were to imagine a more subsidiarist structure for governance, a far greater number of things could be done through direct actions of citizens and interest groups among them, and fewer tasks would be in the domain of representatives.

The hope for this shift is particularly strong because the nascent efforts are confined not to any one country, but occurring in many nations around

the world. And the success of such efforts anywhere could reset the boundary between participatory and representative governance in many other countries too.

Let us assume, therefore, that is quite conceivable that some of the dissatisfaction with the administration of justice could begin to be addressed by citizens themselves. Where could such an exercise begin? And who among the citizens would be particularly well-suited to it?

In answer, we can look to precedents, appropriately. In many robust democracies around the world, Bar associations have been at the forefront of leading the move to measuring and responding to public perceptions of the justice system. Their members potentially possess the necessary knowledge to chart the course and are at the same time citizens themselves too. The public has a very deep and abiding interest in the proper functioning of a justice system and is therefore bound by a responsibility to itself to seek it. Collectives of lawyers and citizens working together could very well begin to pose, and seek answers to questions about the efficacy of justice administration, and light a path for many others to follow.

Indeed, we may even be seeing that. In the legal community, the recognition of and search for 'public interest' has in the past been confined to a narrow definition, which allows for arguments and decisions in the courts. But in fact, the law takes on its full purpose by being present to citizens everywhere else first, and only consequentially in the courts. It follows quite naturally, therefore, that the public interest too should be sought more fully. That recognition is now dawning, with a few advocates venturing into new territories in their search for ways to contribute to the public interest.

Judges and lawmakers, for their part, could strengthen this quest, and some surely would, in the process adding wisdom and heft to the efforts

all around. But in the current scenario, we would do better to begin this effort as a public initiative, and find more allies and partners as we progress.

STARTING POINTS

How should we set the contours of a new effort to measure and improve perceptions of the administration of justice, keeping in mind that our beginnings are not within the judiciary or the executive, but among private citizens? Here, rather than reinvent the wheel, we could look at the recommendations from other efforts in democracies, and look for clues within them. A brief survey of Bar associations' suggestions to promote the perception of justice pointed to three recurring themes, and the first steps could be along these lines.

1. We must educate the public about laws, especially the ones that protect their rights, partly with the goal of promoting positive views about the justice system. We must also educate the public about the processes by which justice is administered, with the specific purpose of demystifying these.
2. Opportunities for the learning of the law among communities and groups that are under-represented in the justice system—such as women and scheduled castes and tribes in particular—must be encouraged. Alongside this, active recruitment of such persons into positions in the system must be promoted.
3. Public defenders' programmes must be strengthened and people must be given greater access to legal aid in the protection of their rights.

Governments, of course, are well-suited to pursue these goals, but there is no reason why a strong

beginning in search of them cannot be made elsewhere. Philanthropic foundations focused on legal reforms, law firms with active corporate social responsibility (CSR) initiatives, and the legal education community share a common interest in all of these, and coalitions of such groups are forming to spawn systematic efforts to these goals. Realising them fully will one day require the participation of governments and the justice system itself, but it is increasingly clear that we will arrive sooner upon that day if we set out to get there without waiting for public institutions.

Educating the public about the justice system, in particular, may be something that the government is best left out of, considering that in a very high proportion of cases in the courts in India, the government itself is one of the interested parties. In those cases, what the public needs is awareness of the law in ways that allow legal protections to be used against governments.

One much-needed focus of such interventions is in schools. The sharp divergence of learning trajectories into science, commerce, and the arts in high school itself for most students has led to a situation where only a small sliver of the population receives any education at all about the laws, apart from what they receive in civics classes. This needs to be addressed, in much the same way that environmental science was made part of the wider school curriculum for all students some years ago.

The rising capabilities for distance education through the use of internet, especially on phones, should also be explored more strongly. In particular, there could be a repository of legal awareness materials covering different aspects of the administration of justice. Such a repository, a kind of Wikipedia for a specific purpose, could benefit from the contributions of citizens based on their actual experiences.

SUMMARY

The laws of the land acquire force through institutions, but they acquire acceptance through processes by which citizens encounter them. Perceptions of justice result directly from citizens' approval of these processes. However, without the necessary means to comprehend and be part of those processes, citizens find the laws and the justice system to be aloof. Their everyday encounters also reinforce the view that the protections of law are not available to ordinary citizens, especially unfortunate ones. A deliberate programme to improve perceptions of justice is needed to overcome this.

Such an effort need not be left to formal institutions alone. In fact, there is considerable evidence

that much of this can be done without waiting for governments and the judiciary, and that a lot of this could be done better and faster if this path is chosen. Citizenship works best when people are themselves direct producers, and then consumers of the systems by which they choose to govern themselves, rather than relying upon either the executive or the judiciary to chart that course for us.

This is a potentially fruitful choice, judging by recent trends. Many of the concerns and demands articulated by citizens' groups are now finding their way to the forefront of the national agenda. There is every reason to hope that creating a stronger system of administration of justice, and benefiting from it in the form of higher perceptions of justice, can also be part of that new narrative.

Paths to Justice: Surveying Judicial and Non-judicial Dispute Resolution in India

Padmini Baruah

Shruthi Naik

Surya Prakash B.S.

Kishore Mandyam

Abstract

DAKSH has continued its work on access to justice in India by conducting a survey in 2017 to understand the expectations and experiences of Indian citizens in resolving their disputes. In this chapter, the authors highlight key results from the survey, including the kinds of disputes that people have faced, the modes of dispute resolution they choose, reasons why some people prefer to not resolve their disputes, experiences with the police, and costs of resolving their disputes.

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In 2015, DAKSH began its work on access to justice, when it conducted a survey, the first of its kind in India, to understand access to justice, and the experiences and perceptions of litigants in the subordinate courts of India.¹ However, it was recognised that Indian society looks not only to the judiciary to resolve disputes, but has historically² and continually developed alternative means of dispute resolution to suit local needs and changing circumstances.³ DAKSH therefore undertook a survey in 2017 to understand the various modes of dispute resolution used in India as a means to access justice, and the experiences of people who have used these varied means of dispute resolution.

METHODOLOGY

The Access to Justice Survey, 2017 was ideated by the DAKSH team over three months and a questionnaire was prepared keeping in mind our objective

of understanding the concept of access to justice, and people's perceptions of India's existing 'justice mechanisms'. The survey sought to record data on the socio-economic profile of survey respondents, their perceptions regarding dispute resolution, and their experiences in resolving a dispute either with the help of the judiciary or a non-judicial dispute resolution body or organisation. Suggestions on the questionnaire were sought from external specialists in sociology and the criminal justice system, and we consulted access to justice data studies conducted internationally. Once we had the questionnaire in place, it was translated into eight Indian languages—Hindi, Kannada, Telugu, Tamil, Malayalam, Bengali, Marathi, and Oriya—in order to aid the surveyors in effectively communicating the questions to the survey respondents. On finalising the questionnaires, we then calculated the number of responses that we sought to collect (data sample), and the geographical distribution of these responses.

We targeted collecting responses from 50,000 households across India. This number was arrived at by means of a random-sampling approach based on the population of India as per the 2011 census. We aimed to cover the jurisdiction of all High Courts in India, and hence the number of responses for each High Court's jurisdiction was calculated in proportion to the population in the states that fall under a particular High Court's jurisdiction.⁴ Within each state, the locations for conducting the survey were selected by means of random sampling. The number of responses to be collected in each location varied between five and 55 responses, depending on the number of residents at the location.⁵ Therefore, locations with a smaller number of residents have contributed fewer responses than locations with larger numbers of residents.

DATA COLLECTION

As soon as the questionnaires and the data sample were in place, the DAKSH team scouted for an appropriate tool through which the survey could be conducted. Various options were explored and tested based on the survey design envisioned and a consensus was formed on using the offline survey tool developed by QuestionPro. The questionnaires were then uploaded onto the QuestionPro software, to be downloaded through the QuestionPro application on the surveyors' mobile phones.

DAKSH carried out the survey with the help of surveyors from the Centre for Development, Planning and Research (CDPR) in Pune. Prior to initiating the data collection process, the DAKSH team travelled to various parts of the country and conducted training programmes for the surveyors to familiarise them with the QuestionPro application and the survey questionnaire. The surveyors were asked to bear in mind two main concepts while conducting the survey: the meaning of the term 'dispute', and what is considered a 'non-judicial dispute resolution method'. The meaning of a 'dispute' for the purpose of this survey was any dispute in which a party claimed the violation of a legal right. The meaning given to 'non-judicial dispute resolution method' was broad, as it covered any mode of dispute resolution other than courts, including basic methods such as directly negotiating with the opposite party, obtaining the help of family or friends in mediating a dispute, and taking the help of village elders, religious authorities, or even the police.

Surveyors were directed to collect responses from a random sample of houses in each location chosen, by approaching every fifth house using the right-hand rule. Surveyors were also instructed to aim at collecting an equal proportion of responses from male and female respondents. Further, surveyors

were asked to ensure that they collect a random sample of responses and not purposively survey only households where there had been a dispute. Once the concept of the survey and the questionnaire were understood by surveyors, and the training programmes were completed, the surveyors commenced data collection in various parts of the country. The entire process of data collection lasted for eight months.

MONITORING

The responses collected by the surveyors were synchronised at the end of each day through the QuestionPro application, which allowed the DAKSH team to effectively monitor the progress of the survey at any given point in time. In addition to monitoring the number of responses collected and periodically checking trends in the data, the DAKSH team monitored the quality of the data collected in two ways, by physical field visits and calling respondents. During physical field visits, members from DAKSH accompanied surveyors on the field and monitored the collection of data, whereas phone calls to a random set of survey respondents were a post facto method of verifying the data collected to confirm whether the survey had been conducted and to check the veracity of the responses.

At the end of the data collection and quality verification, we collected 45,551 responses across 959 locations, 778 taluks or blocks, 385 districts, and 28 states.

DATA ELEMENTS

The data collected in the survey can be sorted into four broad categories:

1. Demographic and socio-economic information—age, education, occupation, religion, caste, type of household, income, and assets owned.
2. Perceptions regarding dispute resolution and experiences with disputes—which dispute resolution methods people would opt for if they had a dispute, whether they have filed a police complaint, whether they have had any disputes in the last five years, nature of their disputes, and what mode of dispute resolution they have opted for.
3. Information on disputes resolved in court—nature of the dispute, details of the opposite party, experiences with the police (if any), prior experience with litigation or non-judicial dispute resolution, and costs of litigation.
4. Information on disputes resolved through non-judicial methods—reasons for not approaching the courts, nature of the dispute, mode of dispute resolution used, details of the opposite party, experiences with the police (if any), prior experience with non-judicial dispute resolution or litigation, and costs of resolving a dispute.

IMPORTANT FINDINGS

Navigating Justice

The survey provides insights into the different methods people choose to adopt when confronted with any kind of dispute. It is seen that people prefer, in the initial stages, to rely on informal mechanisms. We asked who it was that people would reach out to, in order to understand more about their dispute. Friends and family (74 per cent),

village elders or local leaders (49 per cent), and caste or religious panchayats (25 per cent) were in the majority, rather than lawyers, police, or legal services authorities. Further, 23 per cent of respondents said that they would rely on gram panchayats or nyaya panchayats, which is an encouraging sign about the functionality of these grassroots institutions. In contrast, when asked whom they would *not* approach, a large number of respondents (40 per cent) said that they would not approach the police. This was followed by lawyers (32 per cent). This is a cause of worry as it shows that people do not approach these two fundamental pillars of the justice system when it comes to disputes.

Of the 5.8 per cent of respondents who had a dispute and said that they wanted to resolve it, around 70 per cent of these respondents said they wanted to go to the court, with the remainder opting for non-court methods. Extrapolating this to India's adult population,⁶ we can say that around 4.42 crores of the Indian people (5.8 per cent of the adult population) look to resolve their disputes, and approximately 3.04 crore people (around 4 per cent of the adult population) approach the court system, while approximately 1.52 crores (around 2 per cent of the adult population) prefer non-court mechanisms.

Among non-court methods that people tried, the majority opted for negotiation with the opposite party (71 per cent). This was followed by mediation or intervention by family or friends (37 per cent), and gram panchayats or nyaya panchayats (20 per cent), suggesting that the out-of-court methods people use are largely informal. This was similarly reflected in the numbers for non-court methods that helped *resolve* the dispute—negotiation with the opposite party was the most effective means of out-of-court settlement, with over half the respondents (54 per cent) who used non-court methods successfully resorting to it. While 32.5 per cent of respondents who had tried non-court means relied

on family and friends to help them resolve the dispute, 21.8 per cent relied on gram panchayats or nyaya panchayats. These were the three most common means used for resolving crimes too.

In terms of income levels, most people from middle- to high-income categories (annual income of ₹3,00,000 and above) prefer to use the court system, while most people relying on non-court mechanisms are from lower income categories. This suggests that cost is a deterrent for approaching the courts for people with low income.

Courts were the most predominant means of conflict resolution (*vis-à-vis* non-court mechanisms) for disputes with the government (91 per cent) or police (74 per cent) and insurance related cases (88 per cent), perhaps because there are very few non-court avenues to resolve such issues.

Nature of Disputes

We found that the majority of respondents had disputes relating to recovery of money (30.2 per cent) and land- or property-related matters (29.3 per cent). In our survey last year, we had found that nearly 66 per cent of civil litigation stemmed from land- and property-related cases.⁷ In this year's survey, most land-related disputes involved agricultural land, and the subject matter in most of these disputes (around 80 per cent) related to ownership or inheritance. An indicator of the prevalence of land-related litigation is that over 15.4 per cent of the total land distributed under land ceiling initiatives remains tied up under litigation as per the last report of the Department of Land Reforms.⁸

Crimes were found to constitute only 5.6 per cent of the total disputes. This statistic is likely to be due to respondents' reluctance to disclose details about criminal matters because of associated social stigma. Further, we have seen from our field

visits during data collection that instances which could qualify as crimes (for example, causing hurt, theft, etc.) are considered trivial, and not important enough to be perceived as a dispute by the population.

Challenges of Dealing with Police Process

An overwhelming majority (91 per cent) of the surveyed respondents said that they had never filed a police complaint, while only 9 per cent stated that they had either filed or tried to file a complaint. Of this 9 per cent, almost 44 per cent said that their complaint was registered, and 49 per cent said that they did not eventually end up filing the complaint, while 7 per cent said that they filed the complaint, but did not pursue it. This implies that a very small proportion of people pursued the complaint until it was ultimately registered. Of the people who did not file a complaint, the majority (56 per cent) did not file one because they were advised not to do so by their friends or family. Almost a quarter (22 per cent) of this set of respondents did not file a complaint because they were advised not to do so by the police themselves. Further, of the people who did not pursue their complaint after filing it, 35 per cent were dissuaded because the police themselves did not take it forward. One-fifth (20 per cent) of respondents who did not pursue the complaint felt that filing a complaint would cost too much in terms of time, effort, or money. Further, 18 per cent of respondents said that they were either paid or pressurised to drop their complaint.

Only 18 per cent of the people who had a dispute filed a first information report (FIR). This implies that the majority of people who had a dispute did not register complaints with the police. Of those who filed an FIR, only around one-third (31 per cent) had their FIR registered immediately. The three major reasons for delays in registering FIRs (across all categories of disputes) were: (a) the police

wanted a compromise, (b) they did not believe the complainant, or (c) no reason.

Costs

Personal costs that the litigants bore while engaging with courts were found to be significant. People who went to court incurred on an average, a cost of around ₹1,049 per day, with ₹728 being direct costs, and ₹321 being due to loss of business. In contrast, people who adopted out-of-court methods spent a little more than half that amount, at ₹659, split between ₹420 as direct costs, and around ₹239 due to loss of business. This could be why almost one-third (32 per cent) of respondents who had a dispute, and wanted to resolve it, relied on non-court methods.

It was seen that those with an annual income of less than ₹50,000, spent over 10 days' worth of their income on courts, and 5.5 days' worth of their income on non-court proceedings per day. In sharp contrast, those in the annual income range above ₹3,00,000 spent less than a single day's worth of their income in court as well as non-court proceedings daily. Thus, the cost of the legal system seems to be exponentially more burdensome for those who belong to the poorest income groups.

Further, the issue of bribes remains sensitive—17 per cent of the people who approached the court and 20 per cent of the people who used non-court methods did not want to disclose whether or not they had had to give bribes. Of the people who used the court system, 42 per cent stated that they had been asked to pay a bribe. In contrast, only 10 per cent of those who had relied on non-court mechanisms said that they had been asked to pay a bribe. In both cases, 58 per cent of respondents who were asked to pay a bribe did in fact pay a bribe. This implies that the experience of the people who rely on the court system has been unfavourable, and

has cost them money over and above what they are mandated to pay by the law.

Religion

Despite a strict method of random sampling, we found that the proportion of respondents across various religions did not match the proportion of the population belonging to different religions as found in the 2011 Indian census. While 80 per cent of the population is Hindu as per census data, in our data sample, 85 per cent were found to be Hindu. While 14 per cent of India's population is

Muslim, in our survey, 7 per cent of respondents were found to be Muslim. However, the proportion of respondents who were Christian (2.8 per cent) is similar to the proportion in the census (2.3 per cent). The same is true for the Jain community (0.7 per cent in our survey, compared to 0.37 per cent in the census), and the Buddhist community (0.8 per cent in our survey, as compared to 0.7 per cent in the census). In comparison, in last year's survey, 79.8 per cent of respondents were Hindu, 9.8 per cent were Muslim, 5.6 per cent were Christian, 3.2 per cent were Jain, Sikh, and Buddhist, while the remaining 1.6 per cent were from other religions or did not disclose their religion.⁹

DETAILED FINDINGS

PART 1. SOCIO-ECONOMIC PROFILE OF SURVEY RESPONDENTS

FIGURE 1. Age

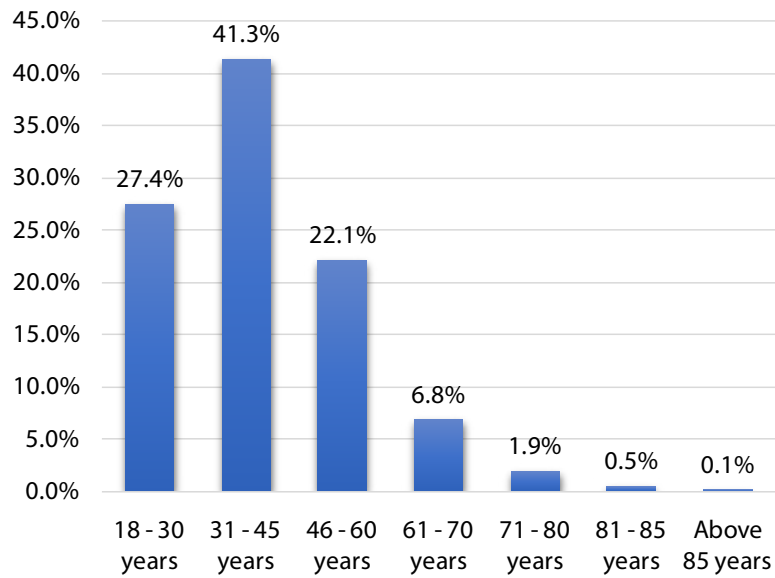


FIGURE 2. Gender



In addition to the percentage of male and female respondents shown in Figure 2, 0.04 per cent of respondents were transgenders and 0.05 per cent of

respondents said they did not want to disclose their gender.

FIGURE 3. Education

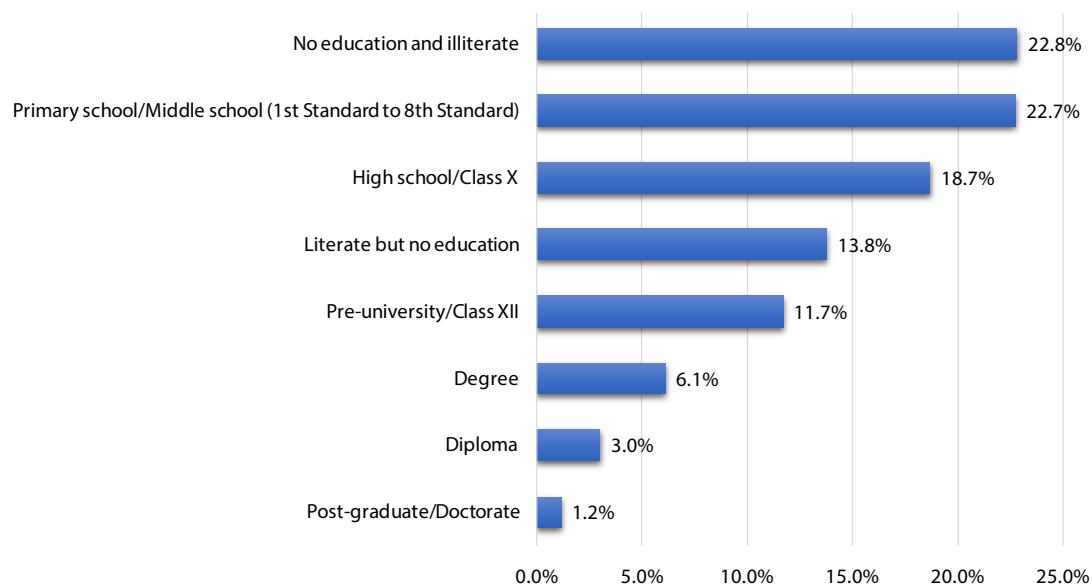


FIGURE 4. Occupation

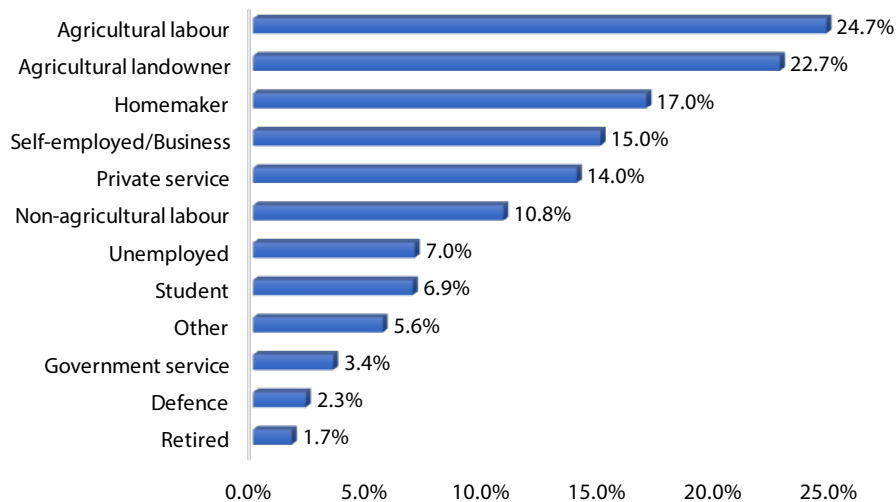


FIGURE 5. Religion

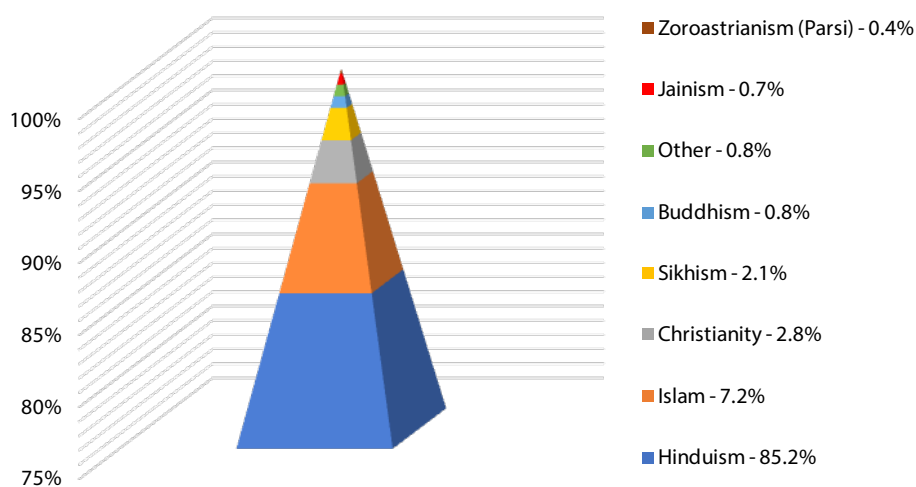


FIGURE 6. Caste

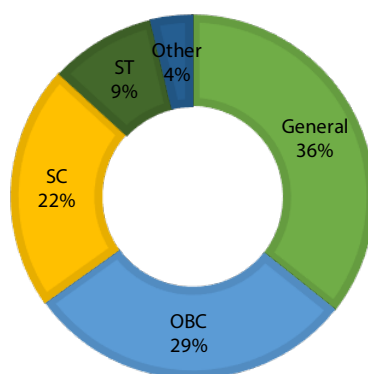
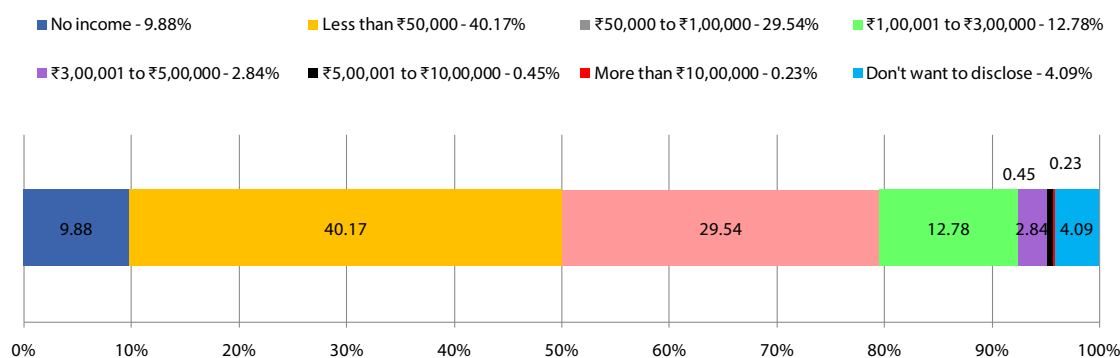


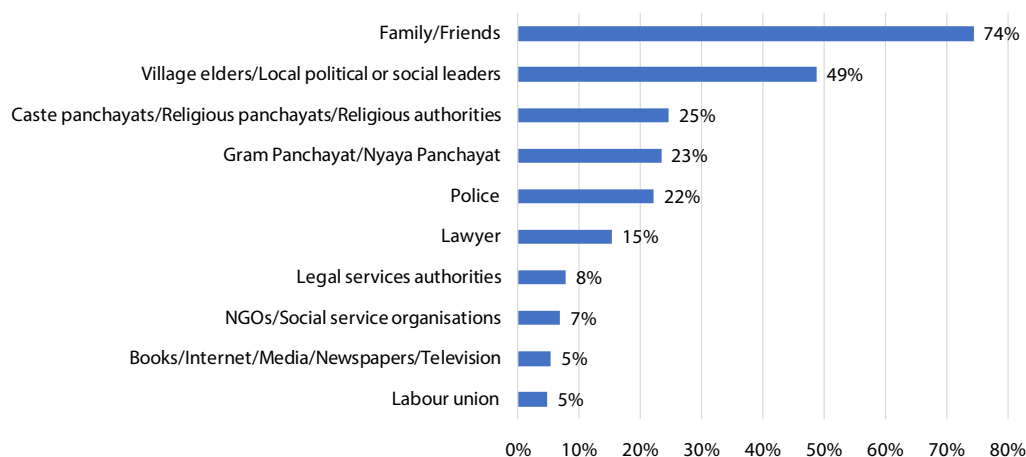
FIGURE 7. Annual Income



PART 2. INFORMATION ABOUT DISPUTES

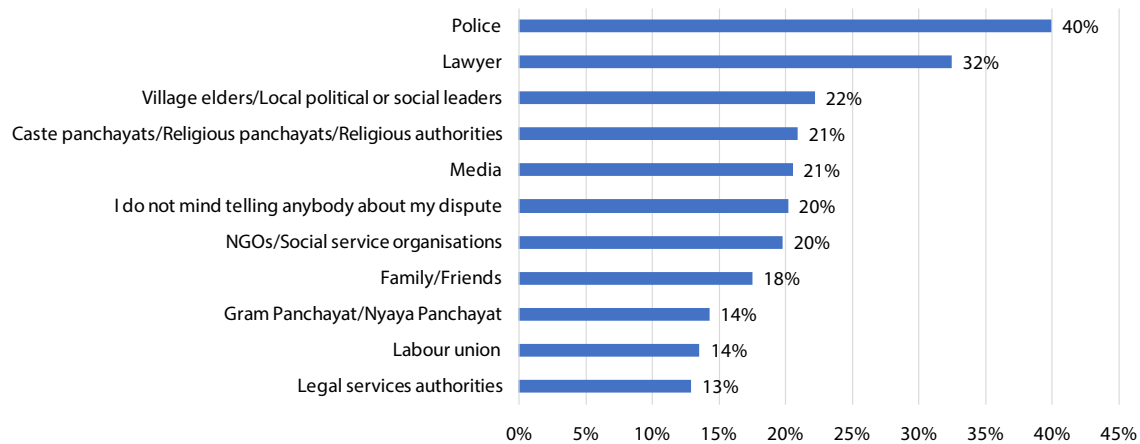
A. Seeking Information

FIGURE 8. Where People Go for Information about Their Dispute



Note: Values are percentages calculated on the basis of multiple-choice responses of respondents.

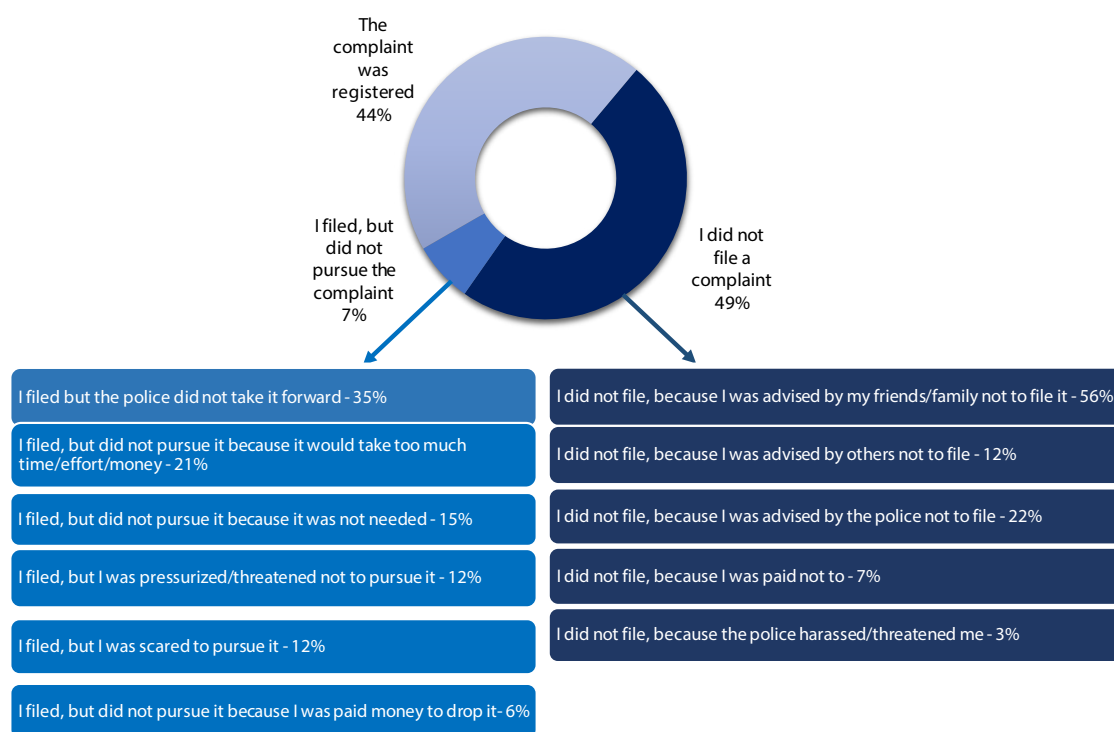
FIGURE 9. Whom People Would Not Approach if They Had a Dispute



Note: Values are percentages calculated on the basis of multiple-choice responses of respondents.

B. Police Interaction

FIGURE 10. Police Complaints



Among the respondents, 9 per cent stated that they filed or tried to file a police complaint at some point. Figure 10 tracks what happened to the complaints that respondents filed with the police. It also looks at reasons why the complaints were either not filed or not pursued after filing—which accounts for 56 per cent of all complaints made by our respondents.

Of the people who did not file a police complaint, 56 per cent were dissuaded by their friends or family. Further, over one-third (35 per cent) of respondents who filed, but did not pursue the complaint, said that they did not do so because the police did not take it forward.

FIGURE 11. FIRs Filed during the Course of the Dispute

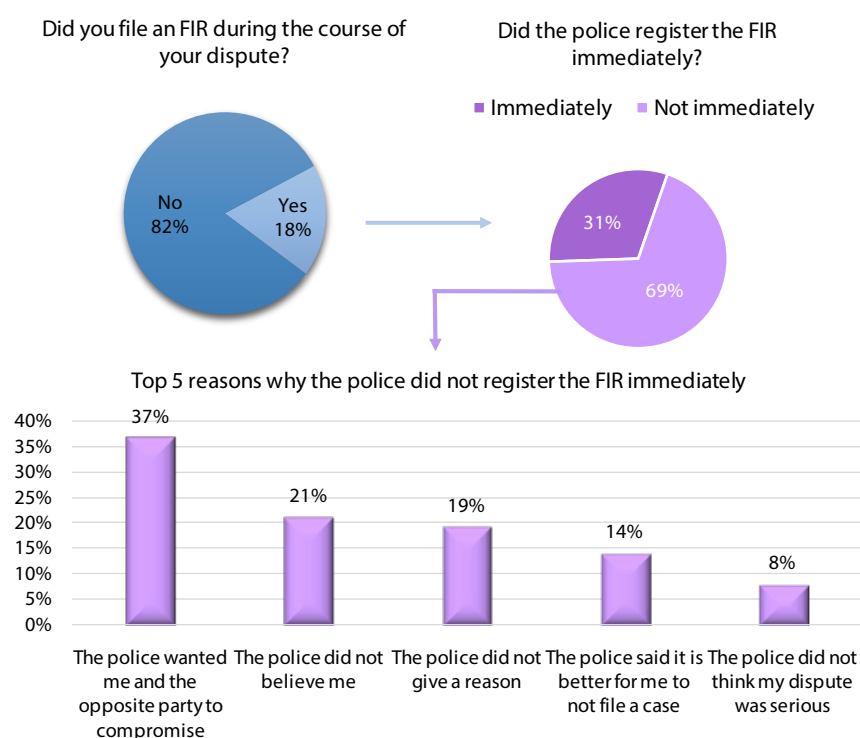


Figure 11 looks at the fate of the FIRs that respondents tried to file in relation to their disputes. Of the FIRs registered, 69 per cent did not get registered

immediately. The reason most cited for this is that the police wanted the respondents to compromise with opposite parties.

FIGURE 12. Reasons for Not Registering the FIR — Based on the Nature of Dispute

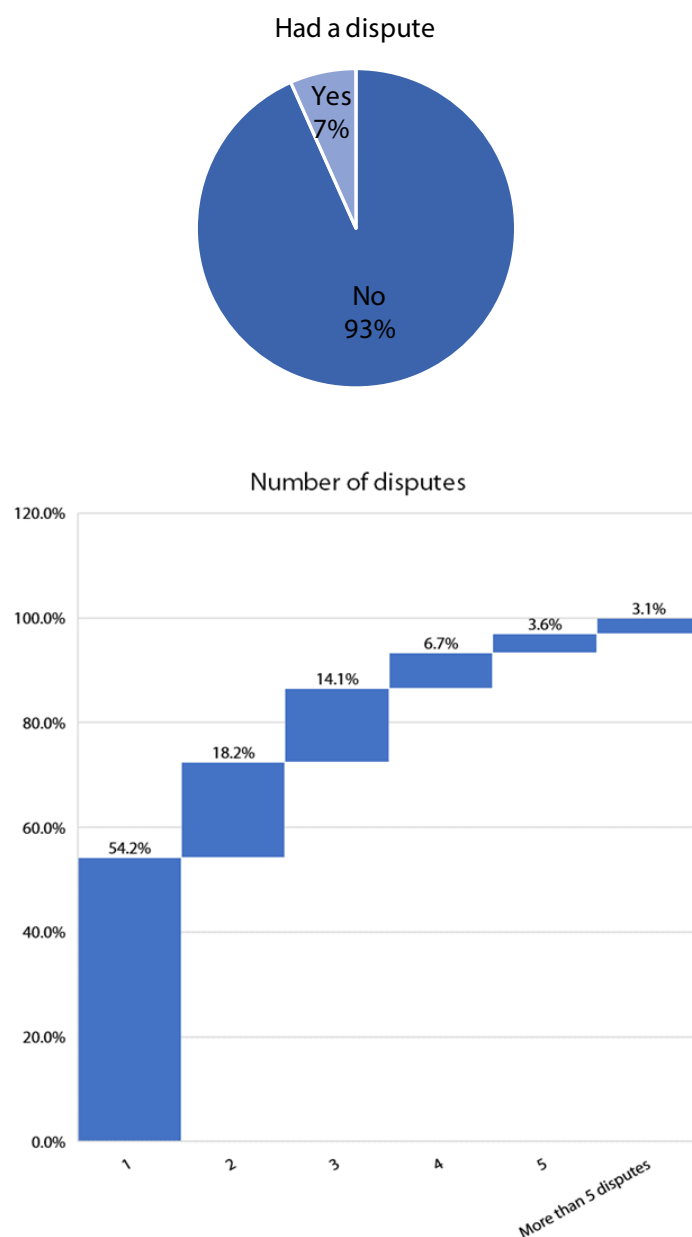
	The police did not give a reason	The police did not believe me	The police wanted me and the opposite party to compromise	The police said it is better for me to not file a case
Land	25%	19%	40%	6%
Recovery of money	21%	34%	27%	18%
Insurance	10%	20%	38%	20%
Labour, employment and service	19%	14%	33%	19%
Family	16%	16%	43%	16%
Intellectual property	17%	17%	25%	17%
Crime	36%	14%	57%	0%

Note: The highlighted figures show the highest percentages in each type of dispute.

The same major reasons why the police do not register an FIR dominate across all major categories of disputes.

C. Disputes and Nature of Disputes

FIGURE 13. Disputes in the Last Five Years



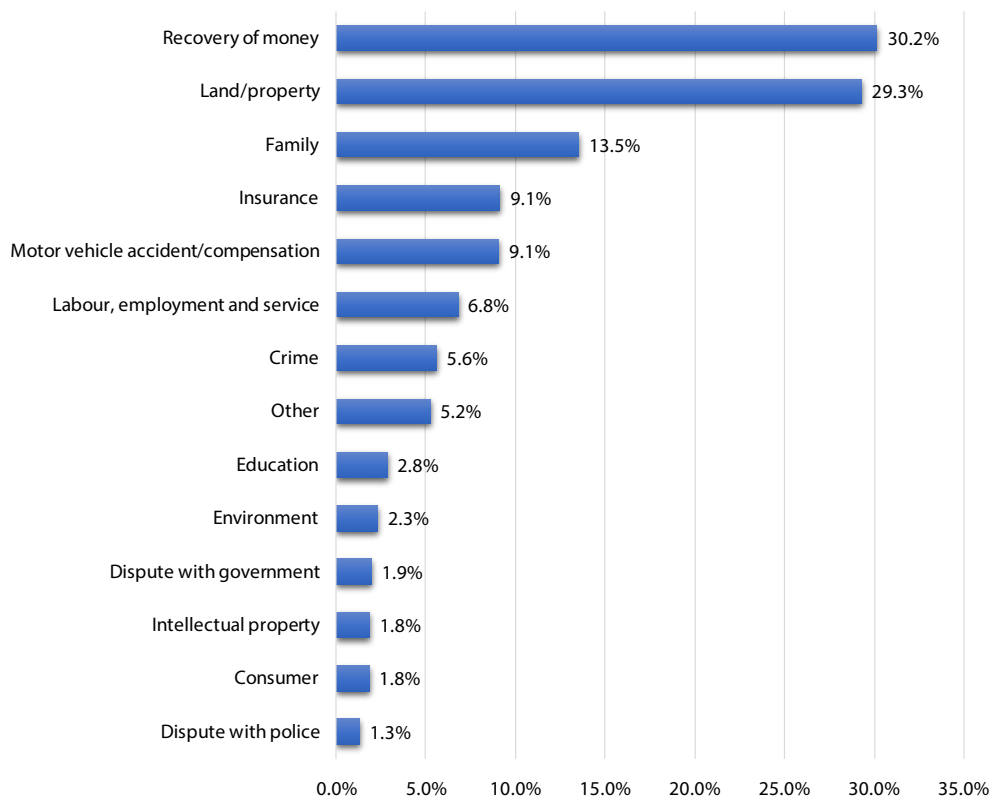
The survey records the number of disputes faced by respondents over the past five years. Figure 13 shows that of the respondents surveyed, 7 per cent

stated that they had some kind of dispute over the past five years. Of these respondents, over half (54.2 per cent) had only one dispute, while around

40 per cent had between two and five disputes. A very small fraction (3 per cent) had over five disputes. Based on this percentage and census data,

we can extrapolate that approximately 5.3 crore people have had disputes in India over the last five years.¹⁰

FIGURE 14. Nature of Disputes Faced in the Last Five Years

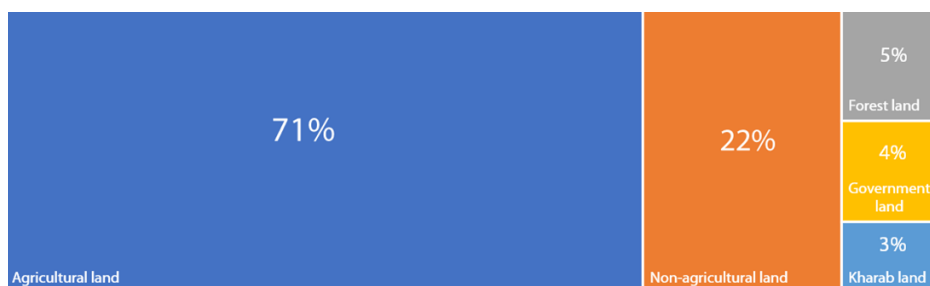


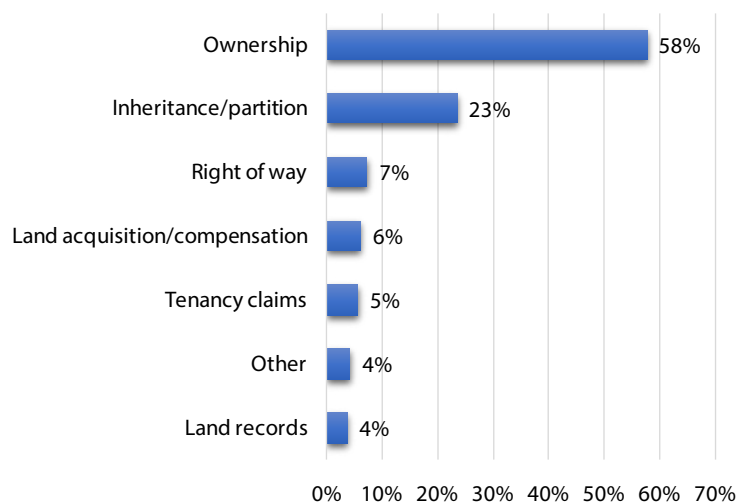
Note: Values are percentages calculated on the basis of multiple-choice responses of respondents.

Figure 14 looks at the nature of disputes that most people face in India. Recovery of money is the most prevalent, at 30.2 per cent, closely followed

by land- or property-related issues, at 29.3 per cent. Family-related cases also form a sizeable proportion of cases, at 13 per cent.

FIGURE 15. Nature of Land Disputes

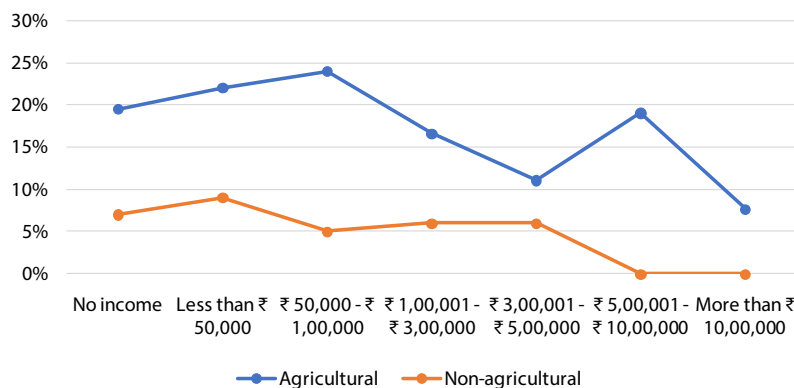




Note: Percentages are based on multiple-choice responses from 29.3 per cent of respondents with a land dispute.

Figure 15 shows that in land-related cases, most of the disputes were regarding agricultural land. Further, most of the land disputes (81 per cent) were related to ownership or inheritance.

FIGURE 16. Income of People with Disputes Involving Agricultural and Non-Agricultural Land



Note: Percentages have been calculated based on the number of people with a dispute in each income bracket.

Figure 16 shows that the largest number of respondents with land disputes (24 per cent) were those with a dispute about agricultural land and an annual income between ₹50,000 and ₹1,00,000. It is pertinent to note that people with land disputes

and belonging to a higher-income (₹5,00,000 and above) category have only had disputes about agricultural land, and not disputes about non-agricultural land.

FIGURE 17. Disputes Faced by People of Different Religions

	Hinduism	Islam	Christianity	Sikhism	Buddhism	Jainism	Parsi	Other
Land/property	30%	21%	32%	33%	23%	19%	0%	25%
Recovery of money	31%	26%	14%	32%	12%	34%	60%	34%
Insurance	9%	8%	10%	7%	8%	22%	10%	16%
Labour, employment and service	6%	7%	5%	7%	15%	6%	20%	11%
Family	14%	19%	14%	10%	15%	6%	10%	11%
Intellectual property	2%	3%	3%	2%	4%	0%	0%	8%
Crime	5%	8%	8%	7%	4%	6%	0%	8%
Education	3%	3%	4%	3%	12%	3%	0%	6%
Motor vehicle accident/compensation	9%	11%	11%	8%	12%	3%	10%	6%
Consumer	2%	4%	0%	0%	4%	3%	0%	6%
Environment	3%	0%	0%	2%	4%	6%	0%	0%
Dispute with government	2%	1%	3%	4%	0%	9%	0%	5%
Dispute with police	1%	1%	1%	3%	0%	0%	0%	0%
Other	5%	8%	4%	2%	8%	9%	0%	8%
	Highest value				Second highest value			

Note: Percentages have been calculated within each religion and the nature of disputes faced by people of each religion are based on responses to a multiple-choice question.

Figure 17 shows that a majority of respondents, regardless of their religion, were involved in disputes relating to land or property and recovery of money. Notably however, for respondents from the

Christian and Buddhist communities, there was a significant percentage of family law cases as well (at 14 and 15 per cent respectively).

FIGURE 18. Religion Matrix of Survey Respondents against their Opposite Party

Survey respondents	Opposite party								
		Hinduism	Islam	Christianity	Sikhism	Buddhism	Jainism	Parsi	Other
	Hinduism	88%	3%	2%	2%	1%	2%	0%	2%
	Islam	34%	55%	4%	1%	1%	1%	1%	2%
	Christianity	12%	0%	71%	3%	0%	3%	0%	12%
	Sikhism	19%	5%	2%	64%	4%	2%	1%	3%
	Buddhism	27%	0%	0%	0%	60%	13%	0%	0%
	Jainism	36%	0%	0%	9%	0%	45%	0%	9%
	Parsi	50%	0%	17%	17%	0%	0%	17%	0%
	Other	25%	14%	11%	0%	6%	8%	6%	31%

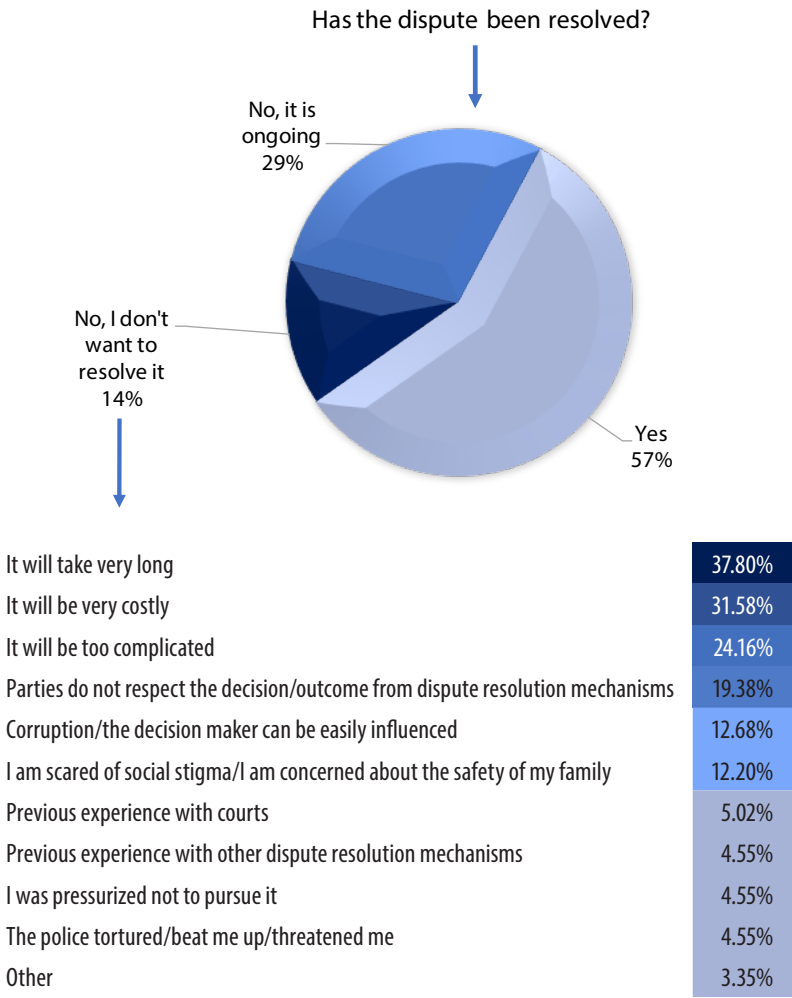
Note: Highlighted figures show highest percentages.

Further, as may be seen in Figure 18, the majority of respondents from nearly every religion had disputes against people from the same religious community

as them. The exception to this was people from the Parsi community, the majority of whom had disputes against people from the Hindu community.

D. Dispute Resolution

FIGURE 19. Resolution of the Dispute

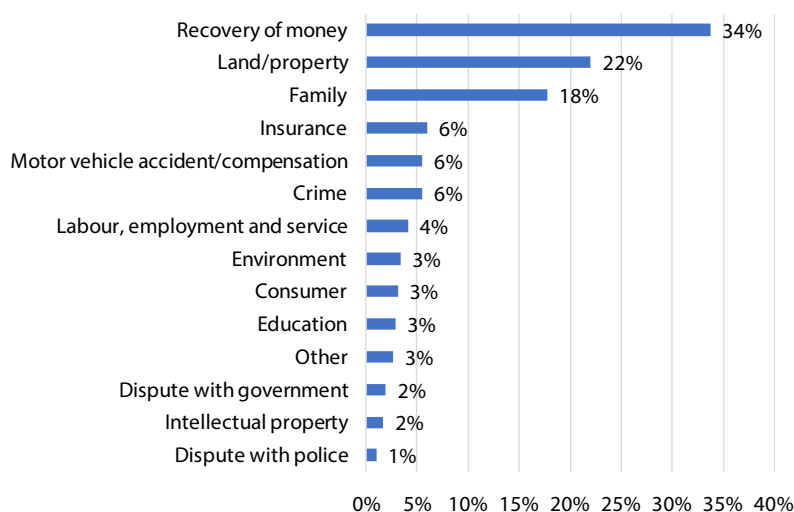


Note: Values for the reasons for not resolving the dispute are based on a multiple-choice question.

Of the respondents who had had a dispute in the preceding five years, 14 per cent did not wish to resolve it for a variety of reasons. The predominant among these was the time taken, the cost, and the

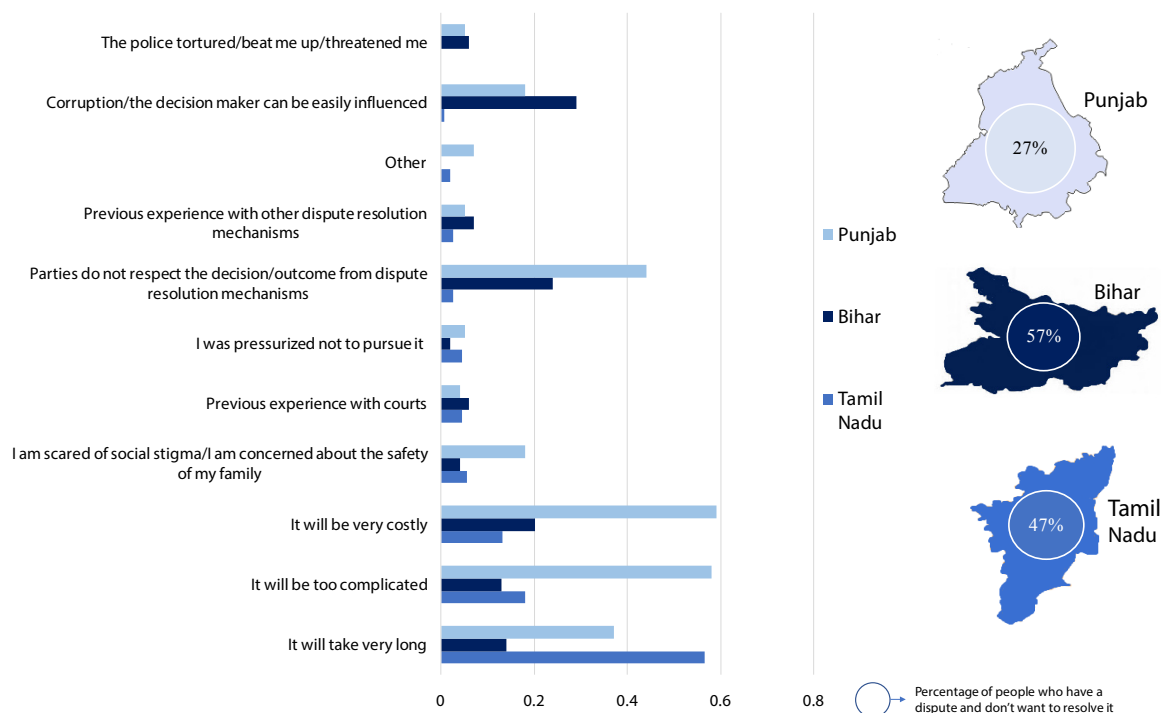
complexity of resolving a dispute—pointing to the main concerns that the population has about dispute resolution.

FIGURE 20. Disputes that People Do Not Want to Resolve



Land or property, recovery of money, and family disputes that respondents were involved in, but did not want to resolve.

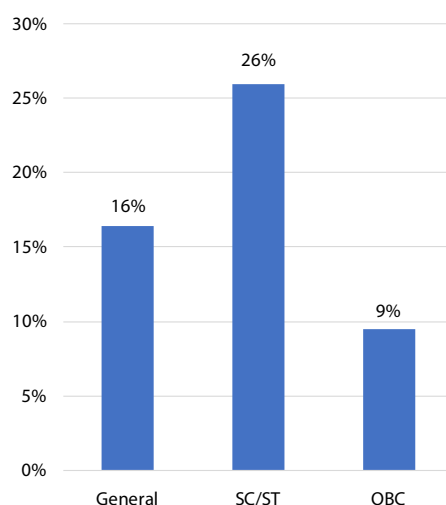
FIGURE 21. Reasons for Not Resolving the Dispute: Tamil Nadu, Bihar, and Punjab



Tamil Nadu, Punjab, and Bihar were found to have the highest percentages of respondents who did not wish to resolve their dispute. The highest percentage of respondents from Tamil Nadu, who did not resolve their dispute, said it was because of the time it would take to resolve. The highest percentage of

respondents from Bihar said they did not want to resolve their disputes due to corruption, and the highest percentage of respondents from Punjab said they did not want to resolve their dispute as it would be too costly.

FIGURE 22. Caste-wise Distribution of Respondents Who Did Not Want to Resolve Their Dispute



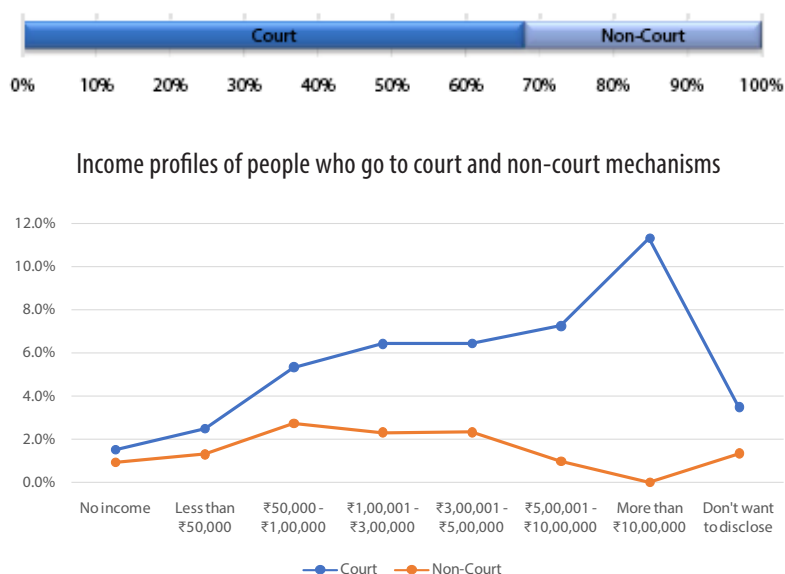
If we consider the caste-wise distribution of respondents who did not want to resolve their dispute, we find that 26 per cent of them belong to the scheduled caste (SC) or scheduled tribe (ST) category, and 9 per cent to the other backward

class (OBC) category, showing that by and large, people from the disadvantaged castes amongst the respondents had disputes, but did not want to solve them.

PART 3. COURT VERSUS NON-COURT METHODS

A. Methods on Which People Relied

FIGURE 23. Resolution of Disputes: Court and Non-court Mechanisms

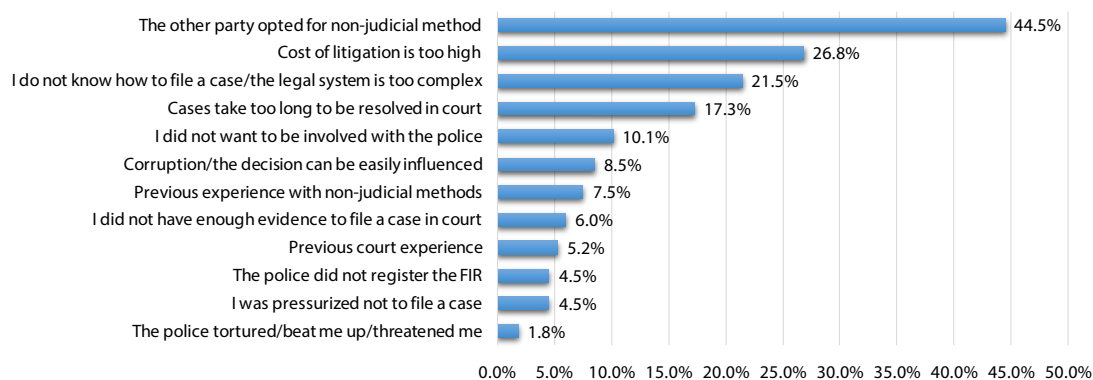


Note: Counts have been normalised to the number of respondents within each income bracket.

Figure 23 looks at the percentage of respondents who had an ongoing dispute and approached the court, as against adopting non-court mechanisms, for resolution. It also looks at the income levels

of respondents who chose these methods. It can be seen that people with higher incomes (above ₹5,00,000 annually) show a strong preference for courts as the mode of dispute resolution.

FIGURE 24. Reasons for Not Going to Court

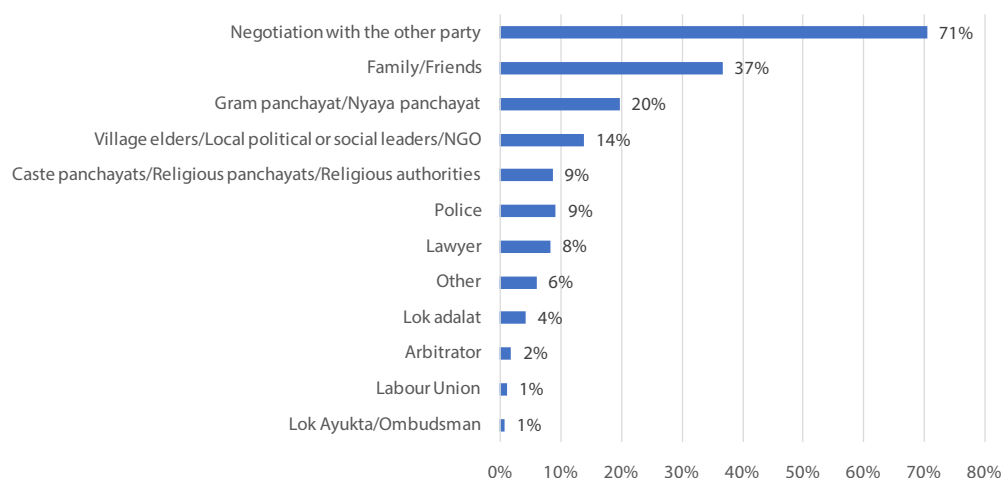


Note: Percentages are based on multiple-choice responses of respondents who chose non-court mechanisms.

Figure 24 shows reasons why respondents who used non-court mechanisms elected to do so. Other than using a non-court mechanism at the behest of the opposite party, the cost, complexity of legal

system, and length of the court process stand out as the most important reasons why people did not go to court.

FIGURE 25. Non-court Methods People Tried

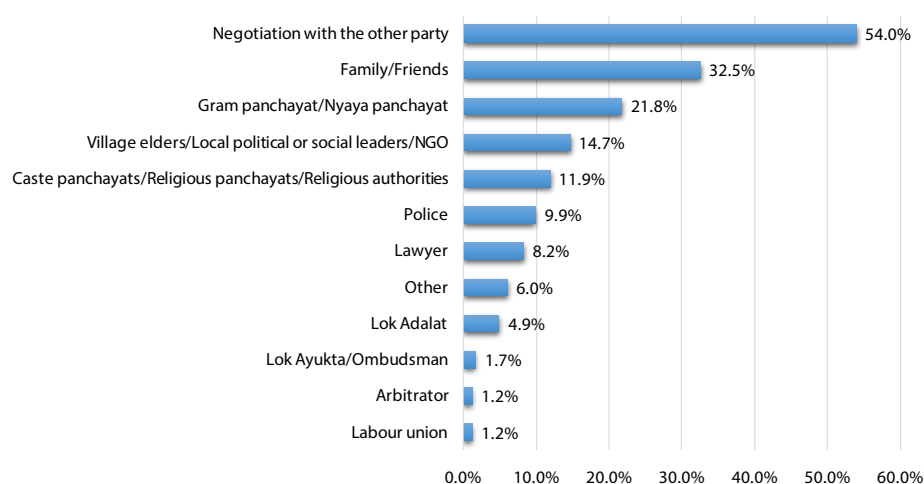


Note: Values are percentages calculated based on the multiple-choice responses of the number of respondents who opted for non-court mechanisms.

Figure 25 shows the different non-court mechanisms that people tried to use to resolve their disputes. Respondents who opted for non-court

mechanisms were asked which mechanisms they tried to use in resolving their dispute and which method actually helped resolve the dispute.

FIGURE 26. Non-court Methods That Helped Resolve the Dispute



Note: Values are percentages calculated based on the multiple-choice responses of the number of respondents who opted for non-court mechanisms.

Figure 26 shows the non-court mechanisms that respondents used which helped them in resolving their dispute. Negotiation with the other party helped a majority of respondents (54 per cent).

FIGURE 27. Use of Non-court Methods in Resolving Crimes

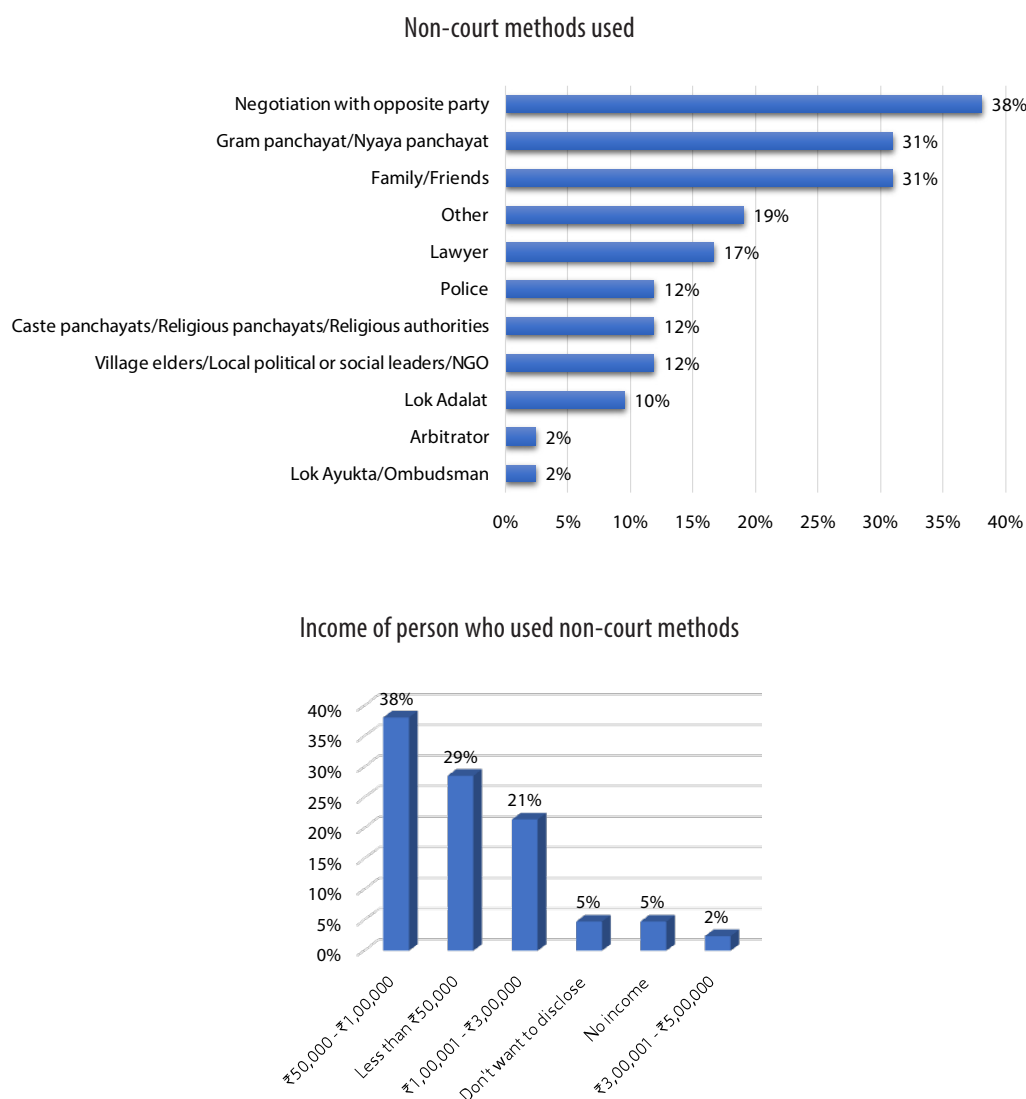


Figure 27 shows the non-court mechanisms adopted by respondents to resolve disputes pertaining to crimes. Negotiating with opposite party, gram panchayat or nyaya panchayat, and family or friends are the most important mechanisms used.

In terms of income levels, it can be seen that most respondents relying on non-court mechanisms to resolve crime-related disputes are from lower-income categories.

FIGURE 28. Nature of Disputes

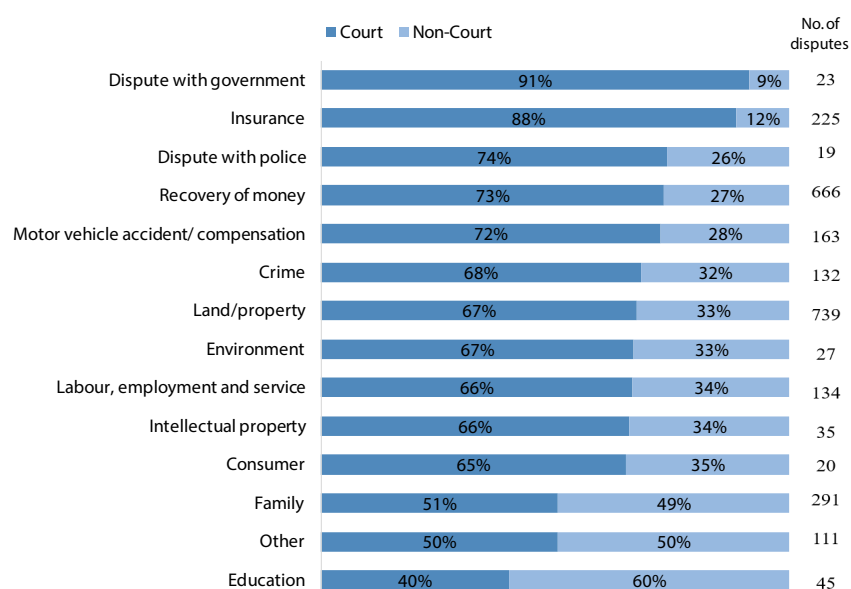
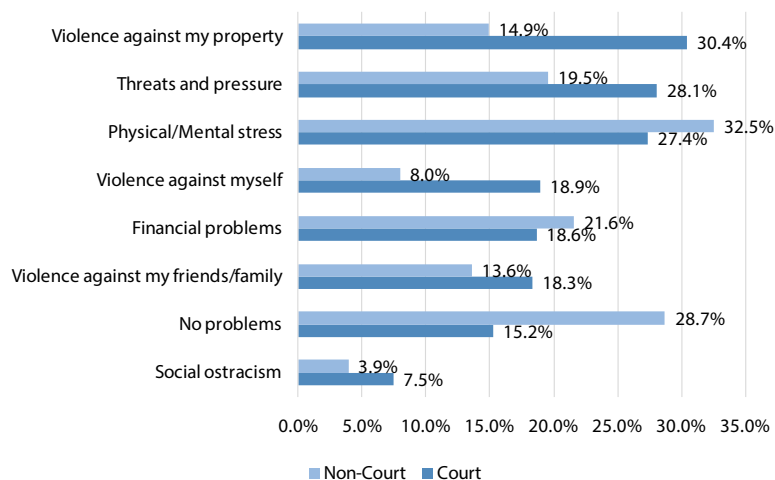


Figure 28 shows the split between respondents who used court and non-court mechanisms for each type of dispute. A preference for using the court can be seen among respondents for most categories

of disputes. However, this finding must be viewed in light of the number of respondents who had a dispute of that nature.

B. Challenges Faced Due to Having a Dispute

FIGURE 29. Problems Resulting from the Dispute



Note: Values are based on multiple-choice responses of respondents who went to court or used non-court mechanisms.

As shown in Figure 29, a high percentage of people who used the court mechanism faced violence against themselves, friends and family, their property, threats and pressure, and social ostracism. Physical and mental stress, as well as financial problems were widely prevalent overall, as a

consequence of both court and non-court related disputes. However, a higher percentage of respondents who used non-court mechanisms (28.7 per cent) felt that they did not face any problems as a result of their dispute.

FIGURE 30. Problems Faced by People Going to Court: Top Four States

	Delhi	Punjab	Tamil Nadu	Uttar Pradesh
Threats and pressure	21%	49%	26%	26%
Violence against my property	27%	44%	15%	43%
Violence against myself	17%	31%	10%	24%
Violence against my friends/family	39%	29%	8%	9%
Physical/mental stress	39%	51%	34%	7%
Financial problems	13%	40%	22%	5%
Social ostracism	6%	35%	14%	3%
N/A	23%	8%	19%	1%

Note: Highlighted figures indicate the problems faced by the highest percentage of people.

Among the top four states in terms of the number of respondents who went to court, about 80 per cent of respondents from Delhi, Punjab, and Uttar

Pradesh reported violence against themselves, family, friends, and/or property.

FIGURE 31. Problems Faced by People Who Used Non-court Mechanisms: Top Three States

	Maharashtra	Punjab	Uttar Pradesh
Threats and pressure	18%	22%	18%
Violence against my property	6%	20%	15%
Violence against myself	7%	8%	9%
Violence against my friends/family	19%	12%	9%
Physical/mental stress	36%	45%	34%
Financial problems	37%	38%	7%
Social ostracism	3%	11%	1%
N/A	20%	22%	27%

Note: Highlighted figures show the problems faced by the highest percentage of people.

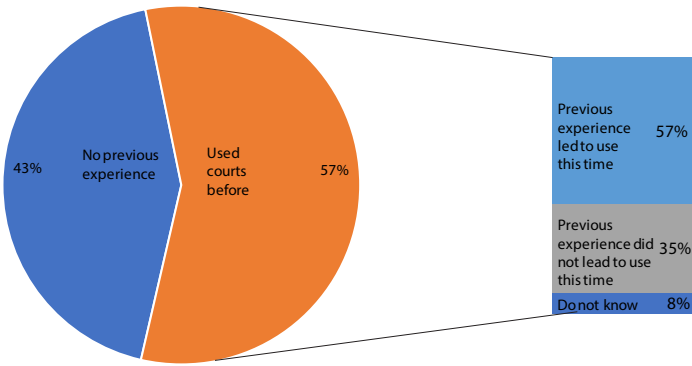
For the people from the top three states in terms of respondents who relied on non-court methods, financial problems were reported to be the biggest

problem in Maharashtra, while stress was the greatest problem in Punjab and Uttar Pradesh.

C. Previous Experience

(i) Previous Experiences of Those Who Have a Dispute in Court

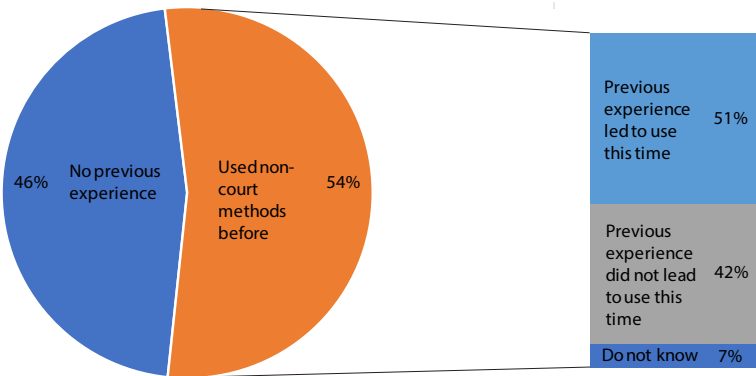
FIGURE 32. Previous Court Experience and Impact on Use of Courts



Around 57 per cent of respondents who went to court had prior court experience, and of those,

about 57 per cent said that their court experience had led them to approach court again.

FIGURE 33. Previous Non-court Experience and Impact on Use of Courts

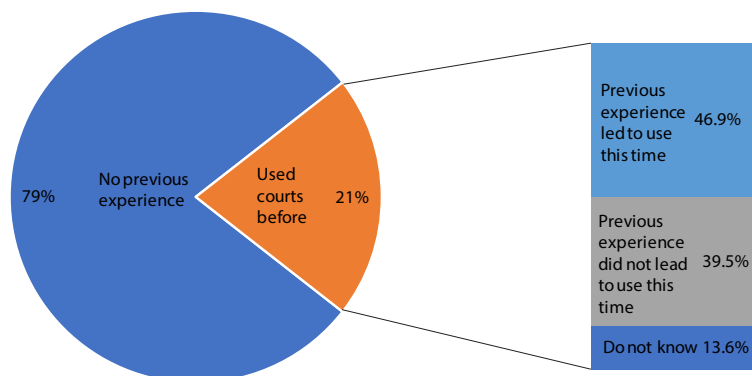


Around 54 per cent of respondents who went to court had previous non-court experience, of whom around 51 per cent said that their experience with

non-court mechanisms had led them to approach the court system this time.

(ii) Previous Experiences of Those Who Have a Dispute and Used Non-court Mechanisms

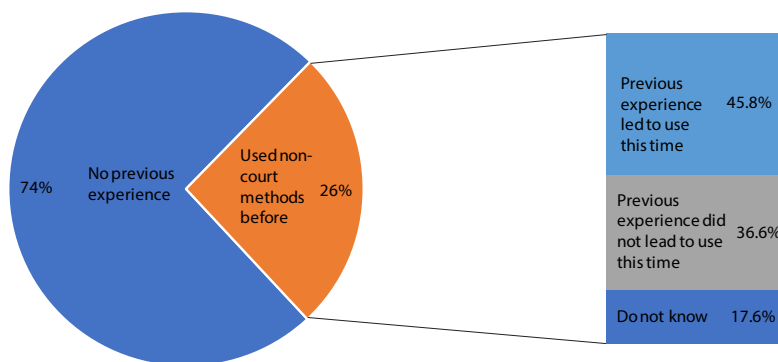
FIGURE 34. Previous Court Experience and Impact on Use of Non-court Methods



Of the respondents who used non-court mechanisms, 21 per cent had prior court experience. Of this, around 47 per cent said that their previous

experience in court had led them to use non-court systems this time.

FIGURE 35. Previous Non-court Experience and Impact on Use of Non-court Mechanisms



Among those who chose a non-court dispute resolution method, only 26 per cent had prior non-court experience, and of this number, around 46

per cent were led by their previous experience with non-court mechanisms to use a non-court mechanism again.

FIGURE 36. Prior Experience of Respondents Who Went to Court

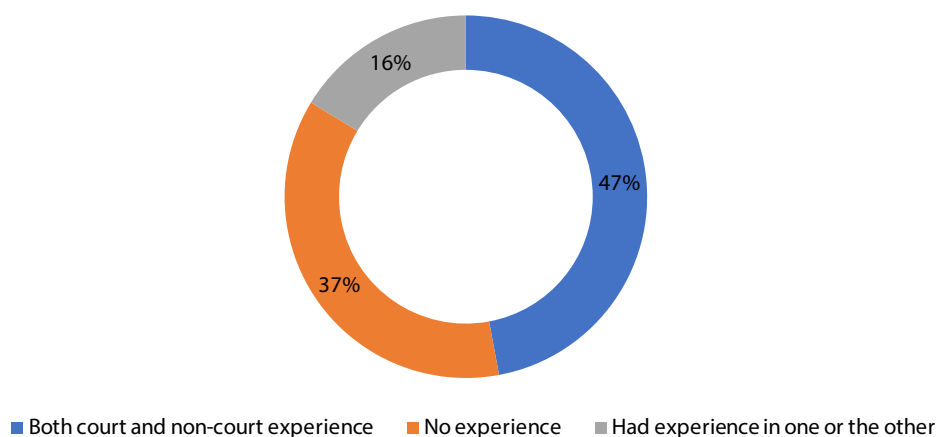
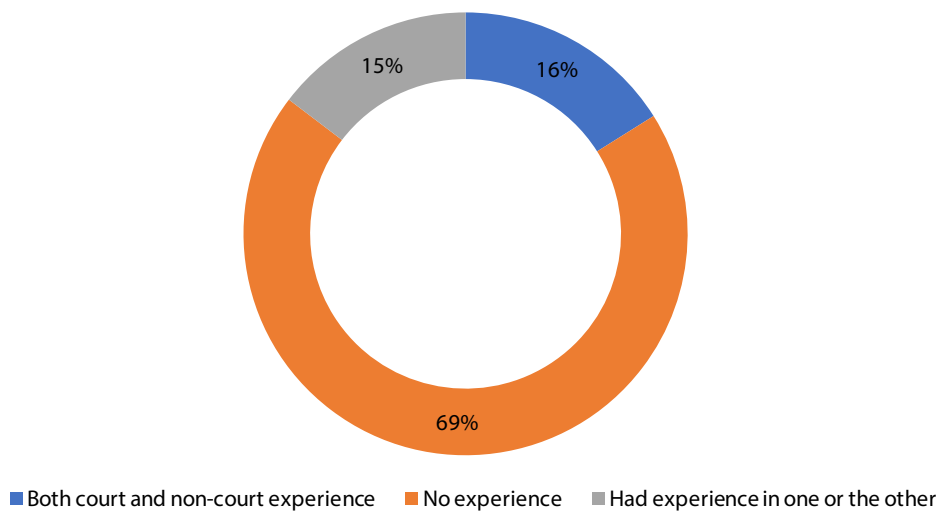


FIGURE 37. Prior Experience of Respondents Who Used Non-court Methods

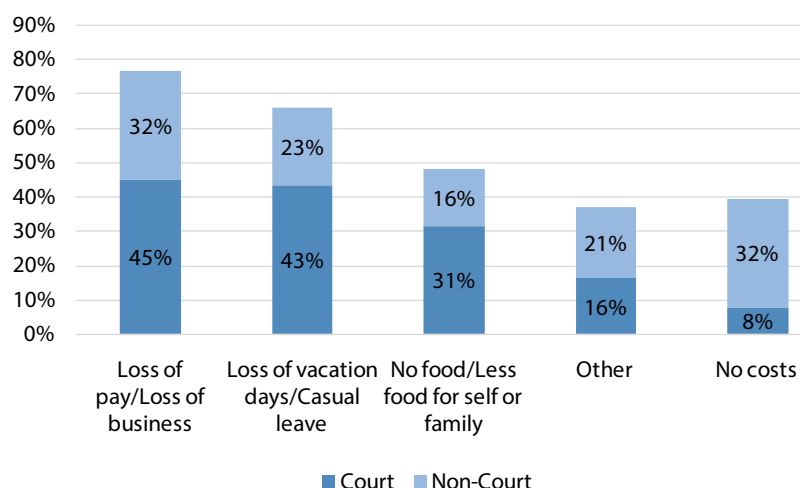


An interesting point to note here is that while 63 per cent of those who approached courts had previously approached the courts or a non-court mechanism,

69 per cent of those who approached a non-court mechanism had never had any prior experience in dispute resolution.

D. Costs

FIGURE 38. Costs of Participating in the Dispute Resolution Process



Notes: Values are based on multiple-choice responses of respondents who went to court or used non-court mechanisms.

Other than legal fees and court fees, there are numerous indirect ways in which people are financially affected by disputes. When compared with respondents who elected non-court mechanisms, a higher percentage of people who went to court incurred costs due to loss of pay or loss of

business (45 per cent), loss of vacation days or leave (43 per cent), and a shortage of food (31 per cent). Further, a large number of those who used non-court mechanisms (32 per cent) said they did not face any costs in participating in the dispute resolution process.

FIGURE 39. Average Cost of Participating in the Dispute Resolution Process

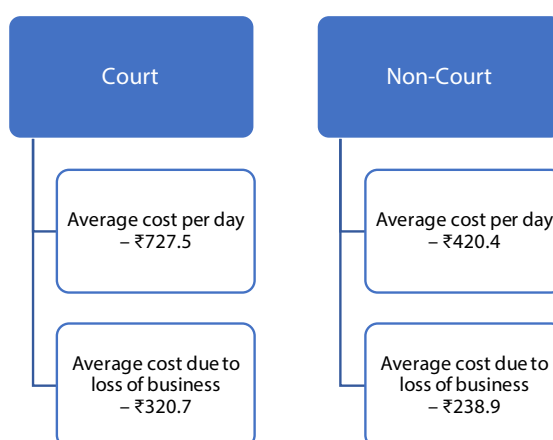


Figure 39 shows the direct and indirect costs of litigation as well as using non-court mechanisms. The

cost is found to be around 60 per cent higher for those who approach the courts.

FIGURE 40. Daily Cost of Attending Proceedings

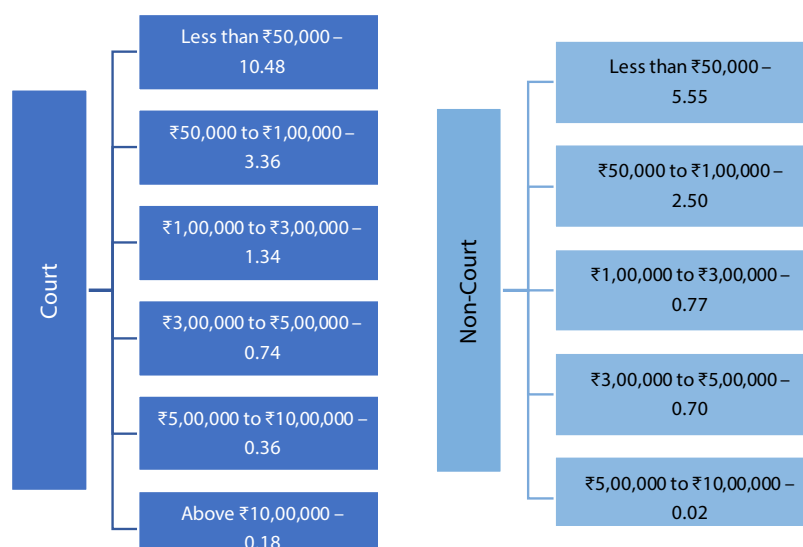


Figure 40 shows how many days' worth of a person's income is spent when they attend proceedings in a dispute resolution process, for people across

various income categories. In respect of both court and non-court mechanisms, the highest per diem cost is for the lowest income category.

FIGURE 41. Experience with Bribes

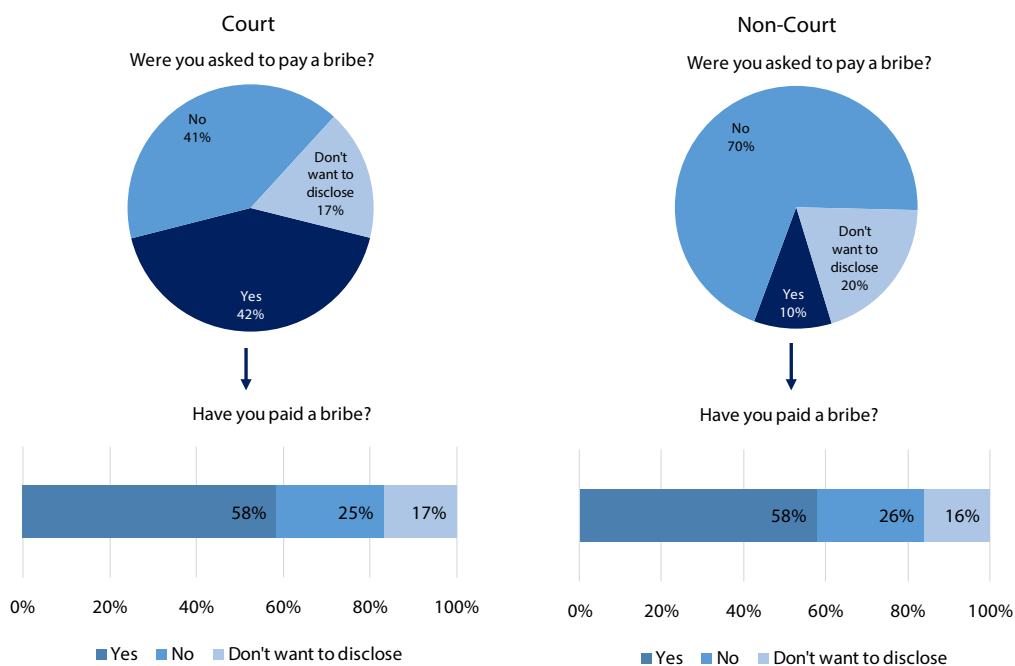


Figure 41 looks at the issue of how respondents dealt with bribes—17 per cent of respondents who went to court and 20 per cent of those who used non-court mechanisms did not wish to disclose whether or not they were asked to pay a bribe. Prevalence of bribes is less in non-court mechanisms, with around 70 per cent of respondents stating that they were not asked to pay a bribe.

Of the 42 per cent of respondents who went to court and were asked to pay a bribe, 58 per cent admitted to paying one. Of the 10 per cent of respondents who chose non-court mechanisms, 58 per cent admitted to paying a bribe.

Notes

1. Harish Narasappa, Kavya Murthy, Surya Prakash B.S., and Yashas C. Gowda. 2016. 'Access to Justice Survey: Introduction, Methodology, and Findings', in Harish Narasappa and Shruti Vidyasagar (eds.), *State of the Indian Judiciary: A Report by DAKSH*, pp. 137–155. Bengaluru: DAKSH and EBC. Available online at http://dakshindia.org/state-of-the-indian-judiciary/28_chapter_15.html#_idTextAnchor320 (accessed on 11 October 2017).
2. Priyanka Upadhyaya and Anjoo Sharan Upadhyaya. 2016. *Traditional Institutions of Dispute Resolution*

in India: Experiences from Khasi and Garo Hills in Meghalaya. Berlin: Berghof Foundation, p. 6.

3. Sylvia Vatuk. 2013. 'The "Women's Court" in India: An Alternative Dispute Resolution Body for Women in Distress', *The Journal of Legal Pluralism and Unofficial Law*, 45(1): 84.
4. To illustrate, the number of responses that we sought to collect for the population within the jurisdiction of the High Court of Allahabad was 16 per cent of the total number of responses, because as per the 2011 census data, the population of Uttar Pradesh was about 16 per cent of India's population.
5. For example, since the population of Mubarakpur Khurd in Uttar Pradesh is 93, the number of responses to be collected from there were five responses. However, since the population of Gopi in Uttar Pradesh is 6,967, the number of responses to be collected from there was 55.
6. Taking the base as the adult population of India, which as per Census 2011 data, is around 76.2 crore people. See http://www.censusindia.gov.in/2011census/Age_level_Data/India/Age_data.xls (accessed on 16 October 2017).
7. Narasappa et al. 2016. 'Access to Justice Survey'.
8. Ministry of Rural Development. 2008. 'Report of the Committee On State Agrarian Relations and Last Unfinished Task of Land Reforms', 30 October, available online at <http://dolr.nic.in/Committee%20Report.doc> (accessed on 16 October 2017).
9. Narasappa et al. 2016, 'Access to Justice Survey'.
10. Taking the base as the adult population of India, which, as per Census 2011 data, is around 76.2 crore people. See http://www.censusindia.gov.in/2011census/Age_level_Data/India/Age_data.xls (accessed on 16 October 2017).

Saddharma Nyaya Peetha: The Role of Taralabalu Math in Resolving Disputes

Shivamurthy Shivacharya Mahaswamiji

Abstract

As part of its video documentary project, 'Justice, Access, and the Nation's Approaches' (JANA), whose aim is to understand various institutional and non-institutional dispute resolution mechanisms in our country, DAKSH interviewed Dr Shivamurthy Shivacharya Mahaswamiji at Sirigere, who conducts the Saddharma Nyaya Peetha every week. This chapter contains excerpts from the interview, in which Swamiji speaks about the legacy of Sri Taralabalu Jagadguru Brihanmath in resolving various disputes that people bring to him.

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DAKSH has undertaken a video documentary project titled 'Justice, Access, and the Nation's Approaches' (JANA), with an aim to highlight the various institutional and non-institutional dispute resolution mechanisms that exist in our country. While it is common to approach the courts, police, panchayat, and/or various other statutory bodies when one has a dispute, it is interesting to find that there are several non-judicial institutions that also play a significant role in resolving disputes. Dr Shivamurthy Shivacharya Mahaswamiji at Sirigere (Swamiji) is one such authority.

Swamiji is the 21st Jagadguru in the lineage of Sri Taralabalu Jagadguru Brihanmath, Sirigere and has dedicated his time and energy to resolving the problems of the common people through mediation. An eminent Sanskrit scholar with a PhD from the Banaras Hindu University, Swamiji has created a dispute resolution system that aims to redress the day-to-day problems of the people. As part of JANA, DAKSH interviewed Swamiji, and

he shared his thoughts on this dispute resolution method, known as the ‘Saddharma Nyaya Peetha’.

Excerpts from Swamiji’s interview follow.

Institution

I conduct the ‘Saddharma Nyaya Peetha’ (Nyaya Peetha), which is an open court session, every Monday, throughout the year, in Sirigere. The system of resolving disputes is a legacy of Sri Taralabalu Jagadguru Brihanmath (Math). The proceedings begin at 10:30 in the morning and continue until 9:00 at night. At times, they even go on until midnight, depending on the gravity of the matter. I have tried to modernise the age-old practice of mediation by documenting the details of the proceedings, providing structure to the entire process, and incorporating the use of technology.

Disputes

On a daily basis, people approach me with disputes about personal and family matters, strained relationships, property, financial issues, as well as communal conflicts. You could say that all cases that one sees in a regular court of law can also be seen in the Nyaya Peetha. Though the law does not permit me to deal with criminal cases, I do try to resolve the animosity and tension in an affected area or village to bring about peace before and after the case is decided by the court. I deal with approximately 1,200 cases annually.

Parties

People come to me whenever they are in trouble. There have been instances when parties have even approached me in the middle of the night regarding their disputes. People also approach me during public gatherings.

At times, in the furtherance of public interest, I summon parties suo motu, or go to the place of conflict to resolve the tension or crisis, depending on the

gravity of the situation. People of all religious faiths approach me, since human problems and sufferings are similar, irrespective of caste, community, and creed.

Functioning of the Nyaya Peetha

To file a case in the Nyaya Peetha, the aggrieved party must first file a petition. Once the petition is admitted, a date is given to the party to present their case, and a notice is issued to the opposite party, enclosing a copy of the petition, asking the other party to appear before the Nyaya Peetha, if they intend to get their dispute settled amicably.

Once the opposite party appears, a written statement needs to be filed by them. All the petitions and written statements filed by the parties are briefly dictated and summarised in front of the parties. If there are any errors or mistakes, they are immediately rectified. Further, all orders are typed directly on a computer by my assistant. To keep track of the orders that are being dictated, a separate monitor is placed in front of me so that I can view the contents of the order being typed up by my assistant on a real-time basis. Thus, I can notice any errors and immediately rectify them. At the end of the hearing, all the orders passed by me based on the submission of the parties are printed and signed by the parties to the case. Certain sensitive cases that cannot be taken up in the open court are dealt with separately in private.

A computerised database consisting of detailed information about various cases registered in the Nyaya Peetha has been maintained. The oldest case in the database dates back to 1983. However, not all the case records can be found on the database, as the process of digitising older case records has only begun recently.

Resolution

Unlike regular courts, I do not pronounce judgments. The intention is to settle dispute amicably amongst the parties. In the Nyaya Peetha, there are

no distinct winners and losers in a case. The intention is to strike a balance between the viewpoints of both the parties.

There have been instances in which cases that were already admitted in a regular court were settled in the Nyaya Peetha, after which a compromise petition as agreed by both the parties was submitted to the court and the final decree was obtained. In my experience, courts tend to give adjournments liberally if parties inform them that the case is pending in the Nyaya Peetha for a compromise.

Unlike a regular court, I am not bound by precedent. Each case that comes before me is unique and has different facts, which I decide based on their merits.

I cannot prescribe punishment to the parties; however, at times I order parties to pay compensation to those who have suffered a wrongdoing. Although there have been instances of social boycott of wrongdoers in the history of the Math, the same has been made unlawful in today's democratic set-up.

An interesting case from the archive of the Math, which dates back to 1874, records that a jury constituted by the then Swamiji imposed a fine of ₹2 on a petitioner for lodging a false complaint. The allegation was that a woman had spat on the face of his wife in the middle of the street. Such an act was considered to be an irreligious act, known as *ucchishtha aparadha*. Nearly 90 witnesses were examined by the jury in support of the allegation; however, none of them could sustain the claim. The entire case was based on hearsay evidence. The petitioner could not produce any eyewitnesses and subsequently admitted his folly in making a false complaint.

Authorities

Police assistance becomes crucial given the complexity of issues that are presented before me. Depending upon the nature of the case, I use my moral authority to direct the police and other authorities, including the government, to act in the larger interest of the

people. This intervention helps in resolving several cases, which would have otherwise gone to court.

At times, I have found myself in conflict with the police. The police and other authorities are governed by certain rules; however, at times rules fall short as they cannot handle all the nuances of a human relationship. These rules and regulations bind the enforcing authorities, leading to conflicts, thus worsening the situation. I cannot go against the laws of the country, and so I have tried to strike a balance by observing the issue independently and providing natural justice by taking the parties into confidence.

Enforceability

It is important to observe the extent to which orders are being followed by the people. Most of the parties who appear before the Nyaya Peetha follow my decisions due to their devotion and respect for me. However, there are instances in which parties do not cooperate, and refuse to appear before the Nyaya Peetha.

In the recent past, the proceedings of the Nyaya Peetha have been legitimately recognised by the court. In a recent case, which was decided in June 2010 by the Additional Civil Judge (Senior Division), Hospet, Karnataka, the court identified the proceedings relating to an agreement of sale carried out by the Nyaya Peetha to be valid under the Arbitration and Conciliation Act, 1996. In this case, the parties appeared before me on their own. One of them became hostile after the agreement was signed before me. As a result, the aggrieved party went to the court during the pendency of case in the Nyaya Peetha. The court dismissed the case on the grounds that it did not have jurisdiction to take up the case and directed the parties to approach me (arbitrator) to get the final award.

Courts

Continuous delay in the courts remains a huge problem in the Indian judicial system. Cases taking several years to get resolved has resulted in parties losing

faith in the system. Some of the parties who approach the Nyaya Peetha, despite having filed cases in the regular court, do so because of the inordinate delay caused in the courts. People prefer approaching the Nyaya Peetha for two reasons: first, they do not have any documentary evidence to prove their case in the court and second, they are poor and cannot afford a lawyer.

As opposed to regular courts, there are no advocates in the Nyaya Peetha. Each party speaks for themselves. There is no fee charged nor any sort of remuneration expected to be paid by the parties who bring their case before the Nyaya Peetha. To prevent delay, I ensure that I listen to all the cases listed on a day. This means that on some days, proceedings go on till late at night in the Nyaya Peetha.

Cases in the Nyaya Peetha can get resolved quickly provided both the parties cooperate. Ego, hatred, and

selfishness of the parties are the three major factors that come in the way of quick settlement.

Justice

The concept of justice is simultaneously easy and difficult to articulate in a single sentence. Though constitutional experts would perhaps say that justice means protecting the fundamental rights of citizens, according to me as a religious leader, justice means alleviating the pain, suffering, and hardship of an individual or a group of individuals irrespective of their social or economic status, caste, or creed in the society. To protect the good from the wicked, to make them live with dignity, and above all to enable a person to live in peace and happiness is the fundamental objective of justice.

The Mediation Gap: Where India Stands and How Far It Must Go

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Annapurna Sreehari

Shruthi Ramakrishnan

Abstract

The introduction of Section 89 of the Code of Civil Procedure, 1908 gave the Indian judicial system the impetus to use several alternative modes for dispute resolution. One of them is mediation. In this chapter, the authors introduce readers to the mediation process, discuss the Indian legal landscape and frameworks with respect to mediation, and examine the practice of mediation in India through a discussion of court-annexed mediation programmes as well as nascent private mediation programmes. The authors recommend steps that need to be taken to develop an ecosystem that is conducive to mediation becoming an accepted and effective dispute resolution process in the Indian legal system.

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If you really want to see something,
look at something else.

If you want to say what something
is, inspect something that it is not.

—Howard Nemerov, Pulitzer Prize Winner, Poet

Mediation is the ‘something else’ to litigation, arbitration, and conciliation as a structured dispute resolution process for resolving conflicts. It is a collaborative manner of resolving disputes where the parties make the ultimate decision on the terms at which they settle their disputes. It is a completely voluntary process, which means that the parties can opt out of the process anytime they feel it is not working for them. Mediation is confidential, anything that the parties may have discussed

with the mediator or the other side, any documents exchanged, any proposals made during mediation will remain confidential even after the process has concluded, and neither party is permitted to use any information gathered in mediation in any judicial or quasi-judicial forum.

The mediator facilitates negotiation and communication between the parties while uncovering their underlying interests and identifies overlapping interests that can result in a zone of possible agreement. The mediator coaches the parties to negotiate effectively, by unhinging them from their positional bargaining style and using a problem-solving manner. It is important for a mediator to remain, and be perceived as being, neutral in the process.

In 2002, the Code of Civil Procedure (CPC), 1908 was amended to introduce Section 89. The amendment was instrumental in promoting alternative dispute resolution (ADR) processes in India, including mediation. Yet, there are certain difficulties and impediments in the acceptance of mediation as a form of dispute resolution and its integration with the country's civil justice dispensation framework.¹ In order for the process of mediation to take root in the country, there is a strong need to examine the landscape of the Indian legal and dispute resolution context, the active players and their mindset towards mediation, the supporting institutions and framework that need to be established and nurtured to facilitate the increased use and acceptance of this process.

In the following section, we explore the legal developments affecting mediation in India, such as policy guidelines in the older Law Commission of India reports, case laws, and statutes. The next section explores the implementation of mediation through court-annexed and private mediation institutions. We conclude by discussing next steps on increasing viability for mediation in India.

LEGAL DEVELOPMENTS AFFECTING MEDIATION IN INDIA

In 1988, the 129th Law Commission Report on Urban Litigation and Mediation as Alternative to Adjudication (129th Report) observed that the enormous amount of congestion in courts and unnecessary delays had led to an explosion of cases in urban litigation. The backlog was so severe that the average time taken to dispose of a case in Bombay Small Causes Court was seven years from the date of institution of the suit.² The 129th Report pressed for the need to look outside the then extant system for remedies and suggested several alternative ways of dispute resolution, including the setting up of a conciliation court where the judge attempts to bring about an amicable settlement between the parties, failing which the matter could be routed to the courts.³ Around the same time, the Arrears Committee⁴ (also known as the Malimath Committee) was constituted by the government of India in order to look into the grave concern of arrears in courts and make suitable recommendations in this regard. The Arrears Committee gave its report in 1990, with several recommendations, including the introduction of conciliation courts as recommended by the 129th Report.⁵

Despite the staggering pendency of cases in the country, use of mediation in India was given a significant impetus only in 2002 via the amendment to the CPC,⁶ which introduced Section 89, permitting the court to refer a dispute to an ADR forum when it deemed that elements of a settlement existed.

While the introduction of Section 89 was a landmark step, it quickly became apparent that the poor and hurried drafting of the provision was resulting in more problems than solving any. The constitutional validity of the amendment was raised and

several questions regarding the manner of referral by courts needed to be clarified. The Supreme Court referred to the provision as 'a trial judge's nightmare'.⁷

In *Salem Advocate Bar Assn. v. Union of India*⁸ (*Salem I*), the Supreme Court held that Section 89 was constitutionally valid and established a committee (Salem I Committee) to, inter alia, draft rules on mediation and create a report on effective case management to reduce the burden on courts. Justice Jagannadha Rao was elected as the chairman. The Salem I Committee published detailed reports which contained a guideline to the courts on the manner of referring cases to mediation titled the Civil Procedure Alternative Dispute Resolution (CPADR) Rules, 2003. The CPADR Rules, 2003 also required various High Courts to provide necessary training to its mediators. The Salem I Committee also drafted the Mediation Rules, 2003, to be adopted by various High Courts.

On 9 April 2005, the then Chief Justice of India, Justice R.C. Lahoti, gave further impetus to mediation in India by ordering the establishment of the Mediation and Conciliation Project Committee (MCPC).⁹ The purpose of the MCPC was to establish court-annexed pilot mediation centres in several states, and ensure that the mediation rules to be adopted in various court-annexed mediation centres were uniform, that training imparted to mediators were consistent, and that mediation was implemented at a national level.¹⁰ The MCPC was involved in training district judges in mediation, who started judicial mediation by the end of August 2005.¹¹ The training was subsequently extended to lawyers rendering mediation services at court-annexed mediation centres.

Around the same time, the Salem I Committee filed its reports on the issues identified in *Salem I*. Another Supreme Court Bench, comprising Justice Y.K. Sabharwal, Justice D.M. Dharmadhikari, and

Justice Tarun Chatterjee, extensively reviewed the reports in *Salem Advocate Bar Assn. (2) v. Union of India*¹² (*Salem 2*). In *Salem 2*, the Supreme Court directed the High Courts, the central government, and state governments to file a progress report with respect to adoption of the rules developed in the Salem I Committee reports, within four months of the date of the judgment.

Gradually, several High Courts adopted versions of the Mediation Rules, 2003 and established court-annexed mediation centres as pilot programmes, which were governed by the aforesaid rules.

In 2010, another important development occurred in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, where the Court highlighted the unclear drafting of Section 89 and its several ambiguities, although it lauded the purpose behind the introduction of the provision.¹³ The case attempted to provide the procedure to be followed by the court while referring cases to an ADR forum. In particular, the judgment elucidated the following:

1. The appropriate stage for referring a matter to mediation.
2. The court must explain the different ADR modes available to enable the parties to make a choice.
3. If mediation facility or service is not available, the parties can opt for the guidance of a judge to arrive at a settlement. In such cases, the court can refer the matter to another judge for this purpose.¹⁴

If the ADR process fails, the court may proceed to hear the matter after receiving a report from the forum in which ADR was attempted.¹⁵

In recent years, mediation has been given further impetus by the inclusion of a provision in the Companies Act, 2013, which makes it mandatory for the central government to maintain a mediation and conciliation panel, comprising experts for mediating commercial disputes between the parties.¹⁶ Further, tribunals under the Companies Act or the central government may also refer a dispute to mediation where it deems it appropriate. The maximum time to conclude a mediation is three months.¹⁷ Similarly, the Consumer Protection Bill (Consumer Bill), 2015 provides for mediating disputes at the first instance of admission of a complaint before any consumer disputes redressal agency.¹⁸ Chapter V of the Consumer Bill envisages the establishment of consumer mediation cells at the national, state, and district levels, to whom the consumer disputes redressal agencies shall refer their cases.¹⁹ The Real Estate (Regulation and Development) (RERA) Act, 2016 also encourages amicable conciliation of disputes between promoters and allottees through dispute settlement forums established by consumer or promoter forums.²⁰

MEDIATION IN PRACTICE IN INDIA

Court-annexed Mediation in India

Mediation has formally been introduced into our legal system only since 2005. Available data on implementation of mediation in India is therefore scanty. Studies undertaken by the Vidhi Centre for Legal Policy on mediation in Delhi and Bengaluru reveal that although mediation has received the kick-start that was needed, much still needs to be done to attract disputants away from litigation.

For instance, in 2011, only 2.79 per cent of all cases were referred for mediation by the High Court of Karnataka²¹ and by the year 2015, this

figure rose only marginally to 4.83 per cent.²² The situation in Delhi is not that different and it is seen that only 2.86 per cent of cases instituted were referred to mediation by the High Court of Delhi in 2011, which gradually dropped to 2.31 per cent of cases in 2015.²³

Between 2011 and 2015, in Bengaluru, amongst the cases that were mediated, 66 per cent of the cases were settled through mediation.²⁴ It is important to note, however, that not all cases referred for mediation actually proceed. In 17 per cent of cases, mediation was terminated even prior to commencing.²⁵ The reasons were that the case was not fit for mediation, one or more parties never appeared or were not present for follow-up, one or more parties appeared but refused to participate, etc. The non-appearance of parties for follow-up mediation was the foremost reason for termination, amounting to nearly 45.51 per cent of such cases.²⁶ In comparison, in Delhi, 56 per cent of the mediated cases were settled, while 15 per cent of cases referred were terminated prior to mediation commencing.²⁷

As to types of cases, it is seen that mediation is most popular in matrimonial and family law disputes, such as divorce, partition, and restitution of conjugal rights, protection of women from domestic violence, and dowry prohibition cases, contributing to nearly 80 per cent of the mediation docket in Bengaluru.²⁸ Cases concerning property disputes amount to around 11 per cent of the total number of cases referred to mediation in Bengaluru.²⁹

Table 1 contains statistics on referral of cases to mediation and their disposal rates in some of the cities and states. The figures below are only intended to give a general idea of the functioning of mediation centres in India. The referral and settlement rates in court-annexed mediation require to be studied in depth to gain any insight on the effectiveness of these centres.

TABLE 1. City and State-Wise Referral of Cases to Mediation and Disposal Rates

State/City	Duration	Number of cases referred	Settlement rate (in percentage)
Delhi ³⁰	2005–2016	1,64,674	56.6
Bengaluru ³¹	2007–2017	56,759	65
Tamil Nadu ³²	2005–2015	38,592	16.5
Gujarat ³³	2008–2017	17,451	18.9
Kerala ³⁴	2009–2015	1,05,783	24.8
West Bengal ³⁵	2012–2016	3,126	17.1
Chandigarh (referred by High Court of Punjab and Haryana) ³⁶	2008–2017	12,080	19.4

Private Mediation in India

The establishment of court-annexed mediation programmes has gradually led the path for the establishment of private mediation institutions throughout the country—such as the Indian Institute of Arbitration and Mediation (IIAM), Centre for Advanced Mediation Practice (CAMP), and Foundation for Comprehensive Dispute Resolution (FCDR).

At CAMP, for example, disputing parties are provided access to private mediation services on a pre-litigation basis. CAMP has a panel of mediators and provides private mediation services, following its own institutional rules. Mediations at private mediation institutions are quick and successful. For example, CAMP records a settlement rate of 80–90 per cent, with cases being settled in one or two sessions lasting a full day each.

Disputes pending in courts are brought to private mediation institutions when parties seek the

ambience and expertise of specialised mediators. The need for confidentiality and resolving disputes without tarnishing reputations, the requirement of an efficient process and most importantly, the desire to resolve disputes without destroying relationships are some of the reasons that keep parties away from courts. Some cases that were mediated at CAMP are:

1. A start-up company came in for mediation but did not want to use the word ‘mediation’ in their settlement agreement for restructuring the ownership pattern, as even a hint of a dispute could jeopardise their international contracts. They instead preferred to call it ‘facilitated discussion’.
2. An 18-year-old dispute between a developer and a property owner, who was emotionally fragile and had been refusing to resolve the conflict, because he wanted to avoid courts.
3. A family settlement between the parents of a disabled child who could not agree on the terms of a family settlement they wanted to draw up to secure the interest of their child.

The extensive *convening and follow-up* practised by skilled mediators in private institutions enable a very high percentage of settlement. This is also the experience of skilled mediators internationally.

As legislation is not currently available to provide enforceability to a settlement at mediation, parties have the option to: (a) enter into a fresh contract, (b) file the settlement in court for a decree, if the case has come from the court, or (c) in case of pre-litigation mediation, name the mediation process as a ‘conciliation’.

The Supreme Court in the *Afcons* judgment held that mediation and conciliation are synonymous. The mediated settlement agreement is termed a ‘conciliator’s settlement agreement’, which is equivalent

to an arbitrator's award under Section 74 of the Arbitration and Conciliation Act, 1996.

Private mediation institutions are necessary to create the ecosystem for mediation in many ways, such as, to: (a) encourage resolution of disputes on a pre-litigation basis, (b) encourage mediation of commercial disputes, (c) provide parties access to mediators with subject matter expertise, and (d) enhance the standards for mediation.

THE WAY FORWARD FOR MEDIATION IN INDIA: ENSURING A DIFFERENT FUTURE

Mediation is at a nascent stage in our legal system. In order for mediation to truly take root, numerous steps must be taken. These are not only essential for a better understanding of mediation but also to create an ecosystem for mediation, thereby integrating it into mainstream Indian legal society. Some of our recommendations are as follows:

1. *Standalone legislation for mediation:* After the 2002 amendment to the CPC, there have not been substantial changes in the legislative framework of the country, which can support increased traction for mediation in India. The 2015 amendment to the Arbitration and Conciliation Act, 1996 made significant changes to the way arbitration and conciliation was practised in the country, however, the same does not have an impact on the mediation process.

There is an urgent need for an overarching mediation legislation that consistently governs all types of mediation in the country. A standalone legislation can address the enforceability of settlement agreements, accreditation and standards of practice,

confidentiality, privilege, conflict of interests, voluntariness, self-determination, and other ethical concerns that would inevitably arise from mediation practice, thereby granting increased legitimacy to mediation. Such a legislation needs to be drafted with utmost concern and care, without affecting the creativity and flexibility of the process.

It is pertinent to note that the recent report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanisms in India chaired by Justice B.N. Srikrishna has also recommended a standalone mediation law for India to promote dispute resolution using the ADR mechanism.

2. *Training judges in mediation:* Mediation needs the patronage of the judiciary to be accepted by the community as an effective dispute resolution mechanism. Moreover, considering the overwhelming backlog of cases in the system, it becomes more important for judges to familiarise themselves with the process and refer parties to mediation. Parties referred by a judge are known to participate effectively and successfully in mediation. It is therefore critical for judges to be trained to identify appropriate cases for mediation and actively refer them to mediation. The parties can choose if they would like to adopt the court-annexed or private mediation institutions for settlement.
3. *Modifying law school curriculum to include mediation studies and training:* In order for the process to get recognition, mediation should be included in law school curriculum, so that the emerging generation of lawyers are familiar with the process and therefore use the process more frequently and effectively. At the recent Global Pound Conference,

India that was held in Chandigarh in May 2017, familiarity with the dispute resolution process was identified as the biggest influencer when lawyers make recommendations to parties about procedural options for resolving commercial disputes.³⁷ Training of law students and lawyers is therefore essential to build needed familiarity and therefore increased usage. In that regard, the Ministry of Law and Justice is taking steps to include ADR practices and techniques in law school curriculum. According to an official in the ministry, 'Lack of awareness at the student level translates into lack of conviction in mediation as an advocate, which must be addressed.'³⁸

4. *Nurturing mediators with passion and commitment:* Mediation is an experience-driven process. The perceived success or failure of it, irrespective of reaching a settlement, is determined by the manner in which it is conducted. For that very reason, it becomes important that mediators are carefully nurtured so that they are potential leaders, brand ambassadors, and earnest service providers. Mediators must be given high-quality mediation training and encouraged to regularly attend advanced training programmes to constantly hone and develop their skills to provide high-quality mediation services.

Additionally, high-performing mediators must be recognised and encouraged. At Bangalore Mediation Centre, for example, one mediator, over the last six years, singly mediated 1,934 cases and resolved 72 per cent of them. These settlements are final and non-appealable. Currently, it is free for the parties. It comes at a minimal cost for the administration of justice. These are mediators who work tirelessly and relentlessly, earning only an honorarium. It is time to ask if these

heroes are being adequately rewarded. Are we sustaining the motivation of our mediators?

5. *Creating a physical space that honours the practice:* Mindsets are being changed about mediation. The space must be conducive for active listening, sharing confidential information, and making decisions in a comfortable and calm environment. In court-annexed programmes, adequate attention must be paid to appropriate infrastructure. This lends credibility to mediation in the minds of the litigant, especially when the judge has put pressure on them to participate.
6. *Funding for support court-annexed mediation programmes:* The liberal budgetary allocation for mediation by 13th Finance Planning Commission is commendable. However, the allocation by the central government was under the head 'mediation awareness'. This restricted using of funds only for 'awareness purposes' preventing investment in other key areas such as infrastructure and training.

The 14th Finance Planning Commission further aggravated the problem. The union government changed its approach to budgetary allocation for mediation programmes and urged the state governments to raise funds for mediation. Unfortunately, since 2015, state governments have been unable to release sufficient funds, leaving court-annexed mediation programmes starved of funds. Funds are urgently needed for better mediation rooms, payment to mediators who have rendered pro bono service for many years, ongoing training for mediators, training for judges to refer suitable cases to mediation, and training for staff to maintain the spirit of mediation and others.

7. *Building private institutions and mediation centres that serve as platforms for mediators to*

practice in the country: In order for mediation to take the next step in our country, private mediation institutions are essential. Private mediation will: (a) allow access to mediation on a pre-litigation basis, (b) allow parties to have a choice as to their mediator, resulting in improved quality of mediators, (c) allow the development of mediation as a profession, and (d) provide a better incentive for commercial clients to try mediation. Private mediation institutions are, unfortunately, very few and struggling. Intervention by the government and judiciary is needed to support these fledgling institutions to sustain themselves in providing quality mediation services, especially on a pre-litigation basis.

8. *Creating strong leadership to promote awareness to mediation and manage its growth and development:* A new process is being developed in our country. Its growth must be organised and planned in order for it to be a truly effective option in our legal system. Mediation suffers from ignorance and misconception. Awareness must be created at the commercial, personal, and community levels in a structured and organised manner to support a thriving culture of mediation. Widespread use of mediation cannot take place without a fundamental change in the perception of dispute resolution—such a change can be efficiently brought about through effective and inspiring leadership.

For further development of the fledgling state of mediation in India, the above recommendations would be first good steps. However, implementation would be the challenge and would require considerable tenacity and perseverance from all stakeholders concerned.

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Manpower Malady: Managing Legal Aid Institutions

Shruthi Naik

Abstract

Provision of legal aid is crucial in ensuring access to justice. Since the judiciary in India is overburdened with a burgeoning caseload, allowing it to optimally use judicial time is imperative to reduce backlog. At the same time, it is crucial that members of the judiciary, as administrators of legal aid, devote adequate time to ensuring effective provision of legal aid. How can a balance be struck between both these important functions, which compete for judges' time and attention? In this chapter, the author examines the working of the legal services authorities in India against the backdrop of available judicial manpower, and reviews legal aid models followed internationally, in order to propose an alternative model that can aid the judiciary in managing the administration of legal aid efficiently.

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In order to bridge the gap between the weaker strata of society and the monetary demands of the formal legal system, most legal systems today provide for the right to legal aid. Legal aid refers to the concept of providing a support mechanism to socially or economically weaker sections of society in order to ensure that they are provided equal opportunities to secure justice. The Constitution of India is the cornerstone of the legal aid system; it mandates that 'the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.¹

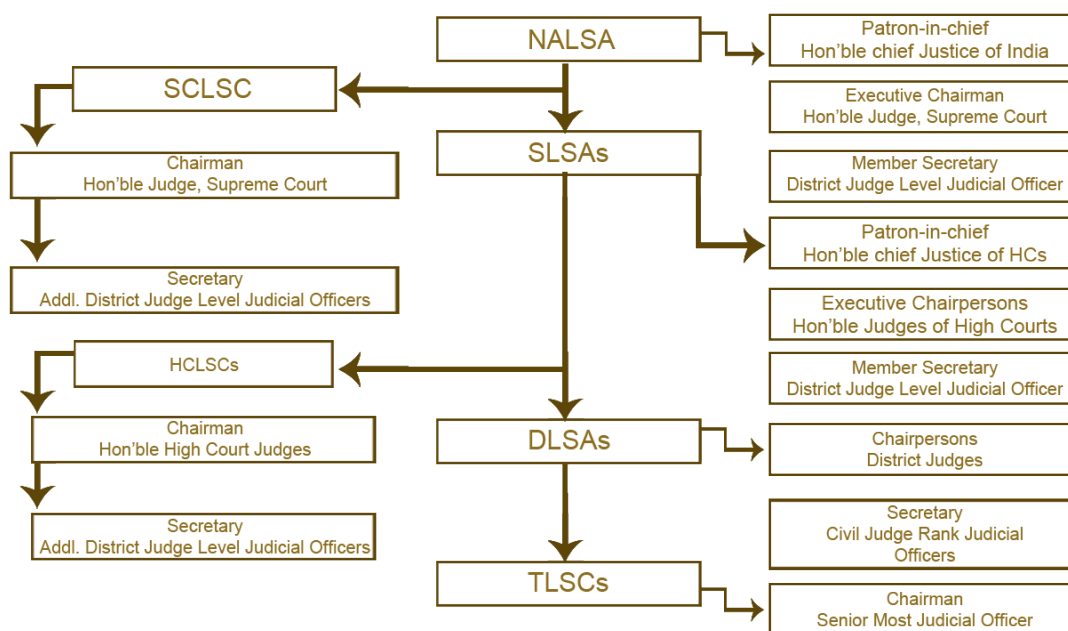
LEGAL SERVICES AUTHORITIES IN INDIA

With about 21.92 per cent² of the population of India living below the poverty line, an efficient system of legal aid is of paramount importance. In order to fulfil the requirements of a formal system of legal aid, the Parliament enacted the Legal Services Authorities (LSA) Act, 1987. The LSA Act is implemented by entities across four levels (national, state, district, and taluk) with each of these entities being presided over by judicial officers of various standing. The organisational structure and leadership of the authorities as envisaged under the LSA Act is set out in Figure 1.³

legal awareness, monitoring the implementation of legal aid programmes, and engaging in social justice litigation.⁵

State Legal Services Authorities (SLSAs) are set up in every state and each of them is responsible for ensuring that the directions provided to it by NALSA are put into effect. The functions of SLSAs include providing legal services to those who are eligible, conducting Lok Adalats, and undertaking legal aid programmes.⁶ District Legal Services Authorities (DLSAs) are set up in the districts, and each of them is responsible for ensuring that the directions provided to it by the SLA are put into effect. The functions of DLSAs include coordination

FIGURE 1. Organogram of Legal Services Authorities and Committees



The National Legal Services Authority (NALSA) is the nodal authority, and has been entrusted with wide functions to fulfil the mandate of the

LSA Act. Its functions include framing schemes to make legal services⁴ available, allocating funds to authorities, organising legal aid camps, spreading

of activities of the Taluk Legal Services Committees (TLSCs), ensuring legal services within the district, as well as organising Lok Adalats.⁷

In addition to establishing authorities, the LSA Act envisages the setting up of committees at three levels, the Supreme Court Legal Services Committee (SCLSC), the High Court Legal Services Committee (HCLSC), and the TLSC. The functions of the SCLSC include receiving applications for legal services, maintaining a panel of advocates to provide legal advice, implementing legal services programmes that relate to the Supreme Court, determining costs related to legal services, and submitting reports to the NALSA.⁸ The functions of the HCLSCs mirror the functions of the SCLSC, but are to be performed at the state level and these functions have been prescribed by their SLSAs under state-specific regulations.⁹ The functions of the TLSCs are to coordinate legal services activities within the taluk and organise Lok Adalats within the taluk.¹⁰

The functions of judicial officers who preside over the various Legal Services Institutions¹¹ vary based on the designations of officers. For instance, the committee constituted to evaluate applications received for legal aid is set up by the Executive Chairman/Chairman of the Legal Services Institution; however, the Member-Secretary/Secretary of the Legal Services Institution must act as the committee's chairman and is responsible for evaluating the applications received. If any persons are aggrieved by the decision of the committee, they may appeal to the Executive Chairman/Chairman.¹² With respect to the selection of panel lawyers, it is the function of the Executive Chairman/Chairman of the Legal Services Institution to scrutinise and select lawyers to be empanelled.¹³ However, some functions must be performed jointly by the Executive Chairman/Chairman along with the Member-Secretary/Secretary, such as the task of monitoring the legal services rendered and progress of the cases.¹⁴

Having gained some insight into the working of the Legal Services Institutions and the functions of the judicial officers who preside over these institutions, it is worthwhile to look at the magnitude of responsibility on the judiciary in the administration of legal aid. In order to determine the extent of judicial manpower required under the current scheme of legal aid in the country, I collected data based on publicly available information and through right to information (RTI) applications.¹⁵ As per the information collected, across the 36 SLSAs in the country, there are 36 HCLSCs, 605 DLSAs, and 2,217 TLSCs (refer Annexure A for a state-wise count of DLSAs and TLSCs).¹⁶ Given that each SLA should have two judges of the High Court and one judge from the subordinate judiciary (Member-Secretary),¹⁷ each HCLSC should have one judge of the High Court,¹⁸ each DLSA should have two judges from the subordinate judiciary (Chairman and Secretary),¹⁹ and each TLSC should have one judge from the subordinate judiciary (Chairman),²⁰ the entire framework for SLSAs, HCLSCs, DLSAs, and TLSCs across the country will require 102 judges across High Courts and 3,463 judges from the subordinate judiciary to carry out the functions prescribed by the LSA Act.²¹

UNDERSTANDING THE WORKING OF THE KARNATAKA STATE LEGAL SERVICES AUTHORITY

While the structure of the legal aid system envisages a significant amount of judicial manpower and extensive functions, the amount of time and effort that goes into the system is difficult to quantify. To get a better understanding of this, I spoke to Ms Uma M.G.²² about the functioning of the Karnataka SLA and discovered that judicial officers devote

considerable time and effort on a daily basis towards the functioning of the Legal Services Institutions. The Member-Secretary revealed that the Patron-in-chief/Executive Chairman and Member-Secretary meet on almost all working days to discuss the activities of the SLISA. Ms Uma stated that considerable time is spent on deciding petitions received from people regarding problems they have with other departments, such as the labour department, social welfare department, housing department, etc. When such petitions are received, they are examined and then referred to the relevant department for further action; however, since the SLISA receives around 150 petitions in a month, acting on the petitions takes up a significant amount of time. These petitions are in addition to the 15 legal aid applications²³ (approximately) that her office receives every month, which are also applications that the Member-Secretary has to consider and send to the panel advocates. In addition to attending to its day-to-day functions, the KSLISA holds meetings with its members once every three months to take stock of the activities of the KSLISA. The DLSAs are to provide a monthly report to the Member-Secretary regarding activities within their jurisdiction. The Member-Secretary reviews these reports and discusses them with the Executive Chairman in case of any abnormalities in the reports.

Ms Uma opined that while having the judiciary on board the Legal Services Institution is undoubtedly a requisite to ensure adequate access to justice, carrying out the functions envisaged under the LSA Act can be quite strenuous for persons who also have to attend to regular judicial functions. This is especially so in the case of the DLSAs, as chairpersons are mostly sitting district judges and not judges who work with the Legal Services Institutions on deputation. Further, work at the DLSA level can be said to be more difficult at times due to the lack of adequate support staff.

WHO MUST SERVE AS OFFICE-BEARERS IN THE LEGAL AID SYSTEM?

Given the number of judicial officers required to put the LSA Act into effect and the time and effort needed on their part, a question that requires examination is whether judicial officers are the most suitable and appropriate office-bearers to carry out these functions. The first comprehensive study on the state of legal aid was carried out by the Committee on Legal Aid and Legal Advice chaired by Justice N.H. Bhagwati which provided a detailed report in October 1949 on the question of legal aid. During this period, there was not much effort being poured into legal aid, and most assistance people received was either through societies such as the Bombay Legal Aid Society or under existing civil and criminal laws.²⁴ Upon examining the state of affairs of the legal aid system at the time, the Committee on Legal Aid and Legal Advice recommended that a scheme of legal aid be administered by committees across four levels—taluk level, district level, state level, and in each court. It was recommended that retired judicial officers, if available, be a part of the committees at the taluk, district, and court levels, but a judge of the High Court be part of the state committee.²⁵ Similar recommendations were also given in 1949 by the committee headed by Sir Arthur Trevor Harries, the then Chief Justice of the Calcutta High Court. The committee recommended setting up of legal aid authorities at the level of the High Court, city court, and at the district level, with the High Court committee consisting of members of the bar association and the other two authorities consisting of judicial officers as well as members of the bar association.²⁶

In 1958, the 14th Report of the Law Commission of India discussed in depth the responsibility of the state in ensuring the provision of legal aid to those in need and recommended that states must adopt, with suitable modifications, recommendations of

the Justice N.H. Bhagwati Committee and the Trevor Harries Committee in addition to bar associations taking initiatives to provide legal aid on a voluntary basis.

Subsequently, a report submitted by the committee headed by Justice P.N. Bhagwati in 1971 recommended that committees should be formed at the taluk, district, and state level in order to provide for legal aid.²⁷ This was followed by the 1973 report by the Expert Committee on Legal Aid headed by Justice V.R. Krishna Iyer, where the committee examined at length the various aspects of legal aid, including the role of the judiciary in the legal aid system. The committee was of the opinion that since the judiciary is the guardian of justice, an efficient system of legal aid must necessarily contain judicial presence to instil public confidence in the system. That said, the committee also stated that 'this does not necessarily mean that the judiciary as such should be entrusted with the implementation of what is basically a social welfare project which calls for talent of a different kind'.²⁸ The committee warned that the top judicial officers must not be implicated in the day-to-day functioning of legal aid and a separate executing chairman or director general must be appointed to oversee the same. The committee was of the opinion that it would suffice if such executing chairman or director general was an eminent person in the field of advocacy with social service and administrative experience.²⁹ In terms of the structure of the authorities, the committee recommended authorities at the national, state, Supreme Court, High Court, district, and taluk levels, with judicial officers at each of the levels but recommended setting up separate executive bodies at the state and national levels, which would have the primary function of overseeing the day-to-day activities of the bodies, with the executive chairmen being persons who possess legal and administrative expertise as well as are (or have been) qualified to be judges of the High Court or Supreme Court, as the case may be.³⁰

It was in 1977 that a committee consisting of Justice P.N. Bhagwati and Justice V.R. Krishna Iyer recommended the establishment of a National Legal Services Authority.³¹ As Article 39-A was introduced during this time by means of the Constitution (42nd Amendment) Act, 1976, the Government of India in 1980 constituted the Committee for Implementing Legal Aid Schemes (CILAS) under the chairmanship of Justice P.N. Bhagwati to implement legal aid programmes across all states. Although CILAS prepared a model programme under which legal aid boards were set up across the country, since certain deficiencies were pointed out, a need to set up statutory legal authorities was felt. This led to the enactment of the LSA Act, which set up the legal aid system in India as we know it today.³²

Throughout the history of the making of the LSA Act, it was acknowledged that the judiciary undoubtedly ought to play a role in the administration of legal aid. Inclusion of the judiciary helps to instil public confidence in the system, and their involvement is critical since legal aid is a core component in ensuring justice. However, at the same time, it was acknowledged that administering legal aid requires a significant amount of time and effort, which may be better provided by retired judicial officers or persons who were qualified to be judges, since appointing such persons would ensure that undue burden is not placed on serving judicial officers whose time may be more efficiently expended in the adjudication of disputes. However, in a writ petition filed by the Supreme Court Bar Association, where the question was whether a retired judge must be allowed to serve as the executive chairman, the Supreme Court held that the rule must be to appoint a sitting judge as much as possible and only if there are any unusual difficulties can a retired judge be appointed to the posts under the LSA Act.³³ In this case, NALSA stated in its affidavit that a sitting judge may be able to deal with other judicial officers, non-governmental

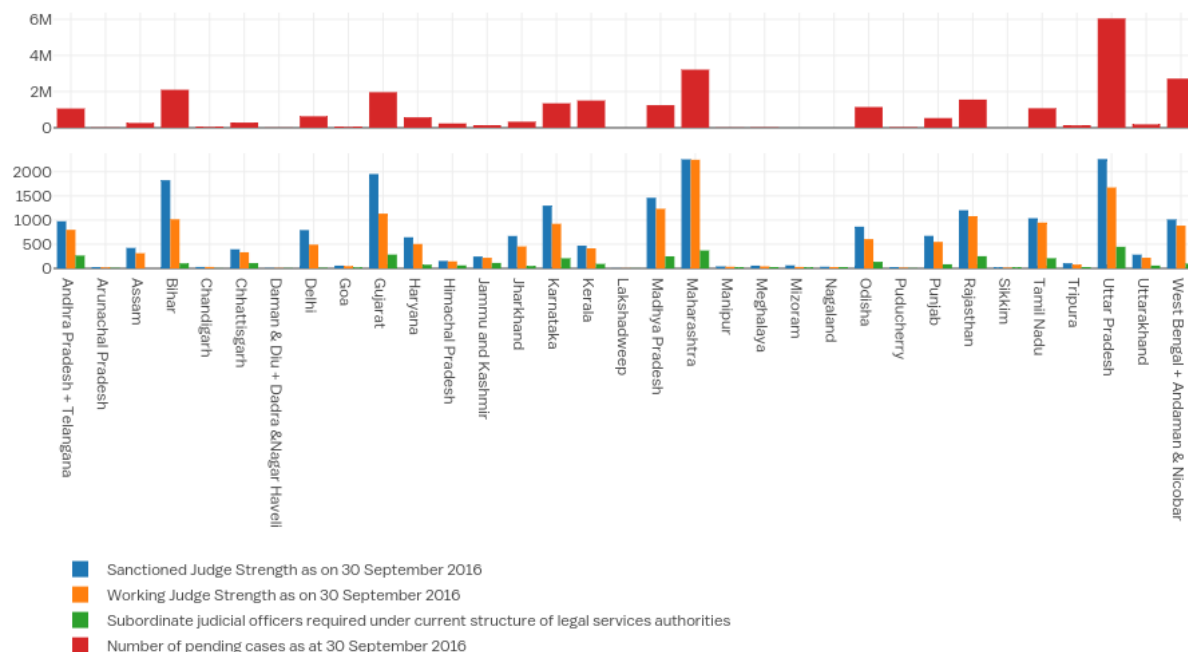
organisations, and government officers more effectively than a retired judge, and hence submitted that sitting judges must, as much as possible, hold posts under the LSA Act.

PENDENCY, STRENGTH OF SUBORDINATE JUDICIARY, AND SUBORDINATE JUDICIAL OFFICERS PERFORMING FUNCTIONS UNDER LSA ACT

Time spent by judicial officers to perform functions under the LSA Act cannot be looked at in isolation.

Given that a substantial amount of work under the LSA Act is the responsibility of subordinate judicial officers in the system, and the entire system requires about 3,463 subordinate judicial officers (as discussed earlier), we must look at the time that these judicial officers can spare, given the number of pendency cases, sanctioned judge strength, and working judge strength. To illustrate this, Figure 2 shows the number of subordinate judicial officers required as per the current structure of the authorities under the LSA Act as well as the sanctioned judge strength, working judge strength, and the number of pending cases in the subordinate judiciary as on 30 September 2016.³⁴

FIGURE 2. Subordinate Judiciary Pendency, Judge Strength, and Legal Service Officials



Note: The number of pending cases are expressed in millions.

There are some interesting observations to be made from Figure 2. For instance, the subordinate courts in Uttar Pradesh have the highest pendency rates and the highest number of subordinate judicial officers required to perform functions under the LSA Act—around 26 per cent of the current subordinate judiciary workforce is required to take out time from their adjudicatory roles in order to perform their functions under the LSA Act. Further, Maharashtra—with the second highest pendency levels in the subordinate judiciary—is also the state with the second highest number of subordinate judicial officers who perform functions under the LSA Act. However, as Maharashtra has the highest working strength in the subordinate judiciary, only around 16 per cent of their subordinate judicial officers perform functions under the LSA Act. Turning to West Bengal (and Andaman and Nicobar), while the pendency is around 85 per cent of that of Maharashtra, its working subordinate judicial strength is only around 39 per cent of that of Maharashtra. However, as Legal Services Authorities for this region are fewer in number, only around 11 per cent of their subordinate judiciary is required to dedicate time towards legal aid administration.

The case of Bihar and Gujarat, the third and fourth states in terms of high pendency levels, are unique, because both these states have the highest differences in the sanctioned judicial strength and working judicial strength. However, as Bihar has fewer Legal Services Authorities as compared to Gujarat,³⁵ only around 10 per cent of the subordinate judiciary is required to dedicate time towards legal aid administration, whereas around 25 per cent of the subordinate judiciary in Gujarat performs both adjudicatory functions and functions under the LSA Act. It must be remembered here that since the population and number of talukas of Bihar are higher than those of Gujarat,³⁶ it may be ideal in the interests of access to justice that the

number of legal services authorities in the state increase, and in such an event, the percentage of the judiciary who devote time towards legal aid would also increase.

If we were to look at the overall percentage of subordinate judicial officers carrying out functions under the LSA Act, given the subordinate judicial working strength in a state, on an average around 38 per cent of the subordinate judicial officers in a state distribute their time between adjudication and legal aid administration!³⁷ Given that there are about two crore cases currently pending in the subordinate courts across India, what we ought to consider is this: is it *absolutely essential* for our judicial officers to perform non-adjudicatory functions? While non-judicial officers can perform non-adjudicatory functions, non-judicial officers cannot perform adjudicatory functions and therefore a systemic change may be overdue to help ease the workload of the judiciary and allow them to use their time efficiently.

COMPARISON WITH OTHER LEGAL AID MODELS

As our existing legal aid system functions primarily due to the work of serving judicial officers, and historically, it has been recommended that members of the judiciary administer the legal aid system, it may be useful to look at some models being followed internationally. Since India is the second-most populous country in the world, the largest democracy, and unique owing to its socio-economic diversity, there is no other similar country whose legal aid model and efficacy we could compare to the legal aid system of India. However, based on India being a common law country, in this section, I will consider the structure and functions of five legal aid systems across jurisdictions influenced by the

common law system: Hong Kong (in China), New South Wales (in Australia), Ontario (in Canada), Scotland, and South Africa.

Hong Kong

The Legal Aid Department (LAD) of Hong Kong is the nodal authority which administers legal aid in Hong Kong. The LAD, a statutory body,³⁸ is headed by the Director of Legal Aid, a person appointed by the chief executive and who is qualified to practise as a legal practitioner.³⁹ The LAD is split into three primary verticals: the application and processing division, the policy and administration division, and the litigation division. Each of these verticals is headed by deputy directors of legal aid and assistant directors of legal aid and are further divided based on the functions of the personnel. The deputy directors of legal aid and assistant directors of legal aid are also appointed by the chief executive and must possess the same qualifications as a director of legal aid. Further, turning to the functions carried out by these persons, much like the Indian system, the director is the person responsible for taking decisions regarding maintaining panels of counsels and solicitors, waiving financial eligibility ceilings, the scope of legal representation, directing enquiries regarding the legal aid applications received, granting or refusing to grant legal aid certificates, etc. The application and processing division as well as the litigation division are then further managed by assistant principal legal aid counsels, who are also appointed by the chief executive.⁴⁰ The policy and administration division is assisted in its management by a departmental secretary and a departmental accountant.

The LAD also works with the Legal Aid Services Council, a statutory authority⁴¹ set up to supervise the provision of legal aid as well as provide policy-level recommendations to the chief executive. The Legal Aid Services Council consists of

members including the director of the LAD, two barristers, two solicitors, and members chosen from other fields. While the Legal Aid Services Council is not responsible for the direct administration of legal aid, having a separate body to oversee the administration of legal aid from outside the system and engage with stakeholders outside the LAD can help serve as a check and act as a mirror to the system, which can provide periodic recommendations on areas of betterment.

Therefore, although the nature of functions carried out by officers of the LAD are similar to the nature of functions carried out by office bearers of the legal aid authorities in India, the Hong Kong model varies significantly from the Indian system in that qualified legal practitioners are in charge of administering legal aid and no members of the judiciary are required to perform these functions.

New South Wales

The Legal Aid Commission, a statutory body constituted under the Legal Aid Commission Act, 1979, is responsible for the administration of legal aid in New South Wales. The Commission is headed by a chief executive officer whose responsibility is to manage the day-to-day management of the Commission. The chief executive officer may or may not be a barrister or solicitor and is appointed by the minister for a term not exceeding five years.⁴² The organisational structure of the Commission also envisages the chief executive officer to be assisted by a deputy chief executive officer and directors in charge of specific verticals such as criminal law, civil law, finance, human resources, information and technology, etc., with each of these directors possessing experience and skills of working in the related field.⁴³

The Legal Aid Commission also has a board, which is responsible for establishing policies and

preparing plans for the Commission. The board consists of the chief executive officer and nine part-time members; the members must include a representative from the Bar association, a person to represent community welfare interests, a person to represent bodies that provide community legal services, persons who possess skills that would benefit the board, etc.⁴⁴

As can be seen, the model followed by New South Wales largely focuses on requiring persons to possess the experience and skill to handle the functions that they are entrusted with, so much so that it does not even mandate the chief executive officer, the key person responsible for the day-to-day management of legal aid, to be or have been a barrister or solicitor. Further, the model does not envisage the involvement of the judiciary in administering legal aid and employs legal practitioners as directors in charge of the verticals related to criminal law and civil law.

Ontario

Legal Aid Ontario (LAO) is a statutory corporation established under the Legal Aid Services Act, 1998 to administer legal aid within the province of Ontario, Canada. The members of the LAO consist of members of its board of directors who are to be appointed by the Lieutenant Governor-in-Council;⁴⁵ the members of the board shall include a chairperson and other members who ought to be selected such that the board as a whole possesses knowledge and experience in areas such as business, management, financial matters, law and the operation of courts/tribunals, operation of clinics, and knowledge of the social and economic circumstances regarding special needs of low-income persons.⁴⁶ Further, the statute specifically states that the majority of the appointed members of the board must not be lawyers.⁴⁷ In addition to the board, a president is appointed who will be the chief

executive officer of the corporation and responsible for the management and operation of the corporation under the board's supervision.⁴⁸ The current serving president and chief executive officer of the LAO has consistently played a role in the LAO from its inception in 1998 and has an extensive background in financial and strategic planning.⁴⁹

The board of the LAO is also empowered to set up advisory committees to assist them in subjects such as criminal law, civil law, and family law.⁵⁰ Similarly, the board may also set up a clinic committee to recommend policies with respect to the functioning and funding of clinics.⁵¹

It is noteworthy that the LAO's model acknowledges the fact that management of a legal aid programme primarily requires a high degree of socio-economic knowledge backed by strong managerial skills. Therefore, while representation from the legal fraternity is undoubtedly crucial, an essential factor to see a legal aid programme fulfil its mandate is effective management by those skilled and experienced personnel.

Scotland

The legal aid system in Scotland is managed by the Scottish Legal Aid Board (SLAB), a public body established under the Legal Aid (Scotland) Act, 1986. The SLAB must consist of 11–15 members, all of whom are to be appointed by the Secretary of State; the Secretary of State is also entrusted with the power to appoint a chairman to the SLAB from among its members.⁵² While the entire composition of SLAB has not been specified, the statute requires that it consist of the following categories of persons at the minimum: (a) two members to be appointed from the Faculty of Advocates; (b) two members to be appointed from the Law Society; and (c) one person possessing experience regarding the procedure and practice of courts.⁵³ The SLAB has been

entrusted with the broad functions of providing legal aid, advice and assistance, as well as administering the legal aid fund.⁵⁴

The members and chairman of SLAB are assisted by an executive team (headed by the chief executive), which is responsible for the administration and operations of the SLAB.⁵⁵ The chief executive is assisted by a principal legal advisor and three directors heading separate wings: (a) operations, (b) strategic development, and (c) corporate services and accounts.⁵⁶ With respect to the qualifications of the executive team, the current chief executive of the SLAB is a lawyer with vast experience of working with the SLAB, the director of corporate services and accounts is an accountant, while the principal legal advisor, director of strategic development, and director of operations are solicitors.⁵⁷

Thus, SLAB, which is responsible for managing funds and ensuring the provision of legal aid, comprises persons with legal knowledge as well as persons with administrative experience, while most leaders of the executive team are solicitors with prior experience of working with SLAB. A key takeaway from the Scottish system is this split in decision-making and execution, which is also crucial for the Indian system, to ensure that those entrusted with monitoring and decision-making are not also saddled with all the responsibility and accountability for execution, more so because the judicial officers in charge of dispensing legal aid in India will be carrying out their legal aid functions in addition to their judicial responsibilities.

South Africa

Legal Aid South Africa (LASA) is a statutory entity⁵⁸ governed by a board of directors who have wide-ranging functions to carry out the objects of

the Legal Aid South Africa Act, 2014. The board of directors consists of 14 members, including one serving judge, a chief executive officer, director general of the Department of Justice and Constitutional Development, three employees responsible for the management of LASA, and eight other members.⁵⁹ The statute requires that the composition of board of directors accounts for racial, gender, and provincial representation, as well as experience in areas such as business management, information technology, provision of legal services, knowledge of public interest law, community-based knowledge pertinent to legal aid, etc.⁶⁰ The judge appointed on LASA's board must act as its chairperson and the cabinet member responsible for the administration of justice can designate a director as the deputy chairperson of the board.⁶¹

While the board has broad functions including employing legal practitioners and setting the criteria for legal aid, the actual execution and delivery of legal aid services is carried out by various executive officers headed by the chief executive officer.⁶² The chief executive officer must be a person who is considered fit and proper with the requisite knowledge and experience.⁶³ Under the leadership of the chief executive officer, the organisational structure⁶⁴ of the LASA consists of four tiers—the head office, regional offices, justice centres, and satellite offices that are responsible for the actual delivery of legal aid.

The key takeaway from the legal aid model of South Africa is that while the system includes representation from various entities—lawyers, judges, or management experts—it does not restrict the qualifications of its executive officers by requiring them to belong to any specific sphere but emphasises that such persons must possess the knowledge and experience to administer legal aid.

CONCLUSION

The judiciary is the largest formal dispute resolution forum in India with crores of cases pending across various levels of the judiciary. While the judiciary is striving to hold itself up despite the burden on its shoulders—one which neither the legislature nor executive can help with—placing additional responsibilities on it can be unhelpful. Those who are a part of the judiciary are there by virtue of their knowledge of the law and skills to critically analyse and adjudicate disputes. While administrative skills may be inherent in some members of the judiciary, it is not a skill set that is imperative for judicial officers and is therefore not a skill that most judges would necessarily possess.

Legal aid, while imperative in ensuring access to justice, is nonetheless an area that lies closer to the executive than the judiciary. That is not to say that the judiciary is not required in the sphere of legal aid dispensation, the judiciary is undoubtedly crucial, but at the policy level and as a monitoring agency, to ensure that an effective legal aid mechanism is put in place to ensure access to justice. The actual administration of legal aid however, and the running of day-to-day operations and the implementation of legal aid programmes, is of an administrative and managerial nature, a role on which the judiciary is not required to spend its time. While legal aid is a means to provide access to justice, in reality, justice itself is not being served due to an overburdened judiciary, and therefore, migrating non-judicial functions from the judiciary to non-judicial bodies is the need of the hour.

Although historically one of the recommendations was that retired judicial officers should hold the posts under the LSA Act to ensure that the judiciary is not overburdened, having the time to carry out the functions is only one side of the coin, we must also remember that those in charge

of administering legal aid also have the required skills to effectively manage and implement legal aid programmes. As per the data collected through RTIs, the closing balance of the National Legal Aid Fund steadily increased from ₹1.15 crores at the end of March 2012 to ₹51.9 crores at the end of March 2015, and then ₹54.02 crores at the end of December 2016, and the closing balances of accounts of eight SLSAs also revealed that there was a steady rise in their closing balances, running into crores over the years. This shows that there is an underutilisation of total funds available for the provision of legal aid.

It is therefore hoped that creating a model where the judiciary is part of the higher level decision-making and monitoring of legal aid, and a separate dedicated unit with knowledge of the socio-economic realities of India and strong managerial credentials, is allowed to carry out the operative functions of delivering legal aid, ‘access to justice’ in its full meaning and spirit will be better achieved.

ANNEXURE A

State and Union Territory	DLSAs	TLSCs
Andaman and Nicobar	1	4
Andhra Pradesh	13	138
Arunachal Pradesh	4	0
Assam	—*	—*
Bihar	37	29
Chandigarh	1***	0***
Chhattisgarh	21***	66
Dadra and Nagar Haveli	0	0
Daman and Diu	2	0
Delhi	11	0
Goa	2	11

State and Union Territory	DLSAs	TLSCs
Gujarat	30***	225***
Haryana	21	33
Himachal Pradesh	11	39
Jammu and Kashmir	22	68
Jharkhand	24	0
Karnataka	30	148
Kerala	14**	64**
Lakshadweep	0***	2***
Madhya Pradesh	50	149
Maharashtra	33	304
Manipur	9	0
Meghalaya	10	0
Mizoram	8***	0***
Nagaland	11***	0***
Odisha	30	74
Puducherry	1	3
Punjab	22	40
Rajasthan	35	181
Sikkim	4	9
Tamil Nadu	29	151
Telangana	11	78
Tripura	5***	14***
Uttar Pradesh	71	304
Uttarakhand	13***	31***
West Bengal	19***	52***
TOTAL	605	2,217

Notes: * Information for Assam could not be collected.

** Information available from the website of the SLA.

*** Information collected through telephonic conversations with the SLA.

Notes

- Article 39-A, Constitution of India, 1950.
- Statistics are based on the 2011 census population given in Reserve Bank of India. 2016. 'Number and Percentage of Population Below Poverty Line', *Handbook of Statistics on the Indian Economy 2015-16*, p. 253, available online at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0HANDB_F0651BA902A5244DFB75DA46261B53726.PDF (accessed on 4 October 2017).
- Available online at <http://nalsa.gov.in/content/organizational-structure> (accessed on 3 October 2017).
- Under the LSA Act, legal services include legal aid as well as legal advice. See Section 2(c), LSA Act.
- Section 4, LSA Act.
- Section 7, LSA Act.
- Section 10, LSA Act.
- Regulation 5, Supreme Court Legal Services Committee Regulations, 1996.
- For instance, Regulation 8, High Court Legal Services Committee Regulations, 1998 (Delhi) and Regulation 5, Madhya Pradesh State Legal Services Authority Regulations, 1998.
- Section 11-B, LSA Act.
- 'Legal Services Institutions' is hereafter used to refer to any one or more of the SCLSC, SLA, HCLSC, DLSA, and TLSC.
- Regulation 7, NALSA (Free and Competent Legal Services) Regulations, 2010.
- Regulation 8, NALSA (Free and Competent Legal Services) Regulations, 2010.
- Regulation 10, NALSA (Free and Competent Legal Services) Regulations, 2010.
- Data collected is as of March 2017. In some cases where information was not received under the RTI applications and information was unavailable on the websites of the respective SLAs, information was collected through telephone calls to the SLAs.
- Please note that the number of HCLSCs includes those established in different benches of the same High Court. Further, this number of DLSAs and TLSCs excludes those in Assam, as information could not be collected for that state.
- Section 6, LSA Act.
- Section 8-A, LSA Act.
- Section 9, LSA Act.
- Section 11-A, LSA Act.
- This calculation considers that the Hon'ble Patron-in-Chief and Executive Chairman are common between

- the states of Maharashtra, Dadra and Nagar Haveli, and Daman and Diu, as well as between the states of Kerala and Lakshadweep. Further, as the secretary to the HCLSCs can be a non-judicial officer, this number has been left out of final calculations.
22. Ms Uma M.G. is the current full time Member-Secretary, Karnataka State Legal Services Authority (KSLSA).
 23. In 2016–2017, the KSLSA provided legal aid to 5,029 persons and legal advice to 38,126 persons. Statistics of the KSLSA, available online at <http://www.kslsa.kar.nic.in/docs/Statistics.pdf> (accessed on 3 October 2017).
 24. Law Commission of India. 1958. *Report No. 14: Reform of Judicial Administration*. New Delhi: Government of India, p. 593. Available online at <http://lawcommission-ofindia.nic.in/1-50/Report14Vol2.pdf> (accessed on 4 October 2017).
 25. Law Commission, *Reform of Judicial Administration*, p. 601.
 26. Law Commission, *Reform of Judicial Administration*, p. 612.
 27. Shashank Kumar Dey and Nupur Kumari. 2016. 'Role of Legal Aid in Contemporary India', *International Journal of Law*, 2(6): 1–4, p. 2. Available online at www.lawjournals.org/archives/2016/vol2/issue6/2-5-43 (accessed on 3 October 2017).
 28. V.R. Krishna Iyer. 1973. 'Processual Justice to the People', *Report of the Expert Committee on Legal Aid*, p. 209, available online at <http://reports.mca.gov.in/Reports/15-Iyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf> (accessed on 3 October 2017).
 29. Iyer, 'Processual Justice', p. 22.
 30. Iyer, 'Processual Justice', p. 216.
 31. Dey and Kumari, 'Role of Legal Aid', p. 25.
 32. Statement of Objects and Reasons, LSA Act.
 33. *Supreme Court Bar Assn. v. Union of India*, (2007) 4 SCC 353 : AIR 2007 SC 1670.
 34. Supreme Court. 'Vacancies in the Courts' 'Institution, Disposal and Pendency of Cases in the Supreme Court', 'Institution, Disposal and Pendency of Cases in the High Courts', 'Institution, Disposal and Pendency of Cases in the District & Subordinate Courts', *Court News*, 11(3): 6–9. Available online at http://supremecourtindia.nic.in/courtnews/2016_issue_3.pdf (accessed on 4 October 2017). The number of subordinate judicial officers required as per the structure of authorities under the LSA Act is as per the information collected as on March 2017 under Regulation 10, NALSA (Free and Competent Legal Services) Regulations, 2010. Further, the number of subordinate judicial officers required under the LSA Act in Assam has not been depicted, as no information could be collected about the same.
 35. As per information collected, Bihar has 37 DLSAs and 29 TLSCs, while Gujarat has 30 DLSAs and 225 TLSCs.
 36. According to the 2011 Census, the population of Bihar was around 10 crores while the population of Gujarat was around six crores. Further, Bihar has 534 CD blocks while Gujarat has 249 taluks. See CensusInfo India Dashboard, available online at http://www.dataforall.org/dashboard/censusinfoindia_pca/ (accessed on 4 October 2017); Bihar State Profile available online at <http://gov.bih.nic.in/Profile/> (accessed on 3 October 2017); List of District-Wise No. of Talukas of Gujarat, available online at http://gstfc.gujarat.gov.in/downloads/guj_state_no_talukas_01042015.pdf (accessed on 3 October 2017).
 37. This calculation is based on information regarding DLSAs and TLSCs collected as on March 2017 and the subordinate judicial working strength as on 30 September 2016 (see Dey and Kumari, 'Role of Legal Aid'). While the average (mean) percentage of the number of subordinate judicial officers in a state required to perform functions under the LSA Act is around 38 per cent, it must be noted that the standard deviation of the same is around 30, therefore indicating that the spread of judicial officers required by the LSA Act varies widely across the various states.
 38. Set up under the Legal Aid Ordinance, Cap. 91 (1967).
 39. Section 3, Legal Aid Ordinance, Cap. 91 (1967) read with Schedule 2 of the Legal Officers Ordinance, Cap. 87 (1950).
 40. Section 3 read with the definition of 'Legal Aid Officer' as provided under Section 2 of the Legal Aid Ordinance, Cap. 91 (1967).
 41. The Legal Aid Services Council has been constituted under the Legal Aid Services Council Ordinance, Cap. 489 (1996).
 42. Section 16, read with Schedule 3-A of the Legal Aid Commission Act, 1979.
 43. The organisation structure of the Legal Aid Commission, available online at http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0006/7782/organisational-structure.pdf and <http://www.legalaid.nsw.gov.au/about-us/who-we-are/our-organisation> (accessed on 3 October 2017).
 44. Section 14, Legal Aid Commission Act, 1979.
 45. Sections 3 and 5, Legal Aid Services Act, 1998.
 46. Section 5(4), Legal Aid Services Act, 1998.
 47. Section 5(6), Legal Aid Services Act, 1998.
 48. Section 64 of the Legal Aid Services Act, 1998 read with By-Law No. 1, General By-Law of the Corporation, available online at <http://www.legalaid.on.ca/en/about/bylaw-1-general.asp> (accessed on 3 October 2017).

49. Mr David Field, LAO President and CEO. See http://www.legalaid.on.ca/en/about/board_of_directors.asp (accessed on 3 October 2017).
50. Section 7, Legal Aid Services Act, 1998.
51. Section 8, Legal Aid Services Act, 1998.
52. Section 1, Legal Aid (Scotland) Act, 1986.
53. Section 1, Legal Aid (Scotland) Act, 1986.
54. Section 1, Legal Aid (Scotland) Act, 1986.
55. Business plan (2016–2017) of SLAB, available online at <http://www.slab.org.uk/permalink/10c540ce-690e-11e6-91a9-0015c5f5117d.pdf> (accessed on 3 October 2017).
56. Management Structure of SLAB (September 2017), available online at http://www.slab.org.uk/export/sites/default/common/documents/about_us/board_members_senior_staff/Management_Structure.pdf (accessed on 3 October 2017).
57. Board and senior staff of SLAB, available online at <http://www.slab.org.uk/about-us/who-we-are/board/> (accessed on 3 October 2017).
58. LASA is set up under the provisions of the Legal Aid South Africa Act, 2014. Initially, a system of judicare, where legal aid was provided by private legal practitioners under a system of legal aid tariffs was in place. Now legal aid is now primarily provided by LASA and to account for certain exceptional circumstances, a mixed system of the LASA and judicare continues to exist. See *The Legal Aid Guide, 2014*, p. 106, available online at <http://www.legal-aid.co.za/wp-content/uploads/2012/03/Legal-Aid-Guide-2014.pdf> (accessed on 3 October 2017).
59. Section 6, Legal Aid South Africa Act, 2014.
60. Section 7, Legal Aid South Africa Act, 2014.
61. Section 8, Legal Aid South Africa Act, 2014.
62. *Legal Aid Guide*, p. 22.
63. Sections 15 and 16, Legal Aid South Africa Act, 2014.
64. Legal Aid South Africa. 2015. 'Access to Information Manual', 28 February, p. 8, available online at http://www.legal-aid.co.za/wp-content/uploads/2013/03/Access-to-Information-Manual-for-Board-Consideration-Approved-Version-7_-28-February-2015.pdf (accessed on 3 October 2017).

Bail and Incarceration: The State of Undertrial Prisoners in India

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Keerthana Medarametla

Abstract

The authors examine the state of undertrial prisoners in India, using data from crime and prison statistics released by the National Crime Records Bureau. They find that despite various interventions and reforms introduced by the legislature and judiciary, the extent and duration of undertrial incarceration amongst prisoners is not only on the rise, but also that it has a disproportionate impact on the most socio-economically vulnerable sections of society. The authors argue that judicial and legislative measures have failed because of lack of sustained and systematic institutionalisation. They conclude that a systemic re-imagining of bail law is needed for a true ameliorative impact on the state of undertrial prisoners in India.

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The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of the trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. The plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop.

*Thana Singh v. Central Bureau of Narcotics*¹

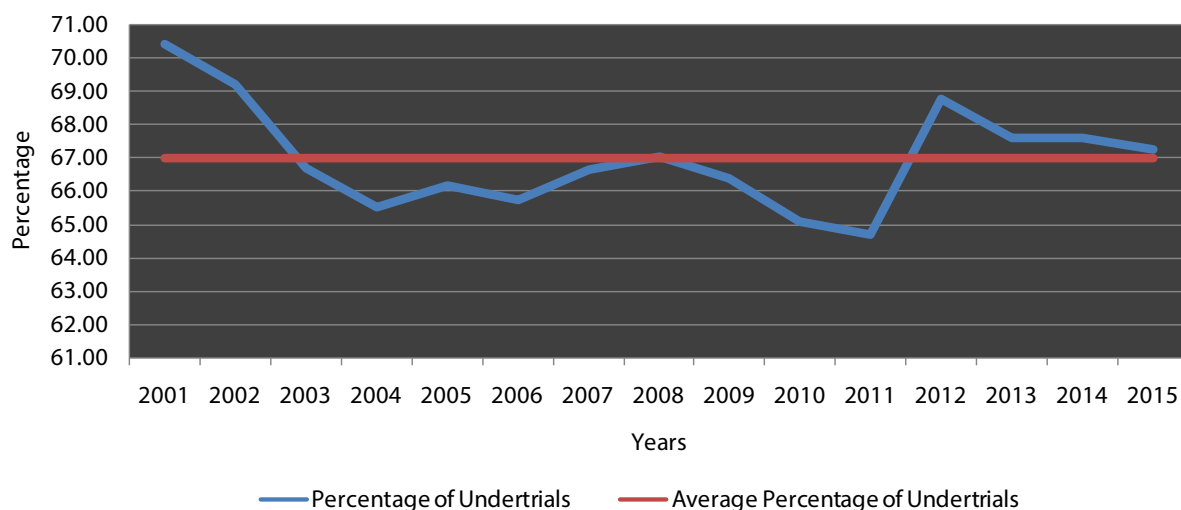
BACKGROUND

In this chapter, we analyse the state of undertrial incarceration in India. It is based on data from the *Prison Statistics India Report* and *Crime in India Report* released annually by the National Crime Records Bureau (NCRB). The latest data available is for 2015. We have compared the data for 2015 with that for the preceding 14 years to study trends and patterns in undertrial incarceration. Where data for the preceding 14 years is not available, we have relied on data for 10

years. We find that despite various interventions by the legislature and the judiciary in this duration, not only is the extent and duration of undertrial incarceration on the rise, but also that such incarceration has a disproportionate impact on the most socio-economically vulnerable sections of society.

The *Prison Statistics India Report, 2015* indicates that 67 per cent of India's prison population comprises undertrial prisoners.² This number has been consistently high, at an average of 66.97 per cent over the last 15 years,³ as may be seen in Figure 1.

FIGURE 1. Percentage of Undertrial Prisoners (2001–2015)

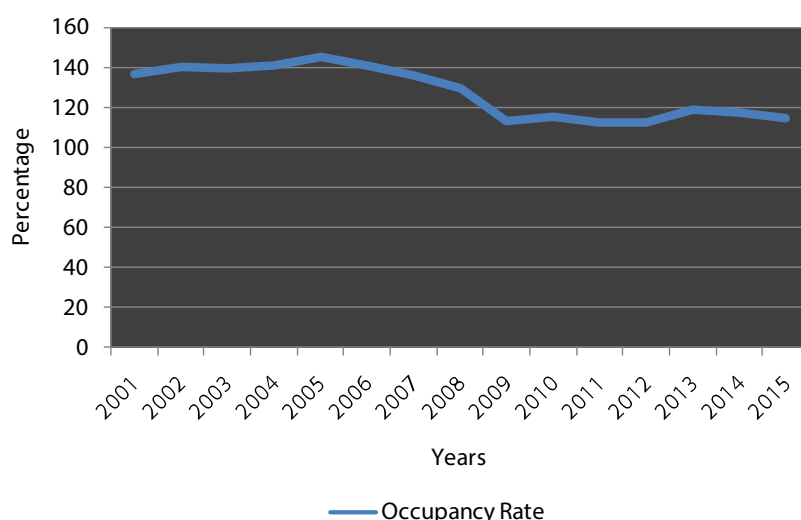


Note: The corresponding figures are set out in Table A1 in the Annexure.

In addition to this, prisons are chronically overcrowded, operating at 114.5 per cent of their capacity at the end of 2015, a marginal decrease of 2.56 per cent from 117.4 per cent in 2014. After a visible

decline in occupancy rate from 2001 to 2009,⁴ the rate has been consistent over the last seven years, as can be seen in Figure 2.

FIGURE 2. Occupancy Rate in Prisons (2001–2015)



Note: The corresponding figures are set out in Table A2 in the Annexure.

Significantly, although the Supreme Court has held that speedy trial is implicit in the requirement for ‘just, fair, reasonable’ procedure under Article 21,⁵ the data on undertrial prisoners for over five years in the last 15 years highlights certain grave concerns. As may be seen from Table 1, the absolute number and percentage of undertrials who have spent more than half a decade in prison, especially in the last five years, has been progressively increasing, indicating that the problem is only getting worse. Currently, 3,599 prisoners have been

incarcerated for over five years. This phenomenon is at a time when the number of undertrial prisoners as a whole has been on the rise and the percentage of undertrials who spend less than one year in prison is broadly on the decline, implying that a higher proportion of people tend to stay in prison for longer than one year. That the proportion of the undertrial population that spends more than five years in prison is also increasing buttresses the concern regarding the increasing length of undertrial incarceration.

TABLE 1. Number and Percentage of Undertrial Prisoners for More than Five Years and Less than One Year (2001–2015)

Year	Total number of undertrials	Number of undertrials who have been in prison for longer than five years	Percentage of undertrials in jail for more than five years	Number of undertrials who have been in prison for less than one year	Percentage of undertrials in jail for less than one year
2001	2,20,817	1,264	0.57	1,77,386	80.33
2002	2,23,038	1,026	0.46	1,79,015	80.26
2003	2,17,658	1,481	0.68	1,77,921	81.74

Year	Total number of undertrials	Number of undertrials who have been in prison for longer than five years	Percentage of undertrials in jail for more than five years	Number of undertrials who have been in prison for less than one year	Percentage of undertrials in jail for less than one year
2004	2,17,130	2,069	0.95	1,70,059	78.32
2005	2,37,076	1,884	0.79	1,91,827	80.91
2006	2,45,244	1,569	0.64	1,99,608	81.39
2007	2,50,727	1,891	0.75	1,99,517	79.58
2008	2,57,928	2,130	0.83	2,03,898	79.05
2009	2,50,204	2,422	0.97	1,96,144	78.39
2010	2,40,098	1,659	0.69	1,87,459	78.08
2011	2,41,200	1,486	0.62	1,88,246	78.05
2012	2,64,857	2,028	0.77	1,97,467	74.56
2013	2,78,503	3,047	1.09	2,13,956	76.82
2014	2,82,879	3,540	1.25	2,11,441	74.75
2015	2,82,076	3,599	1.28	2,11,460	74.97

The reasons for the increasing undertrial problem in India are twofold: *first*, lax arrest laws and *second*, stringent bail laws.

ARREST

Indiscriminate arrest laws contribute significantly to the burgeoning undertrial population. The law relating to arrest with or without a warrant and the rights of persons who are arrested are contained in Sections 41–60 of the Code of Criminal Procedure (CrPC), 1973. Section 41 stipulates the different categories of persons who may be arrested without warrant by the police. The bulk of arrests under this section concerns persons who have been accused of being involved in any cognisable offence, or against whom a reasonable complaint has been made, or credible information has been received, or

a reasonable suspicion exists of their involvement.⁶ This section is so broadly worded, and places so few requirements on a police officer in relation to effecting an arrest, that it has long been the source of indiscriminate arrests. The Supreme Court itself recognised this concern in *Joginder Kumar v. State of UP*.⁷ The court has also cautioned that arrest should be treated as an exception and not the rule and that just because the police has the power to arrest, does not mean that they should do so in each and every instance.⁸

In light of concerns raised about the arbitrary use of the arrest power, in 2009, the Parliament amended Section 41 to limit the power of arrest for cognisable offences for which punishment is seven years or less. Section 41(1)(b) of the CrPC now provides that a police officer may arrest any person without warrant against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists

that he has committed a cognisable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, only after certain conditions have been satisfied. These conditions include that the police officer should be satisfied that such arrest is necessary to:

1. Prevent the person from committing any further offence;
2. For proper investigation of the offence;
3. To prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner;
4. To prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to the police officer; or
5. Unless such person is arrested, his presence in the court whenever required cannot be ensured.

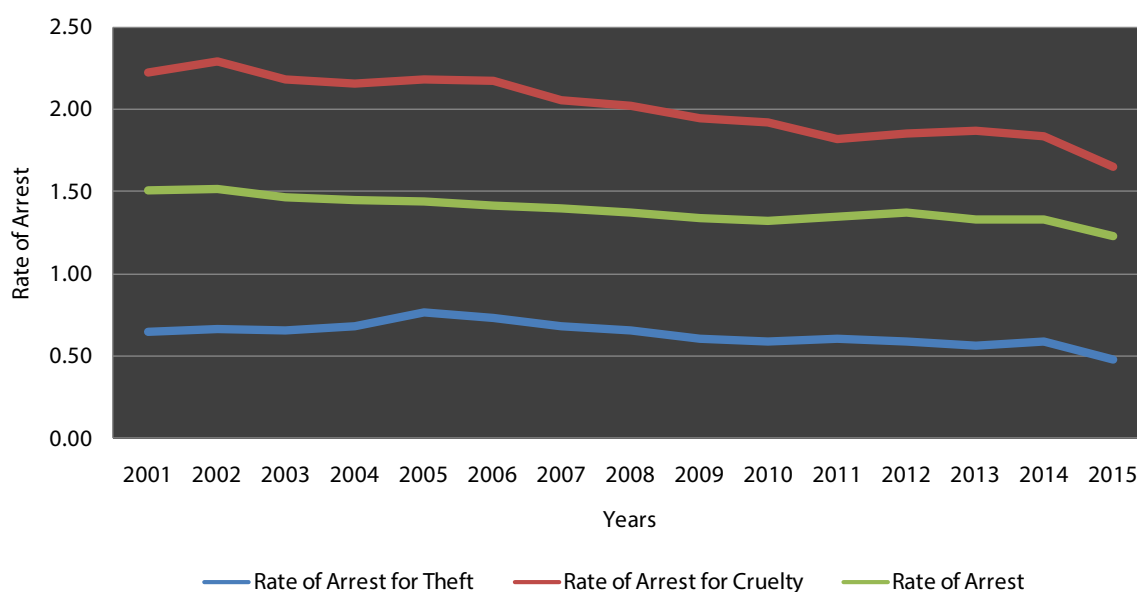
The amended section also requires that the police officer records in writing his reasons for making or not making the arrest.

In *Arnesh Kumar v. State of Bihar*,⁹ the Supreme Court reviewed the amended provision on arrest and sought to further curb the problem of unnecessary arrests and detention. While under Section 41(1)(b) the requirement of giving reasons is limited to the police officer, the Supreme Court emphasised that the magistrate should also apply his mind

while ordering an arrestee to be detained beyond a 24-hour period as prescribed in Section 167 of the CrPC. Commenting on the routine manner in which courts remand a person to custody upon the first production, the Supreme Court held that a magistrate must address the question of whether specific reasons that are *prima facie* relevant have been recorded for arrest. The court also stated that the magistrate must assess whether the police officer could have reached a reasonable conclusion that any of conditions mentioned above are attracted. The court mandated departmental action against police officers and magistrates who do not comply with the provisions of Section 41(1)(b) or do not record reasons for authorising arrests or detentions.¹⁰

Through these systemic changes, the legislature and judiciary have attempted to curb unnecessary arrests. These developments seem to be bearing fruit. An analysis of the overall rate of arrest [calculated by dividing the total number of arrests against the total number of cognisable crimes reported under the Indian Penal Code (IPC), 1860] for the last 15 years, suggests a decline.¹¹ We also analysed the rate of arrest for theft, as well as for cruelty by husband and his family in particular. Theft forms the largest bulk of cases registered under cognisable offences for which punishment is seven years or less.¹² Further, since the guidelines in *Arnesh Kumar* were laid down in the context of Section 498-A of the IPC, cruelty by husband and his relatives has also been analysed. Figure 3 compares the overall rate of arrest with the rates of arrest for cruelty and theft. The data for theft and cruelty by husband and his relatives also indicates a sharp decline in the rate of arrests after *Arnesh Kumar*.

FIGURE 3. Rates of Arrest



Note. The corresponding figures are mentioned in Tables A3, A4, and A5 in the Annexure.

It is important to note that *Arnesh Kumar* was decided in late 2014. Therefore, we only have figures for 2015 to study the impact of *Arnesh Kumar*. As such, it might be too early to draw inferences about the impact of this judgment. Having said that, the trend does indicate that if there are sufficient safeguards in place to prevent arrest unless absolutely necessary, it will go a long way in preventing undue incarceration.

BAIL

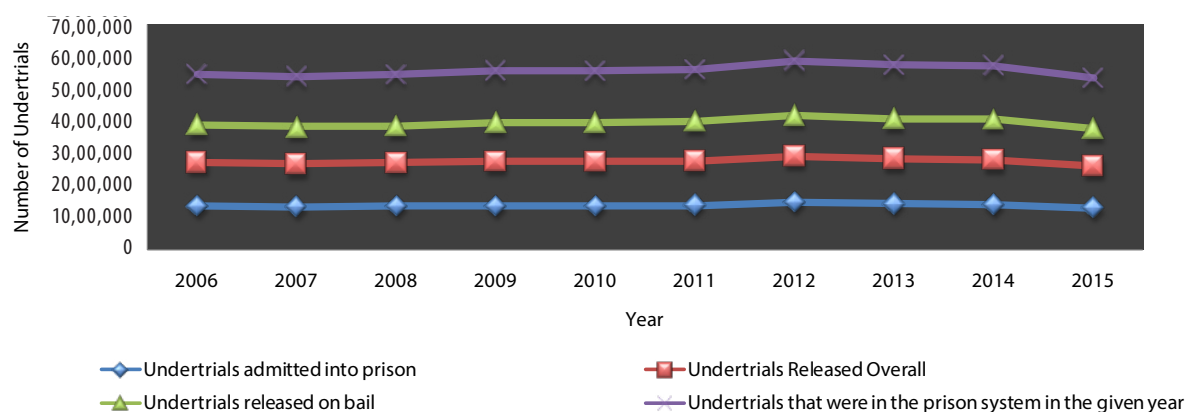
The second cause of the increasing undertrial incarceration is the problematic bail law in India.¹³ An analysis of the *Prison Statistics* of 2014 and 2015 indicates that a total of 15,74,433 undertrial prisoners passed through the prison system in 2015. This includes 2,82,879 persons who were in prison pending trial at the end of 2014 and 12,91,554 who

came into the system in 2015. By the end of 2015, of these 15,74,433 individuals, 12,92,357 (82.08 per cent) were released from prison for various reasons such as acquittal, release on bail, release on appeal, transfer, extradition, and other releases during the course of the year. Of these, 11,57,581 persons (73.52 per cent of the 15,74,433 undertrials) were released on bail,¹⁴ while 2,82,076 undertrials remained in the system at the end of 2015. On the face of it, the numbers suggest that a large proportion of people who are incarcerated are released, especially on bail. However, in absolute numbers, a significant proportion of them continue to remain in prison. Further, as we demonstrate in Figure 4, despite various interventions by the legislature and the judiciary, the proportion of undertrial prisoners who continue to remain in prison has not shown any decline. The number of undertrial prisoners released in general and the number of undertrial prisoners released on bail has been constant in proportion to the total number of undertrial prisoners

admitted into prison. Given that all these other figures are constant, it is worrying that percentage of the prison population that is less than one year old is decreasing, and the proportion of people who are in prison for longer than five years is increasing, as

illustrated in Table 1. This means that people are staying in prison for longer, implying that the state of undertrial prisoners is neither improving, nor maintaining status quo, but is actually regressing. It is taking people longer to be released on bail.

FIGURE 4. Number of Undertrial Prisoners Released (2006–2015)



Note: The corresponding figures are mentioned in Table A6 of the Annexure.

Of the 26.48 per cent (4,16,852) undertrial prisoners who were not released on bail, 12.5 per cent (52,191) were either released on appeal or for other reasons.¹⁵ That leaves 3,64,661 undertrial prisoners who were not released on bail, appeal, or otherwise. Of this group, 22.64 per cent (82,585) were acquitted and the remaining (2,82,076) continue

to be in the system. This implies that of the people who are not released on bail or otherwise, nearly one in four ended up being acquitted. Table 2 shows a similar analysis for the last 10 years, and suggests that on average one in five undertrials are acquitted.

TABLE 2. Percentage of Undertrial Prisoners Acquitted (2006–2015)

Year	Number of undertrials that passed through the prison system	Number of undertrials not released on bail, appeal, or otherwise	Number of undertrials acquitted	Percentage of undertrials acquitted from those who are not released on bail or otherwise
2006	15,85,844	3,21,569	76,325	23.74
2007	15,70,336	3,20,506	69,779	21.77
2008	15,95,896	3,42,551	84,623	24.70
2009	16,15,945	3,20,278	70,074	21.88

Year	Number of undertrials that passed through the prison system	Number of undertrials not released on bail, appeal, or otherwise	Number of undertrials acquitted	Percentage of undertrials acquitted from those who are not released on bail or otherwise
2010	16,05,620	3,11,658	71,560	22.96
2011	16,15,023	3,11,139	69,939	22.48
2012	16,99,731	3,40,940	76,083	22.32
2013	16,74,497	3,43,989	65,486	19.04
2014	16,78,000	3,47,095	64,216	18.50
2015	15,74,433	3,64,661	82,585	22.65

This worsening problem is despite interventions from various organs of the state. For example, the legislature amended the CrPC in 2005 and introduced Section 436-A to release undertrial prisoners who serve half the maximum sentence in prison as a matter of right. Further, Section 436 of the CrPC was amended in 2005 to provide that if a person arrested for a bailable offence is not able to furnish bail within a week of arrest, he shall be presumed to be indigent, and shall be released on bond without sureties.

The judiciary has also prescribed guidelines to deal with the issue of overcrowding in prisons. In light of a large number of long-pending cases, the Supreme Court has periodically issued ‘one-time’ directions for the release of prisoners,¹⁶ for example, in *Supreme Court Legal Aid Committee v. Union of India*¹⁷ and in *Shaheen Welfare Assn. v. Union of India*.¹⁸

Similarly, in *R.D. Upadhyay v. State of AP*,¹⁹ the Supreme Court held that undertrial prisoners charged with murder should be released on bail if their cases were pending for two years or more, and that persons charged with comparatively minor offences, such as theft, cheating, etc., should be released if they had been in prison for more than a year. This order was limited to the cases pending at

the time of the order. Similar ‘one-time’ orders were also passed by the High Court of Delhi in *Shankra v. State (Delhi Admn.)*.²⁰ Since the directions in all these cases were limited to matters pending at that time, they did not contribute to systemic changes in bail laws. Systemic changes such as the introduction of Section 436-A have also not contributed significantly due to the non-implementation of the provisions, as noted by the Supreme Court in *Bhim Singh v. Union of India*.²¹ While recognising the problems with implementation of Section 436-A, the Court directed the jurisdictional magistrate/chief judicial magistrate/sessions judge to hold one sitting per week in each jail/prison for two months to identify undertrials eligible for bail under Section 436-A and to pass an appropriate order with respect to Section 436-A in the jail itself. This was yet another one-time solution to a problem that is endemic to the system.

In 2016, in *Inhuman Conditions in 1382 Prisons, re*,²² the Social Justice Bench of the Supreme Court prescribed comprehensive guidelines to ameliorate the condition of overcrowding in prisons. It asked the central government and the state governments to take steps for the effective implementation of Section 436 of the CrPC. It also asked National Legal Services Authority (NALSA) to issue directions to state legal services authorities to look into

matters of undertrial prisoners still in prison due to inability to furnish bail. To the best of our knowledge, there is no data available to determine the impact of the orders of the Court in this case, but past practice indicates that without sustained implementation and follow-up, judicial orders such as these are likely to have little impact on the state of undertrial incarceration in India.

DEMOGRAPHIC COMPOSITION OF UNDERTRIAL PRISONERS

Muslims and persons belonging to Scheduled Castes and Scheduled Tribes are overrepresented in the undertrial prisoner population, when compared to their demographic share in the general population. Data from the *Prisons Statistics India, 2015* indicates that 69.8 per cent (1,96,814) of undertrial prisoners identify as Hindus and 20.9 per cent (n=59,053) identify as Muslims. According to the 2011 census, only 14 per cent of the general population is Muslim.²³ This suggests that Muslims are over-represented by 49.28 per cent and Hindus are under-represented by 12.75 per cent in the undertrial prisoner population when compared to the general population. When we examine the religious profile of convicts, of the 1,34,168 convicts in prison at the end of 2015, 21,220 or 15.8 per cent of them were Muslims, showing a drop of 24.4 per cent in comparison to their presence in the undertrial population. This implies that although the presence of Muslims in the convict and general populations is roughly the same, they are however likely to be over-represented as undertrials. In other words, Muslims are over-incarcerated pending trial as compared to other religious groups.

Further, 21.6 per cent (61,139) of the undertrial prisoner population belongs to Scheduled Castes and 12.4 per cent (34,999) belongs to Scheduled

Tribes. On the other hand, the 2011 census indicates that 16.2 per cent of the overall population are Scheduled Castes and 8.2 per cent are Scheduled Tribes, suggesting an over-representation of 33.33 per cent by Scheduled Castes and of 51.22 per cent by Scheduled Tribes in the undertrial prison population.

An overwhelming majority of the undertrials (70.6 per cent) are either illiterate or have not completed Class 10. Of these, 28.5 per cent (80,528) of undertrial prisoners were reported to be illiterate and 42.12 per cent (1,19,082) dropped out of school before passing Class 10. Those who had cleared Class 10, but had not graduated from college constituted 20.61 per cent (58,160) of the total undertrial prisoners. Only 5.8 per cent (16,365) graduated from college and 2.8 per cent (7,941) received a postgraduate degree or a technical degree or a diploma. In the absence of data regarding the economic status of prisoners, these numbers serve as a useful proxy to appreciate that the majority of undertrial prisoners belong to socio-economically marginalised groups and are thus more vulnerable to poor legal representation, and therefore to extended periods of incarceration.

CONCLUSION

Taken together, the numbers above reveal a grim picture of the state of undertrial incarceration in India. It is a picture of overflowing prisons, housing mostly undertrial prisoners, most of whom are impoverished and marginalised, but many of whom will, after long periods of undertrial detention, be acquitted of the charges against them.

People are being incarcerated for longer durations. Nearly a quarter of those who are not otherwise released will finally be acquitted of the crime for which they are incarcerated. Such incarceration

has a disproportionate impact on the most vulnerable sections of the population. Also, the rate of incarceration is higher than the capacity of prisons to house this population, leading to problematic prison conditions.

This data demonstrates the need for a sustained and systemic re-imagination of bail law in India to ensure that the prisoners are not unduly incarcerated. The amendments that laid down restrictions on the power of arrest for cognisable offences for which punishment is seven years or less and the systemic changes brought about by the judiciary for arrest laws appear to be bearing some fruit. Similar efforts are required in the realm of bail law in order to address the issue of undertrial incarceration in India. Insistence on reasoned orders and justifications for denial of bail; automatic evaluation by the judge at every remand and trial hearing of whether the prisoner should remain incarcerated or be released on bail (without the prisoner having to file an application for this purpose); re-thinking the current framework of monetary sanctions as the primary condition for bail; and strict implementation of the Supreme Court's guidelines in *Inhuman Conditions in 1382 Prisons*, are some measures that are likely to have a positive impact on undertrial incarceration in India.

ANNEXURE

TABLE A1. Undertrial Prisoner Population

Year	Total prison population	Undertrial population	Percentage of undertrials
2001	3,13,635	2,20,817	70.41
2002	3,22,357	2,23,038	69.19
2003	3,26,519	2,17,658	66.66

Year	Total prison population	Undertrial population	Percentage of undertrials
2004	3,31,391	2,17,130	65.52
2005	3,58,368	2,37,076	66.15
2006	3,73,271	2,45,244	65.70
2007	3,76,396	2,50,727	66.61
2008	3,84,753	2,57,928	67.04
2009	3,76,969	2,50,204	66.37
2010	3,68,998	2,40,098	65.07
2011	3,72,926	2,41,200	64.68
2012	3,85,135	2,64,857	68.77
2013	4,11,992	2,78,503	67.60
2014	4,18,536	2,82,879	67.59
2015	4,19,623	2,82,076	67.22

TABLE A2. Occupancy Rate in Prison

Year	Occupancy rate
2001	136.5
2002	140.2
2003	139.8
2004	141
2005	145.4
2006	141.4
2007	135.7
2008	129.2
2009	112.8
2010	115.1
2011	112.1
2012	112.2
2013	118.4
2014	117.4
2015	114.4

TABLE A3. Rates of Arrests for All Cognisable Offences under the IPC

Year	Arrests made	Cases reported	Rate of arrest
2001	26,71,540	17,69,308	1.51
2002	26,96,543	17,80,330	1.51
2003	25,10,892	17,16,120	1.46
2004	26,60,910	18,32,015	1.45
2005	26,21,547	18,22,602	1.44
2006	26,53,683	18,78,293	1.41
2007	27,80,559	19,89,673	1.40
2008	28,82,286	20,93,379	1.38
2009	28,49,025	21,21,345	1.34
2010	29,47,122	22,24,831	1.32
2011	31,45,845	23,25,575	1.35
2012	32,70,016	23,87,188	1.37
2013	35,23,577	26,47,722	1.33
2014	37,90,812	28,51,563	1.33
2015	36,36,596	29,49,400	1.23

TABLE A4. Rates of Arrest for Theft

Year	Arrests made	Cases reported	Rate of arrest for theft
2001	1,62,214	2,52,803	0.64
2002	1,63,475	2,47,462	0.66
2003	1,59,518	2,45,237	0.65
2004	1,86,005	2,73,045	0.68
2005	2,08,670	2,73,111	0.76
2006	1,99,228	2,74,354	0.73
2007	1,94,182	2,85,043	0.68

Year	Arrests made	Cases reported	Rate of arrest for theft
2008	2,08,311	3,16,761	0.66
2009	1,94,348	3,24,195	0.60
2010	1,94,066	3,30,312	0.59
2011	2,04,207	3,40,800	0.60
2012	1,97,555	3,37,407	0.59
2013	2,10,304	3,72,622	0.56
2014	2,59,441	4,40,915	0.59
2015	2,22,556	4,67,833	0.48

TABLE A5. Rates of Arrest for Cruelty by Husband and Relatives

Year	Arrests made	Cases reported	Rate of arrest for cruelty
2001	1,09,467	49,170	2.23
2002	1,12,956	49,237	2.29
2003	1,10,623	50,703	2.18
2004	1,25,657	58,121	2.16
2005	1,27,560	58,319	2.19
2006	1,37,180	63,128	2.17
2007	1,56,412	75,930	2.06
2008	1,64,861	81,344	2.03
2009	1,74,395	89,546	1.95
2010	1,80,413	94,041	1.92
2011	1,80,701	99,135	1.82
2012	1,97,762	1,06,527	1.86
2013	2,22,091	1,18,866	1.87
2014	2,25,648	1,22,877	1.84
2015	1,87,067	1,13,403	1.65

TABLE A6. Undertrial Prisoners Released Each Year (2006–2015)

Year	Undertrials admitted into prison	Undertrials that were in the prison system	Undertrials released overall	Undertrials released on bail
2006	13,48,768	15,85,844	13,40,600	11,65,836
2007	13,25,092	15,70,336	13,19,609	11,55,154
2008	13,45,169	15,95,896	13,37,968	11,50,505
2009	13,58,017	16,15,945	13,65,741	12,10,453
2010	13,55,416	16,05,620	13,65,522	12,16,280
2011	13,74,925	16,15,023	13,73,823	12,16,481
2012	14,58,531	16,99,731	14,34,874	12,65,500
2013	14,09,640	16,74,497	13,95,994	12,47,721
2014	13,99,497	16,78,000	13,95,121	12,39,733
2015	12,91,554	15,74,433	12,92,357	11,57,581

Notes

- (2013) 2 SCC 590.
- NCRB. 2015. *Prison Statistics India 2015*. Available online at <http://ncrb.nic.in/StatPublications/PSI/Prison2015/PrisonStat2015.htm> (accessed on 29 September 2017).
- NCRB, *Prison Statistics*.
- Occupancy rate refers to the actual number of prisoners per 100 authorised slots in prisons.
- Hussainara Khatoon (4) v. State of Bihar*, (1980) 1 SCC 98; (1979) 3 SCR 532.
- Sections 41(1) and 41(2) of the CrPC.
- (1994) 4 SCC 260.
- Joginder Kumar v. State of UP*, (1994) 4 SCC 260. See also *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273; *Lalita Kumari v. Govt. of UP*, (2014) 2 SCC 1.
- (2014) 8 SCC 273 (*Arnesh Kumar*).
- To ensure that a person who is not arrested is available for investigation, Section 41-A of the CrPC states that the police officer shall issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognisable offence, to appear before him at such other place as may be specified. Once such a notice is issued, the person shall comply with the terms of the notice. If he complies with the notice, he shall not be arrested unless the police officer is of the opinion that he ought to be arrested after recording reasons. If the person does not comply with the terms or is unwilling to identify himself, the police officer may arrest him for the offence mentioned in the notice.
- Data available on *Crime in India Reports* published annually by the NCRB.
- Theft constitutes 27 per cent of the cognisable offences for which punishment is seven years or less. A general category called 'Other IPC Offences' covers around 60 per cent of all cognisable offences.
- The Law Commission of India recognised in its 78th Report, *Congestion of Undertrial Prisoners in Jails*, that 'detention in prison in the case of undertrial prisoners is generally the result of arrest for an alleged offence not followed by the grant of bail. It becomes, therefore, material to consider at some length the law relating to grant of bail.' Law Commission of India. 1979. *Congestion of Undertrial Prisoners in Jails*, p. 4, available online at <http://lawcommissionofindia.nic.in/51-100/report78.pdf> (accessed on 29 September 2017).
- The NCRB data does not clarify whether bail was granted by the court of first instance or by a higher court.
- The NCRB uses the phrase 'release on appeal', which we have assumed to mean release pending appeal, under Section 389 of the CrPC.
- Supreme Court Legal Aid Committee v. Union of India*, (1994) 6 SCC 731; *Shaheen Welfare Assn. v. Union of India*, (1996) 2 SCC 616.
- (1994) 6 SCC 731.
- (1996) 2 SCC 616.
- (1996) 3 SCC 422.
- 1995 SCC OnLine Del 399.
- (2015) 13 SCC 603.
- (2016) 3 SCC 700 (*Inhuman Conditions in 1382 Prisons*).
- Commissioner & Registrar General. 2015. 'Religion Census 2011', *Population Census 2011*, available online at <http://www.census2011.co.in/religion.php> (accessed on 29 September 2017).

Gandhi's Jurisconscience: Evolution of His Ideas of Justice

Sudarshan Iyengar

Abstract

The author, a lifelong Gandhian and former vice chancellor of Gujarat Vidyapith, the university founded by Mahatma Gandhi, discusses Gandhi's ideas of justice in this chapter. The author makes an attempt to trace and illustrate the formation of Gandhi's convictions and his reasoning on the idea of justice. He goes on to describe Gandhi's training as a barrister and certain instances where he appeared before the court of law for his clients, to understand his idea and approach to legal justice. Finally, the author discusses Gandhi's evolved idea of justice in the context of jurisprudence and jurisconscience.

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At the outset, it needs to be stated that I do not have any formal background in law and its practice. My thoughts, shared here, are those of a student of Mahatma Gandhi and his thought. In this chapter, an attempt is made to explore Gandhiji's idea of justice.¹ The idea of justice arises in the context of interpersonal and inter-group conflict of interests. For Gandhiji, it also arises in the context of the self and the self's responsibility to itself and others. A just society is an ideal order in which harmony prevails with the self and with others including the external environment—nature. However, in reality, injustice is addressed within a given framework of set norms and there is a system of justice. If there is any violation of the accepted norms of just order due to injustice committed by an individual or a group against any other individual or a group, the sufferers can approach the judicial system and make a plea with facts and reasoning and expect a judgment correcting the injustice if so established. The individual or the group inflicting injustice is

penalised variously, which is also supposed to act as a deterrent for others from inflicting injustice. Thus, each society has its jurisprudence and on the basis of it, the system and structure of justice are laid out.

Gandhiji was a barrister, who initially failed in practice in India, but later set up a good practice in South Africa. However, he gave up his practice and led movements for Indian citizens' rights in South Africa and the freedom movement in India. On various occasions, he stood before the courts of law of the British Empire and argued that his defiance of the law of the land was justified because he believed in natural law, which was above the law of the land. His idea of justice was indeed different and unique.

In Part I of this chapter, an attempt is made to trace and illustrate, through instances in Gandhiji's childhood, the formation of his conviction and reasoning on the idea of justice. In Part II, Gandhiji's formal training in law and selected instances where he appeared before the court of law for his clients, mainly in South Africa, are described, and an effort is made to understand his idea and approach to legal justice. In Part III, Gandhiji's evolved idea of justice in the context of law of the land (jurisprudence) and natural law (jurisconscience) is discussed in brief.

FORMATION OF IDEAS OF JUSTICE

Gandhiji has said all along that he was an ordinary person. But his claim was in a specific context. He stated this clearly in the introduction to his autobiography. Gandhiji saw his life as experiments in the search of Truth.² Experiments, because he does not claim any degree of perfection in them in the sense of finality. But he believed what appeared correct had to be practised with passion. He said his

quest was for Truth, which is the sovereign principle: 'This truth is not only truthfulness in word, but truthfulness in thought also, and not only the relative truth of our conception, but the Absolute Truth, the Eternal Principle, that is God.'³

Gandhiji notes in his autobiography that he was a mediocre student in the conventional sense, but he never told a lie either to his teachers or to his schoolmates. At the age of 12, Mohan (as he was called), was in the first year of high school. The education inspector was on a visit of inspection in his school, and when he was taking down dictation, he misspelled the word 'kettle'. His teacher tried to prompt Mohan.⁴ But he would not be prompted. For Mohan, it was beyond him to see that his teacher wanted him to copy the spelling from his neighbour's slate. He turned out to be the stupid one in the class, as everyone but him had taken the five words of dictation correctly. The teacher tried to make Mohan aware of his stupidity, but Mohan could never learn the art of copying.

Pre-teen and teenage are impressionable years. Some impressions become deeply imprinted in the conscience. Mohan mentions such impressions, and that they were imprinted so deep in the recesses of his mind and heart, that his practice and advocacy of self-suffering became the law to be followed in the quest for Truth and formation of a just society. This imprint was not only out of thinking with his head, but it was also created out of feeling intensely from the heart. Gandhiji was deeply inspired by the ideals of truth in the play *Harishchandra*.

Mohan's personality evolved from his intense sensitivity, self-introspection, and continuous course correction. The foundation of jurisconscience was laid in young Mohan, which took firm form as the duty of the self to conduct *aatma nirikshan*, *aatma parikshan*, and *aatma shodhan*. In other words, it is self-introspection on a continuous basis, examining the self, and setting course correction.

To Mohan, it occurred naturally, as from his childhood he was truthful not only in an ordinary sense but also with a resolve to uphold this character under the most adverse situations. It gave him the strength to move toward *nirikshan*, *parikshan*, and *shodhan*.⁵

The process of character building showed soon in another instance in which, as per prevalent jurisprudence, the teenaged Mohan and his elder brother had committed a crime. Mohan's brother had run into a debt of about ₹25, a large sum in those times. Mohan stole a bit of gold out of his brother's armlet of solid gold to pay off the debt.

Mohan was an ordinary teen and had done wrong. But his sensitivity led him to self-introspection and correction. The impact of Mohan's act on his father Karamchand was also unusual. Gandhiji has noted in his autobiography that his father was short-tempered. Stealing gold was a grave matter. Mohan then thought that his father would be immensely pained and he would be angry, say hard things, and inflict punishment on his self. This would have caused deep anguish to the boy as he had profound respect for his father. However, Mohan took a risk as he wrote his confession on a slip of paper. He wanted to confess his wrongdoing and also express his resolve about never ever repeating the act. He also volunteered to take any punishment meted out to him. Thus, even in case of retributive justice, Gandhiji had formed the idea that at an individual level there must be punishment for wrongdoing, but its transforming impact over an individual would occur only if it is preceded by clean confession and repentance, with a resolve not to repeat any wrongdoing in future.

Gandhiji's disposition about being truthful and his experience in practising it from his childhood appear to have helped him in forming his jurisconscience and his attitude towards prevalent jurisprudence later in life.

FORMAL TRAINING IN LAW

Gandhiji's quest for Truth was routed through working for societal well-being. In the process, he suffered, and the strength he received from it helped him in building his jurisconscience.

Let us now review his study of jurisprudence in England. Kirit Bhavsar, Mark Lindley, and Purnima Upadhyay have compiled a book titled *Bibliography of Books Read by Mahatma Gandhi*,⁶ where an annotated bibliography of the books read by Gandhiji when he was in England studying law is provided.⁷ Gandhiji notes that the curriculum of study in preparation for the bar was relatively easy. Examinations had practically no value. Though textbooks were prescribed for some subjects, students rarely read them. Most relied on some notes which were remembered by rote. However, Gandhiji seems to have taken pains to study. He had passed his matriculation examination in England for which he had studied Latin. Hence, he was able to read the legal texts better. He took it upon himself to read all the textbooks. Gandhiji went above regular expectations in this and read the books on ethical grounds. In his autobiography, he writes: 'I felt that I should read all the textbooks. It was a fraud, I thought, not to read these books.... I decided to read Roman Law in Latin.... And all this reading was not without its value later on in South Africa, where Roman Dutch is the common law.'⁸

Gandhiji, during his study of law and later, while practising law, read basic texts of British jurisprudence with seriousness. Practice was a different matter, however, and Gandhiji has devoted a chapter to his predicament on this count.⁹ He mentions that he was able to read more books when he started practising in South Africa. His idea of legal justice that arose from existing jurisprudence also was distinct, and this had an impact on his practice in South Africa.

It is known that he did not have a good practice as a barrister in India after he returned from England. His failure, which was more because of his timidity and lack of confidence, is described again in a separate chapter in his autobiography.¹⁰ His practice did however pick up in South Africa. During his tenure, he displayed his distinctive approach to legal practice. Ajit Atri notes that Gandhiji's view on legal justice was not epistemological but ontological.¹¹ We will first review his idea of legal justice.

Gandhiji's first informal case was that of Dada Abdulla's dispute in the matter of business accounts. Though he was not formally associated with the case as a lawyer, Gandhiji helped Dada Abdulla by explaining to him the legal intricacies of the case and informed the English barrister who appeared in court for Dada Abdulla of facts and case details.¹²

Gandhiji had studied the facts and found that they were on the side of Dada Abdulla. As a professional in the formative age, he could have impressed his client and continued with the case in court and earned money. But Gandhiji had evolved as a person in the quest for Truth, and in that quest, a sense of being fair and honest was at the core. A lawyer's duty is to the client and to his conscience. Similarly, lawyers should not take help of legal lacunae and technicalities to secure clients' due, when he is morally certain that his clients are guilty.¹³

This case illustrates Gandhiji's thoughts on legal justice was one that dealt with highly complicated accounts. The accounting was given to arbitrators who had submitted the accounts. The award was to be in favour of Gandhiji's client. However, while examining the report, Gandhiji found the arbitrators had inadvertently committed an error. The senior counsel in the case saw no need to admit this mistake on the part of their client. However, Gandhiji stated that he would withdraw himself if the error was not admitted in the court. The senior

counsel refused to argue the case and so, with his client's consent, Gandhiji argued the case with the admission of the error. Gandhiji notes in his autobiography: 'I was confirmed in my conviction that it is not impossible to practise law without compromising truth.'¹⁴

Atri has summarised Gandhiji's idea of legal justice well.

Gandhiji's insistence on truth is not a matter of personal conviction. It is a matter, which is inherent in the proper functioning of the law and society, and above all, in the proper dispensation of legal justice. In Gandhi's definition justice is an inquiry into truth by using fair means as to what is due to whom and who is entitled to what within the established framework, when the framework itself is not faulty or discriminatory.¹⁵

The second case relates to admission of guilt and preparedness to accept punishment. Atri has stated this case well.

In Parsi Rustomji's case, the Parsi was an importer of goods from Bombay and Calcutta. He resorted to smuggling and was caught. He came to Gandhiji and confessed his guilt. Gandhi's answer was clear that he could try to save him only by means of confession. The confession was made before the Customs Officer as well as the before the Attorney General. Gandhiji pleaded Parsi's case, the Parsi was scared from the ordeal of going to jail and was ordered to pay a penalty equal to twice the amount he had confessed for having smuggled.¹⁶

When Gandhiji presented the case to the customs officer he not only admitted the wrong his client had committed but also told him how penitent his client had been feeling. Gandhiji's approach to legal justice and hence his idea of justice at the individual level was based on facts and truth and in case of guilt, its admission with remorse, resolve to never do it again, and readiness to accept the punishment. He established *sveekruti* (acknowledging

the wrong), *pashchatap* (remorse), and *prayashchit* (punishment to correct self).

Before the discussion on Gandhi's idea of justice in legal practice and individual wrongdoing is closed, it would be relevant to discuss punishment in the context of *prayashchit*. The starting point for this discussion is again with reference to the admission of guilt by Mohan at the age of 15 and his reflection on it when he was 58. In his autobiography he says, 'This was, for me, an object lesson in *Ahimsa*. Then I could read in it nothing more than a father's love, but today I know that it was pure *Ahimsa*. When such *Ahimsa* becomes all-embracing, it transforms everything it touches. There is no limit to its power.'¹⁷

Gandhiji called it 'sublime forgiveness', which in his opinion, is the highest form of forgiveness to be adopted in correcting the wrongdoer. He would look for transformation in the wrongdoer and the forces of transformation would be love and non-violence. However, as seen above, he had told Parsi Rustomji that he should be prepared to go to jail and treat that as penance for transformation.

The system's approach to justice has been varied in different human societies. In most societies, punishment is an acceptable part of jurisprudence. A wrongdoer is punished and wrong is determined by the established norms that change over time. There have been refinements both in the norms and in processes used for proving wrong. In the Western world, the system has evolved from Moses' teaching of justice as 'an eye for an eye', to Jesus Christ's Sermon on the Mount where he said that one should turn the other cheek if somebody slaps one on one cheek. Gandhiji was most impressed by the Sermon on the Mount and celebrated the force of love in building a non-violent society. Democracy has evolved and has come to stay. Human rights have become fundamental rights for

the global citizen. But, retributive justice is yet to be replaced by restorative and or reformatory justice completely.¹⁸

Gandhiji was clearly in favour of restorative justice. The foundation for it is the individual quest for Truth through non-violence. *Sveekruti*, *pashchatap*, and *prayashchit* is the process of transformation for the individual and the acceptance of the restoration method by society. If an individual sways from the path of Truth and non-violence, and harms another individual who may or may not be following the same path, jurisprudence should not be resorting to retributive justice, as those who judge would also be following the same path. This is Gandhiji's approach to legal justice. In the following section, we discuss Gandhiji's appearance in court as an accused and reveal his jurisconscience.

JURISPRUDENCE AND JURISCONSCIENCE

The making of the Mahatma began in earnest in South Africa. His inward journey had begun right from his childhood, as has been illustrated in the foregoing sections. Had his life not taken the course it did, he may have perhaps been a spiritual master for all those who consider this world as an obstruction to achieving *moksha*. Gandhiji was admittedly a *mumukshu*.¹⁹ His quest for Truth, instead of alienating him from society for his *sadhana* (practice), put him in the midst of the oppressed. The society became his *dharmakshetra* (temple of justice). Be it South Africa or India, Gandhiji became the proverbial 'good man', having been blessed by God and took up the fight against the bad, namely, the oppressive state apparatus.

The 'coolie barrister's' initial experiences were jolting. As a young man of 23, he was pushed out of the first-class compartment despite possessing a

valid ticket. Sitting and shivering in the cold winter night in the waiting room of Maritzburg railway station, Gandhiji was in deep thought. His first thought was that he should immediately return to India. Another thought was to bear the insult, proceed further, finish the assignment that he had accepted and then return. He did not do either. Deep down, he sensed that the issue was that of equality at a human level. He thus reacted to the inequality that was meted to him. On this incident, Gandhiji says:

I began to think of my duty.... It would be cowardice to run back to India without fulfilling my obligation. The hardship to which I was subjected was superficial—only a symptom of the deep disease of colour prejudice. I should try, if possible, to root out the disease and suffer hardship in the process. Redress for wrongs I should seek only to the extent that would be necessary for the removal of colour prejudice.²⁰

A fine distinction was made by the young Gandhiji that eventually changed the course of the history of humanity. He realised that the true inequality was not being disallowed from a particular compartment in the train, but being considered inferior as a human being due to one's skin colour. The *mumukshu* in Gandhiji was pursuing the Truth, and hence this realisation hit him hard. The jurisconscience in Gandhiji had already taken him above the legal system and he sensed the supremacy of conscience over the legal system.

More hardships were yet to follow in his journey to Johannesburg.²¹ He was beaten up on the stagecoach that he had taken from Charlestown to Johannesburg. He protested on the spot and did not yield to the physical violence and also wrote a letter to the agent of the coach company, narrating the misdeed of the coach-in-charge. He got a reassuring reply, but the important point that Gandhiji notes was that he had no intention of proceeding against the man who had assaulted him. For him, the public cause was supreme, and any suffering

that came upon an individual had to be endured with no ill will towards the tormentor.

When pushed and kicked by the policeman standing outside President Kruger's house from the footpath onto the road, his friend Mr Coates, who was instrumental in getting him a letter from the state attorney authorising Gandhiji to move freely during all hours in the state (the evening and night hours were forbidden for the coloured), was passing by and felt sorry for him. Mr Coates told Gandhiji that he was ready to stand as a witness in the court if Gandhiji decided to proceed against the police guard for the offence. Gandhiji told Mr Coates not to be sorry and added, 'I have made it a rule not to go to court in respect of any personal grievance.... I could not follow their talk, as it was in Dutch, the policeman being a Boer. But he apologised to me, for which there was no need. I had already forgiven him.'

Seeking equality and equity for human beings in any society and protesting for it with preparedness to undergo personal suffering also had another component. Addressing the Indian community in Pretoria he prompted the community to rise for their rights and simultaneously engaged them over the issues of conducting business by fair and truthful means and to maintain high standards of hygiene and sanitation. The word *satyagraha* was yet to be coined, but the duties of a *satyagrahi* were already laid out and the practice of it had begun from himself first. Before Gandhiji left Pretoria, he made a strong case for equality in railway travel and received a reply 'to the effect that first and second class tickets would be issued to Indians who were properly dressed'.²² The young barrister had accomplished what he thought was equality in the issue he had made public based on a personal experience of being discriminated.

Gandhiji's historical actions reflecting his jurisconscience were yet to blossom fully, and may

not even have, had Gandhiji not happened to see a report in the newspaper *Natal Mercury* where he saw that Indians were to be disenfranchised. People in South Africa requested him to stay on in South Africa and he eventually led the *satyagraha*, which was a long-drawn battle. The initial issue of disenfranchisement was settled relatively quickly as Lord Ripon, Secretary of State for the Colonies, disallowed the Bill after receiving 10,000 signatures from Indians, which meant almost the total population of the free Indians in Natal. Other discriminatory laws and rules were however imposed from time to time. Intensity of protest, resistance, and defiance began in 1906. For more than a dozen years, the Indians became organised, became politically sensitive towards discrimination, and protested in various forms registering small victories. The turn of events came on 11 September 1906.

The Transvaal Government Gazette Extraordinary of 22 August 1906 contained the most draconian of all the ordinances passed since the Indians had organised protests for demanding and obtaining equal status with other British citizens in South Africa.²³ Gandhiji saw nothing but hatred for Indians in it. He had never known a legislation of this nature being directed against free men in any part of the world. When a huge gathering met in a Jewish theatre in Johannesburg on 11 September 1906, to discuss and plan protest, the full implications of the draft resolution hit Gandhiji also for the first time. In Gandhiji's words: 'But I must confess that even I myself had not then understood all the implications of the resolutions I had helped to frame.... I could read in every face the expectation of something strange to be done or to happen.'²⁴

It was the impassioned speech by Sheth Haji Habib, a very old man who had lived in South Africa, which made Gandhiji think deeply and consider the implications of sharing the resolution with God as witness. Interestingly, Gandhiji

was himself not prepared to take such an oath! But having realised the import of what Haji Habib had said, Gandhiji welcomed it and thought it to be his duty to explain the implications of such an oath to every one of those who were present. It was in later life that he said, 'Truth is God', but on that day in the Jewish theatre meeting, he explained to the gathering that they had resolved to oppose with all their strength a proposed draconian law which was against the 'rule of life' for all those who were in search of the ultimate Truth which was God. The actions that followed, which had a clear code of conduct for every protestor, came to be known as *satyagraha*. Gandhiji was successful in making people understand that the proposed rule of law was in contravention to the rule of life. Gandhiji explained that *satyagraha* was not the weapon of the weak but was the use of soul force with total non-violence and love towards the opponent.

Gandhiji was keen to serve people in India and make them aware that the rule of law should always move towards the rule of life. When rule of law or its implementation gives rise to injustice, rule of law must be defied. Gandhiji soon got an opportunity to demonstrate this.

The venue for the play was the magistrate's court in Motihari, Champaran, Bihar. Gandhiji had been issued an order by the police superintendent to leave Champaran. Gandhiji accepted the notice and in acknowledgement wrote that he did not propose to comply with it and he would do so once the inquiry that he wanted to undertake was over. He received a summons to take his trial for disobeying the order. It became a sensational event. The administration was unnerved and wanted the trial to be postponed. But Gandhiji intervened and told the magistrate that he wanted to plead guilty and hence the trial should proceed. Gandhiji read a statement that he had prepared. Some excerpts are of the statement follow:

As a law-abiding citizen, my first instinct would be, as it was, to obey the order served upon me. But I could not do so without doing violence to my sense of duty to those for whom I have come.... I could only throw the responsibility of removing me from there on the administration. I am fully conscious of the fact that a person holding, in the public life of India, a position such as I do, has to be most careful in setting an example ... what I have decided to do, that is to submit without protest to the penalty of disobedience.

I venture to make this statement not in any way in extenuation of the penalty to be awarded against me, but to show that I have disregarded the order served upon me not for want of respect for lawful authority, but in obedience to the higher law of our being, the voice of conscience.²⁵

On 10 March 1922, Gandhiji was arrested from Satyagraha Ashram, Sabarmati and was charged under Section 124-A of the Indian Penal Code (IPC), 1860, for spreading disaffection towards the state by writing articles in *Young India*. Both Gandhiji and Shankarlal Banker, as the publisher of *Young India*, were being tried. The trial took place on 18 March 1922 at the Government Circuit House, Shahibaug, Ahmedabad before Mr C.N. Broomfield, District and Sessions Judge, Ahmedabad. Both Gandhiji and Banker had pleaded guilty and were undefended. The prosecution pressed the charges and the judge, before pronouncing the sentence, asked Gandhiji whether he wished to make a statement on the question of sentence. It is his statement and the response of the judge that has made the Shahibaug trial of Gandhiji iconic in the history of freedom struggle. Through his oral and written statements, Gandhiji established how a law-abiding citizen responds when the law is violated by him or because of him and why a citizen is right in defying the law when the state does not act in the earnest interest of its subjects.

Gandhiji stated that the grounds for being disaffectionist in India had its history in South Africa

when he had the first contact with the British government. He discovered that as a man and an Indian he had no rights. More precisely, he had discovered that he did not have any rights as a man because he was an Indian. He believed that the treatment given to Indians in South Africa was an eyesore to the British system which was intrinsically and predominantly good. Hence, he had cooperated with the British government. Gandhiji also elaborated his cooperation in making recruitment for the First World War as late as 1918. But the British government was not responsive to Indians. He said:

The first shock came in the shape of the Rowlatt Act, a law designed to rob the people of all real freedom. I felt called upon to lead an intensive agitation against it. Then followed the Punjab horrors beginning with the massacre at Jallianwala Bagh and culminating in crawling orders, public floggings, and other indescribable humiliations.... I fought for cooperation and working the Montagu-Chemsford reforms ... that the reforms, inadequate and unsatisfactory though they were, marked a new era of hope in the life of India. But all that hope was shattered. The Khilafat promise was not to be redeemed. The Punjab crime was whitewashed ... I saw, too, that not only did the reforms not mark a change of heart, but they were only a method of further draining India of her wealth and of prolonging her servitude.²⁶

Gandhiji then described in detail the economic exploitation of India and how the British policies and programmes killed the vibrant local home-based and small-scale industries in the country and how agriculture too had been brought to peril. The British government had failed to save lives and provide food during famines that were frequent. The law had simply served the foreign exploiters. Gandhiji explained that it was for these reasons that he was raising the conscience of every Indian through his writings.

But I hold it to be a virtue to be disaffected towards a government which in its totality has done more harm to India than any previous system. India is

less manly under the British rule than she ever was before.... I believe that I have rendered a service to India and England by showing in non-cooperation the way out of the unnatural state in which both are living. In my humble opinion, non-cooperation with evil is as much a duty as is cooperation with good. But, in the past, non-cooperation has been deliberately expressed in violence to the evildoer. I am endeavouring to show to my countrymen that violent non-cooperation only multiplies evil and that, as evil can only be sustained by violence, withdrawal of support of evil requires complete abstention from violence. Non-violence implies voluntary submission to the penalty for non-cooperation with evil. I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen.

The *satyagrahi* was in full action. He was not sorry for preaching non-cooperation, but he was regretful that people were not yet ready to protest with complete non-violence. If the government felt that by doing so he was breaking the law, then he was willing to undergo the severest of the punishment. In this context, Justice Iyer had remarked that the moral imperative of the Mahatma was the rule of law shall not, without peril to its own life, rob its consumer, the common man, of his right to inalienable liberties. Gandhiji was a strong votary of individual freedom. Justice Iyer quotes Gandhiji in his lecture²⁷ and says that Gandhiji's notion of democracy meant a system where the weakest had the same opportunity as the strongest and claimed that no society could be built on a denial of individual freedom. The only tyrant Gandhiji accepted was the still small voice within. This was Gandhiji's jurisconscience.

The idea and philosophy of justice that has evolved is in the context of the social entity of the human being. The code of conduct that was devised for a person had other persons in consideration. The more we socialised and the more we were civilised,

the code of conduct was further refined. And when the code was violated, then came jurisprudence. If the provisions in a particular jurisprudence allowed for violating and exploiting fellow human beings, jurisconscience arose and defied the rule of law. Gandhiji's unique position in this respect has been the presence of conscience even if the whole society consisted only of a Robinson Crusoe. There was justice to be done with self. Beginning from this position, the formation of society consisting of many individuals also requires each individual to be a *mumukshu*. The liberty and the right to liberty for an individual arises out of duty to the self. If the individual falters, then there is a corrective path. Reiterating what has been said earlier, it is *sveekruti*, *pashchatap*, and *prayashchit*. It involves immense suffering which is self-purifying. From such a person flows the soul force that impacts the heart and mind of the tyrant. In the highest point of Gandhian jurisconscience, jurisprudence is minimal.

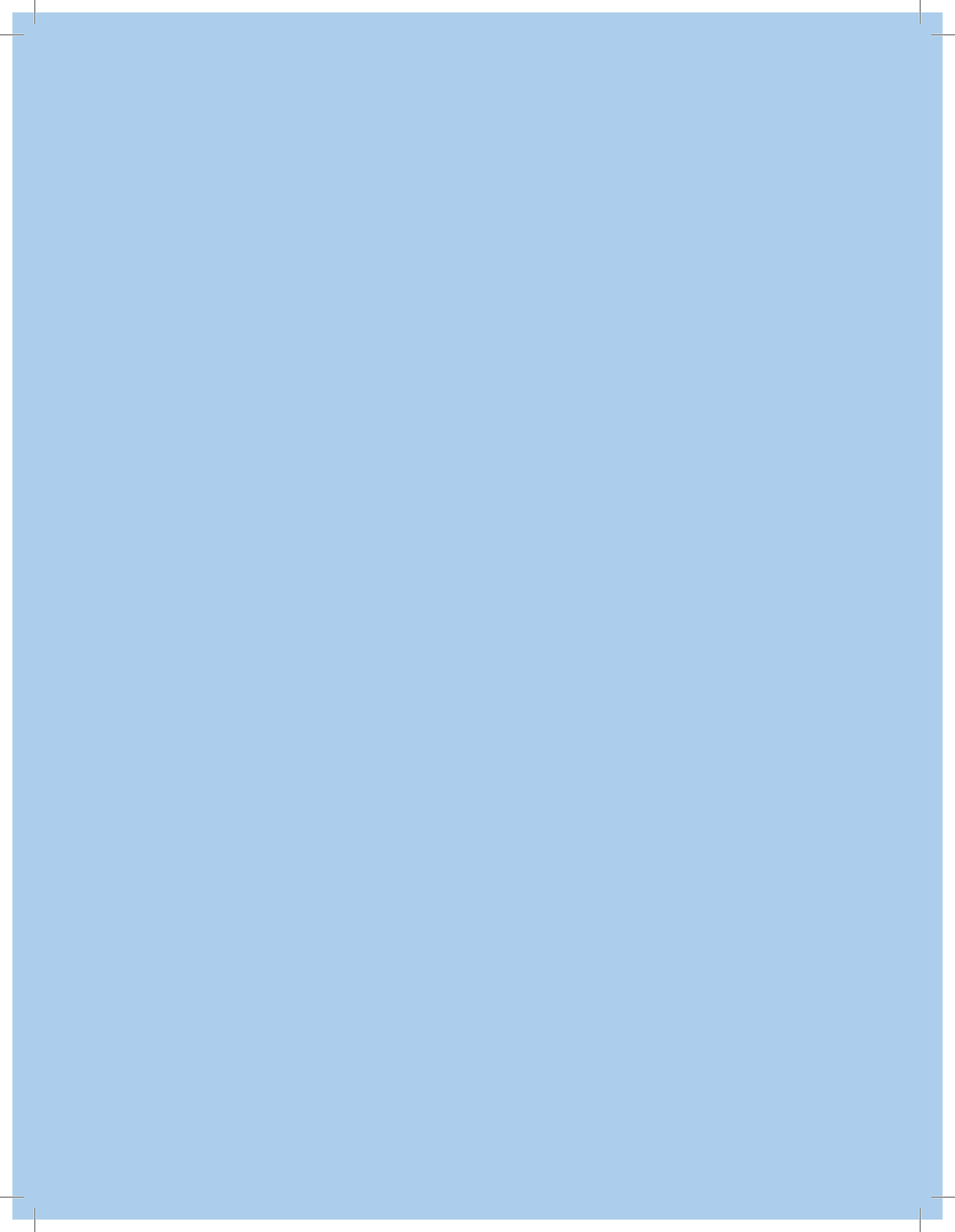
NOTES

1. Some researchers and scholars with a background in law have written on the subject. One of the most erudite works is a lecture by Justice V.R. Krishna Iyer delivered on 30 January 30, at the Gandhi Peace Foundation, New Delhi. This lecture, titled 'Jurisprudence and Jurisconscience a la Gandhi' was published in the form of a book. See V. R. Krishna Iyer. 1976. *Jurisprudence and Jurisconscience a la Gandhi*. New Delhi: Gandhi Peace Foundation.
2. Truth (with a capital 'T') refers to the ultimate Truth. Gandhiji's struggle for practising and establishing truth in worldly affairs was the path that led to the ultimate Truth.
3. M.K. Gandhi. 1927 [1976 reprint]. *An Autobiography or the Story of My Experiments with Truth*. Ahmedabad: Navajivan Publishing House, p. x.
4. Gandhiji's full name was Mohandas Karamchand Gandhi. In this chapter, he is called 'Mohan' when the reference is to his childhood or youth.

5. The words mean, respectively, *nirikshan*—observation, *parikshan*—introspection or examination, and *shodhan*—correction.
6. Kriti K. Bhavsar, Mark Lindley, and Purnima Upadhyay. 2011. *Bibliography of Books read by Mahatma Gandhi*. Ahmedabad: Gujarat Vidyapith. Available online at www.gujaratvidyapith.org (accessed on 6 October 2017).
7. Bhavsar et al., *Bibliography of Books*.
8. Gandhi, *An Autobiography*, pp. 59–60.
9. Gandhi, *An Autobiography*, pp. 60–62.
10. Gandhi, *An Autobiography*, pp. 68–70, 159.
11. Ajit Atri. 2007. *Gandhi's View of Legal Justice*. New Delhi: Deep and Deep Publications.
12. Gandhi, *An Autobiography*, p. 99.
13. Gandhi, *An Autobiography*, pp. 273–274. For an analysis, refer to Atri, *Gandhi's View*, pp. 57–60.
14. Gandhi, *An Autobiography*, p. 276.
15. Atri, *Gandhi's View*, p. 59.
16. Atri, *Gandhi's View*, p. 58.
17. Atri, *Gandhi's View*, p. 20.
18. Atri, *Gandhi's View*, Chapter 4. One may also find it interesting to read 'Gandhi's Justice and Restorative Justice', by Fania E. Davis, remarks delivered at the 10th Annual Howard Thurman Convocation, Church of the Fellowship of All Peoples, available online at <http://restorativejustice.org/10fulltext/davisfania.pdf> (accessed on 7 October 2017).
19. In Hinduism and Hindu philosophy, a *mumukshu* is a seeker of *moksha*, or salvation of the soul.
20. Gandhi, *An Autobiography*, p. 82.
21. Gandhi, *An Autobiography*, pp. 82–94.
22. Gandhi, *An Autobiography*, p. 94.
23. M.K. Gandhi. 1928. *Satyagraha in South Africa*. Ahmedabad: Navajivan Publishing House.
24. Gandhi, *Satyagraha*, p. 140.
25. Gandhi, *An Autobiography*, pp. 311–312.
26. M.K. Gandhi. 1962. *The Law and the Lawyers*. Ahmedabad: Navajivan Publishing House, p. 123.
27. Iyer, *Jurisprudence and Jurisconscience*.

SECTION TWO

**RULE OF LAW
PROJECT**



Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts

Arunav Kaul

Ahmed Pathan

*Harish Narasappa**

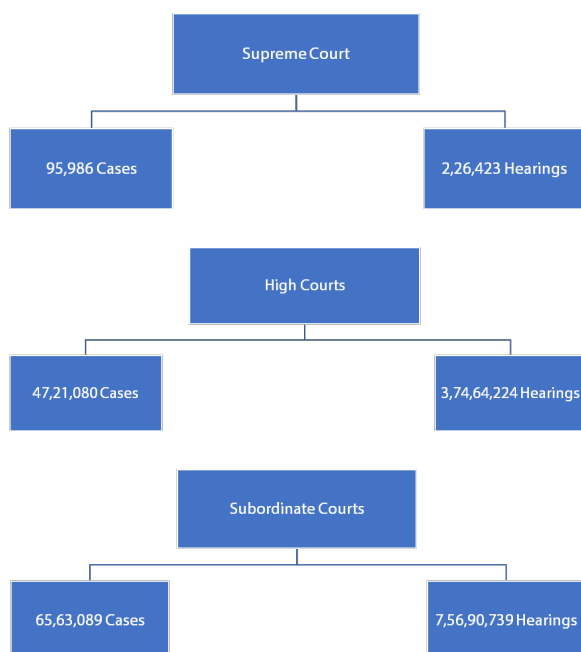
Abstract

DAKSH's Rule of Law Project created a database containing case and hearing information from the Supreme Court, High Courts, and subordinate courts on a single analysable platform. The National Judicial Data Grid (NJDG) was set up by the government under its e-Courts Project to provide district court data. Both these databases have made aggregate data about the judicial system available for researchers, and analysing data to monitor judicial performance, as well as identify and understand the problem of pendency and delay in the judicial system, is now possible. This chapter uses data from the DAKSH database and NJDG to create metrics to measure pendency, efficiency, and workload of courts, as well as the progress of cases in the High Courts and subordinate courts.

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Since the publication of the *State of the Indian Judiciary* in 2016 (SoJR 2016), the DAKSH database has been continuously updated and as on 11 August 2017, contains information for 1,13,80,155 cases filed in courts across India. Data is collected for both pending and disposed cases, along with information about hearings. All information about cases and hearings are sourced from the individual websites of the Supreme Court, each of the High Courts, and from the e-Courts website¹ (for cases in the subordinate courts). Figure 1 provides a summary of the cases and hearings in the DAKSH database.

FIGURE 1. Summary of the DAKSH Database



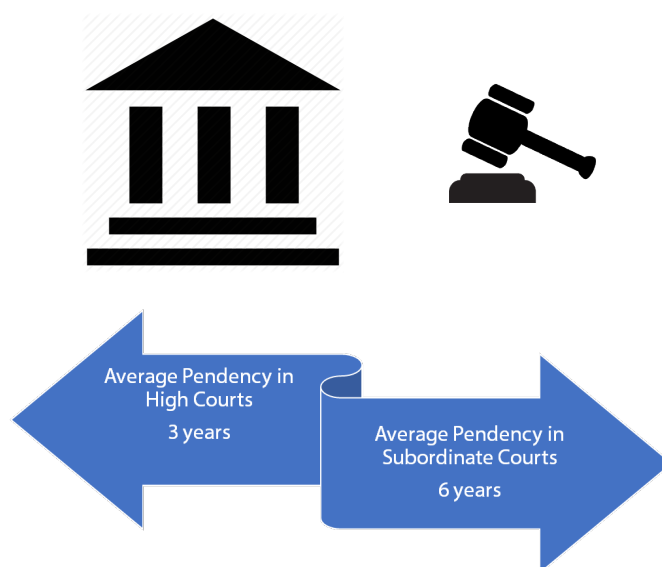
ANALYSES

Through an empirical analysis of High Court and subordinate court data from the DAKSH database, this chapter throws light on issues such as pendency, backlog, efficiency, and the manner in which courts are handling their case load.²

Part 1 of the chapter describes the present state of the Indian judiciary by providing a bird's-eye view of pendency and workload of the courts across the country. A special analysis of courts in Delhi has also been carried out in Part 1. Part 2 of the chapter provides an in-depth analysis of factors that affect judicial efficiency, such as judge strength and disposal rates. Part 3 of the chapter contains detailed research methodology and sample descriptions for certain analyses.

Figure 2 shows the average pendency in all the High Courts and subordinate courts in the country.

FIGURE 2. Average Pendency in All High Courts and Subordinate Courts



number of pending cases in the country—58,73,958 cases. The UT of Daman and Diu has the lowest number of pending cases in the country—1,422 cases.

1,422

58,73,958

77,827

1,91,257

5,39,269

2,13,095

6,19,038

5,59,504

14,00,652

58,73,958

15,61,920

1,522

2,29,132

7,071

9,615

25,750

2,876

17,49,909

1,422

3,348

33,45,307

2,78,960

9,93,112

3,89,686

4,47,531

13,32,792

10,83,850

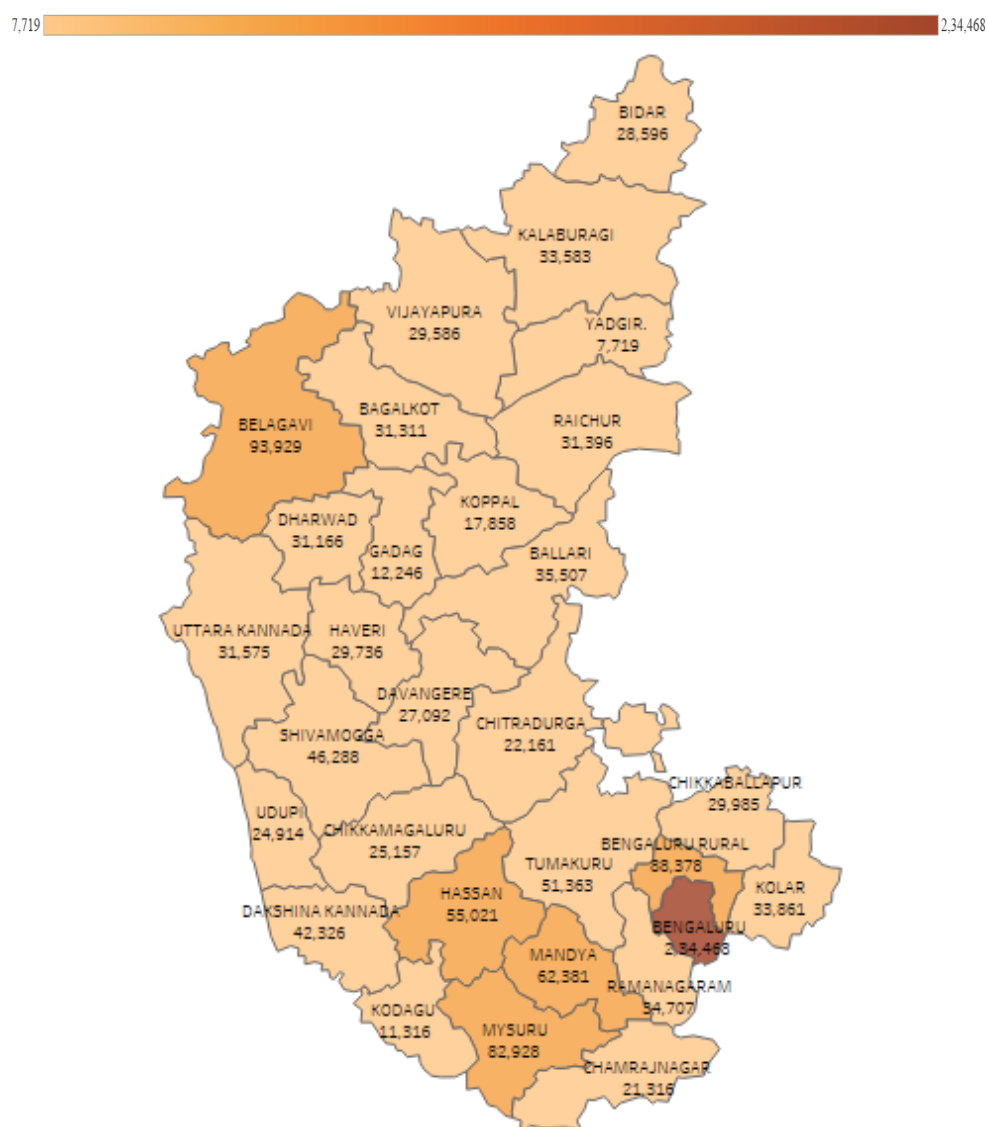
9,24,194

11,038

The volume of pending cases can also be looked at district-wise. Figure 4 presents the total number of cases pending in each district of Karnataka.

Bengaluru and Belagavi have the highest number of pending cases, with 2,34,468 and 93,929 cases respectively.

FIGURE 4. Number of Pending Cases in Subordinate Courts of Districts in Karnataka



Note: Data collected from NJDG as on 29 March 2017.

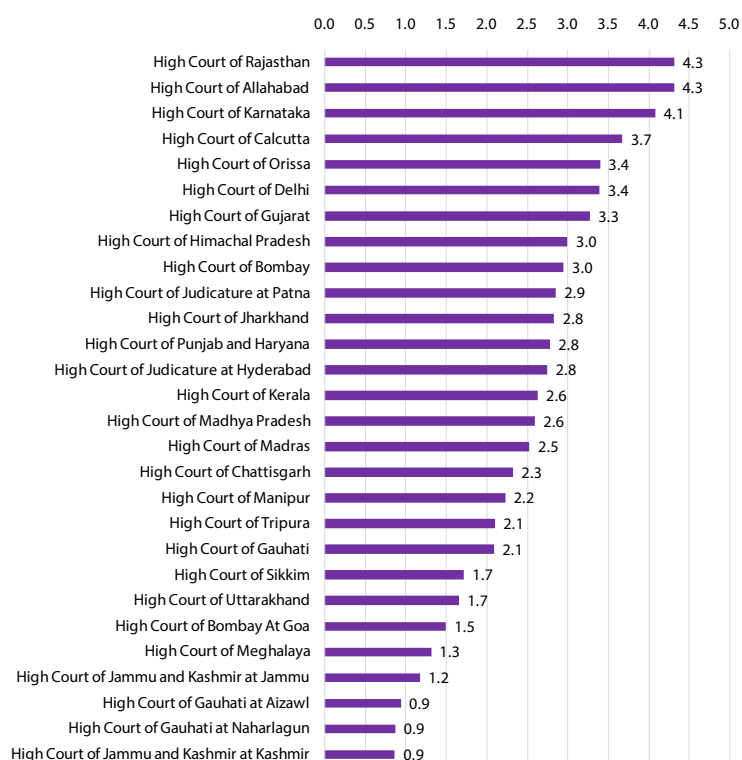
PART 1

OVERVIEW OF PENDENCY IN INDIA

Figure 5 shows the average pendency of cases in all the 24 High Courts and their benches. Average

pendency indicates the average age of the pending cases and the length of time for which they remain in the courts without being disposed.

FIGURE 5. Average Pendency in High Courts



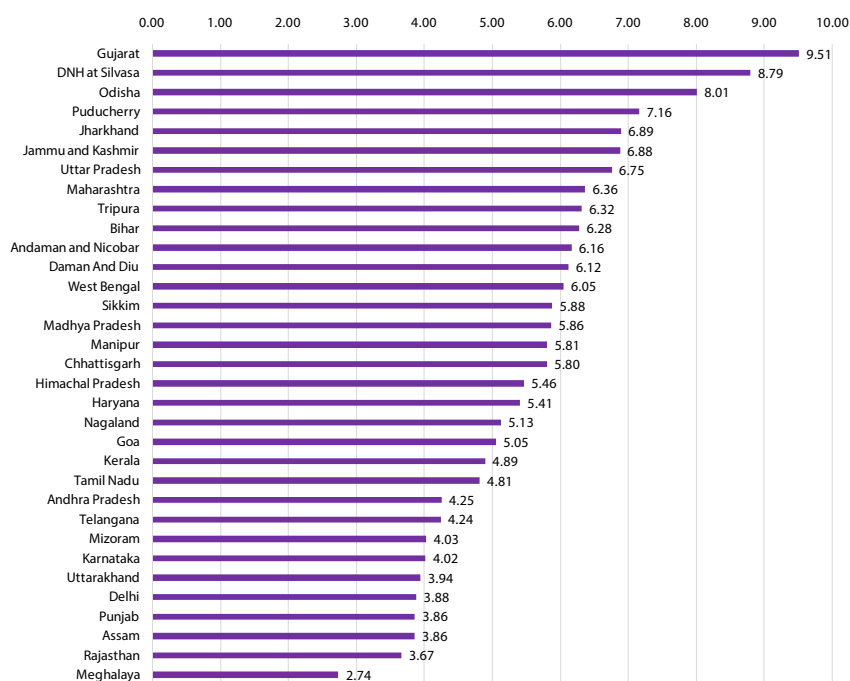
Notes: (i) All values are expressed in years. (ii) For analysis, all the cases that were pending in the DAKSH database as on 19 September 2017 have been considered.

In the SoJR 2016, the High Court of Allahabad had the highest average pendency of approximately three years.⁴ From Figure 5, we see that the High Court of Rajasthan and the High Court of Allahabad have the highest average pendency of 4.32 years each. It is important to note that the number of cases in the DAKSH database over the last one year have increased substantially. To calculate average pendency, while the SoJR 2016 considered a total of 16,07,557 cases from the DAKSH database, the total number of pending cases considered this year are 45,51,453. A comparison between the number of pending cases considered for the SoJR 2016 and this year's report is provided in the Annexure in Part 3. According to data released by *Supreme Court News*,⁵ the High Court

of Allahabad has the highest number of pending cases in the country, with 9,25,084 cases while the High Court of Rajasthan is in the eighth position, with 2,50,824 cases.

Figure 6 compares the average pendency of cases in subordinate courts across all states and UTs. Gujarat has the highest average pendency at 9.51 years, followed by Dadar and Nagar Haveli with 8.79 years. However, in terms of the number of pending cases, Gujarat has 17,49,909 cases while Dadra and Nagar Haveli has 3,548 cases.⁶ Despite having very few pending cases, Dadra and Nagar Haveli has the second highest average pendency in the country. On the other hand, Meghalaya with 7,071 pending cases⁷ has the lowest average pendency of 2.74 years.

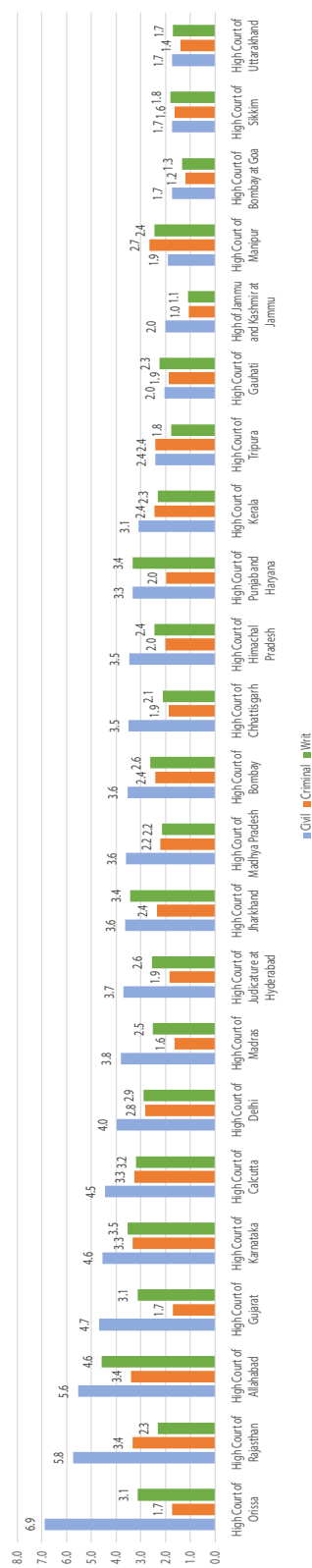
FIGURE 6. Average Pendency in Subordinate Courts



Notes: (i) All values are expressed in years. (ii) For this analysis, all the cases that were pending in the DAKSH database as on 29 August 2017 were considered. (iii) Due to paucity of data Chandigarh, Lakshadweep, and Arunachal Pradesh were not considered.

Figure 7 shows the average pendency of civil, criminal, and writ cases across the High Courts. We can see that civil cases in the High Court of Orissa have an average pendency of 6.9 years, which is higher than in all other High Courts, as well as the highest for any category of cases in all the High Courts.

The High Court of Allahabad has the highest average pendency—4.6 years—for writ cases. In general, civil cases have a higher average pendency than criminal and writ cases in most of the High Courts.

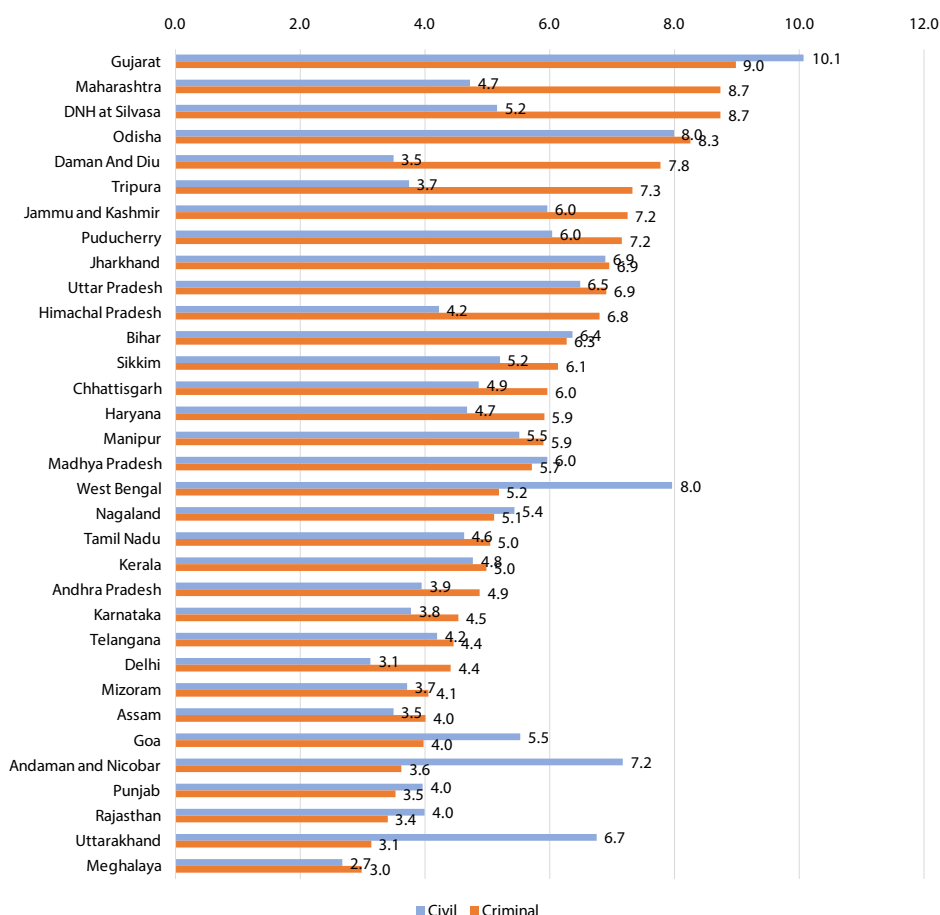
FIGURE 7. Average Pendency of Civil, Criminal, and Writ Cases in High Courts

Notes: (i) All values are expressed in years. (ii) For this analysis, all the cases that were pending in the DAKSH database as on 19 September 2017 were considered. (iii) Due to paucity of data, the High Court of Judicature at Patna, High Court of Gauhati at Aizawl, High Court of Gauhati at Naharlagun, High Court of Meghalaya, and the High Court of Jammu and Kashmir at Srinagar were not considered.

Figure 8 shows the average pendency of both civil and criminal cases in the subordinate courts.⁸ While Gujarat has similarly high average pendency for both civil (10.1 years) and criminal (9 years)

cases, in Maharashtra, the average pendency of criminal cases (8.7 years) is nearly twice that of civil cases (4.7 years).

FIGURE 8. Average Pendency of Civil and Criminal Cases in Subordinate Courts



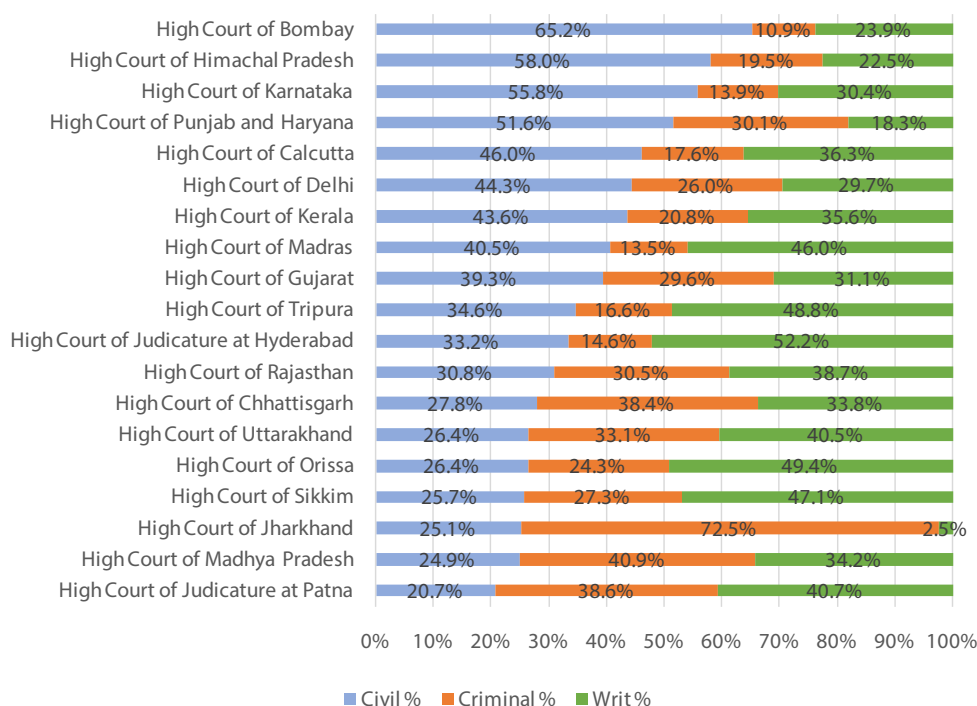
Notes: (i) All values are expressed in years. (ii) 3 per cent of the case types in subordinate courts could not be categorised. (iii) For analysis, all cases that were pending in the DAKSH database as on 29 August 2017 have been considered. (iv) Due to the paucity of data, Arunachal Pradesh, Chandigarh, and Lakshadweep were not considered.

WORKLOAD OF COURTS IN INDIA

In Figure 9, each differently coloured segment corresponds to the proportion of civil, criminal, and writ cases pending in the High Courts. The

High Court of Bombay has the highest percentage (65.2 per cent) of pending civil cases. The High Court of Jharkhand has the highest proportion of criminal cases, constituting 72.5 per cent of its workload.

FIGURE 9. Proportion of Pending Cases in High Courts

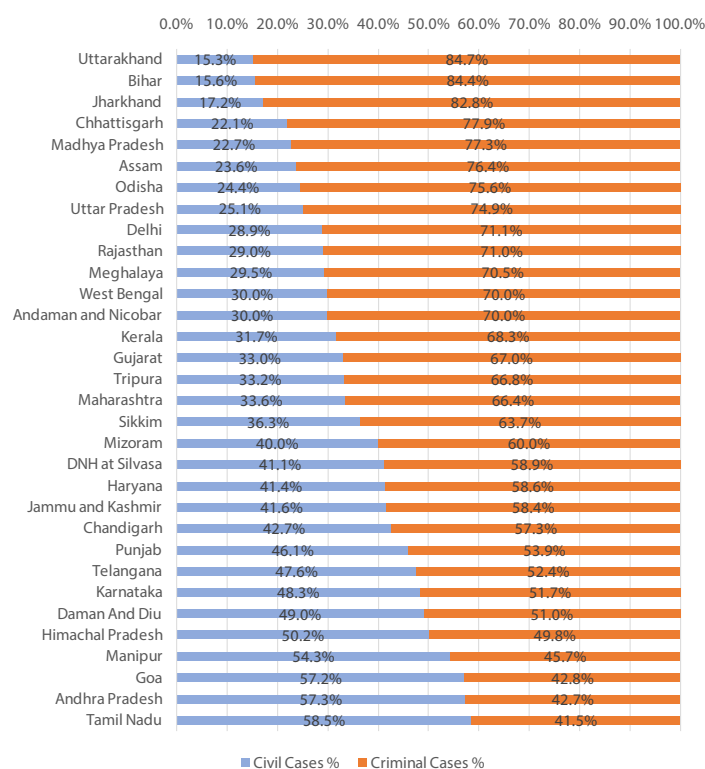


Notes: (i) Data collected from NJDG as on 10 September 2017. (ii) Due to paucity of data, the High Courts of Allahabad, Gauhati, Sikkim, Manipur, and Jammu and Kashmir were not considered.

When we examine Figure 7 (average pendency of civil, writ, and criminal cases in High Courts) and Figure 9 together, we can see that civil cases in the High Court of Orissa constitute 26.4 per cent of the court's workload, but have the highest average pendency in the country with 6.9 years. In the High Court of Rajasthan, criminal cases, which constitute 30.5 per cent of the workload, have the highest average pendency of 3.4 years (along with the High Court of Allahabad).

Figure 10 shows the proportion of pending civil and criminal cases in the subordinate courts of each of the states and UTs. The total number of criminal cases are nearly twice the number of civil cases in the country. The caseload of Uttarakhand is dominated by criminal cases, constituting 84.7 per cent of the total, and is the highest in the country. However, in Tamil Nadu, Andhra Pradesh, Goa, Manipur, and Himachal Pradesh, civil cases constitute more than 50 per cent of the courts' workload.

FIGURE 10. Proportion of Pending Cases in Subordinate Courts



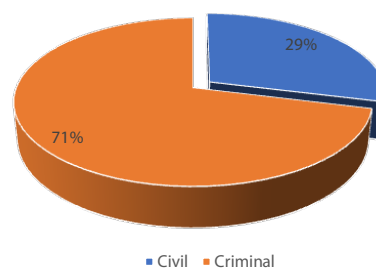
Notes: (i) Data collected from NJDG as on 7 August 2017. (ii) Data for pending cases was not available for the subordinate courts in Arunachal Pradesh, Nagaland, Puducherry, and Lakshadweep.

WORKLOAD OF SUBORDINATE COURTS IN THE NATIONAL CAPITAL, DELHI

Delhi, the National Capital Territory (NCT) of India, is a hub of massive litigation. There are close to five lakh cases pending in all the subordinate courts in Delhi.⁹ In this chapter, we focus on the national capital, given the high number of pending cases, 30 per cent of which have been pending for more than two years.¹⁰

Figure 11 shows the proportion of pending civil and criminal cases in all the subordinate courts in Delhi.

FIGURE 11. Proportion of Civil and Criminal Cases in Subordinate Courts



Note: Data collected from NJDG as on 7 August 2017.

Figure 12 shows the types of cases that constitute a majority of the workload of subordinate courts in Delhi. The 10 case types highlighted in

the figure collectively represent 85 per cent of the courts' workload. Cases registered by the police officials under Section 156 of the Code of Criminal Procedure (CrPC), 1973, which deal with cognisable offences are categorised as Criminal Cases (16.1

per cent of the workload). Individual complaints filed with a magistrate under Chapter 15 of the CrPC are categorised as Complaint Cases (18.2 per cent of the workload).

FIGURE 12. Judicial Workload of Subordinate Courts Categorised by Types of Cases

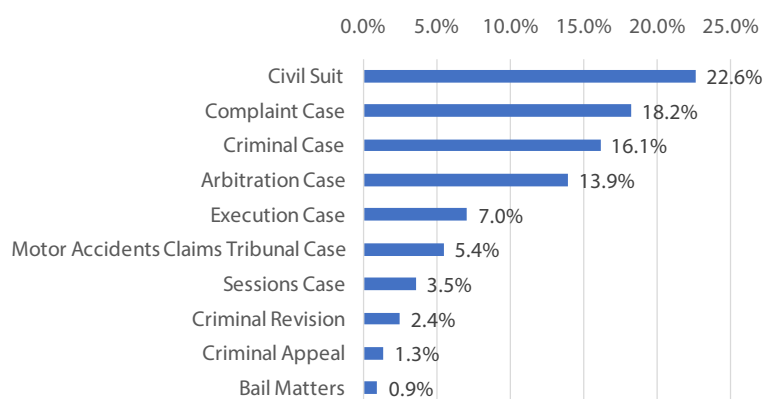
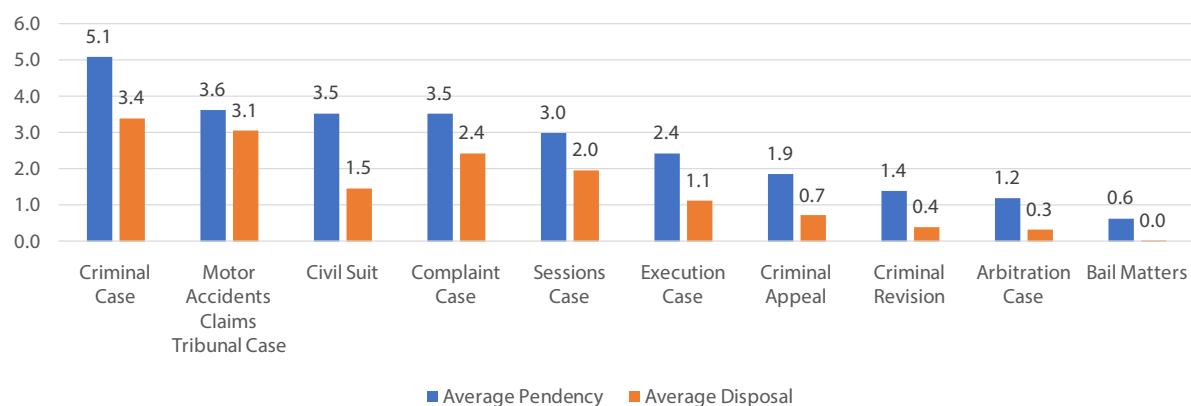


Figure 13 depicts the ageing profile of 10 case types, which collectively constitute 85 per cent of the workload of Delhi's subordinate courts. A comparison is drawn between the average time for which a type of case is pending (average pendency) and the

average time taken to dispose of that particular case type (average disposal). For 90,877 pending cases found in the DAKSH database, the overall average pendency is four years, while average disposal for 2,25,140 cases is two years.

FIGURE 13. Average Pendency and Disposal in Subordinate Courts

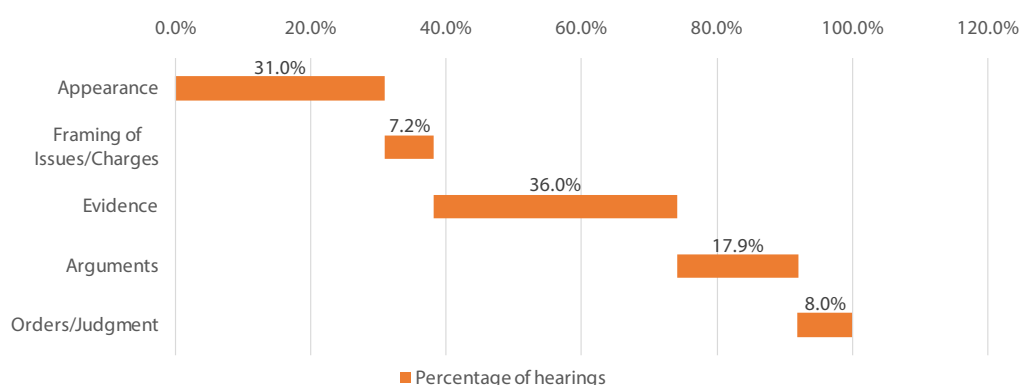


Note: All values are expressed in years.

The case type ‘Criminal Cases’ has the highest average pendency of 5.1 years, and a low average disposal of 3.4 years. Most case types exhibit a similar pattern, with average pendency being higher than average disposal. This shows that cases which are not disposed quickly tend to be pending for a longer duration. This finding is counter-intuitive, leading us to question why certain cases of a specific case type are disposed of quickly, while other cases of the same case type remain pending. These are complex questions that require further in-depth research and investigation.

Figure 14 represents the stage-wise distribution of hearings in the cases filed before the subordinate courts in Delhi. The stage related data provided on the e-Courts website is not uniform. To ascertain the stage-wise distribution of hearings, all the stages were manually standardised and categorised. The evidence stage forms the majority, with 36 per cent of hearings falling in this stage. During recording of evidence, the attendance of not only the parties, but also the witnesses is necessary, failing which proceedings tend to get delayed.

FIGURE 14. Stage-wise Distribution of Hearings in Cases in Subordinate Courts



Note: Both pending and disposed cases in the DAKSH database have been considered for this analysis. There were some stages, for example, ‘formality’, ‘applications’, etc. that could not be included under any of the categories and therefore these have not been included.

The amount of time cases spend at each stage plays a crucial role in determining the progress of the case. We have identified the stage of evidence as a significant milestone to determine the time spent by cases in the courts.

Figure 15 shows the amount of time taken from the first hearing of the case until the stage when

evidence is recorded in the subordinate courts in Delhi. In 50 per cent of cases, it takes 331 days or less to reach the evidence stage from the day when they were first heard in court. The remaining cases take more than 331 days to reach the evidence stage, with one case going up to 4,486 days (12.3 years).

FIGURE 15. Time Taken from First Hearing to Evidence in Subordinate Courts

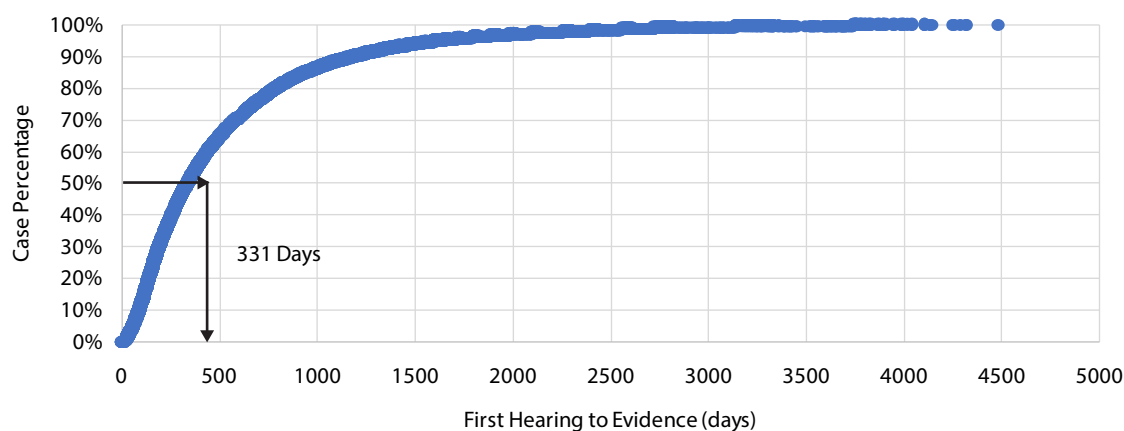
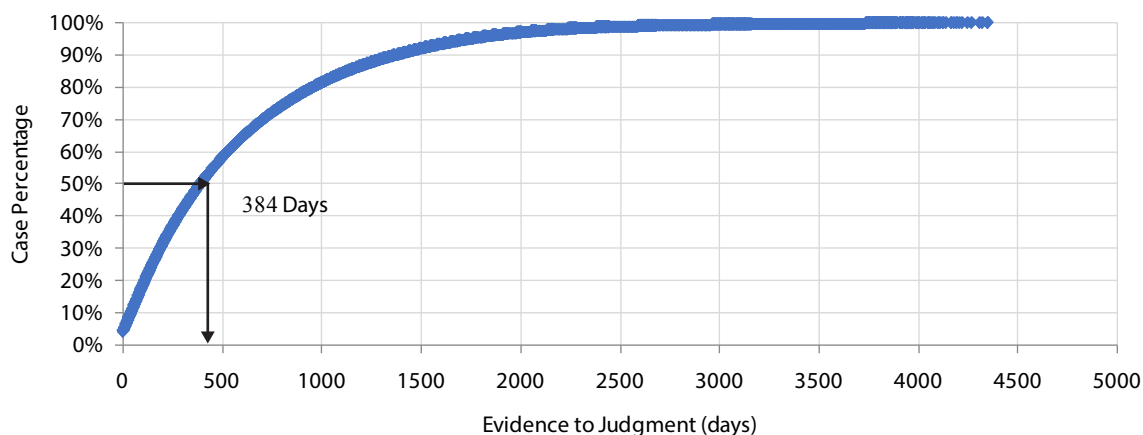


Figure 16 continues the analysis, and provides the complete picture of the life cycle of a case, by portraying the time taken from the evidence stage to the final judgment or order in all cases in Delhi's subordinate courts. In 50 per cent of

cases, there are 384 days or less between the evidence stage and until the final judgment or order is passed. However, in the remaining cases, it takes longer, with two cases going up to 4,350 days (11.9 years).

FIGURE 16. Time Taken from Evidence to Final Judgment in Subordinate Courts



One can note that only 50 per cent of the cases get disposed within two years in the subordinate courts in Delhi. Recommendations of the Malimath Committee¹¹ and the Jagannadha Rao Committee¹²

have set a benchmark of two years within which cases should be disposed by the courts. Therefore, cases that take more than two years to be disposed should be considered as delayed.

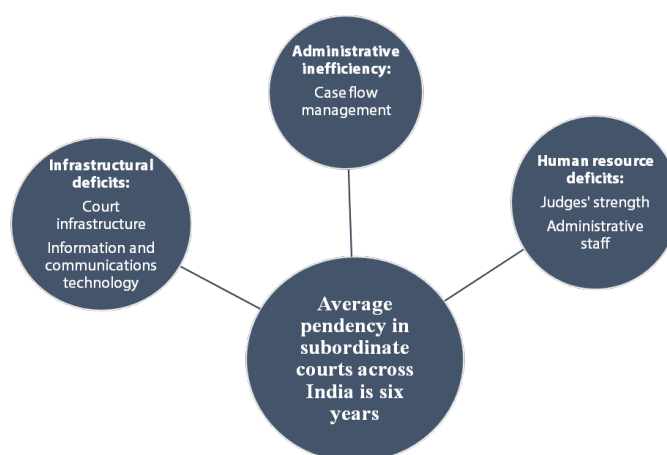
PART 2

UNDERSTANDING MEASURES TO REDUCE PENDENCY

High average pendency in the courts adversely affects the judicial system, as it results in the

accumulation of cases and creation of backlog. In order to resolve these issues, courts must be able to identify causal factors which have a direct impact on pendency. Figure 17 depicts various factors that affect pendency.

FIGURE 17. Factors Affecting Pendency



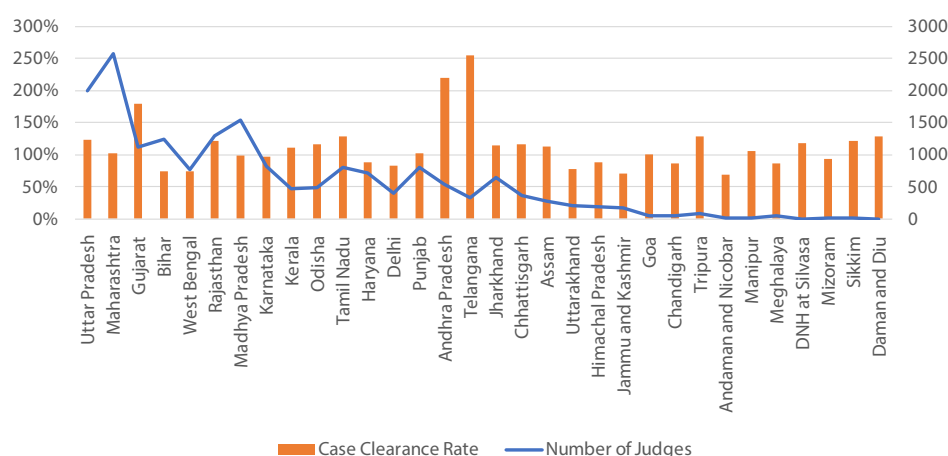
Administrative inefficiency, as well as human resource and infrastructural deficits play a major role in contributing to pendency. Improving these factors will help in combating pendency in the Indian courts.

It is a common notion that courts will have a better rate of disposal if there is an increase in judges' strength. Therefore, the question that arises is to what extent does an increase in judges' strength lead to a better case clearance rate.

Figure 18 shows the relationship between the case clearance rates and the total number of judges

in the subordinate courts across states and UTs. Case clearance rate is calculated by dividing the number of cases disposed during a specified period by the number of cases filed in the same period, and multiplying the result by 100. Case clearance rate thus indicates the rate at which courts dispose of cases. Courts that have a case clearance rate of less than 100 dispose fewer cases than those being filed, thus creating a backlog. In Figure 18, the blue line depicts the case clearance rate, while the orange bars indicate the total number of judges in each state and UTs.

FIGURE 18. Relationship between Case Clearance Rate and Judges' Strength



Notes: (i) Case clearance rate is calculated on number of cases filed and disposed between 9 April 2017 and 9 May 2017, and 7 July 2017 and 7 August 2017. An average of the two rates has been taken. (ii) Data for the pending cases and the number of judges (including vacant courts) in the subordinate courts was taken from NJDG. (iii) Data for pending cases was not available for the subordinate courts in Arunachal Pradesh, Nagaland, Puducherry, and Lakshadweep.

In Figure 18, all the states and UTs have been arranged in the decreasing order of the number of pending cases, with Uttar Pradesh having the highest number of pending cases in the country. It can be seen that states such as Telangana¹³ and Andhra Pradesh,¹⁴ which have a similar number of pending cases, have different case clearance rates. Telangana has 341 judges, however it has a higher case clearance rate than Andhra Pradesh which has 539 judges. Also, Karnataka¹⁵ and Madhya Pradesh,¹⁶ which have a similar number of pending cases but varying judge strength, have an equal case clearance rate of 97. While Madhya Pradesh has 1,547 judges, Karnataka has 819 judges.

There is a weak correlation of 0.05 between case clearance rate and judges' strength in the country. A weak correlation indicates that there is a lower likelihood of a relationship between the two variables.

Although, more judges means a better case clearance rate, it is not a proportionate increase. For instance, in Figure 18, consider Odisha¹⁷ and Tamil Nadu.¹⁸ Odisha, with 497 judges, has a case

clearance rate of 117, while Tamil Nadu, with 812 judges, has only a slightly higher case clearance rate of 127. Thus, the number of judges does not have a significant impact on the case clearance rate.

Day-to-day efficiency primarily determines the rate at which courts clear cases. Increasing judges' strength cannot not be viewed as a standalone measure to address the problem of pendency. Attention must be given to improving systemic efficiency, such as the effective implementation of case flow management rules, in order to reduce pendency in the courts.

There is also a need to improve infrastructure in courts. Apart from improving the physical infrastructure of the courts, governments now realise the importance of providing information and communications technology (ICT) to re-engineer current judicial processes. ICT infrastructure aims at digitisation of services, for example, setting up of kiosks in court halls for efficient dissemination of information or providing an integrated payment gateway for depositing court fees.¹⁹ The National

and Policy Action Plan to implement and improve ICT infrastructure was proposed in 2005.²⁰ As a part of this plan, the High Court of Judicature at Hyderabad was chosen to implement the integrated knowledge management information system. Since the implementation of the plan, there has been a positive impact of ICT infrastructure on the judicial system.²¹

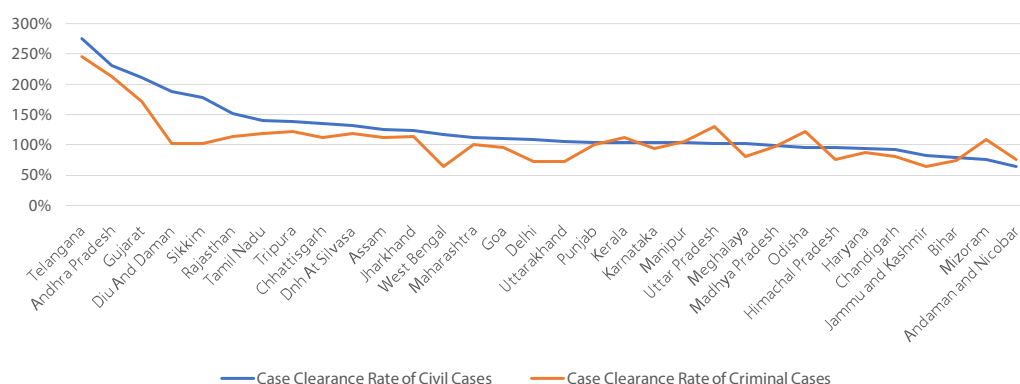
the states and UTs. In the analysis, the civil and criminal cases categorisation has not been carried out by DAKSH. The NJDG specifically provides data on the number of civil and criminal pending cases in the subordinate courts, therefore, all the numbers have been taken from the NJDG.

Overall, the case clearance rate of civil cases is higher than the case clearance rate of criminal cases across all states, leading to the accumulation of a higher number of criminal cases than civil cases in the country.

TRENDS OF CIVIL AND CRIMINAL CASES

Figure 19 compares the case clearance rates of civil and criminal cases in the subordinate courts in all

FIGURE 19. Case Clearance Rates in Civil and Criminal Cases



Notes: (i) Case clearance rate is calculated on number of cases filed and disposed between 9 April 2017 and 9 May 2017, and 7 July 2017 and 7 August 2017. An average of the two rates has been taken. (ii) Data for the pending cases in the subordinate courts was taken from NJDG. (iii) Data on pending cases was not available for subordinate courts in Arunachal Pradesh, Nagaland, Puducherry, and Lakshadweep.

Figure 20 shows the quantum of the population currently fighting a case in court. The percentage of population involved in civil litigation is compared to the percentage in criminal litigation

in subordinate courts in all the states.²² The percentage is calculated as: number of pending cases *2/(assuming each case has a minimum of two parties)/population *100.

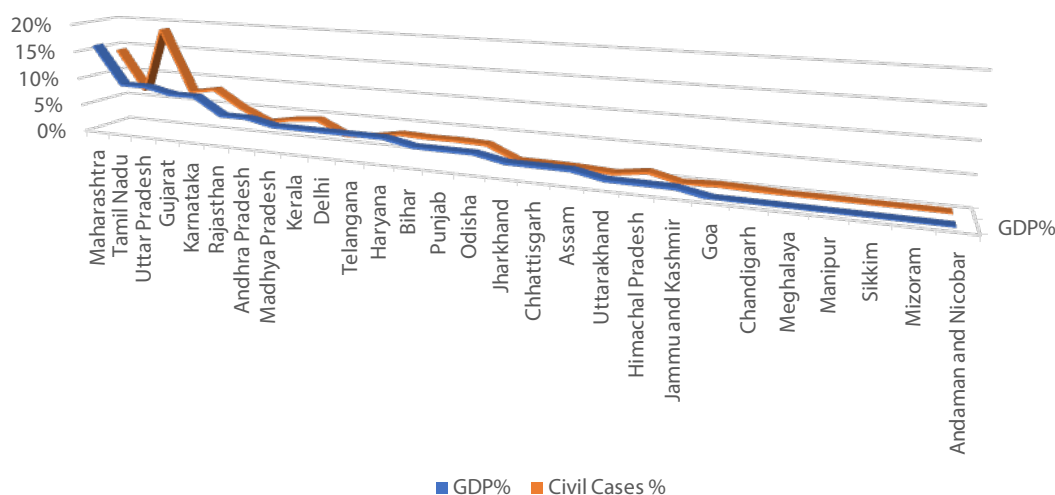
Notes: (i) Data for pending cases in the subordinate courts is taken from NJDG as on 7 August 2017. (ii) Data for pending cases was not available for the subordinate courts in Arunachal Pradesh, Nagaland, Puducherry, and Lakshadweep. (iii) Data for population is taken as per census 2011.

In Delhi 4.7 per cent of the population is involved in criminal litigation, which is the highest in the country. As per the data released by National Crime Records Bureau (NCRB) on crime rates in India in 2015, the rate of cognisable crimes reported in Delhi was 916.8 for every 1,00,000 people, which is also the highest in the country.²³ In Chandigarh and Goa, nearly three per cent of the population is involved in civil litigation, which is much higher than most other states. Barring Goa, Tamil Nadu, Andhra Pradesh, and Manipur, the percentage of people involved in criminal litigation is higher than those involved in civil litigation.

Economic growth can have a direct impact on the litigation activity in a state. Figure 21 compares

the percentage of gross domestic product (GDP)²⁴ contributed by the state or UT to the national GDP and the proportion of civil cases pending in the subordinate courts in each state or UT. The correlation between the contribution to GDP and civil cases is 0.9. A positive correlation value, which is close to one, indicates a strong relationship between two data points. In other words, states that contribute more towards the GDP of the country have a higher percentage of civil cases pending in the country.²⁵ GDP plays a role in determining the growth of civil litigation in the country.²⁶ With the growth in the economic sphere, more people are aware of their rights and approach the courts, hence increasing the overall percentage of civil litigation.

FIGURE 21. Impact of Gross Domestic Product on Civil Litigation



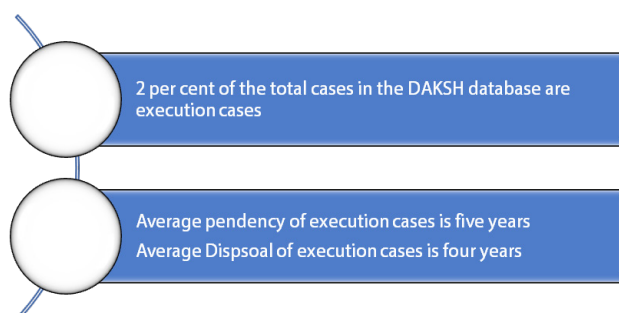
Notes: (i) The data for the number of cases pending in the subordinate courts is taken from NJDG as on 7 August 2017. (ii) Data for pending cases was not available for the subordinate courts in Arunachal Pradesh, Nagaland, Puducherry and Lakshadweep. (iii) Due to paucity of GDP data, West Bengal, Daman and Diu, Dadar and Nagar Haveli, and Tripura were not considered.

COURT ORDER COMPLIANCE — EXECUTION CASES

Execution cases are filed to implement the final order or judgment of the courts. Even after fighting a case for several years, parties who win may

have to approach the court again if they are denied the benefit of the award passed in their favour.²⁷ Figure 22 highlights the average pendency and disposal of execution cases in subordinate courts in the DAKSH database.

FIGURE 22. Average Pendency and Disposal of Execution Cases



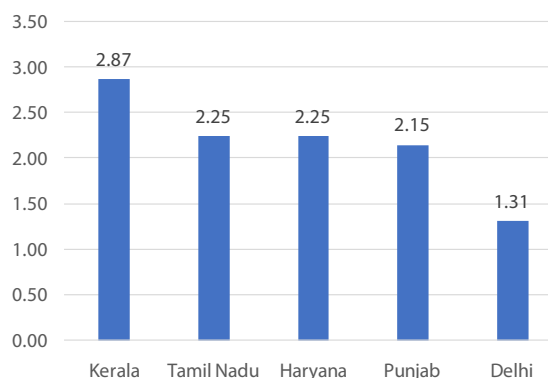
Note: To calculate average pendency and disposal, all the cases in the DAKSH database that were filed between 2010 and 2017 were taken into consideration.

The average time taken to dispose of execution cases is four years. That means that parties spend four years in court, *after* the decision in their favour in the primary case, before they can get the benefit of the final order or judgment. Additionally, execution cases are a strong indicator for determining public trust and confidence in the judiciary. Compliance and non-compliance with court orders indicate the seriousness with which parties acknowledge the decisions of the courts.

Of the total number of execution cases in the subordinate courts in the DAKSH database, 63 per cent of the cases originate from five states, namely, Delhi, Haryana, Kerala, Punjab, and Tamil Nadu.

Figure 23 highlights the average pendency of execution cases in each of these states.

FIGURE 23. Average Pendency of Execution Cases



Notes: (i) All values are expressed in years. (ii) All the execution cases in the DAKSH database filed between 2010 and 2017 in the subordinate courts have been considered.

PART 3

RESEARCH METHODOLOGY AND SAMPLE DESCRIPTION

Figure 5. Average Pendency in High Courts

All cases from the DAKSH database whose current status were *not* marked as ‘disposed’ and ‘dismissed’ were deemed to be pending. All such cases were considered for the calculation of average pendency of cases in the High Courts. Cases whose status was ‘null or blank’ were also considered to be pending and included in the sample. The sample size is therefore 45,51,453 cases.

Average pendency is calculated by finding the difference (in days) between the current date, which in this case was taken to be 19 September 2017 and the date on which the case was filed.

The date of filing is a key piece of data, required to calculate average pendency. There were 32,50,565 cases in which date of filing was not provided. For such cases, we considered the date of filing to be 1 July (middle of the calendar year) of the year of filing provided in the case number. For instance, the filing date for case number SA/1/2015, where the date of filing was not provided, was considered to be 1 July 2015.

Figure 6. Average Pendency in Subordinate Courts

All cases from the DAKSH database whose current status was denoted as ‘pending’ were considered for the analysis. Since there is a uniformity in the current status of cases on the e-Courts website,

identifying pending cases was simple. For this analysis, we had a sample of 17,10,605 cases from 3,364 subordinate courts across the country, based on which average pendency as on 29 August 2017 was calculated.

Average pendency for cases in subordinate courts was calculated by finding the difference in days between the filing date and the current date (similar to the method used for High Courts and described under Figure 5). For the 4,695 cases which did not have a date of filing, average pendency has been calculated based on the registration date.

Figure 7. Average Pendency of Civil, Criminal, and Writ Cases in High Courts

To arrive at the average pendency of civil, criminal, and writ cases separately (from the data set used in Figure 5), it was essential to classify cases based on their case type. Chapter 1 of the *State of the Indian Judiciary: A Report by DAKSH*, published in 2016 (SoJR 2016), titled, ‘Decoding Delay: Analysis of Court Data’, provides details about the manner of classification of cases in the High Courts by DAKSH. Once the classification of cases from the DAKSH database was completed, average pendency for civil, criminal, and writ cases was computed using the same method described in respect of Figure 5. The analysis was carried out on a sample of 45,51,453 cases pending as on 19 September 2017. Less than one per cent of the case types could not be classified and hence, were not considered.

Figure 8. Average Pendency of Civil and Criminal Cases in Subordinate Courts

To determine the average pendency of civil and criminal cases in the subordinate courts, all the cases from the DAKSH database whose current

status was 'pending' were considered, constituting a sample of 17,10,605 cases as on 29 August 2017. For these cases, the case type was extracted from the DAKSH database. Since there was no readily available list of case types with their full forms, a repository of case types and full forms was manually created. Case types were then classified into two categories, namely, civil and criminal. Thereafter, average pendency for civil and criminal cases was calculated in a manner similar to that described for Figure 6.

Around three per cent of the case types could not be classified and hence, they were not considered.

Figure 12. Judicial Workload of Subordinate Courts Categorised by Types of Cases

Case details of all the cases in the DAKSH database for selected subordinate courts in Delhi were extracted. The courts that were considered are:

1. Chief Metropolitan Magistrate, North, RHC (Rohini).
2. Chief Metropolitan Magistrate, North-East, KKD (Karkardooma).
3. Chief Metropolitan Magistrate, South, Saket.
4. Chief Metropolitan Magistrate, South-West, DWK (Dwarka).
5. Chief Metropolitan Magistrate, West, THC (Tis Hazari).
6. District and Sessions Judge, North, RHC (Rohini).
7. District and Sessions Judge, North-West, RHC (Rohini).
8. District and Sessions Judge, South, Saket.

9. District and Sessions Judge, New Delhi, PHC (Patiala House).
10. Senior Civil Judge-cum-RC, East KKD (Karkardooma).
11. Senior Civil Judge-cum-RC, New Delhi, PHC (Patiala House).
12. Senior Civil Judge-cum-RC, North, RHC (Rohini).
13. Senior Civil Judge-cum-RC, North-West, RHC (Rohini).
14. Senior Civil Judge-cum-RC, South, Saket.

The sample consisted of 3,53,461 cases. The cases were categorised based on case type, and the percentage they constituted of the total sample were calculated accordingly.

Figure 13. Average Pendency and Disposal in Subordinate Courts

To calculate average pendency, all cases in the 14 courts chosen for analysis (see Figure 12) whose current status was indicated as 'pending' in the DAKSH database as on 15 September 2017 were considered.

To calculate the average disposal, all cases in the 14 courts chosen for analysis (see Figure 12) whose status was 'disposed' in the DAKSH as on 15 September 2017 were considered. Average days to disposal was calculated by finding the average of the difference (in days) between the date of disposal and the date of filing for all disposed cases.

Figure 14. Stage-wise Distribution of Hearings in Cases in Subordinate Courts

To calculate the stage-wise proportion of hearings in the studied subordinate courts in Delhi,

information from the column titled ‘purpose of hearing’ was extracted from the DAKSH database in all cases, which resulted in a sample of 23,93,905 hearings. Due to paucity of data at the hearings level, data from the court of Senior Civil Judge-cum-RC, East KKD was not taken into consideration.

The column titled ‘purpose of hearing’ records the stages of a case’s progress in the courts. Since there are numerous stages that are recorded on the e-Court’s website that have been collated by DAKSH in the database, the stages were standardised and categorised into five main stages for the purposes of this analysis, namely, appearance, framing of issues or charges, evidence, arguments, and final order or judgment. 0.8 per cent of stages that could not be classified were categorised under ‘others’ and have not been considered in the analysis.

Figures 15 and 16. Time Taken from First Hearing to Evidence and Time Taken from Evidence to Final Judgment, in Subordinate Courts

All cases whose current status was indicated as ‘disposed’ in the DAKSH database for the subordinate courts in Delhi were considered. For this analysis, the time taken was calculated in two parts. First, the number of days between the first hearing of the case and the first hearing on evidence was computed. Second, the number of days between the first hearing on evidence and the disposal date was calculated. Thereafter, all cases were ranked on the basis of time spent between the two events.

Figure 18. Relationship between Case Clearance Rate and Judges’ Strength

The National Judicial Data Grid (NJDG) provides a summary of cases filed and disposed in the previous month for each state and union territory. Data on the number of cases filed and disposed in the subordinate courts was collected at two different intervals—between 9 April 2017 and 9 May 2017 (extracted from the DAKSH database) and between 7 July 2017 and 7 August 2017 (manually entered from NJDG). The case clearance rate for both time periods was calculated separately.

Case clearance rate is calculated by dividing the number of cases disposed during a specified period by the number of cases filed in the same period, and multiplying the result by 100. Thereafter, an average of the two clearance rates was used to carry out the analysis.

The data for the number of judges (including vacant courts) in each of the states and union territories was manually collected from the NJDG on 7 August 2017.

Figure 19. Case Clearance Rates in Civil and Criminal Cases

Data on number of cases filed and disposed in the subordinate courts was collected at two different intervals—between 9 April 2017 and 9 May 2017 (extracted from the DAKSH database) and between 7 July 2017 and 7 August 2017 (manually collected from NJDG). The NJDG provides a summary of civil and criminal cases filed and disposed in the previous month for each state and union territory. The case clearance rate for both time periods

was calculated (as described in the methodology for Figure 18) separately for civil and criminal cases. Thereafter, an average of clearance rates obtained for the two selected periods was used to carry out the analysis.

Figure 20. Percentage of Population Involved in Civil and Criminal Litigation in India

To calculate the percentage of population involved in litigation, two components are necessary: the total number of pending cases in a particular court and the population of the territorial jurisdiction of that court. The total number of cases pending in subordinate courts in each of the states and union territories was obtained from the NJDG on 7 August 2017. The NJDG also provides a distribution of criminal and civil cases pending in each of the states and union territories. Population figures as per Census 2011 were manually collected from the website of the government of India (<http://www.censusindia.gov.in/>).

The percentage of population involved in litigation for civil and criminal cases was calculated using the following formula: number of pending cases multiplied by 2 (assuming each case has a minimum of two parties) divided by total population, multiplied into 100.

Figure 22. Average Pendency and Disposal of Execution Cases

To identify the number of execution cases in the subordinate courts, all subordinate court case types, which began with 'exe' were extracted from

the DAKSH database and manually checked. This method threw up 1,23,766 cases. To calculate average pendency and disposal, only those execution cases that were filed between 2010 and 2017 were included, thus constituting a sample of 96,556 cases.

Figure 23. Average Pendency of Execution Cases

The total number of execution cases filed between 2010 and 2017 in the DAKSH database was a sample of 96,556 cases, of which 60,678 cases were found to be concentrated in five states and union territories, namely, Delhi, Haryana, Kerala, Punjab, and Tamil Nadu.

The average pendency of execution cases in these states and union territories was calculated based on a sample of 16,774 cases in the DAKSH database.

ANNEXURE 1

NUMBER OF CASES CONSIDERED TO CALCULATE AVERAGE PENDENCY

Sl No.	High Court	2016 Report (number of cases)	2017 Report (number of cases)
1.	High Court of Allahabad	1,46,585	6,160,72
2.	High Court of Bombay	68,653	3,06,200
3.	High Court of Bombay at Goa	N/A*	3,788

SI No.	High Court	2016 Report (number of cases)	2017 Report (number of cases)
4.	High Court of Calcutta	69,384	2,57,578
5.	High Court of Chhattisgarh	N/A*	15,680
6.	High Court of Delhi	87,731	1,20,304
7.	High Court of Gauhati	N/A*	28,787
8.	High Court of Gauhati at Aizawl	N/A*	456
9.	High Court of Gauhati at Naharlagun	N/A*	1,856
10.	High Court of Gujarat	99,883	2,15,845
11.	High Court of Himachal Pradesh	9,149	37,789
12.	High Court of Jammu and Kashmir at Jammu	N/A*	5,569
13.	High Court of Jammu and Kashmir at Kashmir	N/A*	2,484
14.	High Court of Jharkhand	53,227	1,46,515
15.	High Court of Judicature at Hyderabad	2,26,997	6,18,495
16.	High Court of Judicature at Patna	97,223	2,31,718
17.	High Court of Karnataka	2,55,973	1,91,861
18.	High Court of Kerala	1,33,538	3,44,287
19.	High Court of Madhya Pradesh	71,678	2,78,438
20.	High Court of Madras	84,570	4,50,834
21.	High Court of Manipur	N/A*	5,341
22.	High Court of Meghalaya	N/A*	1,278
23.	High Court of Orissa	49,280	1,39,471
24.	High Court of Punjab and Haryana	96,736	3,04,609

SI No.	High Court	2016 Report (number of cases)	2017 Report (number of cases)
25.	High Court of Rajasthan	44,950	1,62,700
26.	High Court of Sikkim	90	410
27.	High Court of Tripura	2,247	11,080
28.	High Court of Uttarakhand	9,663	52,008

* Data from these courts were not available on the DAKSH database last year, and hence were not considered in the 2016 report.

Notes

- The authors wish to thank Surya Prakash B.S. for his comments.
- See http://ecourts.gov.in/ecourts_home/ (accessed on 17 October 2017).
- Data for the analyses carried out here was collected from the NJDG and the DAKSH database between 29 March 2017 and 21 September 2017.
- The NJDG's website is available online at http://njdg.ecourts.gov.in/njdg_public/main.php (accessed on 17 October 2017).
- For detailed methodology of calculation, refer to Part 3 of this chapter.
- Supreme Court of India. 'July to September, 2016', *Court News*, 11(3): 8. Available online at http://supreme-courtfindia.nic.in/pdf/CourtNews/2016_issue_3.pdf (accessed on 19 October 2017).
- Data collected from NJDG as on 7 August 2017.
- Data collected from NJDG as on 7 August 2017.
- Kishore Mandyam, Harish Narasappa, Ramya Sridhar Tirumalai, and Kavya Murthy. 2016. 'Decoding Delay: Analysis of Court Data', in Harish Narasappa and Shruti Vidyasagar (eds.), *State of the Indian Judiciary: A Report by DAKSH*, pp. 3–24. Bengaluru: DAKSH and EBC. Available online at http://dakshindia.org/state-of-the-indian-judiciary/11_chapter_01.html#_idTextAnchor009 (accessed on 17 October 2017).

9. Data collected from NJDG as on 12 August 2017.
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13. As per data collected from NJDG, Telangana had 3,89,686 pending cases on 7 August 2017.
14. As per data collected from NJDG, Andhra Pradesh had 4,47,531 pending cases on 7 August 2017.
15. As per data collected from NJDG, Karnataka had 13,32,792 pending cases on 7 August 2017.
16. As per data collected from NJDG, Madhya Pradesh had 13,39,716 pending cases on 7 August 2017.
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26. Sital Kalantry, Theodore Eisenberg, and Nick Robinson. 2013. 'Litigation as a Measure of Well-Being', *DePaul Law Review*, 62(2): 247–292.
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Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts

Harish Narasappa

Abstract

In this chapter, the author identifies and recommends essential steps that need to be taken to address the problem of delay and pendency in the subordinate judiciary, which are based both on analysis of data collected by DAKSH as well as interactions with members of the higher judiciary. The author says that appointing dedicated administrative personnel, managing cause lists, and using technology are crucial to reduce uncertainty of hearings and maximise judicial time, and must be put in place at the earliest.

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Over the last few years, DAKSH has closely studied delay in the disposal of cases and the enormous backlog faced by the judiciary. Apart from gathering and analysing data relating to cases, we have interacted with several judges—both from the higher judiciary and the subordinate judiciary, registrars, court clerks, and other officers working in the registry and discussed this problem with them. In this brief chapter, I identify certain essential steps that I believe need to be taken to address the problem of delay and pendency in the subordinate judiciary.

CREATING A CADRE OF DEDICATED SENIOR ADMINISTRATIVE PERSONNEL

A fact that is obvious to any serious student of the judicial system is the cottage-industry approach to administering the system. The Constitution vests the power and responsibility to administer the judiciary in each state in the office of the Chief Justice

of the High Court of that state. The Chief Justice is also a full-time judge, generally from out of the state, appointed on the basis of his seniority in the higher judiciary and his skills as a judge. Other senior judges in the High Court (who are also full-time judges) assist the Chief Justice by sitting in various committees that are constituted by the Chief Justice in his discretion.¹ There are no published rules for either the constitution or functioning of such committees. The registry at each High Court is headed by a Registrar General and other Registrars, Joint Registrars, and Assistant Registrars who are responsible for the day-to-day functioning of the High Court and sometimes, the subordinate judiciary. Each of these senior officers is also a judge from the subordinate judiciary, who has been posted to the High Court registry for a period of time. Some of them go on to become High Court judges, while others return to serve as subordinate judges. The primary skill set of each these officers is that of a judge. None of them has any administrative skills, except those that they learn on the job and through ad hoc short-term training programmes at various judicial academies. This is shocking, as the judicial system is now a complex one with many intricate processes that need constant monitoring. There is an urgent need to create a cadre of senior administrative personnel to take charge of the administrative functions of the judiciary.

There are three kinds of problems—time, skill, and process implementation. Not enough time is spent on administration of the judiciary. All decisions pertaining to the subordinate judiciary have to be taken by the Chief Justice, assisted by one of the committees. The Chief Justice and the other High Court judges, being full-time judges, focus on administrative issues only when time permits. Consequently, administrative matters do not get the attention they deserve.

Neither the High Court judges nor the senior registrars, who are subordinate court judges, have

the necessary skills to administer a complex judicial system. Administering the judicial system requires knowledge of and ability in information technology processes, human resource management, qualitative and quantitative analytical tools, infrastructure management, and customer service skills. These skills need to be learnt, both in classrooms and by practice over time. A system filled with part-timers whose attention is focused on another job has very little chance of excelling, or even achieving competence, in these aspects.

This lack of time and skill affects the implementation of every good idea proposed to reform the judiciary. Over the last two decades, several policy decisions have been taken by the higher judiciary and the government to improve the efficiency of the subordinate judiciary and reduce the severe backlog. However, on the ground, nothing much appears changed, since lack of, or poor, implementation has plagued all these efforts. Let us take two examples. The Supreme Court in *Salem Advocate Bar Assn. (2) v. Union of India*² mandated the framing and implementation of case flow management rules. This order was passed in 2005, and 12 years later, only 14 High Courts have notified the subordinate court case flow management rules.³ Such of those High Courts which have drafted and gazetted the rules have not implemented the rules in practice. A good policy, which was the outcome of a judicial proceeding, has in effect been ignored due to the inability of the High Courts and the subordinate judiciary in implementing it.

Similarly, directions given by the Supreme Court on the judicial side have also not been implemented due to the lack of support on the administrative side. For instance, in March 2017, the Supreme Court passed an order in *Hussain v. Union of India*⁴ prescribing guidelines for High Courts and subordinate courts on disposing criminal cases speedily, including bail petitions and treatment of cases involving undertrial prisoners. The order directed

High Courts to frame rules for subordinate courts to enable implementation of the principles declared by the Supreme Court. The Court itself noted that most of the guidelines that it had prescribed in the case had already been set out in earlier cases⁵ repeatedly, but no difference was being seen in the daily functioning of the subordinate judiciary.

Implementing the Supreme Court's orders requires efficient day-to-day functioning of the subordinate courts, and in particular, maximising a judge's time on a daily basis for making decisions. Currently, the institutional mechanism that supports the judge is not geared to assist her in managing her time in court better. It is this reality that has resulted in the inability of High Courts to effectively implement the case flow management rules and the guidelines mentioned above. Capacity has to be developed to enable judges and administrative staff to use technology and management processes to make their day more efficient. Unfortunately, at the moment, neither the subordinate courts nor the High Courts have such capacity. Creation of a full-time senior administrative cadre for the judiciary is inevitable and needs to be done at the earliest.

Appointment of full-time administrators is a decision that can be taken by the Chief Justice of each High Court. It does not require elaborate approvals by different institutions. In other countries, significantly the United Kingdom, on whose courts our courts are modelled, there exists a full-time administrative body to administer the judiciary. After the enactment of the Constitutional Reform Act, 2005, the administration of the Supreme Court is supervised by the chief executive, a non-ministerial statutory office. The administration of all other courts and tribunals in the United Kingdom is carried out by an organisation named Her Majesty's Courts and Tribunals Service in the Ministry of Justice.⁶

MAXIMISING JUDICIAL TIME

The judicial system has to empower subordinate judges to deliver timely justice. Steps need to be taken to maximise judicial time in order to give judges enough time to get through their day's work. In a time and motion study carried out by DAKSH,⁷ it was found that between 45 and 55 per cent of court time is spent on non-substantive issues, such as re-issuing summons, fixing dates for future hearings, and similar case administration decisions.⁸ Delegating these functions to an administrative officer will give every judge nearly double the time each day for dealing with substantive matters and can significantly improve day-to-day efficiency.

The case flow management rules notified by most High Courts already provide for such delegation. However, this has not been implemented successfully because the registry in the subordinate courts does not have suitable officers who can deal with these issues authoritatively. An immediate step that can be taken is to appoint retired district judges for a period of two years to deal with the procedural matters in the registry. This will ensure that proper procedure is followed during the initial period of implementing the case flow management rules and also help the subordinate courts to evolve an efficient longer-term process to deal with administrative matters. With all subordinate courts now linked through the e-courts website, it is possible to leverage the technology to deal with most of the procedural hearings outside court time. Until the stakeholders in the system get comfortable with using technology, and suitable officers in the registry are appointed to deal with procedural issues, retired judges can help usher in the new system.

BRINGING CERTAINTY TO EACH HEARING

Any regular visitor to the courts is aware that uncertainty is the name of the game each day. Although a case may be listed on a particular day for a certain stage (and sometimes only after great effort by the lawyer/party), there is no assurance that a case will make progress on that date. There are many reasons why this happens: the judge may have too many matters listed that day, a witness who has to be cross-examined may not be available, the lawyer who needs to conduct the cross-examination may not turn up, the judge may not turn up or may not want to hear the case that day even if sufficient time is available, the files of the case may not come to the court hall from the registry ... the list goes on. Practising lawyers have an endless list of the reasons they encounter in court which results in the case not proceeding. This uncertainty extends even to stages where only lawyers and judges are involved, for example, during written or oral arguments in the case, and not just stages where other people such as doctors, police officers, or witnesses are involved. Unless this uncertainty is removed from the equation and hearings are effective on each date, there is no hope for reducing delays or pendency.

In a comparative study conducted by DAKSH to analyse reasons for delay in High Courts and subordinate courts, a total of 91,797 hearings for 6,167 cases were examined across 12 courts. It was found that for 40 per cent of the 91,797 hearings, other than the date of hearing, absolutely no additional information on proceedings during the hearing had been provided. Of the hearings for which information was available, 47 per cent were adjournments. The reasons for adjournment were varied and attributable to all the actors in the system, including the judge, parties to the case, advocates, witnesses, and

court administrators. This enormous uncertainty needs to be eliminated.

MANAGING CAUSE LISTS

As per data from the DAKSH database, the average number of cases listed each day before a subordinate court judge in India is 87. This is far too many, given that a judge sits in open court for only about five-and-a-half hours. This means that, on average, judges have a little more than three-and-a-half minutes to spend on each case. The long list and the pressure to hear each listed case affects the fundamental concept of a fair hearing. Listing a large number of matters daily puts judges under severe stress, thus not allowing them to perform optimally. If judges are given lesser time to hear matters and write orders or judgments, the quality of such orders or judgments will naturally be affected adversely. While considering the number of cases to be listed daily, the courts should also consider the daily workload of judges and the amount of time a judge needs for each hearing. Further, listing a large number of cases means that uncertainty increases, as everyone knows that the judge has to adjourn at least 50 per cent of them, as she simply cannot proceed with all of them.

While some judges manage their cause list well by ensuring that they do not list too many matters, the majority of the judges do not list matters in a scientific manner. As every date of hearing is arrived at after a round of negotiations between the judge and the lawyers, without much consultation of the calendar of all parties involved, most hearings are scheduled in an ad hoc manner, adding to the uncertainty of proceedings. A uniform method of fixing dates for hearings in compliance with

the case flow management rules is a good place to start to bring certainty to the proceedings and as a means to manage cause lists.

USING TECHNOLOGY

There has been considerable effort by the government and the judiciary to use technology in the functioning of the judiciary. The e-courts project has ensured that case information and data, although limited, from nearly all of India's courts are available online. However, currently, technology is being used as a reporting mechanism only and not as a tool to bring efficiency into the court process.⁹ Merely moving processes from paper mode to digital mode is not going to help improve efficiency. Steps must be taken to integrate the digital mode into the legal process, and vice versa, to ensure that technology benefits the legal process. A simple example is to integrate the allotment of dates and cause list management into the e-courts system based on all the cases that each judge deals with, the time available, the stage at which a case is being heard, and so on. Currently, judicial data is available as standalone pieces of information, and not in a collated form that will help in improving systemic efficiency.

Some recent initiatives suggest that there is a movement towards achieving this integration. The Karnataka Appellate Tribunal (KAT) is working on digitising its case records and adopting a new technological model to enable the effective tracking of case progress and allocation of workload between benches of the KAT.

Another initiative, which aims to use technology to improve efficiency, is the National and Policy Action Plan to implement and improve information and communication technology

(ICT) infrastructure.¹⁰ In 2016, Justice Naveen Rao's court hall in the High Court of Judicature at Hyderabad was the first court in the country to be chosen under the plan to go paperless and use the integrated knowledge management information system. The system is designed to integrate various stakeholders, such as police stations, with courts, jails, prosecution, and forensic science laboratories.¹¹

INTERNALISING LEGAL PROCESS IN DAY-TO-DAY HEARINGS

Judges in the subordinate judiciary have to internalise the legal process, not only the Civil and Criminal Procedure Codes, but also the several directions, rules, and regulations issued by the Supreme Court and High Courts. This may appear a strange point to be making, since judges are presumed to be well-versed with the legal process, given that the conduct of a judge and the cases she hears are both governed by minute and intricate procedures enshrined in statutes. However, there is a difference between being well-versed in procedure and internalising the purpose and spirit of such procedure. I will illustrate this problem with an example.

Judges fail to record complete details of proceedings properly in the order sheet. As mentioned previously, DAKSH conducted a project to analyse reasons for delay in High Courts and subordinate courts. It was found that of the 91,797 hearings analysed, 37,043 (40 per cent) were unrecorded hearings, where no information about proceedings during the hearing were provided. Further, in an additional 7.25 per cent of the hearings, which were recorded as adjournments, no reason was given for the grant of adjournment. This shows that judges are operating in contravention of the Code of Civil

Procedure, 1908, which expressly states in Order 17 Rule 1 that reasons for adjournment must be recorded in writing by the judge. Unless judges operate the process in accordance with procedure, there is no chance of improving efficiency and addressing delay and backlog.

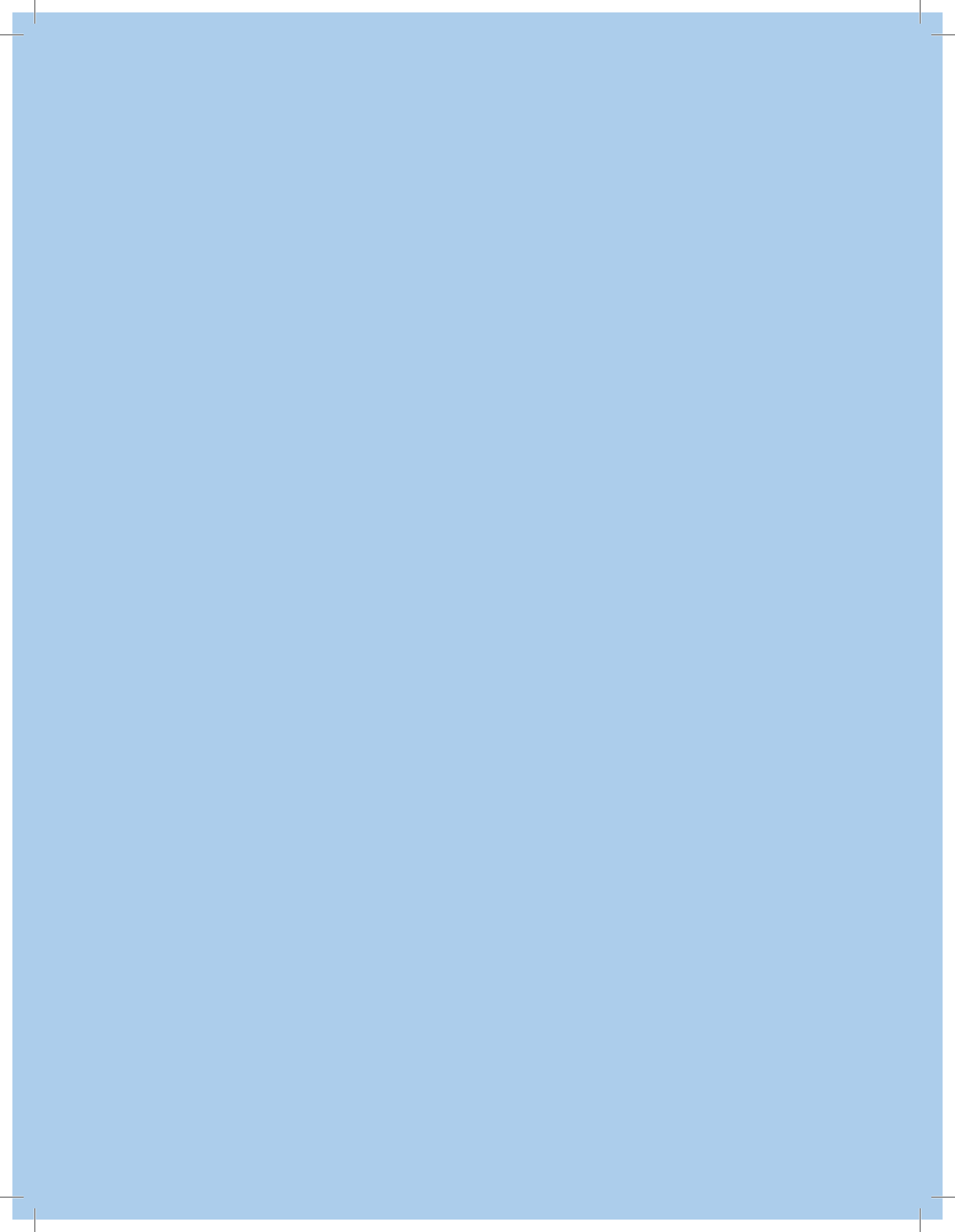
Judicial delay and the resulting pendency and backlog is a multifaceted problem and cannot be tackled by isolated efforts. It requires institutional will and commitment, something that the judiciary has only shown in rhetoric rather than action. For the rhetoric to translate into meaningful action, all of the above steps, in addition to others, need to be taken fairly quickly. They have to be carefully calibrated and can be tried out in pilot projects in various parts of the country before being implemented across all states.

Notes

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2. (2005) 6 SCC 344.
3. Seven High Courts have also enacted case flow management rules for High Courts.
4. (2017) 5 SCC 702.
5. *Hussainara Khatoon (3) v. State of Bihar*, (1980) 1 SCC 93; *Abdul Rehman Antulay v. R.S. Nayak*, (1992) 1 SCC 225; *Akhtari Bi v. State of M.P.*, (2001) 4 SCC 355; *Bhim Singh v. Union of India*, (2010) 5 SCC 538; *Imtiyaz Ahmad v. State of U.P.*, (2012) 2 SCC 688; *Thana Singh v. Central Bureau of Narcotics*, (2013) 2 SCC 590.
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SECTION THREE

**PROBING PENDENCY
AND PERFORMANCE
OF COURTS**



Promise to Pay: An Analysis of Cheque Dishonour Cases

Ramya Sridhar Tirumalai

Abstract

Section 138 of the Negotiable Instruments Act, 1881 deals with the dishonour of cheques in India. There are a large number of cases filed under this section, and these cases are clogging the courts. In this chapter, the author examines in depth the behaviour of cheque dishonour cases in the Indian courts, by looking at data from the DAKSH database across India's courts. She finds that resolution in most cases is delayed well beyond statutorily prescribed time-lines, and that certain banks and financial institutions are frequent complainants. The author makes some recommendations for a more efficient method of solving these disputes, in terms of both steps that credit organisations may take to prevent habitual defaulters from issuing cheques, as well as expediting court processes.

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Although it is known that the challenges the Indian judiciary faces are numerous, few (if any) details are known about the problem of delay in the Indian judicial system.¹ Cases relating to the dishonour of cheques represent an identified, yet unexplored black hole in this ocean of cases. Section 138 of the Negotiable Instruments (NI) Act, 1881 deals with the offence of the dishonour of a cheque for insufficiency of funds in the account on which the cheque is drawn. According to the *213th Law Commission Report*² and several newspaper reports, there are between 38 and 40 lakh³ cheque bounce cases, choking the justice delivery system in the country, which makes it clear that this single category of cases constitutes a solid portion of all pending cases in the judicial system.

Both the higher judiciary and the legislature have expressed concern at this phenomenon and reiterated the need to implement mechanisms for the speedy disposal of cases under Section 138 on numerous occasions. Given the commercial nature of these cases, delay in the disposal of cheque bounce cases affects trade and commerce as well. In his speech to the Indian Parliament, while introducing the Annual Budget for the year 2017–2018, Finance Minister Arun Jaitley spoke about the need to reduce the time taken to redress cheque bounce cases, remarking on the complexity of the litigation process and the length of time traders have to spend in litigation in order to recover money.⁴

In this chapter, I attempt to examine and understand the behaviour of cheque bounce cases within the Indian judicial system and make recommendations for a more efficient method of solving these disputes.

WHAT IS A NEGOTIABLE INSTRUMENT?

The law of negotiable instruments is not specific to India; it is a body of laws pertaining to commerce and commercial transactions worldwide. The term ‘negotiable instrument’ applies to any written statement given as security, usually for the payment of money, which may be transferred by endorsement or delivery, vesting in the party to whom it is transferred.⁵ One of these is a cheque, whose use (and misuse) is governed by Section 138 of the NI Act.

The NI Act was passed into law more than 130 years ago in 1881. However, Chapter XVII, comprising Sections 138 to 142, dealing with the dishonour of cheques, was added to the NI Act much more recently, by an amendment in 1988.

Key Elements of Section 138

To constitute an offence under Section 138 of the NI Act, the following elements need to be fulfilled:

1. A cheque should have been issued by the payer for the discharge of a debt or other liability.
2. The cheque should have been presented or deposited by the payee within a period of six months from the date of drawing of the cheque or within the period of validity of the cheque, whichever is earlier.
3. The payee should have issued a notice in writing to the payer within 30 days of receipt of information regarding the return of the cheque as unpaid from the bank.
4. The payer should have failed to pay the cheque amount within 15 days of receipt of the said notice from the payee.
5. If the payer has not paid the cheque amount, the payee should have filed a complaint within one month from the date of expiry of the grace period of 15 days. The complaint should be filed before a Metropolitan Magistrate or a Judicial Magistrate of the First Class. (The court may take cognisance of a complaint after the prescribed period if the payee provides a satisfactory reason for the delay.)

The key ingredient for registering an offence under Section 138 of the NI Act is a failure of the payer to make payment within 15 days of the service of the notice. If payment is made within the said period, no offence is committed, but in the case of failure, the offence is perpetrated. Even payment a single day after the completion of the notice period will attract prosecution under Section 138.

If a person is convicted under Section 138 of the NI Act, he or she is punishable with two years' imprisonment, or a fine, or both. As per the First Schedule of the Code of Criminal Procedure (CrPC), 1973, cases filed under Section 138 are non-cognisable and bailable.

CRIMINALISATION OF CHEQUE DISHONOUR CASES

As far as the history of the NI Act goes, the criminalisation of dishonour of cheques is a relatively recent addition. Prior to the insertion of Section 138, there were civil and alternative dispute resolution (ADR) remedies for dishonoured cheques. Both of these remedies still exist. The civil remedy for a dishonoured cheque means filing a case for the enforcement of a contract. As is the case with separate criminal remedies, Section 138 does not preclude the institution of a civil suit and civil remedies are still available to the payee.

ADR methods can also be used for the resolution of cheque bounce cases. Criminal compoundable cases can be referred to Lok Adalats under the Legal Services Authorities Act, 1987.⁶ News reports⁷ state that this is how a large number of pending cheque bounce cases have been recently resolved.

Criminal liability of the payer of a dishonoured cheque also exists outside the NI Act. Other remedies based in criminal law are to initiate proceedings against the payer under Sections 406 (criminal breach of trust) and 420 (cheating) of the Indian Penal Code (IPC), 1860. It is possible to carry on proceedings under the IPC and the NI Act⁸ in parallel without falling under the double jeopardy rule defined in Article 20(2) of the Constitution of India.

According to the Law Commission of India,⁹ the reason for the amendment and insertion of Section 138 was the rampant dishonour of cheques, which had rendered cheque transactions problematic. This mistrust of cheques encouraged a move towards cash transactions which brought a host of their own problems, such as counterfeit notes, corruption, and large amounts of untraceable and untaxable money. It was against this background that the provisions criminalising the dishonour of cheques were inserted into the NI Act,¹⁰ with the intent of giving cheques credibility and people a method to solve related disputes. What sets Section 138 apart from existing criminal provisions is that there is no need to prove *mens rea* or the intent of the payer to not pay the promised amount. However, offences under Sections 406 and 420 of the IPC are treated as cognisable and non-bailable, unlike offences under Section 138.

In the following sections, I seek to understand and analyse how cases filed under Section 138 fare in the courts.

ANALYSIS OF CASES

Methodology

To understand how cases filed under Section 138 of the NI Act move through the courts, an empirical analysis was carried out and a total of 67,433 cases filed in 146 subordinate courts across 21 states were examined. These cases were filed between 1980 and 2015, with 95 per cent of them being filed between 2005 and 2015. These cases, along with their details, were identified and extracted from the DAKSH database. The DAKSH database,¹¹ which is freely accessible, is the largest of its kind in India. It collates publicly available data on cases pending before courts in India.

To identify the cases, I specifically searched for Section 138 of the NI Act in the data fields of Act/legislation name and section number. After the details of these cases¹² were extracted, a verification was carried out on a randomised set of cases by checking the case status page of the corresponding court website to ensure the details extracted from the DAKSH database were correct.

Table 1 shows the details of the cases analysed. Of the 67,433 cases, 27,925 cases were pending and 39,508 cases were disposed.

TABLE 1. Details of Cases Analysed

State	Total cases analysed	Pending cases	Disposed cases
Andhra Pradesh	12,165	5,083	7,082
Assam	483	196	287
Bihar	34	25	9
Chhattisgarh	15,819	9,655	6,164
Gujarat	1,313	359	954
Haryana	5,173	2,596	2,577
Himachal Pradesh	1,146	773	373
Jammu and Kashmir	105	71	34
Jharkhand	479	311	168
Karnataka	1,100	289	811
Kerala	8,377	545	7,832
Maharashtra	8,750	2,344	6,406
Odisha	49	49	0
Punjab	661	312	349
Rajasthan	1,418	517	901
Sikkim	5	1	4
Tamil Nadu	735	39	696

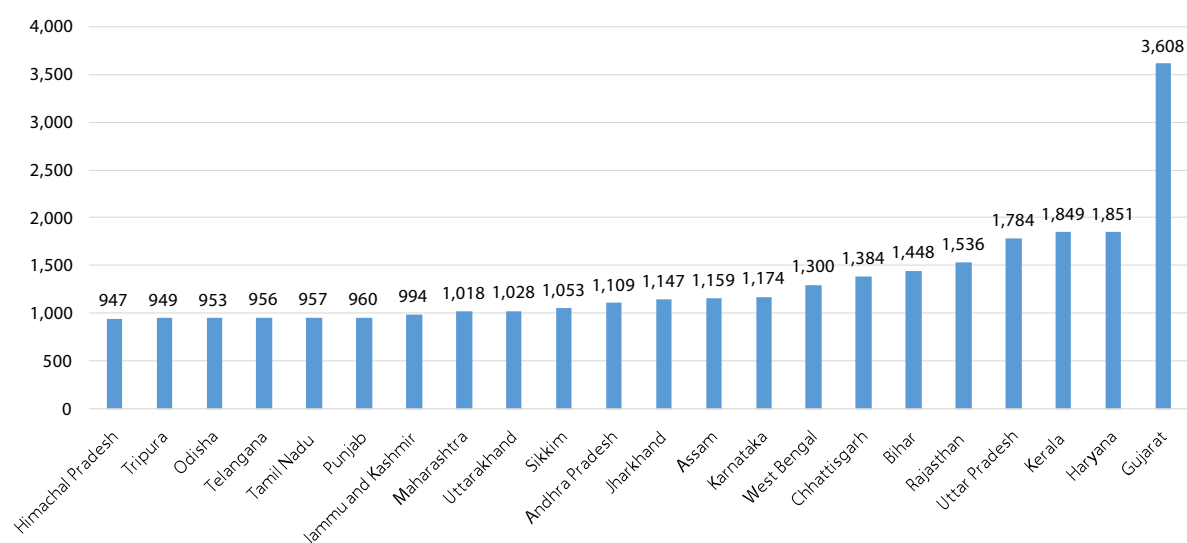
State	Total cases analysed	Pending cases	Disposed cases
Telangana	5,178	1,348	3,830
Tripura	145	72	73
Uttar Pradesh	2,621	2,456	165
Uttarakhand	1,275	582	693
West Bengal	402	302	100

What Do the Numbers Say?

On analysing these cases, it was found that (on an average), cases filed under Section 138 of the NI Act were pending in the subordinate courts for 1,326 days, which is a little more than three years and seven months.¹³ While this number is considerably lesser than the overall average pendency of subordinate court cases in the DAKSH database, which stands at 2,210 days (approximately six years), it is by no means an ideal duration for these cases.¹⁴ Section 143 of the NI Act states that judges should make all possible endeavours to complete trials pertaining to cheque bounce cases within six months from the date of the complaint. The average pendency of the cases analysed is almost six times this.

Figure 1 shows the average number of days a case under Section 138 has been pending by comparing the data from 21 states represented on the DAKSH database. The highest average pendency is seen in Gujarat, with cases pending on average for 3,608 days (a little less than 10 years), whereas Himachal Pradesh has the lowest average pendency of 967 days (nearly two years and nine months). Even the court with the lowest pendency has well overshoot the time prescribed in the NI Act by two years and three months.

FIGURE 1. State-wise Representation of Average Pendency of Cheque Dishonour Cases



Note: Pendency is shown in days.

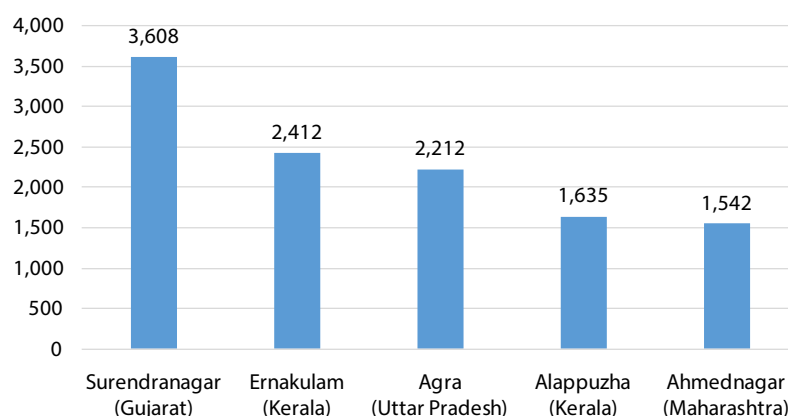
It is also relevant to note that these cases are not merely pending, but also delayed. The Law Commission of India has distinguished these two concepts in its 245th report,¹⁵ where it has clarified that pendency refers to all cases that have not been disposed of, irrespective of when they were filed, whereas delayed cases are those that have been in the judicial system for a longer duration than the normal time that such cases should have been.

Benchmarking what would constitute ‘normal time’ for a case filed under Section 138 is simple, since the NI Act itself states that all trials pertaining to cheque bounce cases should be conducted as

expeditiously as possible and be concluded within six months from the date of filing of the complaint. It is very clear therefore that not only are huge numbers of cheque bounce cases pending in the Indian courts, they are also delayed in courts across the country.

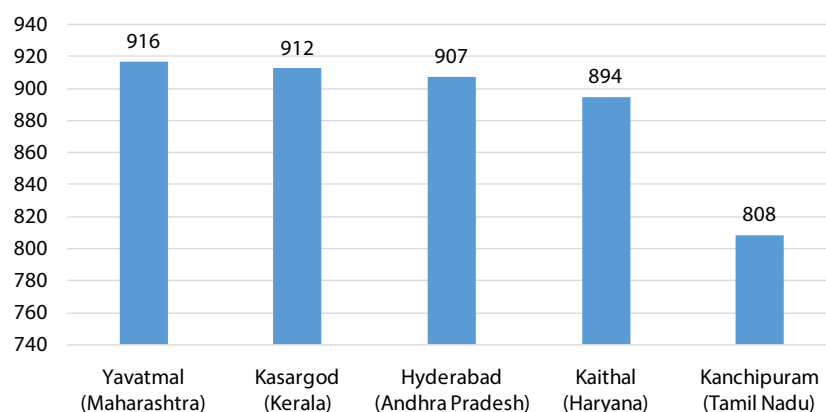
In order to understand the problem of delay at a more granular level, the pendency of these cases was calculated at a district level. The cases came from 144 districts across 21 states. There was not a single district where the average pendency was less than two years. Figures 2 and 3 show the districts with the highest and lowest pendency, respectively, for cheque bounce cases.

FIGURE 2. Districts with Highest Average Pendency



Notes: (i) Pendency is shown in days. (ii) For this calculation, only districts with more than 500 cases were considered.

FIGURE 3. Districts with Lowest Average Pendency



Notes: (i) Pendency is shown in days. (ii) For this calculation, only districts with more than 500 cases were considered.

The districts with the highest average pendency ranged between four and 10 years, while those districts with the lowest pendency averaged between two and three years. What is particularly interesting is that two states, Kerala and Maharashtra, had districts that fell in both the highest and lowest pendency brackets. This demonstrates beyond doubt that the problem of delay in cheque dishonour cases is a pan-India one and is not restricted to a particular state or region.

Figure 4 represents the current stage of pending cases. Of the 27,925 pending cases, a little less than half, or 12,725 cases, are in the notice or summons stage. They are followed by 4,815 cases that are in the evidence or cross-examination stage. As the DAKSH database did not have complete hearing data for these cases, it was not possible to calculate the exact amount of time each case spent at every stage; however, data in Figure 4 shows the stages that occupy most of the courts' time. It can

be seen that most cases are pending in the notice and summons stage, followed by the cross-examination stage. Notice and summons are essential stages, and cannot be done away with. However, courts need to put in place mechanisms to ensure that these stages progress more efficiently, and their

time is not wasted. The question that arises with respect to cross-examination is, in an offence that does not require *mens rea*, why is cross-examination required, unless the accused is claiming that they have not signed the cheque?

FIGURE 4. Current Stages of Cases

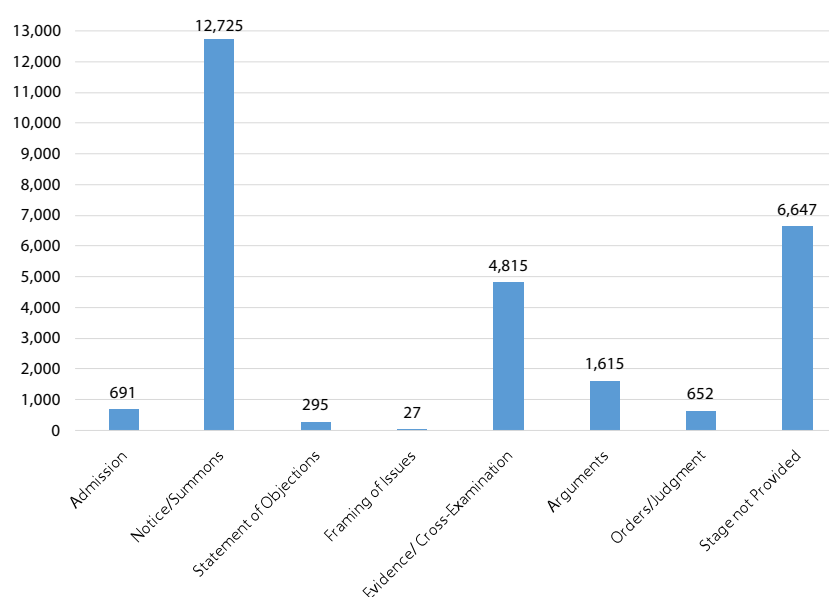


Table 2 shows the 20 parties who were the most frequent petitioners in the set of cases that were examined. The top petitioner, a financial institution named Shriram City Union Finance, is the petitioner in 1,924 cases or nearly 3 per cent of all cases. This indicates that a large number of unsecured loans are being defaulted on.

It is also interesting to see that in this data set, a mere 20 banks¹⁶ and institutions have filed 12 per cent of all the cases examined. Though this particular data set is not comprehensive, it is indicative of the kind of data that needs to be collected to help identify the banks that need to take more stringent

measures for cheque-based banking. It is crucial to create such a data set at the national level, aggregating the petitioners from all cheque dishonour cases, to help in the identification of repeat offenders.

TABLE 2. Top 20 Petitioners Filing the Most Cases

Petitioner name	Cases
Shriram City Union Finance	1,924
HDFC Bank	1,497
Shri Ram Transport Finance	939
Bajaj Finance	410

Petitioner name	Cases
State Bank of India	338
Axis Bank	320
Tata Capital Financial Services	305
BDPCARD Bank	291
Cholamandalam Finance	288
ICICI Bank	266
Kotak Mahindra Bank	259
IndusInd Bank	171
Sree Gokulam Chit and Finance	168
Makhteshim Agan India Private Limited	166
Kaithal District Primary Cooperative Agricultural and Rural Development Bank Ltd.	161
ING Vysya Bank Ltd.	133
Punjab National Bank	133
Reliance Capital	109
Nagarjuna Agrichem Ltd.	108
SML Finance Ltd.	102

SPEEDY TRIAL AND ACCESS TO JUSTICE

The huge number of pending cheque bounce cases is no doubt worrisome to the courts; however, it is even more worrisome to the litigants. The inability of the courts to adjudicate these cases in a timely manner is a serious infringement of the fundamental rights of litigants.

It is certainly important that justice is meted out; however, the ability to access it is equally pivotal. The right to access justice is one that has been reaffirmed by the higher judiciary in India many times.¹⁷ The right to speedy trial is also one that has been reiterated many times by the higher judiciary and has also been granted as a distinct

fundamental right under the aegis of Article 21 of the Constitution.¹⁸

In addition, the Supreme Court of India has laid down specific directions to criminal courts for the expeditious disposal of cases falling under Section 138 of the NI Act. In April 2014, in *Indian Bank Assn. v. Union of India*,¹⁹ the Supreme Court issued the following directions:

1. To the greatest extent possible, magistrates should take cognisance of complaints under Section 138 of the NI Act on the day they are presented. When the complaint appears before the magistrate, they should scrutinise it along with any accompanying affidavits and documents. If all of these are found to be in order, the magistrate must take cognisance and direct the issue of summons immediately.
2. Magistrates should adopt a realistic approach to the issue of summons. Summons must be sent by post and can also be sent by email. For the notice of appearance, a short date should be fixed. If the summons is received back unserved, or there is no response to the email summons, immediate follow-up action should be taken.
3. With respect to settlement or compounding of offences²⁰ the court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case, the court may pass appropriate orders at the earliest.
4. To ensure a speedy trial, the court must ensure that the examination-in-chief, cross-examination, and re-examination of the complainant are conducted within three months of the case appearing before the court. The magistrate also has the option of accepting affidavits from the witnesses, instead of examining them.

5. The data reviewed from the DAKSH database shows that courts are not following these directions. Figure 4 shows that a majority of cases are stuck in the summons and cross-examination stages.

INTERNATIONAL EXPERIENCES

Analysing the way other countries and judicial systems deal with the issue of cheque bounce is important, particularly to see if their methods can help influence effective recommendations for India. The legal liabilities for the dishonour of cheque in the following five countries were analysed.

1. *Australia*: Through the Cheques Act, 1986, the Australian legal system prescribes civil remedies in case of dishonoured cheques.²¹ The payee has the option of filing a civil suit to claim damages.
2. *United Kingdom*: The United Kingdom makes only a civil remedy available to the payee, and gives them the option to file a civil suit in order to claim damages under the Bills of Exchange Act, 1882.²²
3. *Singapore*: The legal system of Singapore imposes a civil liability²³ on payers who dishonour cheques. There is no criminal liability imposed.
4. *France*: While France also imposes civil liability on cheque dishonour cases, it has put into place an interesting system which registers those who have issued more than one dishonoured cheque to a master database called the Fichier Central des Chèques (FCC)²⁴ and bans them from issuing another cheque for five years.

5. *United States of America*: The law on cheque bounce in the United States of America varies from state to state. There is an imposition of both civil and criminal liability.²⁵ Civil liability includes payment of an amount being double or triple the amount of the cheque, while criminal liability includes imprisonment and imposition of fines.

RECOMMENDATIONS

From a statutory viewpoint, there is already a codified law on the procedure for dealing with cheque bounce cases, which states that all cases should be dealt with as expeditiously as possible and courts shall endeavour to conclude the trial within six months from the date of filing of the complaint. Hence, no new statutory provisions need to be added to existing legislation on cheque bounce cases.

The Law Commission of India in its 213th report has recommended that fast-track courts of magistrates be created to dispose of cheque dishonour cases under Section 138 of the NI Act²⁶ and that central and state governments provide necessary funds to meet the expenditure involved in the creation of these fast-track courts. The report has not provided any definition of a fast-track court, nor specified the timeframes within which the fast-track courts must dispose of cases or the locations where they should be set up.

While the establishment of fast-track courts may help in clearing the backlog of pending cases, it will not solve the problem of increasing the system's efficiency to deal with future disputes. It is recommended that these fast-track magistrates' courts are set up in districts with high average pendency and

a large volume of cases, so as to quickly dispose of those cases which are already pending.

The Supreme Court has issued a series of very relevant guidelines, which if followed will mark a noticeable improvement in the progression of cheque bounce cases. Key amongst these are that statements be recorded only once in court, summons be issued on the same day on which the complaint is received, summons also be issued through faster means such as email, personal presence of witnesses be done away with, witness statements be recorded through affidavits, and the be given the chance to offer a settlement following which the case can be immediately disposed of. The data set analysed in this chapter shows that a majority of cases are at the stage of notice and summons or evidence and cross-examination. Stringent implementation of these guidelines will certainly reduce the time these cases take to move through the courts. Keeping abreast of newer technological possibilities, such as sending summons by WhatsApp,²⁷ is also something the courts could do.

While it is crucial that the courts implement statutory and policy changes, for the particular problem, it is also imperative that banks put in place mechanisms that will reduce the number of disputes and help in identifying defaulters more easily. One step that could be taken is for banks to create a master register like the one that France has, which keeps track of all those who have dishonoured cheques. These individuals can be banned from issuing cheques and this list can be provided to credit organisations so that loans and other financial services become difficult for defaulters to avail.

If policy changes such as the ones mentioned above are not brought into effect, it is very likely that cheques will stay mere 'promises to pay' and not realised payments.

Notes

1. Harish Narasappa. 2016. 'The Long, Expensive Road to Justice', *India Today*, 16 April, available online at <http://indiatoday.intoday.in/story/judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice/1/652784.html> (accessed on 26 September 2017).
2. Law Commission of India. 2008. *Report No. 213: Fast Track Magisterial Courts for Dishonoured Cheque Cases*. New Delhi: Government of India, p. 10. Available online at lawcommissionofindia.nic.in/reports/report213.pdf (accessed on 26 September 2017).
3. Indu Bhan. 2015. 'Placing the Burden of Bounced Cheques', *Financial Express*, 30 April, available online at <http://www.financialexpress.com/opinion/placing-the-burden-of-bounced-cheques/68111/> (accessed on 26 September 2017).
4. Arun Jaitley. 2017. 'Union Budget Speech 2017', 1 February, para 120, available online at <http://india-budget.gov.in/ub2017-18/bs/bs.pdf> (accessed on 26 September 2017).
5. Ranganath Misra. 2012. *Bhashyam and Adiga's: The Negotiable Instruments Act*. New Delhi: Bharat Law House.
6. *K.N. Govindan Kutty Menon v. C.D. Shaji*, (2012) 2 SCC 51.
7. Press Trust of India. 2017. 'National Lok Adalat Settles 6.6 Lakh Cases Across the Country', *India Today*, 11 April, available online at <http://indiatoday.intoday.in/story/national-lok-adalat-settles-6.6-lakh-cases-across-the-country/1/926569.html> (accessed on 26 September 2017).
8. *Sangeetaben Mahendrabhai Patel v. State of Gujarat*, (2012) 7 SCC 621.
9. Law Commission, *Report No. 213*, pp. 10–12.
10. Law Commission, *Report No. 213*, pp. 10–12.
11. The DAKSH database can be accessed at zynata.com/base/src/index.html#/access/signin?portal=dakshlegal. in. New users can create an account and sign in to access the database. The database collects various relevant pieces of case information. However, the data that the courts make available for each case is highly varied and difficult to use, further compounded by the fact that multiple pieces of basic data are not made available by court websites. Amongst the important data elements collected for each case are the case number, case type, date of filing and disposal (if the case had been decided), name of court where the case has been filed, district the court is located in, names of the petitioner and respondent,

and name of Act/legislation the case was filed under. A complete list of data fields collected on each case can be accessed at http://dakshindia.org/state-of-the-indian-judiciary/35_chart.html#_idTextAnchor534 and definitions of each of these data fields can be accessed at <http://dakshindia.org/data-dictionary/>

The Indian courts see millions of cases filed, requiring each case to have a unique identity. To create these unique identities, each case receives a case number, which is made up of three parts—a case type indicated by an abbreviation, a serial number, and the year of filing. The first component of the nomenclature of cases, or a case type are court-created categories used to identify and classify cases. These categories are based on varied factors, such as the subject matter of the case or the legislation a case falls under.

12. The data set of cases comprised all cases in the DAKSH database that were marked as filed under Section 138 of the NI Act. While it is possible that there were more cases that were filed under this section in the database, if the courts have not provided the relevant Act and section information, then they have not been included, as identification of these cases is not possible.
13. Average pendency is the average number of days an undisposed case in a particular court has spent before that court. It is calculated by adding up the number of pending days for each case and then finding the average based on the total number of cases. To calculate average pendency, disposed cases are not considered.
14. The sample size used for this calculation is 55,00,000 subordinate court cases, which have a date of filing and whose current status is 'pending' in the DAKSH database.
15. Law Commission of India. 2014. *Report No 245: Arrears and Backlog: Creating Additional Judicial (wo)manpower*. New Delhi: Government of India. Available online at http://lawcommissionofindia.nic.in/reports/Report_No.245.pdf (accessed on 26 September 2017).
16. According to the Reserve Bank of India's statistics, there are 2,133 banks in India including nationalised banks, other public sector banks, Indian private sector banks, foreign private sector banks, small finance banks, payment banks, scheduled state cooperative banks, non-scheduled state cooperative banks, scheduled urban cooperative banks, non-scheduled urban cooperative banks, state cooperative banks, district cooperative banks, and regional rural banks. The complete list can be viewed <https://rbi.org.in/commonman/English/Scripts/BanksInIndia.aspx#rrb> (accessed on 26 September 2017). There is no official complete source that lists the total number of financial institutions in India.
17. Most recently, in July 2016, in *Anita Kushwaha v. Pushap Sudan*, (2016) 8 SCC 509, a Constitution Bench of the Supreme Court has endorsed its own previous declarations and explicitly declared that 'access to justice' is a fundamental right under Arts. 21 and 14 of the Constitution of India.
18. The right to a speedy trial was first recognised as a fundamental right in *Hussainara Khatoon (7) v. Home Secy.*, (1995) 5 SCC 326, and guidelines were also laid out to ensure the expeditious disposal of cases. Subsequently, the Supreme Court has reaffirmed this right in a number of cases.
19. (2014) 5 SCC 590.
20. 'Compound' means 'to settle a matter by a money payment, in lieu of other liability'.
21. Division 2 and Division 3 of the Cheques Act, 1986, available online at <https://www.legislation.gov.au/Details/C2017C00074> (accessed on 26 September 2017).
22. Sections 43 and 44 of the Bills of Exchange Act, 1882, available online at <http://www.legislation.gov.uk/ukpga/Vict/45-46/61> (accessed on 26 September 2017).
23. Sections 43 and 44 of the Bills of Exchange Act, Chapter 23, available online at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=Do-cId%3A3aae4ed9-4f0e-4155-89b8-1a75ef61fb96%20Depth%3A0%20Status%3Ainforce;rec=0;whole=yes> (accessed on 26 September 2017).
24. BIS. 2012. 'Payment, Clearing and Settlement Systems in France', available online at https://www.bis.org/cpmi/publ/d105_fr.pdf (accessed on 26 September 2017).
25. National Check Fraud Center, available online at <http://www.ckfraud.org/penalties.html> (accessed on 26 September 2017).
26. Law Commission, *Report No. 213*, p. 39.
27. *Business Standard*. 2017. 'A First in Indian law: Ashok Khemka-led Court Orders Summons on WhatsApp', *Business Standard*, 8 April, available online at http://www.business-standard.com/article/current-affairs/a-first-in-indian-law-ashok-khemka-led-court-orders-summons-on-whatsapp-117040800389_1.html (accessed on 26 September 2017).

Performance Indicators: Working of Magistrates' Courts in India

Arunav Kaul

Abstract

Magistrates' courts form the bedrock of the criminal system in the country. Given the high number of criminal cases pending in the subordinate courts, it is important to understand the manner in which magistrates' courts handle case flow. In this chapter, the author examines the functioning of the magistrates' courts, in terms of analysing their workload, pendency of cases, and the rate at which they dispose of cases.

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It has been rightly said, 'You cannot manage what you cannot measure.'¹ However, in the Indian scenario one must amend that statement to, 'You cannot manage what you have never measured.' Analysing the workload of the judiciary and assessing the productivity of the system helps in managing workflow efficiently, an exercise which is seldom performed within the judicial system by judges.

It is the primary duty of every court to impart justice not only swiftly but also effectively. Though concepts such as 'justice delayed is justice denied,' and 'justice hurried is justice buried,' are found in most pieces of literature on judicial delay, their application in practice remains a question.

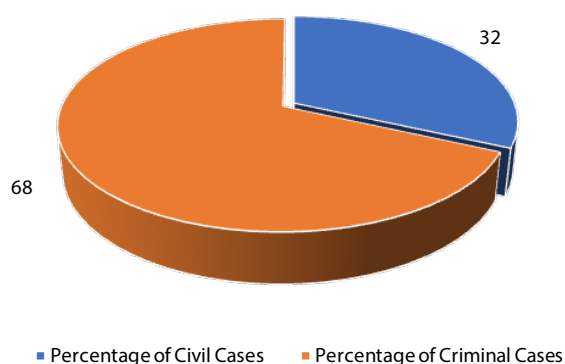
It is therefore important that data-driven studies that aim to understand the workload of the courts be conducted, so that policy interventions can be focused and meaningful. This chapter examines the efficiency and workload of magistrates' courts through various performance indicators, providing insight into the working of the magistrates' courts in India.

METHODOLOGY

In *All India Judges' Assn. (1) v. Union of India*,² the Supreme Court, while highlighting the responsibilities of trial court stated, 'The trial judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the proceedings in court. On him lies the responsibility of building up of the case appropriately and on his understanding of the matter the cause of justice is first answered.'

If one were to prepare a list of the courts with the most number of cases pending in the country, there is no doubt that the list would be dominated by the magistrates' courts.³ The number of criminal cases pending across the country is twice that of civil cases. Figure 1 shows the proportion of civil and criminal cases, as per the data collected from the National Judicial Data Grid (NJDG).⁴

FIGURE 1. Percentage of Civil and Criminal Cases in Subordinate Courts



Note: Data Collected from NJDG as on 5 July 2017.

Figure 1 clearly illustrates that criminal cases dominate the dockets of subordinate court judges. With such a high percentage of pending criminal cases it will be useful and interesting to examine the performance of magistrates' courts dealing with criminal cases.

Data Collection

The NJDG's website provides information on the number of cases pending in the subordinate courts across the country. The information on the website is provided at various levels—the state level, district level, court establishment level, and the judge level. In this chapter, the data is analysed at the court establishment level (courts).⁵

To select the magistrates' courts with the highest number of pending cases, a list of all the courts and the corresponding number of pending cases was obtained from the NJDG.⁶ All of the 10 courts chosen for the study had more than one lakh cases pending as on 29 March 2017. Given the enormous data, the focus of this chapter is limited to only 10 courts, which are:

1. Metropolitan Magistrate Court, Ahmedabad, Gujarat.
2. Civil Court, Vadodara, Gujarat.
3. Metropolitan Magistrate Court, Calcutta, West Bengal (WB).
4. Chief Metropolitan Magistrate Court, Kanpur Nagar, Uttar Pradesh (UP).
5. Chief/Additional Chief Metropolitan Magistrate Court, Jaipur Metro Headquarters (HQ), Rajasthan.
6. Chief Judicial Magistrate Court, Allahabad, Uttar Pradesh (UP).
7. Chief Judicial Magistrate Court, Nagpur, Uttar Pradesh (UP).
8. Chief Judicial Magistrate Court, Ghaziabad, Uttar Pradesh (UP).
9. Civil Court, Surat, Gujarat.
10. Chief Judicial Magistrate Court, Pune, Maharashtra.

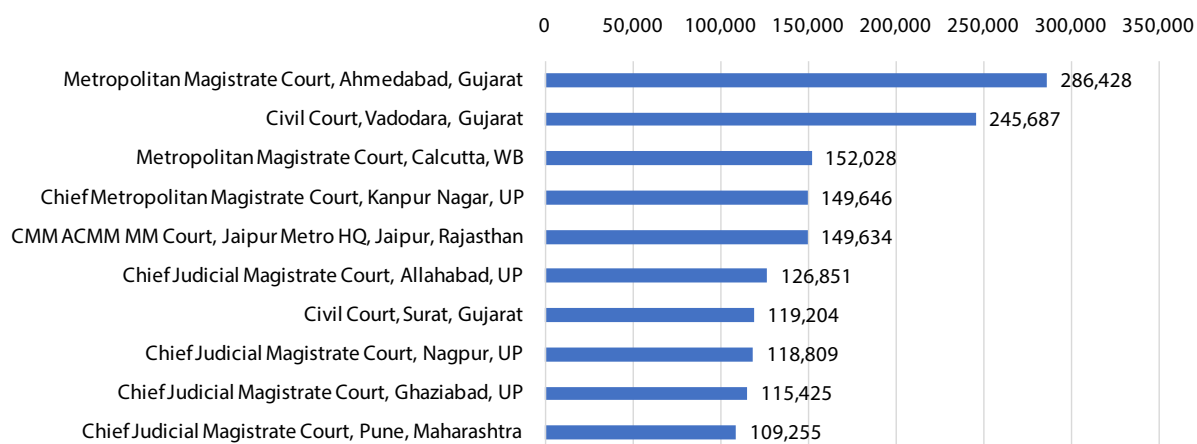
Once the 10 courts were chosen, additional data in terms of number of cases pending per judge, and total number of cases filed and disposed in the previous month was entered manually for these courts between 29 March 2017 and 15 July 2017 from the NJDG.

To evaluate court performance, various metrics can be used for a ‘balanced scorecard of a court’s or court systems performance’.⁷ For this purpose, several performance indicators have been proposed in different studies. To mention a few, the International Consortium for Court Excellence has designed the ‘International Framework of Court Excellence’, a quality management system which

helps in improving court performance.⁸ It has consolidated 11 performance indicators based on which the performance of courts can be judged.⁹ Additionally, the National Court Management Systems in India have come up with set of performance standard indicators in the National Framework for Court Excellence.¹⁰ In this chapter, I use some of these indicators to assess the performance of the chosen courts. My aim in the chapter is not to rank these courts, but to analyse their performance.

Figure 2 contains details of the chosen magistrates’ courts and number of cases pending before each of them as on 29 March 2017.

FIGURE 2. Number of Cases Pending in the Chosen Courts



Note: (i) Data collected from NJDG as on 29 March 2017. (ii) Though their names suggest otherwise, Civil Court, Vadodara and Civil Court, Surat include judicial magistrates (magistrates have been referred to as judicial magistrates in this chapter) and that is the reason that these courts have been chosen in the study.

STRUCTURE OF MAGISTRATES’ COURTS

First Class Magistrates are at the grassroot level in the judicial structure. Sections 12 and 17 of the Code of Criminal Procedure (CrPC), 1973 define the role of the Chief Judicial Magistrate (CJM) and the Chief Metropolitan Magistrate (CMM),

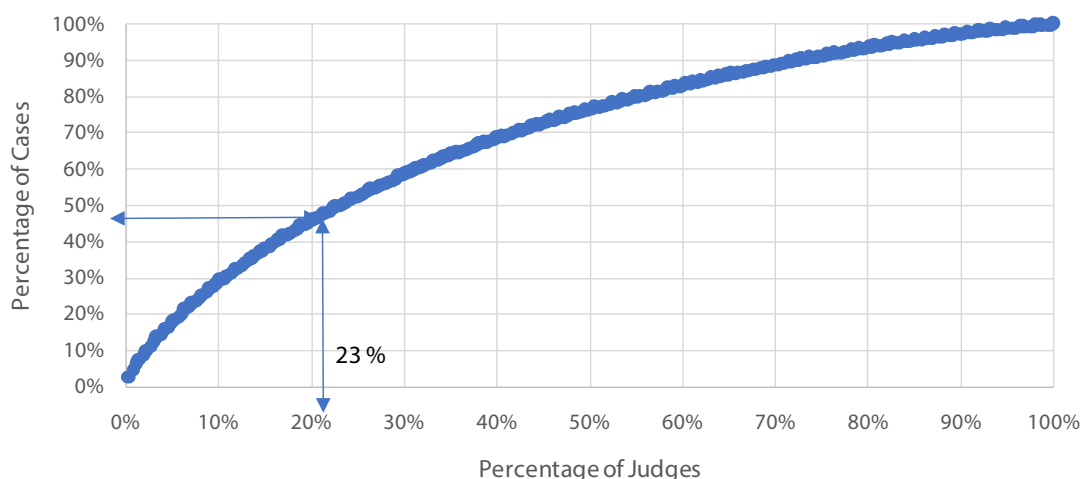
respectively. In terms of powers and superintendence over magistrates, both the CJM and the CMM enjoy equal status, with the only difference being the area in which they operate.¹¹ According to Section 8 of the CrPC, the state government may notify any city or town to be a metropolitan area when its population exceeds 10 lakhs.

Hence, in a metropolitan area the term CMM is used, and in the remaining areas, the term CJM is used. According to CrPC, the High Court has the power to appoint any First Class Magistrate to be the CJM or the CMM for a given area. In terms of hierarchy all judicial magistrates are subordinate to the CJM or the CMM (as the case may be), who are in turn subordinate to the Sessions Judge. As per Sections 17 and 19 of the CrPC, the CJM and the CMM, respectively, have the power to make rules and distribute business amongst the judicial magistrates subordinate to them.

WORKLOAD AND DISTRIBUTION OF CASES

To understand the workload of individual judges in each of the chosen courts, it is important to examine the distribution of cases amongst the judges. Figure 3 portrays the quantum of cases, in terms of percentage, handled by each individual judge in the 10 courts chosen.

FIGURE 3. Distribution of Cases Pending with Judges



Note: Data collected from NJDG as on 26 June 2017.

In Figure 3 the blue arc denotes the variance in the distribution of cases across 265 judges in the 10 courts combined.¹² Although one might think that the workload of the pending cases is distributed to each of the judges equally, the reality seems to be different. From Figure 3, it can be seen that nearly 50 per cent of the cases pending across the 10 courts are being handled by only 23 per cent of judges. The other 50 per cent of cases are being handled by the remaining judges. Since the distribution is

disproportionate, cases get accumulated with a few judges, thus increasing their workload.

However, Figure 3 only provides a broad picture in terms of case distribution, since data is aggregated for all the 10 courts. Individually, each of the courts have a varied case distribution scenario. For instance, in the CMM Court, Calcutta, of the 22 judges, five judges handle 50 per cent of the pending cases, while in CJM Court, Ghaziabad, of the

13 judges, only three handle 50 per cent of the total number of cases pending.

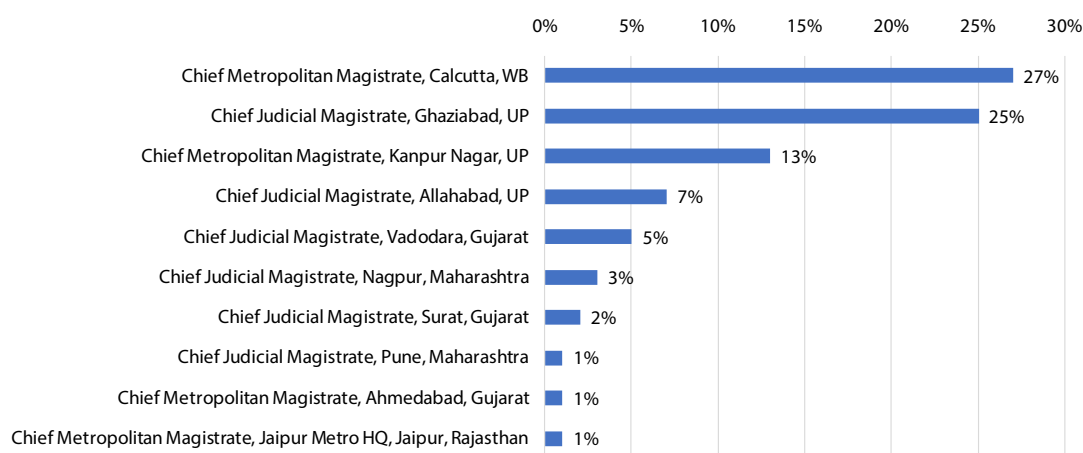
In terms of pendency, cases handled by the 10 judges who had the most number of cases pending before them had an average pendency of six years, whereas the cases handled by the 10 judges at the bottom of the list, who had the least number of cases pending before them, had an average pendency of four years. Thus, increasing workload of some judges may be contributing to increasing pendency in these courts.

Proper case distribution is important, since it may affect the pendency of cases. One may argue that judges with better performance and more

experience must be given more cases or that a few judges can handle high number of cases, hence distribution may not be equal at all. Although there may be merit in this argument, it must be noted that not all judges are able to perform well with the increasing workload of cases. Even in the current scenario, judges that have more number of cases have a higher average pendency as opposed to judges who have fewer cases. Hence, cases must be allocated to a judge keeping in mind the average pendency of cases of that judge, and the rate at which the judge is disposing of cases.

Figure 4 below provides the percentage of cases pending with the CJM and CMM in each of the 10 courts.

FIGURE 4. Comparison of Cases Pending with the CJM/CMM



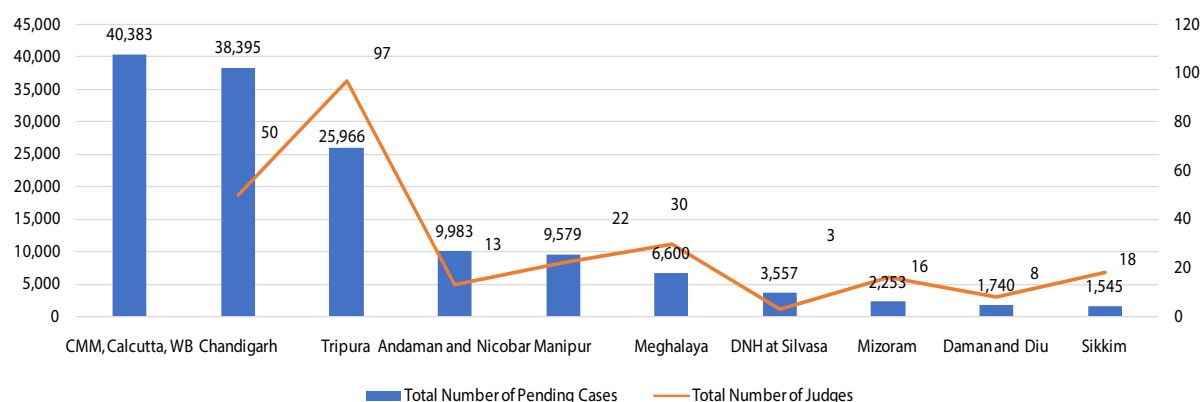
Note: Data collected from NJDG as on 26 June 2017

Each of these courts has one CJM or CMM, who distributes work amongst all the judicial magistrates subordinate to them. As per Figure 4, the CMM in Calcutta, as on 22 June 2017, was handling 27 per cent of the entire workload in that establishment, amounting to 40,383 pending cases. The CJM in Ghaziabad had nearly 25 per cent of the entire workload, with close to 29,000 pending cases.

To put facts into perspective, the CMM of Calcutta is handling more cases than the total number of criminal cases pending before the states/union territories of Chandigarh, Tripura, Andaman and Nicobar Islands, Manipur, Meghalaya, Daman and Diu, Mizoram, and Sikkim combined!

Figure 5 illustrates this clearly.

FIGURE 5. Comparison of Cases Pending with CMM Calcutta with other States/UTs



Note: Data collected from NJDG as on 26 June 2017.

In Figure 5, the orange line indicates the number of judges in each of the states/UTs. In Chandigarh, 50 judges in total handle 38,395 cases.

As a practice, the charge sheet is presented to the CJM or CMM, who peruses the charges and then forwards the same to the judicial magistrates subordinate to him. Thus, the CJM and the CMM not only have the task of deciding cases, but also have to deal with administrative work. Apart from daily court work, CJMs are expected to attend computer training and preside over special courts, such as juvenile courts. Given the amount of administrative work and judicial work, it is only reasonable that more cases be allotted to other judicial magistrates subordinate to the CJM or CMM.

AGEING AND CASE BACKLOG

Assessing the age of pending cases helps in understanding how long they have been pending on the courts' dockets without final disposal. Average pendency is expressed in terms of the number of elapsed

calendar days from the date of the institution of the case to the current date.¹³ Courts with high average pendency indicate that courts have not been able to dispose cases in a timely manner, thus contributing to the increasing backlog.

At this juncture, it is important to demarcate between cases that are pending and delayed. The 245th Law Commission Report,¹⁴ which dealt with the problem of arrears and backlog in the judicial system, defined pendency as cases that have not been disposed, irrespective of the date on which they were filed. Delayed cases on the other hand are cases that have not been resolved and been pending in the the court for a longer time than they are expected to be.

The real question is where the benchmark should be set. What is the upper limit for a case to be pending in the court? Several reports and studies have made an attempt to provide a broad upper limit beyond which a case must not remain pending. The Malimath Committee Report,¹⁵ while recommending reforms to the criminal system, suggested that all the cases pending for more than two years be considered delayed. The Jagannadha

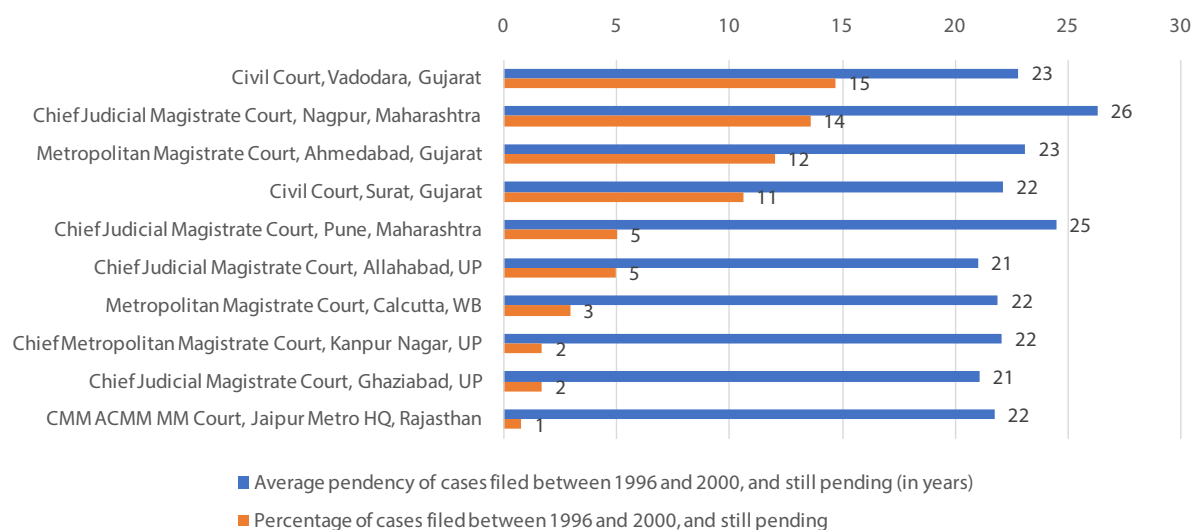
Rao Committee,¹⁶ which was constituted as a result of directions given by the Supreme Court in *Salem Advocate Bar Assn. (2) v. Union of India*,¹⁷ framed a model case flow management system for the High Courts and subordinate courts. The report provides model rules which divides cases into different tracks, based on subject matter. Each track needs to be completed within a specific time frame, the upper limit for which is two years.

In a report on delays in the High Court of Delhi,¹⁸ the Vidhi Centre for Legal Policy, adhered to the same standards and presumed cases pending

over two years to be delayed. Applying this standard to the 10 courts studied in this chapter, 68 per cent of all cases are pending for more than two years. Hence, these cases can be said to be delayed. Further, in the 10 courts, it was interesting to note the number of cases that were filed before the year 2000 but are still pending in the dockets of the court—let us call it the 20th century backlog.

In Figure 6, the orange bar indicates the percentage of cases that were filed before 2000 and are still pending. The blue bar indicates the average number of years for which these cases have been pending.

FIGURE 6. Pending Cases Filed Prior to 2000

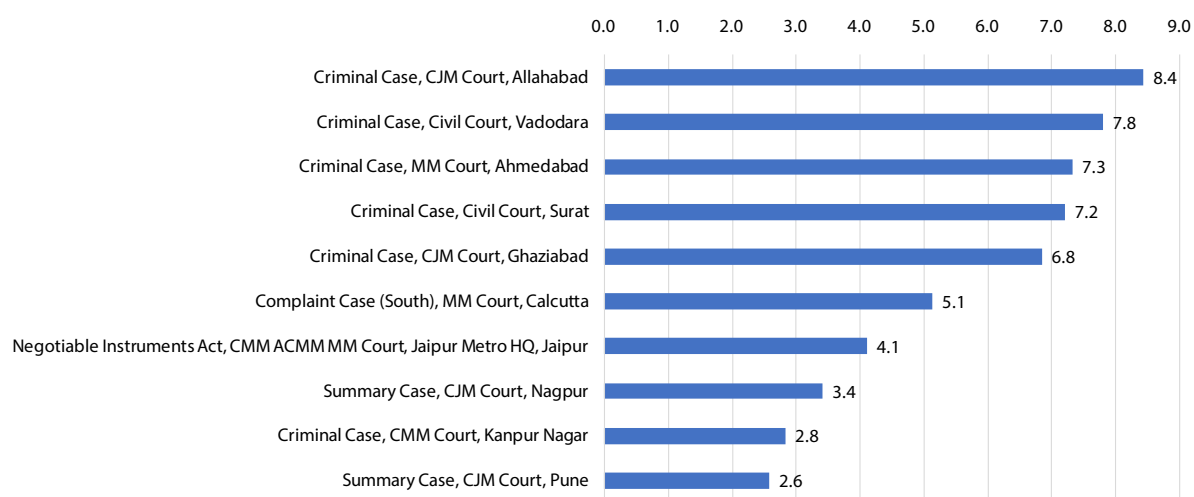


Note: Data collected from NJDG as on 26 June 2017.

As shown in Figure 6, 15 per cent of the entire workload of all the judges in Civil Court, Vadodara, were cases filed before 2000, with an average pendency of 22.8 years. In CJM Court, Nagpur, 14 per cent of the cases were filed prior to 2000 and are still pending, with an average pendency of 26.3 years.

Let us go a step further and analyse the problem of pendency, case type-wise, in each of the 10 courts studied. Figure 7 compares the average pendency of the most frequent type of case handled by each of the studied courts. The case types chosen from each of the courts represent the maximum number of cases in the corresponding courts.

FIGURE 7. Average Pendency of Certain Case Types



Note: (i) Data collected from NJDG as on 26 June 2017. (ii) Average pendency is expressed in years.

It is seen that Criminal Case, Complaint Case, and Summary Case constitute the maximum workload of the judges. The case types are dependent on the nature of the case and the manner in which criminal proceedings have been initiated. The case type 'Criminal Case' is used for cases that are instituted on the report/charge sheet submitted by the police after investigation,¹⁹ in cognisable offences,²⁰ whereas 'Complaint Case' refers to those cases that are instituted on the basis of private complaints given to judicial magistrates.²¹ Section 260 of the CrPC defines offences that can be summarily tried, and 'Summary Cases', as the name suggests, are speedy trials which must be completed without unnecessary delays and formalities.²²

According to data from NJDG,²³ the Metropolitan Magistrate Court, Ahmedabad has close to 1,200 Summary Cases with an average pendency of 10 years,²⁴ which is ironically more than the Criminal Cases, which are pending for seven years.²⁵ Also, Figure 7 shows that the CJM Court, Allahabad has the highest average pendency of approximately eight years for Criminal Cases.

Furthermore, in the CMM's court, Jaipur Metro HQ, 34 per cent of the cases filed under the Negotiable Instruments (NI) Act, 1881 have a high average pendency of nearly four years. As per Section 143 of the NI Act, criminal cases tried by judicial magistrates must be continued on a day-to-day basis until their conclusion. Further, Section 143(3) states that the judicial magistrate shall endeavour to conclude the trial within six months from the date of the filing of the case. However, the cases pending under the NI Act in the CMM's court, Jaipur Metro HQ have an average pendency which is much higher than the statutorily prescribed guidelines.

CASE CLEARANCE RATE

Case clearance rate is a determining factor in terms of assessing the inflow and outflow of cases. It indicates whether the courts are able to keep up with the incoming caseload.²⁶

If courts clear fewer cases when compared to the number of new cases that are being filed, it is certain that the courts will have a backlog. If the courts continue to dispose fewer cases, the backlog will only increase with the increasing number of new filings. Unless courts improve their clearance rate, their backlog will continue to build.²⁷ Hence, case clearance rate helps in determining future productivity.²⁸

The Australian Government's Productivity Commission's Report of Government Services 2012,²⁹ provides the method for calculation of case clearance rate. The report states, 'The clearance indicator is derived by dividing the number of finalisations in the reporting period, by the number of lodgements (generally, demand for judicial services, case filings or referrals) in the same period. The result is multiplied by 100 to convert to a percentage.'

For example, if in a year a total number of 1,00,000 cases have been filed and the court has been able to dispose 95,000 cases then the case clearance rate of the court would be as follows:

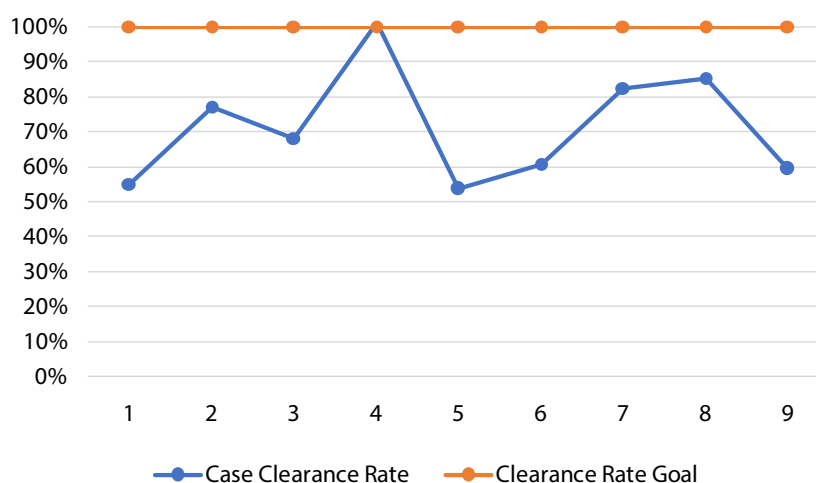
$$\text{Clearance rate} = \frac{\text{Total number of cases disposed in a given time frame}}{\text{Total number of cases filed in a given time frame}}$$

$$\text{Clearance rate} = \frac{95,000}{1,00,000} \times 100$$

Hence, the case clearance rate of the court is 95. If a court has a case clearance rate of more than 100, it means that the court is able to dispose more cases than that are being filed. Therefore, the court is able to meet the demands of the current case flow.

What happens if the case clearance rate is below 100? In the above example, the court will carry a backlog of 5,000 cases from this year to the next. If the court continues in a similar fashion, then in the next 10 years the backlog will increase to 50,000 cases, which means the court will take about half a year to dispose of the backlog even if no new cases are accepted.³⁰ Figure 8 represents the case clearance rate of the 10 chosen courts.³¹

FIGURE 8. Case Clearance Rate



Note: Data collected from NJDG as on 20 June 2017

A common trend is seen across all the courts. The orange line represents an ideal scenario where the case clearance rate is 100. Only one court, CMM's court, Jaipur Metro HQ, was able to touch the 100 mark, with a case clearance rate of 101. All of the other courts have backlogs, given that their case clearance rates are below 100. CJM Court, Allahabad has the lowest case clearance rate of 54.

SUGGESTING REFORMS

The problems of disproportionate distribution of cases, high average pendency, and clearance rates below 100 are consistent across all the eight courts. One of the reasons for the accumulation of cases is lack of effective case management. Studies have shown that effective implementation of a case flow management system greatly reduces the inventory of pending cases and backlog.³²

The National Centre for State Courts, a non-profit organisation working in the sphere of judicial administration in the United States of America, has compiled literature highlighting the positive effects of adopting the case management system. Countries such as Canada,³³ United Kingdom,³⁴ and Australia³⁵ have already adopted case management rules.

Case flow management provides regularity and uniformity in case processing, one of the most important attributes required in the current system. It divides cases based on their priority into several tracks and each track has an upper time-limit within which the case must be disposed. Further, in terms of stages, all procedural tasks are allotted to the Court Registrar, keeping only the substantive judicial work for the presiding judge.

In *Salem Advocate Bar Assn.*, while deliberating on the need for case flow management rules, the Supreme Court noted, 'We hope that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalise the Rules within a period of four months.' The case flow management rules were thereafter prepared by the various High Courts on the basis of the recommendation provided by the Law Commission headed by Justice M. Jagannadha Rao.³⁶

Amongst the states from which the 10 courts studied in this chapter were chosen, case flow management rules have been passed in Rajasthan, West Bengal, and Gujarat. The High Court of Rajasthan³⁷ and the High Court of Calcutta³⁸ notified the rules as early as in 2006, whereas the High Court of Gujarat did that only recently, in 2016.³⁹ The courts that have notified the rules clearly mention an upper limit of two years within which a case must be disposed, however cases in these courts are pending for much longer time.⁴⁰ This shows the lack of implementation of the rules.

There is no doubt that without a concerted effort of the judges and the court staff, process re-engineering is impossible. For case flow management to work, there must be active involvement of the stakeholders who are committed to a shared vision.⁴¹ Even the case flow management rules proposed by the Law Commission suggest division of work between the judges and the Registrar.⁴²

It is time that courts play an active role in identifying the problem in their respective systems and establish effective case management, for until a change is brought, the growing backlog will remain a perennial issue associated with the Indian judiciary.

Notes

1. Department of Justice, Canada. 'Guiding Principles for Effective Case Management', p. 4, available online at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/pdf/eff.pdf> (accessed on 10 October 2017).
2. (1992) 1 SCC 119.
3. As per data extracted from the DAKSH database on the number of cases pending per judge in the country as on 29 March 2017, eight of the 10 judges with the highest number of cases pending before them are judicial magistrates.
4. The National Judicial Data Grid (NJDG) is a government-maintained website that provides data in terms of cases pending and disposed in the subordinate courts. It is available online at http://njdg.ecourts.gov.in/njdg_public/main.php (accessed on 10 October 2017).
5. Each of the court establishments studied consists of a group of judges headed by a Chief Judicial Magistrate or a Chief Metropolitan Magistrate.
6. Due to various technical difficulties caused by the NJDG website, data from a few states, particularly Uttar Pradesh, could not be scraped properly. Hence, it is possible that some courts may have been left out.
7. Dan H. Hall and Ingo Keilitz. 2012. *Global Measures of Court Performance, International Framework of Court Excellence*. Colorado: International Consortium for Court Excellence, p. 5. Available online at http://www.courtexcellence.com/-/media/microsites/files/icce/global%20measures_v3_11_2012.ashx (accessed on 10 October 2017).
8. The website of the International Consortium for Court Excellence is available online at <http://www.courtexcellence.com/> (accessed on 10 October 2017).
9. Hall and Keilitz, *Global Measures of Court Performance*, p. 1.
10. Supreme Court of India. 2013. *NCMS Baseline Report on National Framework of Court Excellence*. New Delhi: Supreme Court of India. Available online at <http://supremecourtindia.nic.in/pdf/NCMS/National%20Framework%20of%20Court%20Excellence.pdf> (accessed on 10 October 2017).
11. S.C. Sarkar. 2012. *The Code of Criminal Procedure*. New Delhi: LexisNexis Butterworths Wadhwa Nagpur, p. 24.
12. Judges who had more than 1,000 cases pending in the 10 chosen courts were taken into consideration.
13. Hall and Keilitz. *Global Measures of Court Performance*, p. 34.
14. Law Commission of India. 2014. *Report No 245: Arrears and Backlog: Creating Additional Judicial (wo)manpower*. New Delhi: Government of India. Available online at http://lawcommissionofindia.nic.in/reports/Report_No.245.pdf. (accessed on 10 October 2017).
15. Committee on Reforms of Criminal Justice System (Malimath Committee). 2003. *Committee on Reforms of Criminal Justice System Report*. New Delhi: Government of India, Ministry of Home Affairs, p. 164. Available online at http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf. (accessed on 10 October 2017).
16. Jagannadha Rao Committee. 2005. *Consultation Paper on Case Management*. New Delhi: Law Commission of India, p. 16. Available online at http://lawcommissionofindia.nic.in/adr_conf/casemgmt%20draft%20rules.pdf (accessed on 10 October 2017).
17. (2005) 6 SCC 344 (*Salem Advocate Bar Association*).
18. Nikita Khaitan, Shalini Seetharam, and Sumathi Chandrasekharan. 2017. *Inefficiency and Judicial Delay: New Insights from the Delhi High Court*. New Delhi: Vidhi Centre for Legal Policy, p. 8. Available online at https://static1.squarespace.com/static/551ea026e4b0adb21a8f9df/t/58db85d25016e15e28a02a56/1490781674626/Inefficiency+and+Judicial+Delay_Vidhi.pdf (accessed on 10 October 2017).
19. Section 173, CrPC.
20. Section 154, CrPC.
21. Chapter 14 and 15, CrPC.
22. Sarkar, *Code of Criminal Procedure*, p. 1183.
23. Data collected as on 26 June 2017.
24. The analysis of the Summary Cases in Metropolitan Magistrate Court, Ahmedabad was carried out separately and therefore it is not represented in the figure.
25. Summary Cases are not displayed in the figure because they do not constitute the maximum number of cases in Metropolitan Magistrate Court, Ahmedabad.
26. Hall and Keilitz, *Global Measures of Court Performance*, p. 23.
27. Hall and Keilitz, *Global Measures of Court Performance*, p. 23.
28. Maria Dakolias. 2014. 'Court Performance Around the World: A Comparative Perspective', *Yale Human Rights and Development Journal*, 2(1): 88–142. Available online at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1009&context=yhrdj> (accessed on 14 July 2017).
29. Hall and Keilitz, *Global Measures of Court Performance*, p. 23.
30. Hall and Keilitz, *Global Measures of Court Performance*, p. 23.

31. Case clearance rate has been calculated on the number of cases filed and disposed between 20 May 2017 and 20 June 2017. Due to paucity of data, Chief Metropolitan Court, Calcutta, West Bengal was not considered.
32. David Steelman, John Goerdts, and James McMillan. 2004. *Case Flow Management: The Heart of Court Management in the New Millennium*. Virginia: National Center for State Courts.
33. Provincial Court of British Columbia, 'Criminal Case Flow Management Rules, Youth Criminal Justice Act', available online at <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/page-1.html#h-2> (accessed on 10 October 2017). *See also*, Department of Justice, Canada, 'Guiding Principle for Effective Case Management', available online at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/pdf/eff.pdf> (accessed on 10 October 2017).
34. Part 3 of Practice Directions to the Civil Procedures Rules, available online at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03> (accessed on 10 October 2017).
35. Justice Ronald Sackville. 2003. 'Courts in Transition: An Australian View', available online at <http://www.austlii.edu.au/au/journals/FedJSchol/2003/5.html#fn67> (accessed on 10 October 2017); *see also* Queensland Courts. 2017. 'Case flow', available online at <http://www.courts.qld.gov.au/court-users/practitioners/case-flow> (last accessed on 10 October 2017).
36. Jagannadha Rao Committee, *Consultation Paper on Case Management*, p. 16.
37. The Rajasthan Subordinate Courts Case Flow Management Rules, 2006. published vide Notification No. 4/S.R.O./2006/1645, dated 12 September 2006.
38. Case Flow Management Rules, 2006 in the Subordinate Courts, published vide Notification No. 4680-G, dated 6 December, 2006, by the High Court of Calcutta.
39. The Gujarat High Court Case Flow Management (Subordinate Courts) Rules, 2016, available online at [http://gujarathighcourt.nic.in/hccms/sites/default/files/rules_files/CFM_\(SUB.CTS_\)_RULES_2016-Gazette_Copy.pdf](http://gujarathighcourt.nic.in/hccms/sites/default/files/rules_files/CFM_(SUB.CTS_)_RULES_2016-Gazette_Copy.pdf) (accessed on 16 October 2017).
40. The exception is the Rajasthan Subordinate Courts Case Flow Management Rules, 2006 which provides an upper limit for each of the four tracks, but mentions that cases in Track 5 for criminal cases must be disposed as soon as possible. This is a clear deviation from the model rules recommended by the Law Commission, since each track is given an upper limit.
41. Steelman et al., *Case Flow Management*.
42. Jagannadha Rao Committee, *Consultation Paper on Case Management*, p. 16.

Diversification and Efficiency: A Case Study of the Karnataka Appellate Tribunal

Amulya Purushothama

*Padmini Baruah**

Abstract

Tribunals are quasi-judicial institutions established to help solve the problems of pendency and delay. In this chapter, the authors conduct an empirical study to examine the efficiency and efficacy of the Karnataka Appellate Tribunal (KAT), and understand whether it has fulfilled its goals in terms of reducing pendency and delay. The authors evaluate whether the KAT works efficiently by disposing of cases, and whether it acts as an effective court of appeals and reduces the caseload of the High Court of Karnataka.

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One of the oft-proposed solutions for growing pendency and delay in the Indian judicial system is that of diversification.¹ Diversification is the establishment of more judicial and quasi-judicial institutions that can divert the caseload of existing courts and thereby reduce caseload, pendency, and delay. Tribunals are among such quasi-judicial institutions that are explicitly established to help solve the problem of pendency and delay.²

Tribunals are comprised of judicial and technical members who decide cases relating to specific subjects such as service rules, tax, competition law, and labour law. Technical members of tribunals are not drawn directly from the state judicial services, but may be retired judges, bureaucrats, social workers, and members of civil society.³

The number of tribunals in India has been increasing since independence and particularly since the 1970s.⁴ The 'tribunalisation' of justice in India has led to a contentious debate about the constitutionality of tribunals.⁵ A 'turf war'⁶ has erupted

between members of the executive and the legal and judicial communities, where the debate centres on the question of whether it would violate citizens' rights if administrative bodies supplanted the judicial machinery.⁷

The argument for technical members being entrusted with judicial functions is that they are subject-matter specialists who would be better equipped to deal with certain cases than a generalist judge, especially if these tribunals are attached to regulatory institutions.⁸ Of course, this leaves the debate open to arguments about principles of natural justice not being followed within the tribunals, leading to concerns about the *efficiency* and *efficacy* of tribunals.⁹

This discussion about the *efficiency* and *efficacy* of tribunals, and the possible consequences of tribunalisation is almost entirely situated in logical and legal reasoning, with sparse empirical evidence on whether tribunals are *efficient*, that is, whether they are good at disposing cases and managing their pendency (number of cases), and whether they are *efficacious*, that is, whether they are good at acting as an effective court of appeals and reducing the caseload at the appellate court.

There have been a few individual case studies of tribunals in India that seek to measure their performance and impact. For instance, Sujata Visaria and others have studied the effect of the debt recovery tribunals on loan recovery to see if these bodies have reduced delinquency.¹⁰ Further, Prasanth V. Regy and Shubho Roy have studied judicial delay in debt recovery tribunals based on a granular study of a sample of cases, to answer the question of why delays are caused and by whom.¹¹ Recently, Vidhi Centre for Legal Policy has carried out a useful statistical analysis on the *efficiency* and *efficacy* of certain tribunals in India.¹² Vidhi examined the disposal rates for two major tribunals—the Telecom

Disputes Settlement and Appellate Tribunal and the Intellectual Property Appellate Board.¹³ Their study looked at the question of *efficiency* by calculating the disposal and pendency rates of cases in a given year, compared to the disposal rate of the High Courts.¹⁴ To determine *efficacy*, they analysed a sample of judgments from each of the tribunals chosen to assess whether that tribunal met the standard of judicious decision-making, as well as judgments of superior courts that have taken up cases in review or appeal (writ or through statutes) from the tribunal's orders, to see whether the courts have largely agreed or disagreed with the tribunal.¹⁵ Our study aspires to add to this body of empirical research to provide insights into whether the tribunal architecture is being able to meet, at least to a substantial degree, the goals it was envisaged to fulfil.

RESEARCH QUESTIONS

This chapter will focus on the Karnataka Appellate Tribunal (KAT) situated in Bengaluru, Karnataka, which was constituted under the Karnataka Appellate Tribunal (KAT) Act, 1976 passed by the Karnataka State Legislature. The KAT hears and decides appeals against orders of competent authorities under the Karnataka Land Revenue Act, 1964; Karnataka Cooperative Societies Act, 1959; Karnataka Sales Tax Act, 1957; and the Karnataka Entertainment Tax Act, 1958, among others.¹⁶

The KAT is comprised of the Chairman (a senior IAS officer) and eight benches consisting of one judicial and one administrative member each. Of these eight benches, two are dedicated to hearing revenue matters, two to cooperative societies' matters, and four to sales tax matters.¹⁷ Appeals

from the KAT are heard by the High Court of Karnataka.¹⁸

Three situations are possible once a case is registered at the KAT. First, that the case is pending and undecided at the KAT; second, that the case is decided and resolved at the KAT with no further appeal; and third, that the case is decided at the KAT and is appealed to the High Court of Karnataka. Once a case has been appealed, the High Court of Karnataka can either allow the appeal and reverse the KAT judgment or dismiss the appeal.

In the following sections of this chapter, we hope to arrive at two key measures of performance of the KAT. The first of this is *efficiency*, that is, whether the KAT is efficient at managing internal case flow, by reducing number of cases pending, increasing disposals (and disposal rates) over time. If the KAT is not efficient at this, it is not working as a good cog in the wheel of the justice system and such issues might need to be addressed.

The second measure of performance we are considering is that of *efficacy*, that is, the extent to which the KAT has been able to fulfil its purpose in reducing the number of cases that are appealed to the High Court of Karnataka under the relevant statutes. If the KAT is not efficacious at limiting appeals and is reversed often, whatever the grounds of these appeals may be, it is an inefficient way to diversify caseload. If the grounds upon which decisions of KAT are challenged and reversed pertain to interpretation of substantive or procedural law, or concerns about natural justice, there might be evidence for concerns about composition of tribunals and the strategy of diversification to quasi-judicial adjudicatory bodies.

EFFICIENCY OF THE KAT

To understand whether the KAT is fulfilling its purpose in reducing caseload at the High Court of Karnataka, first we need to understand whether the KAT is *efficient* in and of itself. While there are many ways to measure efficiency such as studying individual case flow, trial duration, delay, inter alia, the data for that kind of study is not available. We have confined ourselves to an analysis of disposal rate based on data made public by the KAT.

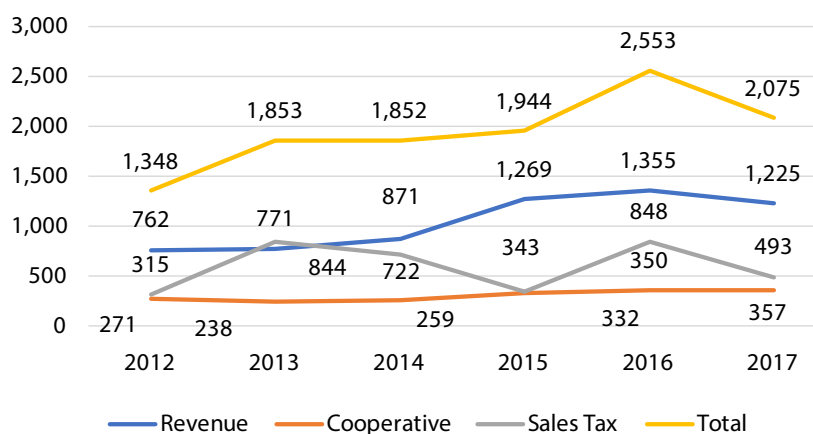
To do this, we have sourced data on case filings and pending cases from the KAT's official website. The official website only has data on the filing of new cases and on pending cases for 2012–2017. For our analysis, we had to arrive at the data on the number of disposed cases for 2013–2017, since this is not directly available on the website. We will also rely on disposal rate, defined as the percentage of filed and pending cases for a year that are disposed in that year, as a metric of this efficiency.

If pending cases and caseload are increasing while disposal rates decrease over time, the obvious conclusion is that the KAT is not efficient and these concerns must be addressed.

Let us begin with a survey of the data available. The landing page of the KAT website notes that there is a total of 15,296 cases in the KAT and 23,509 judgments have been passed as of date of writing.¹⁹ These numbers are out of context as they do not give a sense of the years in which these cases were decided, or how the cases are categorised. The 'Reports' section on the website provides some context, as it provides case filing data from the last five years, which is represented in Table 1 and Figure 1 below.²⁰

TABLE 1. New Cases Filed in KAT between 2012 and 2017

Subject Matter/ Year	2012	2013	2014	2015	2016	2017
Revenue	762	771	871	1,269	1,355	1,225
Cooperative Societies	271	238	259	332	350	357
Sales Tax	315	844	722	343	848	493
Total	1,348	1,853	1,852	1,944	2,553	2,075

FIGURE 1. New Cases Filed in KAT between 2012 and 2017

As can be seen from the numbers, overall, the number of new cases filed increased between 2012 and 2016. This particularly true of revenue cases which saw a steady incline, whereas filings for cooperative societies' cases dipped in 2013 and 2014, and filings for sales tax cases fluctuated from highs in 2013 and 2016 to lows in 2012 and 2015.

The KAT website does not provide us with the number of disposed cases; it only provides us with data on pending cases and new cases filed. To arrive at the total number of disposed cases at the KAT, we utilised the following formula:²¹

for years y1, y2, y3,

if pending cases are denoted by p1, p2, p3...

new cases filed are denoted by f1, f2, f3...

and disposed cases are denoted by d1, d2, d3...

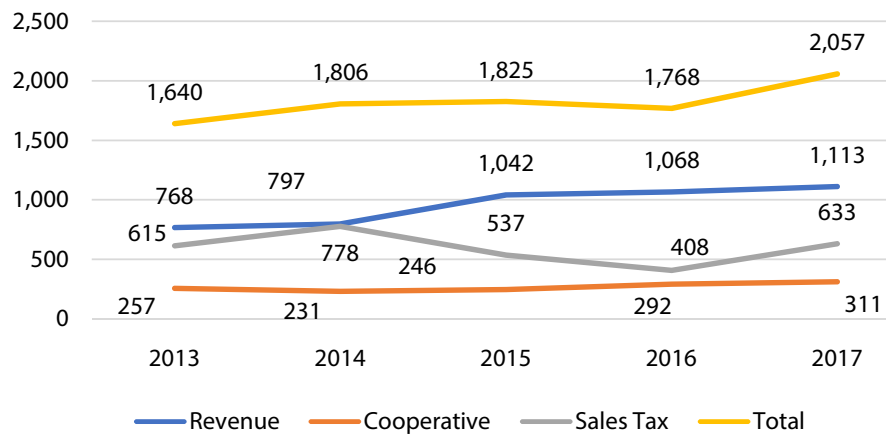
$$p2 = p1 + f2 - d2$$

$$\text{Therefore, } d2 = p1 + f2 - p2$$

What can be seen in Table 2 and Figure 2 is that while there was a dip in overall disposal in 2016, there was a dramatic rise in 2017. While disposal of revenue and cooperative societies' cases increased every year, disposal of sales tax cases fluctuated, with a high of 778 disposals in 2014 and a dip to 408 cases in 2016, while 2017 could be the best year for disposal in this category with 633 cases disposed and a quarter of the year remaining (as of the time of writing).

TABLE 2. Number of Cases Disposed by KAT between 2013 and 2017

Subject Matter/ Year	2013	2014	2015	2016	2017
Revenue	768	797	1,042	1,068	1,113
Cooperative Societies	257	231	246	292	311
Sales Tax	615	778	537	408	633
Total	1,640	1,806	1,825	1,768	2,057

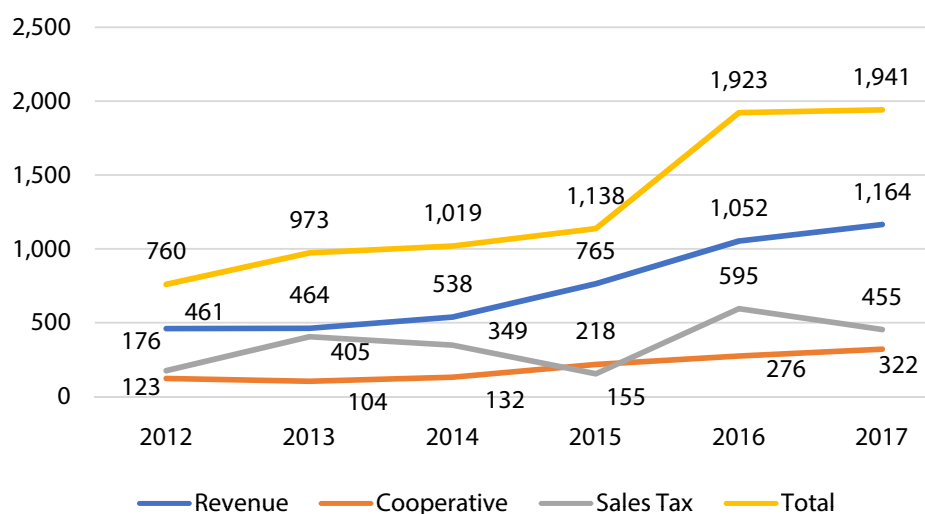
FIGURE 2. Number of Cases Disposed by KAT between 2013 and 2017

As can be seen from Table 3 and Figure 3, the number of pending cases at KAT increased steadily every year, with a dramatic, almost threefold rise from 2012 to 2016. Pending cases for revenue cases and cooperative societies cases also increased more than twofold between 2012 and 2016. Both these categories saw steady increases in disposal, and this corresponds to an increase in filing of new cases over the years.

The number of pending sales tax cases peaked in 2013, dipped in 2015, and increased again in 2016. The peak in 2013 corresponds to an increase in the number of new cases filed, which is its likely cause, as the disposal of sales tax cases held steady at 615 that year. The dip in pending cases at 155 in 2015 also corresponds to a peak in disposal in 2014 (as seen from Figure 2) coupled with a decrease in new cases filed.

TABLE 3. Cases Pending in KAT between 2012 and 2017

Subject Matter/ Year	2012	2013	2014	2015	2016	2017
Revenue	461	464	538	765	1,052	1,164
Cooperative Societies	123	104	132	218	276	322
Sales Tax	176	405	349	155	595	455
Total	760	973	1,019	1,138	1,923	1,941

FIGURE 3. Cases Pending in KAT between 2012 and 2017

What is evident is that increasing number of pending cases corresponds to the increase in the filing of new cases every year. The KAT cannot do much about an increase in case filings year on year, but to understand if the KAT is responding well to this, we need to look at the disposal rate.

Disposal rate is expressed as a percentage of the pending and new cases that are disposed on a yearly basis. We use the following formula to arrive at this rate:

r_1, r_2, r_3, \dots are disposal rate for years y_1, y_2, y_3, \dots

new cases filed are f_1, f_2, f_3, \dots

pending cases are p_1, p_2, p_3, \dots

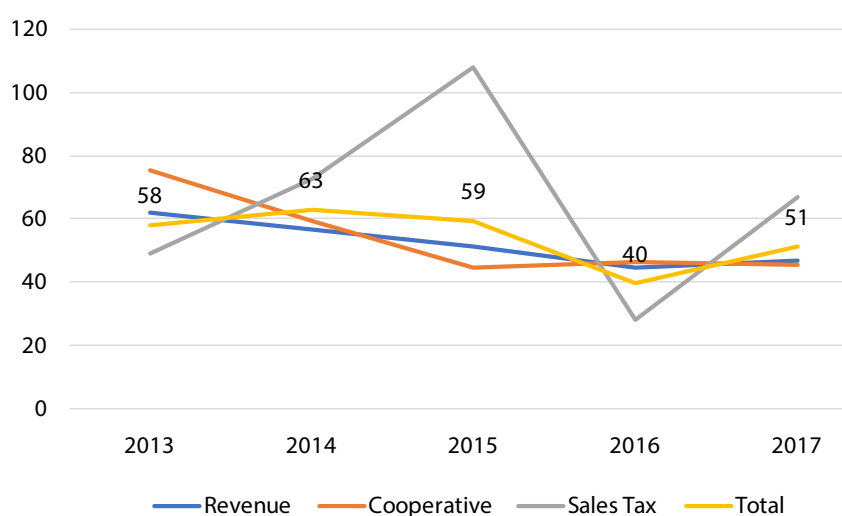
disposed cases are expressed as d_1, d_2, d_3, \dots

Therefore, $r_1 = d_1 / (f_1 + p_1) \times 100$

Applying this formula, disposal rate for each year is shown in Table 4, and the trends over the selected years are given in Figure 4.

TABLE 4. Disposal Rate of KAT between 2013 and 2017

Subject Matter/Year	2013	2014	2015	2016	2017
Revenue	62.19	56.56	51.23	44.37	46.59
Cooperative Societies	75.15	59.08	44.73	46.65	45.80
Sales Tax	49.24	72.64	107.83	28.27	66.77
Total	58.03	62.90	59.21	39.50	51.22

FIGURE 4. Disposal Rate of KAT between 2013 and 2017

As can be seen from Table 4 and Figure 4, the overall disposal rate increased to 63 per cent in 2014 and plummeted to about 39 per cent in 2016, crawling back up to 51 per cent in 2017. This can be related to a corresponding increase to 72 per cent in 2014 and 107 per cent in 2015 and a decrease to 28 per cent in 2016 in sales tax disposal rates.

Revenue disposal rates steadily decreased until they increased somewhat in 2017 and disposal rates of cooperative societies' cases declined dramatically, until they improved slightly in 2016.

What this tells us is that although sales tax cases occupy the most resources from KAT with four courtrooms (eight judicial and technical members)

dedicated to them, they see astonishing highs and lows when it comes to efficiency in disposal.

Courtrooms dealing with revenue and cooperative societies' cases also saw a general trend of decline during these four years. The disposal rate was at its lowest in 2016, due to the sharp rise in number of cases filed, the decrease in number of cases disposed, and the sharp increase in pending cases that year.

Between 2013 and 2017, the number of pending cases as well as the filing of new cases soared, while disposal rates, despite seeing highs and lows, reduced overall. This shows an inefficient system that is not responding well to demand. None of

these benches at the KAT are performing consistently and efficiently. They seem to be failing to dispose cases faster than traditional courts. At the very least they are an inefficient cog in the justice system. However, it is worth mentioning here that the court's performance has overall been far more efficient in 2017. Given that the year is yet to come to an end (at the time of writing this), it remains to be seen whether this is a new trend or an outlier.

From the above, we understand that the KAT is not a very *efficient* quasi-judicial institution. To understand if it fulfils its purpose of reducing the burden on the High Court of Karnataka in these matters and if it is an efficacious court of appeals, we will need to understand the rate at which cases resolved at KAT are appealed to the High Court.

EFFICACY OF THE KAT

The second measure of performance we are considering is that of *efficacy*, that is, whether the KAT is efficient at fulfilling its purpose in reducing the number of cases that are appealed to the High Court of Karnataka. If the KAT is inefficient at limiting appeals and is reversed often, whatever the grounds of these appeals may be, it is an inefficient way to diversify caseload. If the grounds for these appeals are concerns about procedural fairness and legal interpretation, there might be evidence for concerns about the composition of the KAT.

To arrive at a measure of efficacy, we will trace (a) the rate of appeal, defined as a percentage of cases disposed by the KAT that are appealed to the High Court of Karnataka,²² (b) the grounds upon which these cases are appealed, and (c) the reversal and dismissal rate of these appeals.

Data on appealed cases is available on the KAT website. We went through individual orders and

judgments uploaded on <http://judgmenthck.kar.nic.in> for all the cases that were appealed from the KAT to the High Court of Karnataka during one test year, 2014. These appeals have been decided by the High Court of Karnataka at any time between 2014 and 2017. Further, to understand the grounds upon which cases were appealed against the orders of the KAT in the High Court of Karnataka and the outcomes of these appeals, we analysed judgments of the High Court. We chose the year 2014 keeping in mind that a case in any court in India is considered delayed if it is not decided within two years,²³ (assuming that cases at the end of 2014 would only be appealed in 2015), cases decided between 2014 and 2017 that challenge an order of the KAT passed in 2014 is the most recent and best data we can find on the performance of the court.

To arrive at the number of cases appealed, we searched for 'Karnataka Appellate Tribunal' on the website (<http://judgmenthck.kar.nic.in>) and organised the resulting cases by date of judgment. We got 1,305 results, with judgment dates between 1 January 2014 and 28 August 2017. We manually sorted through these search results to arrive at the relevant cases. For our analysis, a case was considered only if it is a challenge to a KAT order passed in 2014. We excluded from our analysis cases such as contempt petitions seeking to force parties to comply with the KAT order, cases which are filed to extend KAT orders, and so on. Thus, the only cases we considered are those where KAT orders passed in 2014 were challenged on the merits, or on procedural grounds—which numbered 120.

Provisions of the KAT Act

The KAT Act itself has provisions for appealing decisions of the KAT if parties are not satisfied, but these are only applicable to orders made under the Karnataka Sales Tax Act, 1957. Section 8-A of the KAT Act allows for filing a revision petition

before the High Court in case any party is dissatisfied with the ruling of the KAT, or feels it has decided wrongly on a point of law.²⁴ This must be done within 60 days, unless there is sufficient cause shown for delay. Section 9 of the KAT Act, provides that orders of the KAT are to be considered final, and not to be subject to questioning from any other court.²⁵

Appeal Rate

In order to arrive at an answer to the question of whether the KAT is efficacious, we scrutinised the total number of disposed cases that were appealed, and the number of these decisions that were reversed. Table 5 provides the details.

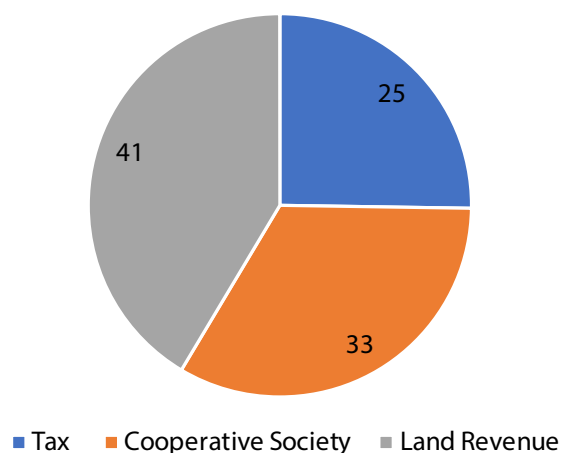
TABLE 5. Appeal Rate of KAT in 2014

Type of case	Disposed cases	Appealed cases	Percentage of cases appealed
Tax	778	30	4
Cooperative Societies	231	40	17
Land Revenue	797	49	6
Unspecified	–	1	–
Total	1,806	120	7

We found that of the total disposed cases in 2014, four per cent of tax cases, 17 per cent of cooperative society-related cases, and 6 per cent of the land revenue related cases were appealed. The total appeal rate is 7, which is not too high, but what is concerning is the appeal rate with cooperative societies' cases (17), since it is outsized, simply because the number of disposed cooperative societies' cases is about a one-third of disposed land revenue or sales tax cases. Further, the number of disposed sales tax and land revenue cases is 778 and 797 respectively, and the appeal rates for those categories are 4 and

6 respectively. That is a huge difference in terms of efficacy.

FIGURE 5. Percentage of Cases Appealed from KAT in 2014 by Case Type



Of all the 120 cases where orders of the KAT passed in 2014 were challenged and decided by the High Court of Karnataka, 25 per cent were tax related, 33 per cent were cases stemming from cooperative societies' matters, and 41 per cent were land revenue related.²⁶

All of this causes some concern about the efficacy of not only the revenue and cooperative societies' courts at the KAT, but about the efficacy of the KAT itself.

CHALLENGES TO ORDERS OF THE KAT

In this section, we will try to understand why orders passed by the KAT are challenged at all. To do this, we analysed decisions of the High Court of Karnataka between 2014 and 2017 that dealt with a challenge to a KAT order passed in 2014. After going through the orders, we have categorised the

grounds on which appeals were made under the following categories:

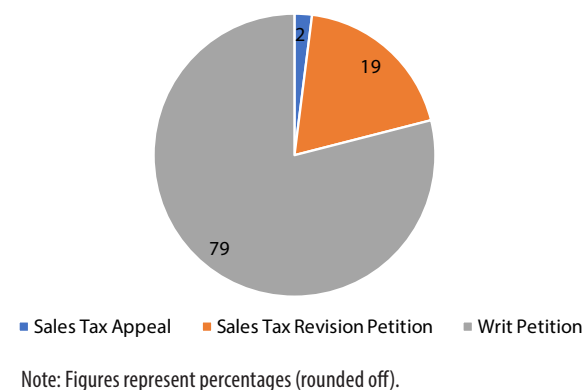
1. None.
2. Rights of the petitioner were violated.
3. The tribunal did not appreciate the relevant facts or evidence properly.
4. The tribunal did not interpret the relevant law properly.
5. The tribunal did not follow the correct procedure.
6. Others.

APPEALS AND PETITIONS

Of the 120 judgments, we found that an overwhelming 79 per cent were comprised of writ petitions. Sales tax revision petitions were the next highest category, with around 19 per cent of the total number of the cases filed. Only 2 per cent of the cases were sales tax appeals. This is shown in Figure 6.

As mentioned earlier, the Karnataka Cooperative Societies Act, as well as the Karnataka Land Revenue Act allow for appeals only to the Tribunal, and Section 9 of the KAT Act clearly states that the decision of the tribunal is final and binding. Therefore, it is perhaps inevitable that the petitioner who is aggrieved by any decision of the KAT would have no choice but to file a writ petition. This is concerning, as it ultimately does not provide for a clear procedure or a limitation period for an appellant aggrieved by an order of the KAT to approach the High Court. It seems to be a loophole in legislative drafting, and is something that ought to be reviewed by lawmakers in the interest of speeding up matters that do reach the High Court from the KAT.

FIGURE 6. Types of Challenges to KAT's Orders

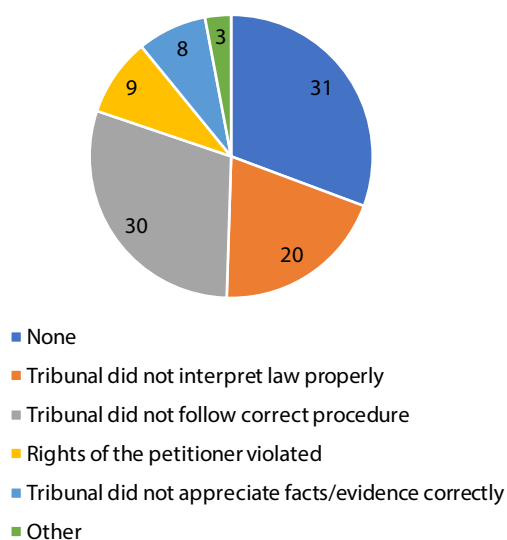


Grounds for Appeal

As shown in Figure 7, in terms of grounds for appeal, 31 per cent of the orders we examined did not specify any grounds, 20 per cent of the cases were appealed because the petitioners felt that the Tribunal did not interpret the law properly, and 30 per cent of the cases were appealed on procedural grounds, arguing that the KAT failed to follow correct procedure. We also found that 8 per cent of the cases were appealed because the petitioner felt that the KAT did not appreciate either facts or evidence properly. In 9 per cent of the cases, the petitioners explicitly felt that their rights were being violated, or that natural justice had been denied to them in some form or the other. A very small percentage of cases were filed because they had been rendered infructuous, or in one instance, because the tribunal was not working due to vacant posts at the time the petition was filed.²⁷

In approximately 59 per cent of the cases, KAT orders are challenged on grounds of procedural infirmities, improper appreciation of facts or evidence, and where the petitioners felt that their rights were being violated. These grounds lend credence to concerns about the composition of the KAT and tribunals as a whole.

FIGURE 7. Grounds for Appeal from KAT to High Court of Karnataka in 2014



Note: Figures represent percentages (rounded off).

Reversal Rate

To understand efficacy, another measure we considered is the frequency with which the High Court of Karnataka reversed the orders of the KAT in appealed cases. Often cases are not appealed for any number of reasons, from high cost of litigation to compromises being worked out. Reversal rates are a sharper picture of the performance of a court.

As shown in Table 6, of the appealed cases, 50 per cent of the decisions were reversed in tax-related matters, 27 per cent reversed in land revenue matters, and 30 per cent were reversed for cooperative societies matters. Overall, one-third of the appealed cases were partly or fully allowed by the High Court of Karnataka. Clearly this is a high reversal rate for any court.

TABLE 6. Reversal Rate for Appeals from KAT to High Court of Karnataka in 2014

Type of case	Disposed cases	Appealed cases	Appeal rate	Reversed cases	Reversal rate
Tax	778	30	4	15	50
Cooperative Societies	231	40	17	12	30
Land Revenue	797	49	6	13	27
Total	1,806	120	7	40	33

This paints a sobering picture for the KAT and adds strength to doubts about the composition of tribunals, and whether this is the appropriate judicial structure for deciding these cases.

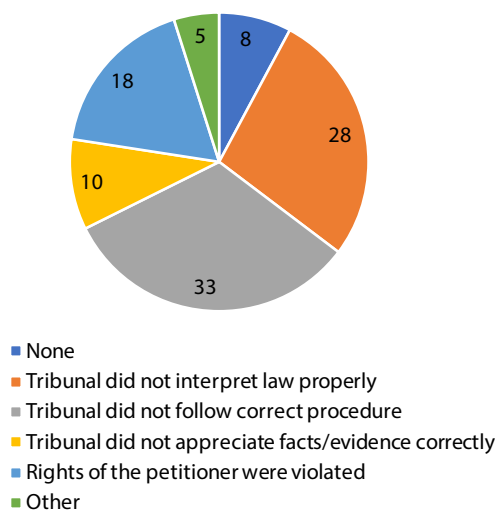
Outcomes

In terms of outcomes, we found that the 66 per cent of cases were dismissed by the High Court of

Karnataka. While 16 per cent of the cases were dismissed as withdrawn, which is possibly due to compromises being worked out between parties, 28 per cent of the petitions were allowed, and 5 per cent were partly allowed. Only one per cent of the cases was adjourned, with no clear outcome.

Of all the cases that were allowed or partly allowed, Figure 8 shows the various grounds on which they were appealed.

FIGURE 8. Grounds for Appeal in Orders from KAT in 2014 Reversed by High Court of Karnataka



Note: Figures represent percentages (rounded off).

Of the cases that were overturned, 33 per cent were on procedural grounds, 18 per cent of cases were on grounds that the rights of the petitioners had been violated, 10 per cent of the cases were on grounds that the facts of the case or evidentiary matters were not pursued properly by the KAT, and 28 per cent were on ground that the tribunal had not interpreted the relevant law properly. For the remaining 8 per cent, the judgment from the High Court did not specify any grounds.

CONCLUSIONS

The *efficiency* of the KAT cannot be said to be optimum, given the trends in terms of number of pending cases and disposal rates. Disposal rate seems to be plummeting unsteadily as both pending cases and new cases filed seem to be increasing. While this is limited data, it does point to concerns about efficiency of the KAT, which must be addressed. It also leads to doubts about arguments in favour of

diversification that are based on efficiency of the tribunals and other quasi-judicial institutions.

On *efficacy*, the data is a little more complex. While the appeal rate per se is low at seven, the data from the appeals section reveals that the KAT's decisions are overturned disproportionately by the High Court of Karnataka, at 33 per cent. Most of these cases are appealed on procedural grounds, as well as on grounds that the KAT is not interpreting the law or facts or evidence properly. In nine per cent of these cases, petitioners' rights or natural justice is explicitly evoked by the petitioners. This lends some credence to the argument that the composition of the KAT, with the inclusion of technical members matched one-to-one with judicial members, may lead to miscarriage of justice especially in cases involving procedural fairness.

Further empirical analyses could examine the question of how to ensure better *efficiency* and *efficacy* of the KAT, either by improving the management of tribunals or by alternative judicial structures.

Notes

* The authors are grateful to Harish Narasappa, Shruti Vidyasagar, and Arun Thiruvengadam for their valuable comments and feedback. They would also like to thank Sudhir Krishnaswamy for his insights.

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 27. It is pertinent to note that in this specific case, the petition was later dismissed as withdrawn because the tribunal started functioning, and the petitioner preferred to approach it.

Government Litigation: A Study of Tax Appeals in Karnataka and Gujarat

Alok Prasanna Kumar

Abstract

Government litigation is often blamed for the huge pendency of cases in courts. However, precise numbers to back up this claim are elusive. A study of a specific type of government litigation, namely tax appeals, in the High Courts, can provide some insight into how a particular government approaches a certain kind of case. To do this, the author compares the approaches of the union government and state governments of Karnataka and Gujarat in filing tax appeals before the High Courts of Karnataka and Gujarat respectively, to determine whether any patterns emerge from the data to indicate how many of the government's cases may be characterised as 'frivolous'. The author finds that the central government is more litigious than state governments in terms of filing tax appeals, and suggests that it needs to immediately re-think its approach to tax litigation.

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It is a truism that in India, 'the government' is the single largest litigant in the country. Those concerned about the pendency of cases and delays in cases in India tout this as a possible cause, dropping (unverifiable) figures which suggest that government litigation constitutes anywhere between 50 per cent and 7 per cent of all cases in the system.¹ One recent 'study' by the Ministry of Law suggested that central and state governments filed 46 per cent of all cases pending in the judicial system,² though it is unclear what the methodology followed was to arrive at that number. There is also no single, cogent definition of 'government litigation'. It could mean cases filed by the government, cases filed against the government, or both. Assuming the widest definition possible—cases filed by and against the government—by itself does not tell us anything useful

or actionable in the context of delay and pendency. At the most basic level, it might mean that government litigation is a significant contributor to the 'supply' of litigation in India. However, this raises further questions, such as:

1. Which 'government' or set of entities are being referred to here?
2. How much does this entity (or do these entities) contribute to litigation supply?
3. How much of it is unnecessary or burdening the court?

What is commonly called the 'government' has many shades and aspects to it legally. India, being a federal polity, has both central and state governments, apart from the local self-government bodies, that is, the panchayats and municipalities. All these bodies act independently, having been given independent powers and functions under the Constitution of India and relevant statute.

Likewise, there are several bodies set up by the Constitution or a statute—these include universities, regulatory bodies, commissions, and others. They function independently of the central or state government. They may be 'state' for the purposes of Article 12 of the Constitution³ or 'authorities' for the purposes of Article 226,⁴ but that does not make them 'government' as this is a clearly defined category even under the Constitution.

Constitutionally, the 'government' in India is the executive wing of the state—the bureaucracy and the 'political executive' which is empowered to exercise all executive functions under the Constitution.⁵ It is this body, both at the central and the state level that I will focus on for the purpose of this study.

This helps us arrive at a narrower definition of government litigation: all cases filed by or against these bodies, namely the central government, the

state governments, and the governments of the union territories in the courts of the country. Such cases are filed at all levels, from the magistrates' courts to the Supreme Court, including tribunals of various sorts, set up by the state and central governments.

In any nation that abides by the rule of law, it is only just and fair that citizens see the court as an institution to remedy any failings or shortcomings or illegalities committed by the government. Likewise, the state is required to abide by the due process of law in punishing people or imposing civil or criminal penalties upon them, and this includes providing a fair hearing before a neutral and independent court. It is therefore highly likely that government litigation will form a significant part of the judiciary's workload in any nation that follows the rule of law.

That being said, how an individual or a private entity approaches or choose to undertake litigation is not the same as the manner in which the government chooses to undertake litigation. An individual chooses to undertake litigation because it directly affects her, likewise a private entity. It is, however, not always obvious as to why the government undertakes litigation in every case. Theoretically, the government does not just act in its own interest but also in the larger public interest. *Second*, the person making the decision to litigate is more removed from the consequences of the litigation in the case of the government than with private entities or individuals. *Third*, the resources available to the government vastly outstrip those available to individuals or entities by many orders of magnitude (with a few exceptions).

The effect of this is that it is possible that the government, as a litigant, might be acting in an irresponsible manner by filing a large number of frivolous cases. This may not necessarily be in bad faith. Rather, this may be because of the existence of

a perverse set of incentives (arising out of the factors mentioned above) which result in the government filing cases in which it has no hope of winning, but ends up overburdening the court system. Whether a case is frivolous depends on the context—an overarching definition that covers everything from simple money suits to constitutional cases is neither necessary nor desirable. What makes a suit frivolous is very different from what makes a tax appeal frivolous and entirely different from what makes an appeal from a tribunal frivolous.

Given a case type and a subject matter, how then do we assess if the case is ‘frivolous’? One answer is to see if the court, in dismissing or disposing of the case within a few months of filing, has held it to be ‘frivolous’ or made an observation to that effect. This methodology was adopted by Vidhi Centre for Legal Policy in their report titled *Inefficiency and Judicial Delay: Insights from the Delhi High Court* where they studied cases filed in the High Court of Delhi between 2011 and 2015.⁶ From a representative sample of cases that they examined, they found that about 4 per cent of the cases were ‘frivolous’ by this definition. However, the authors did point out that this number seems too low and it is possible that a larger number of cases are in fact frivolous but that fact has not been recorded by court. A different definition of ‘frivolity’ therefore needs to be found.

Frivolity could be defined in a manner that accounts for the obvious nature of such frivolity. A case which has no chance of succeeding is usually one which does not even require the other side to rebut factual or legal submissions. The lack of merits is so obvious, it results in the case being dismissed *in limine*. This should be distinguished from the dismissal of a special leave petition by the Supreme Court or any case where the court’s jurisdiction is a matter of discretion, not a right. This definition will also exclude those where the court dismisses the case on a technical ground such as (lack of) jurisdiction.

The problem therefore may be framed thus: are cases being filed by the government that need not have been filed, and thus, constitute a waste of the court’s time and resources?

One way to define frivolous government litigation would be to look at where the government has a choice between filing and not filing a case, and even when the judgment is highly unlikely to go in its favour legally, the government proceeds to file the case. One such type of case, which has been commented upon, is in relation to appeals by the government against orders relating to pensions and service conditions of serving and retired armed forces personnel passed by the Armed Forces Tribunal. Data obtained by the Vidhi Centre for Legal Policy showed that in 2014, of the 924 appeals filed against the orders of the Armed Forces Tribunal, 890 (or nearly 96.3 per cent) were filed by the Ministry of Defence. Of these, more than 96.7 per cent were dismissed in the first hearing itself, suggesting that the Supreme Court did not find any substantial question of law involved in the case (as required by the Armed Forces Tribunal Act, 2007). One can safely say perhaps, that the Ministry was not justified in filing most of these appeals.

Another area of government litigation that has received much attention has been the filing of appeals by the tax department. As of December 2011, ₹1.84 trillion of central government revenues in income tax were held up in nearly 65,998 tax appeals pending at all levels.⁷ This figure has been increasing over the years, and at first blush, seems to suggest an inefficient judiciary. A deeper examination, however, reveals that the central government loses nearly 70 per cent of the cases and that most of this money is not recoverable anyway. It would therefore seem that it is the government that is passing the buck on to the courts and adding to their burdens. Tax appeals *prima facie* seem to provide a good example of wasteful government litigation, and require to be studied further to see

if this still holds true. Tax litigation being a subject matter where both central and state governments in India are likely to file a substantial number of cases, it would be possible to compare and contrast the way in which these governments approach such litigation. This should provide understanding on whether both central and state governments suffer from the same pathology when it comes to tax litigation.

The bulk of tax litigation is simply a question of money, and for both the revenue and the citizen, the incentive is theoretically the same: is the expense of litigation worth the money I am going to recover?

Even where the tax outgo or revenue intake is on a recurring basis, the calculation is the same. An assessee is likely to be affected by an adverse judgment in years to come, just as the revenue is likely to be affected vis-à-vis the assessee in future years. If a case has larger implications beyond the assessee for the revenue (if it loses the case), it also enjoys a power that the assessee does not: the power to amend the law. Theoretically, the assessee and the government should be making the same kind of calculation in deciding whether to file an appeal against an adverse judgment—what are my chances of success in recovering the amount at stake? Whether that happens in reality is what I will analyse in this chapter.

Examining data available in the DAKSH database on the High Courts of Gujarat and Karnataka, this chapter looks to answer the following questions:

1. Is the central government more likely to file appeals in tax cases, in the High Court, than assessees?
2. Is the state government more likely to file appeals in tax cases, in the High Court, than assessees?
3. Inter se state governments, which government is more likely to pursue tax appeals?

METHODOLOGY

For the purpose of analysis in this chapter, cases filed from 2011 to 2015 have been chosen. These cases have been chosen both from the DAKSH database and supplemented, where possible, with cases from the websites of the High Courts of Karnataka and Gujarat. These High Courts have been chosen based on the depth of detail on these High Courts available in the DAKSH database. Coincidentally, they also happen to be among the five largest state economies in India, and are therefore likely to have a sizeable sample of cases to study.

To narrow down categories of tax cases and ensure that comparison takes place on a like-for-like basis, income tax cases of the central government, and sales tax or value added tax (VAT) cases for state governments, have been taken into account. The High Court exercises reasonably similar functions in both cases—examining whether the order of the tribunal is justified in law, without a full re-examination of the facts already established.

Whereas the High Court of Karnataka has a separate category for income tax and sales tax appeals, all of them are clubbed together as ‘Tax Appeals’ in the High Court of Gujarat, with case categories distinguishing between income tax and sales tax cases.

The data collected here is not comprehensive of all tax cases filed in this duration in either the High Court of Karnataka or the High Court of Gujarat. The DAKSH database relates to cases which have been listed for hearing after 2014 and, therefore, will not necessarily contain details of all the cases which have been filed in the five-year

period. However, some data about the cases filed in this period can be gleaned from the websites of the High Courts themselves and this has been done wherever possible.

There is one anomaly in the data which needs to be accounted for. For the years 2011 and 2012, there seem to have been hardly any cases filed in the High Court of Gujarat on VAT. It is unclear exactly what caused this. A possible explanation is that the Gujarat Value Added Tax Tribunal was non-functional during this period, resulting in no cases being decided, and hence no appeals being filed in the High Court.

JURISDICTION

Under the Income Tax Act (IT Act), 1961, an appeal can be filed against the order and judgment of the Income Tax Appellate Tribunal to the jurisdictional High Court. Only an 'aggrieved party' can file an appeal against an order of a lower forum to a higher one. An aggrieved party is one whose civil rights have been disturbed in some way by the order and judgment of the lower court.

This being a second appeal, the requirement is that an appeal to the High Court should involve a 'substantial question of law'. A substantial question of law has been interpreted by the Supreme Court to mean a question of law which has not been finally settled by any superior court and substantially affects the rights of the parties to the case.⁸ Similarly, Section 78 of the Gujarat Value Added Tax Act (GVAT Act), 2003, which was amended in 2006 by the Gujarat Value Added Tax (Amendment) Act, 2006, allows for aggrieved parties to file appeals before the Gujarat High Court from the orders of the Gujarat Value Added Tax Tribunal on a 'substantial question of law'. Since

the phrasing is almost identical to the IT Act, it would have the same connotation.

The Karnataka Value Added Tax Act (KVAT Act), 2003, on the other hand, grants a limited right of revision against the orders of the Karnataka Value Added Tax Tribunal and a right to appeal against the orders of the Commissioner or the Additional Commissioner acting in a quasi-judicial capacity. Under Section 65 of the KVAT Act, a revision petition can be filed against an order of the Tribunal in the High Court, where a question of law has not been decided or decided incorrectly. This is a narrow jurisdiction, but in some ways akin to the appeal under the IT Act and GVAT Act. For the purposes of this study, revision applications have also been incorporated and studied to ensure that there is uniformity among the types of cases being considered.

One caveat is necessary here. The Central Board for Direct Taxes has periodically issued instructions to the income tax department to limit tax litigation. It has done this by limiting appeals in cases where the amount at stake is below a certain threshold. The latest circular (Circular No. 21 of 2015), for instance, prescribes ₹10,00,000 as the minimum limit for an appeal to be filed before the ITAT, ₹20,00,000 as the limit for High Courts, and ₹25,00,000 as the limit for the Supreme Court. Given that this direction was issued 2015, it may have had some impact on the numbers presented below. Presently, there does not seem to be any equivalent for the states.

ANALYSIS OF DATA

Table 1 compares the number of appeals filed in income tax cases, by the revenue and assesseees, in the High Courts of Karnataka and Gujarat.

TABLE 1. Comparison of Appeals Filed by Revenue and Assesseees in the High Courts of Karnataka and Gujarat in Income Tax Cases

Year	Karnataka			Gujarat		
	Government appeals	Private appeals	Ratio	Government appeals	Private appeals	Ratio
2011	66	11	6.00	829	178	4.66
2012	214	67	3.19	509	167	3.05
2013	304	55	5.53	742	113	6.57
2014	234	280	0.84	579	120	4.83
2015	636	157	4.05	455	58	7.84
Total	1,454	570		3,114	636	

One key point of difference to note here is that while the details of cases in the High Court of Karnataka have been taken from the DAKSH database, details of the cases in the High Court of Gujarat have been taken from the DAKSH database, and supplemented by information on the website of the High

Court of Gujarat. Nonetheless, we see a fairly consistent pattern throughout—government appeals far outstrip appeals by assesses. Figure 1 shows the comparison between the ratio of government to assessee appeals in the two High Courts.

FIGURE 1. Comparison of Ratio of Government to Assessee Appeals in the High Courts of Karnataka and Gujarat

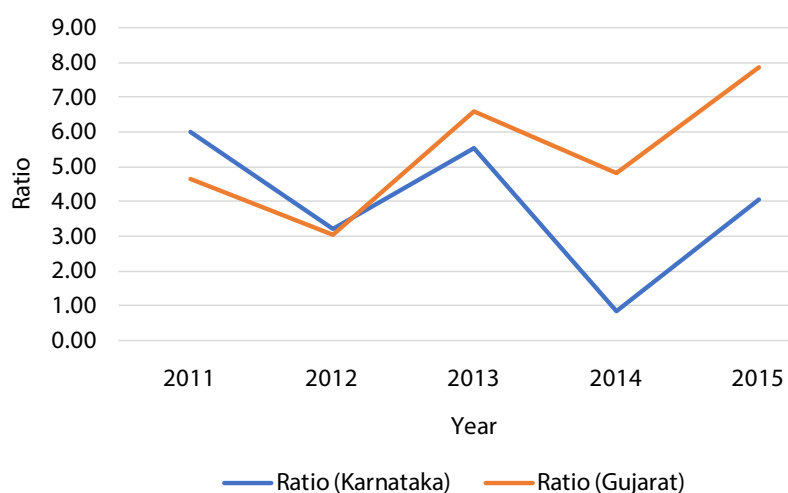


Table 2 compares the number of appeals or revision petitions filed under VAT laws, by state

governments and assesseees, in the High Courts of Karnataka and Gujarat.

TABLE 2. Comparison of Appeals/Revision Petitions filed by State Governments and Assesseees under VAT Laws in the High Courts of Karnataka and Gujarat

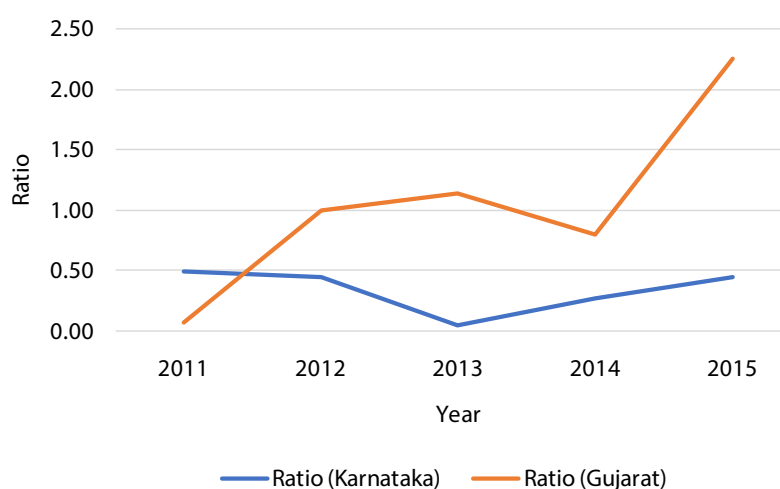
Year	Karnataka			Gujarat		
	Appeals filed by government	Appeals filed by assesseees	Ratio	Appeals filed by government	Appeals filed by assesseees	Ratio
2011	18	36	0.50	1	13	0.08
2012	21	46	0.46	3	3	1.00
2013	2	38	0.05	72	63	1.14
2014	14	50	0.28	70	87	0.80
2015	22	49	0.45	142	63	2.25
Total	77	219		288	229	

In contrast to the income tax appeals, appeals in VAT cases seem to be filed at least as many times, if not more often, by assesseees rather than state governments. Data for a few years appears anomalous—2013 for Karnataka and 2011 and 2012 for Gujarat—insofar as the absolute number of appeals are concerned, and there are no obvious explanations for this, but in general, the government of Karnataka seems to file fewer appeals on average compared to the government of Gujarat. What this could be attributed to is not immediately

obvious, and requires greater in-depth research into the manner in which assessments are carried out in the respective states. The year 2015 is the sole exception in this data, where the number of appeals filed by the state government seems to vastly outstrip the number of appeals filed by the assessee.

Figure 2 shows the comparison between the ratio of government to assessee appeals in the two High Courts filed under VAT laws.

FIGURE 2. Comparison of Ratio of Government to Assessee Appeals in the High Courts of Karnataka and Gujarat



Tables 3 and 4 compare the pendency of appeals in income tax and VAT cases respectively in the two chosen High Courts, in terms of actual numbers as well as the ratios of government to assessee appeals.

TABLE 3. Comparison of Pendency of Appeals in Income Tax Cases

Year	Karnataka			Gujarat		
	Appeals filed by government, still pending	Appeals filed by assessee, still pending	Ratio	Appeals filed by government, still pending	Appeals filed by assessee, still pending	Ratio
2011	60	2	30.00	396	119	3.33
2012	160	44	3.64	195	108	1.81
2013	194	26	7.46	261	53	4.92
2014	179	258	0.69	247	82	3.01
2015	614	149	4.12	196	32	6.13
Total	1,207	479		1,295	394	

A comparison of pendency of appeals filed in each year (as of the date on which the data was collected), shows that the pendency of cases does not seem to be dramatically different between government and

assessee appeals. However, far more government cases in the High Court of Karnataka seems to be pending vis-à-vis assessee appeals; likewise, in the High Court of Gujarat.

TABLE 4. Comparison of Pendency of Appeals in VAT Cases

Year	Karnataka			Gujarat		
	Government pending	Private pending	Ratio	Government pending	Private pending	Ratio
2011	2	5	0.40	0	0	0.00
2012	0	12	0.00	0	1	0.00
2013	2	38	0.05	13	7	1.86
2014	10	42	0.24	5	20	0.25
2015	22	48	0.46	17	17	1.00

Similar to income tax appeals, the ratio of pending government appeals to assessee appeals does not seem to be dramatically different from the ratios in which they are filed.

4. As far as pendency is concerned, there does not seem to be an observable difference between government appeals and appeals by assessees.

What explains the dramatic differences between the litigiousness of the state and the central governments in tax matters?

CONCLUSIONS

Some key conclusions can be summarised from the above data:

1. The central government tends to file far more income tax appeals than assessees (nearly four times as many) in the High Courts of Karnataka and Gujarat put together.
2. The government of Karnataka, during the period for which data was examined, filed far fewer tax appeals and revisions than assessees did in the same period—a ratio of 0.35 for the five-year period. On the other hand, the government of Gujarat filed more appeals than assessees, but only by a factor of 1.26.
3. With reference only to assessees, the central government seems far more litigious than the state governments when it comes to tax appeals.

One possible explanation is the fact that the income tax department seems to lose a lot more cases in the ITAT. One report estimates that the revenue loses 80 per cent of all tax cases in the tribunals.⁹ This might explain why the revenue files far more appeals in the High Courts than the state governments in tax cases. Comparable figures are not available for the state governments of Gujarat and Karnataka to confirm this. This also raises a further question: why does the ITAT decide so many cases in favour of the assessee?

When contrasted with the fact that in the appellate layer immediately below that, the Commissioner of Income Tax (Appeals), the Revenue ‘wins’ 75 per cent of the cases, it does not seem so absurd. This is also because the CIT(A) is a serving officer of the Revenue and is more likely to side with the Revenue in an appeal from the order of the assessing officer. There is perhaps a need to re-look this level of appeal and what purpose it serves.

In the Supreme Court data collected by the Vidhi Centre for Legal Policy, of 732 cases filed by the income tax department in 2014, 216 or 29.51 per cent had been dismissed *in limine*.

There seem to be underlying problems with the way the income tax department approaches litigation that cannot be fixed simply by setting monetary limits to filing of appeals.

While the number of tax cases does not suggest that they are a significant burden on the two High Courts in question, it is possible that in other High Courts, such as the High Courts of Delhi and Bombay, where the volume of tax litigation is much higher,¹⁰ the government's approach to litigation may in fact be leading to greater delay.

At the moment, the data is not sufficient to check if the cases that are being filed are frivolous, but as DAKSH collects more data, this may be possible to address. For the moment however, one conclusion that stands from the data is that the central government needs to immediately re-think its approach to tax litigation.

Notes

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4. See *K.K. Saksena v. International Commission on Irrigation & Drainage*, (2015) 4 SCC 670.
5. Art. 53 in the context of the union government and Art. 154 in the context of the state government.
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7. Kian Ganz. 2015. 'Untangling the Complex Web of Tax Laws', *Livemint*, 2 December, available online at <http://www.livemint.com/Politics/B3w8a9k5fdu3lBQasJhHoN/Untangling-the-complex-web-of-tax-laws.html> (accessed on 28 September 2017).
8. *Chunilal V. Mehta and Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.*, AIR 1962 SC 1314.
9. Remya Nair. 2014. 'CBDT Sets up Panel to Look into Dispute Resolution', 14 July, available online at <http://www.livemint.com/Politics/jQiziSTfvMgRo5rOsuNDYI/Finance-ministry-sets-up-panel-to-reduce-tax-litigations.html> (accessed on 28 September 2017).
10. Between 2011 and 2015, the High Court of Delhi saw 4,447 income tax appeals cases filed (an average of nearly 900 a year) whereas the High Court of Bombay, in the same period, saw 10,185 income tax appeals (an average of nearly 2,000 a year) filed before the Bombay Bench alone.

California's Courts: Judicial Administration and Case Flow Management

Leah Rose-Goodwin

Abstract

The Judicial Council of California is the central policymaking and administrative agency of California's court system. In this chapter, the author discusses the current status of the Council's efforts to implement more effective judicial administration and case flow management. The author highlights the challenges posed by lack of centralised data, severe loss of funding due to national recession, and emphasis on local decision-making rather than state-wide standards in the context of implementation of trial court unification, measurement of judicial workload, and operation of courts. She concludes on a hopeful note, however, noting that several initiatives are underway to improve data measurement and collection, workload models, and allocation of judgeships, so that all Californians may get better access to justice.

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The Judicial Council of California is the central policymaking and administrative agency of the California state court system and strives to provide data and analytics to improve judicial administration and case flow management in California's trial courts. Despite becoming a unified and state-funded system about 20 years ago, there are continued differences in case processing practices and service levels across California's 58 counties. A crippling recession that severely cut funding to trial courts starting in 2012, a lack of centralised case data, and variation in local practices pose challenges to fully implementing case flow management at the state-wide level. Nevertheless, the California Judicial

Branch is moving in the direction of using data and analytics to support funding requests for the courts, making it important than ever to enhance the measurement and reporting of case flow management indicators.

COURTS IN THE UNITED STATES

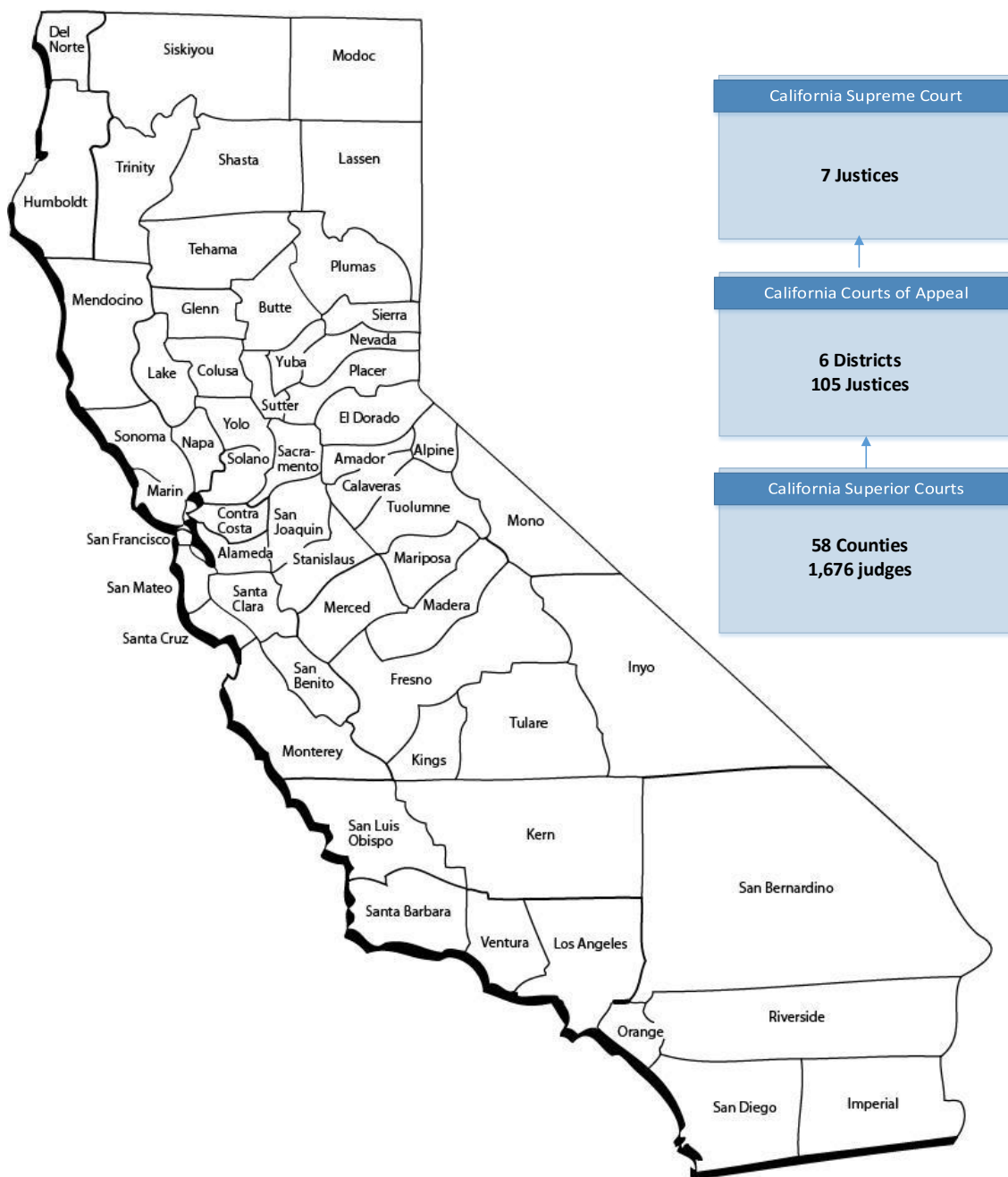
The United States of America has two primary judicial systems: the federal judiciary and the state judiciary.¹ The overall structure of the two systems is the same: lower courts that hear the majority of matters; courts of appeal that provide judicial review of lower court decisions; and a Supreme Court to review decisions made at the appellate court level. The two systems differ in the matters that each may hear, with the state courts hearing

the majority of all criminal, civil, family, and probate matters.

CALIFORNIA'S JUDICIARY

Most cases in California originate at the superior court (also called 'trial court') level, where 1,676 judges hear matters in the 58 courts—one in each county. The courts of appeal both conduct judicial review of lower court decisions and directly receive certain matters which are not heard in the trial courts. Finally, the state Supreme Court reviews lower court decisions, hears appeals of death penalty cases, and oversees judicial and attorney conduct. Figure 1 depicts the structure and hierarchy of California's court system.

FIGURE 1. California's Court System



Map Source: California Association of Counties

California's court system is one of the largest in the world, serving a population of nearly 40 million. In the fiscal year 2014–2015² over 6.8 million cases

were filed in the superior courts. The majority of these cases are traffic infractions, matters such as speeding or making an illegal turn. Beyond that,

the work that comes before the superior courts in California encompasses the full range of issues that require legal adjudication, such as criminal matters, civil litigation, family and juvenile law, and probate.

The variation among the communities served by the California court system is tremendous. There is a superior court in every county in the state and over 500 facilities statewide where court business is conducted. The largest court, in Los Angeles County, serves a population of over 10 million, whereas the smallest courts serve communities of under 10,000 residents each. In addition to population variation, there is considerable differentiation in the communities served—some courts are located in high-density urban areas, whereas others serve more rural communities.

While population is not directly correlated with court workload, it serves as a useful indicator of the need for court services generally. Although California has experienced steady population growth throughout the state, that growth has affected communities unequally. The suburban communities that surround established urban areas have experienced high rates of population growth as people move to the outskirts of urban areas seeking lower-cost housing. Further, staying consistent with trends in other states and countries, rural areas have experienced very modest or negative population growth.

EFFECTS OF TRIAL COURT UNIFICATION

Prior to trial court unification, these wide disparities mirrored the variation in service that courts provided to users. In the early years, the courts were operated at the county level, with all operational and funding issues handled in a decentralised manner by local government. While some communities

had the means to provide adequate funding to the Judicial Branch, others were not as able or willing, and the quality of service provided to the public was uneven as a result.

The Trial Court Funding Act of 1997³ sought to change that by instituting state funding of trial court operations. In addition to changing the funding structure for trial courts, the goal of having a state-funded system was to create uniform standards and procedures for consistency of experience for court users and implement structural efficiencies and economies of scale for the more effective operation of the courts.

In the years following the passage of the Act, a number of steps were undertaken to implement unification. In addition to the centralisation of funding, these included revision of laws, adoption of new rules that would be applicable to all courts, standardisation of forms, and consolidation of many administrative functions. One step that had a profound impact on judicial administration and case flow management was developing a model to evaluate judicial workload across all trial courts.

JUDICIAL WORKLOAD MEASUREMENT

At the time of unification, the California courts had vastly different judicial resource levels. While some counties seemed to have enough resources, others, particularly in high-growth areas, did not appear to have enough judgeships. At the time, the Judicial Branch did not have a means of evaluating how many judicial officers might be needed compared to the numbers that were appointed in each court. Under the decentralised funding model that was in place prior to state funding, trial courts could submit requests for additional judgeships to local legislators. In doing so, these requests were

evaluated on an individual basis, without requiring consideration for the needs of other courts. Jurisdictions were often successful in getting new judgeships based on the relationships these courts had established with those legislators. It comes as no surprise that some jurisdictions were more successful at obtaining new judgeships while others were not as successful.

Once centralised, the Judicial Branch needed to establish a ‘yardstick’ to measure judge need across all courts and to advocate to the state legislature the need for new judgeships using data. Adding to the challenge was the tremendous variation among the courts, as mentioned above. Partnering with the National Center for State Courts (NCSC), a national court organisation that serves as a resource for many aspects of state court judicial administration, the California courts embarked on a workload study to evaluate the amount of resources needed for trial court operations. The approach taken is called ‘weighted caseload’ and is a nationally recognised methodology for assessing court workload by measuring the amount of time needed for cases of various types. The weighted caseload method developed by NCSC has been implemented in nearly 30 states to assess the need for judges, court staff, and other judiciary-related entities. Weighted caseload is based on the premise that cases of different types require different amounts of resources; for example, a homicide case has more hearings and other workload compared to a minor traffic matter. This methodology is also useful when jurisdictions have different case mixes, as is the case in California where two counties of a similar population can have very different workload profiles based on the demographics of the residents, the number of major roadways that pass through the area, and other factors. A weighted caseload method accounts for these differences and can be used to direct the appropriate number of resources to each court.

CHALLENGES OF A STATEWIDE WORKLOAD MODEL

To estimate the amount of time needed for case processing work, a time study is conducted in a sample of courts to determine the average amount of judge time needed to resolve cases of varying case types. The courts selected to participate in the study are chosen on the basis of several criteria that are intended to represent the diversity of the California court system: size (small, medium, large); geographic diversity (urban and rural); and funding level (well-resourced and not well-resourced). During the study, judges fill out a time sheet that describes various activities that they perform and the amount of time allocated to each. The data collection period lasts approximately two to four weeks and takes place in the spring or fall, during a period when there are few holidays or vacations. The time study is intended to capture the distribution of the judge’s time to various activities; all judges in a court that is being studied must participate so that the results give a complete picture of how the court allocates its resources.

The time study results in a set of preliminary estimates, called case weights, that estimate the time that cases of various types take. The case weights are statewide measures that represent average values across all of the courts that participated in the study, and there are weights for about 20 different case types. The number of weights that are used to measure workload are determined by two criterias: whether the Judicial Branch has the filings data to measure the volume of work for that particular case type and whether the workload for that case type is sufficiently different from that of other case types so as to require separate measurement. For example, the workload of a felony case is much more than what would be required to manage a traffic infraction, and, therefore, it makes sense to measure those types of cases separately.

Next, a series of adjustments are made to ensure that the time study data provides a sufficient measure of case processing time. These adjustments include reviewing data with the study courts to make sure the results are consistent with expected values and speaking with focus groups of judges to determine whether adjustments might be needed to account for backlogs or overtime. When the case weights are finalised, estimates of the number of judicial officers needed based on workload can be computed by multiplying the case weights by the annual filings for a particular case type and dividing by the amount of time judicial officers have for their work.

California first conducted a time study as part of implementing a weighted caseload method in 2001. The analysis was updated in 2009 to measure differences in workload that resulted from changes in the law, technology, or case processing practices in the intervening years. For example, electronic filing of documents and the growing practice of scanning documents has eliminated, or at least reduced, much of the manual data entry that clerks previously did. New laws such as those relating to domestic violence cases that were implemented to improve the safety of victims have created new types of workload for court clerks, such as verifying that the perpetrator has relinquished all firearms.⁴ The California Judicial Branch is currently planning another study, as there have been several changes, particularly in criminal case processing, since the workload study was last conducted. Technology has also improved exponentially since then—fillable forms, electronic filing, and automated phone customer service are just some of the many modes of service that have become available to courts and court users in recent years and that affect case processing.

Since courts still operate largely at the local level, the practices and standards in place at the individual participating courts are memorialised

in the workload measures used to identify resource need. One perspective on this is that the workload measures embody a range of various practices and outcomes, staying neutral as to what constitutes a ‘best’ or effective practice. This approach is useful when there is little or no information about the underlying case processing practices and how those practices contribute towards the overall time and resources need to move the case to disposition.

Another approach, and one that has been attempted to varying degrees in the workload models used in California, is to identify and study courts that exemplify specific policies or principles of court performance, and to create workload measures that reflect those policies and principles. The result would be a workload model with a prescribed level of service or performance. This approach has not yet been successfully implemented in California. Variation in local practices makes it difficult to reach agreement on what constitutes a best practice. This is further hampered by judges’ perceptions that any sort of standardisation of practice could impede their ability to render decisions in cases with complete independence. Earlier attempts to identify best practices or baseline levels of service were hindered by uneven resource levels across courts. Courts with insufficient funding were able to argue compellingly that they did not have the financial means to implement new or different practices, making standardisation difficult to achieve. As a result, these early efforts to establish standard practices or performance-based workload measures were abandoned.

STATEWIDE MEASURES OF CASE FLOW MANAGEMENT

The California Standards of Judicial Administration outline time goals for case processing in certain

case types and court performance is tracked in the Court Statistics Report.⁵ These goals were adopted as part of the Trial Court Delay Reduction Act of 1986, and are consistent with national time standards, as adopted by the National Conference of State Trial Judges and the American Bar Association.⁶ Outside of the time goals, there is little in the way of statewide direction on case processing practices that might improve case flow management, other than what might be mandated by law. As described above, individual trial courts are given the latitude to determine how best to manage cases, with little guidance in the way of performance measures or standardised practices. The judicial council compiles best practices and offers training for various case management issues, but does not currently promulgate statewide standards for case processing or case flow management.

LOCAL CASE FLOW MANAGEMENT IN PLACE OF STATEWIDE MEASURES

Anecdotally, it is known that individual trial courts do track and manage judicial workload locally, but the individual efforts of the courts are not compiled or accessible by the judicial council, nor are the indicators measured systematically to ensure uniform reporting. Site visits and conversations with courts show that indicators such as case ageing and backlog are tracked to ensure that judges have an appropriate number of cases relative to their peers and that statutory time limits are met. However, this decentralised approach results in a lack of consistency across courts, which makes it difficult to use this data at the statewide level to advocate for more resources. For example, if the Judicial Branch could demonstrate that the number of cases that

met statutory time limits was decreasing due to limited funding, it could urge lawmakers to provide additional funding in order to improve case processing time. Or, if the branch had the authority to mandate certain practices, it could obtain funding to implement processes that were known to improve outcomes for court users.

CALIFORNIA LACKS A CENTRALISED CASE PROCESSING SYSTEM

Another challenge to a statewide case flow management is the difficulty of obtaining statewide data that could be used as workload indicators. For example, data on the number, types, and occurrence of hearings could be useful in tracking the trajectory of cases and figuring out where bottlenecks occur and how to resolve them. However, the Judicial Branch has been unsuccessful at implementing a centralised computerised case management system. An effort to do so was ended about five years ago because of large cuts to the Judicial Branch budget that made it infeasible to complete and deploy the new system. Instead, each jurisdiction maintains its own case records, and there is no interaction between the case management systems. While certain case data and case flow management indicators are reported centrally for publication in the Judicial Branch's *Annual Court Statistics Report*,⁷ such as filings and dispositions, the data are submitted in aggregate format. The branch does not have access to case information such as the case number, charges, or demographic data on the parties—data that is vital for many case flow management measures. This lack of data limits the Branch's ability to evaluate or compare courts on the basis of workload.

COURT WORKLOAD IS AN 'OUTCOME' OF THE JUSTICE SYSTEM

Perhaps more so than any other part of the legal system, courts have a very passive role relative to the matters that come before them. Courts cannot choose to not accept certain cases. Law enforcement, legislative changes, and local practices influence the number and type of cases that come to the trial courts.

The Role of Justice System Partners

At the end of 2007, California and the rest of the United States of America entered into a severe

recession. The recession's impact on the courts generally are discussed in further detail later in this chapter; however, in terms of court workload, the recession changed behaviour in the agencies that interact with the trial courts. When local police departments' funding was cut as a result of the recession and corresponding loss in public sector funding, those agencies concentrated their limited resources on more serious crimes while cutting back on enforcement of lower-level crimes, such as traffic misdemeanours and infractions. Criminal case filings trends during this period, as depicted in Figure 2, substantiate this hypothesis.

FIGURE 2. Ten-year Trends in Criminal Filings

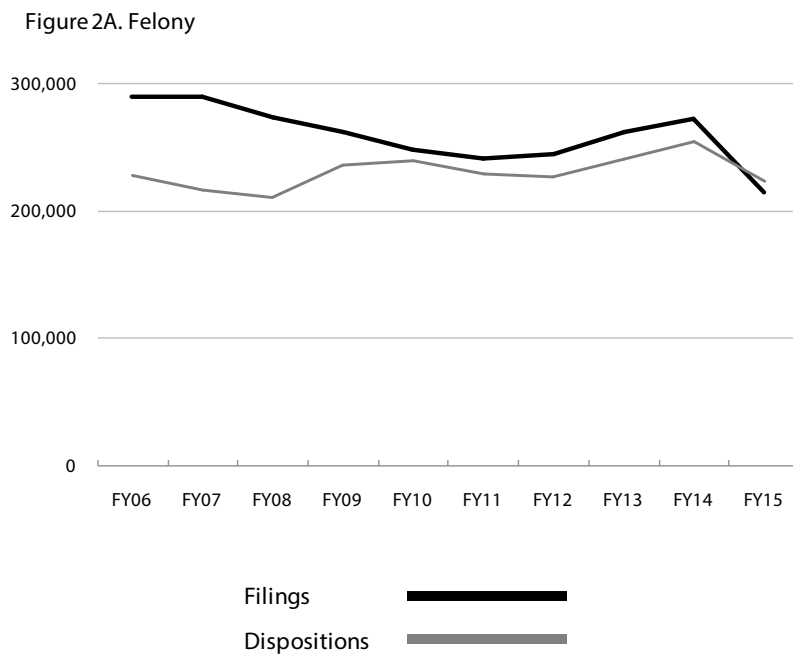


Figure 2B. Non-traffic Misdemeanour

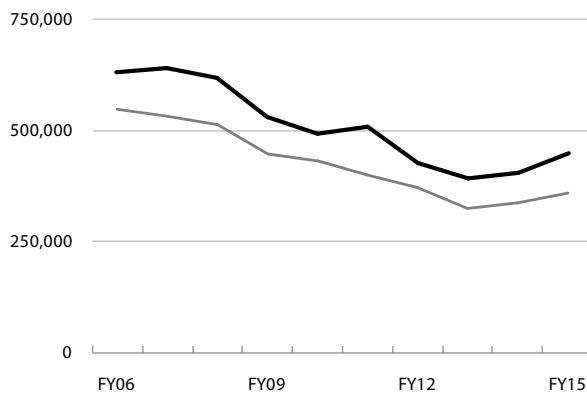


Figure 2C. Traffic Misdemeanour

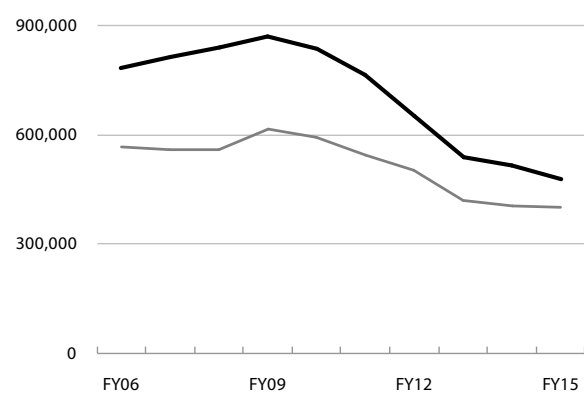


Figure 2D. Non-traffic Infraction

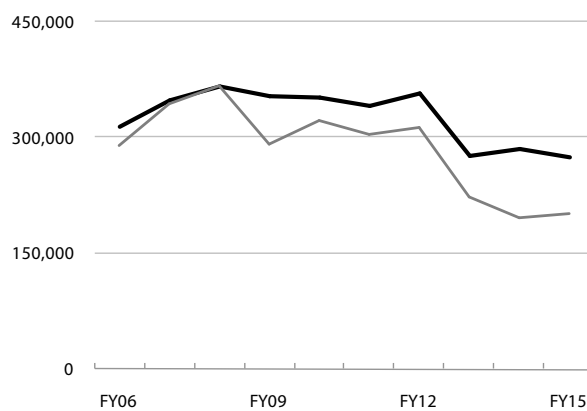
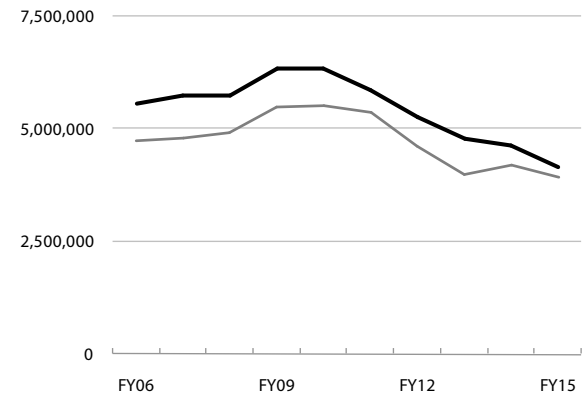


Figure 2E. Traffic Infraction



Source: 2016 Court Statistics Report (annotated to show recession period)

For trial courts, this meant fewer filings were coming in, but it also meant that the fee revenue that comes from certain filings, particularly the lower-level offences, dried up as well.

County prosecutors and defence attorneys similarly changed their operations in response to funding shortfalls. Though difficult to substantiate with data, some courts relayed that prosecutors were

having to change their operations to maximise limited resources. With reduced funding, fewer attorneys on staff would be available to bring cases to court. This potentially resulted in delays or backlogs in prosecuting cases that were beyond the ability of a court to mitigate.

Also, the relationship between the district attorney, who prosecutes matters on behalf of the 'state'

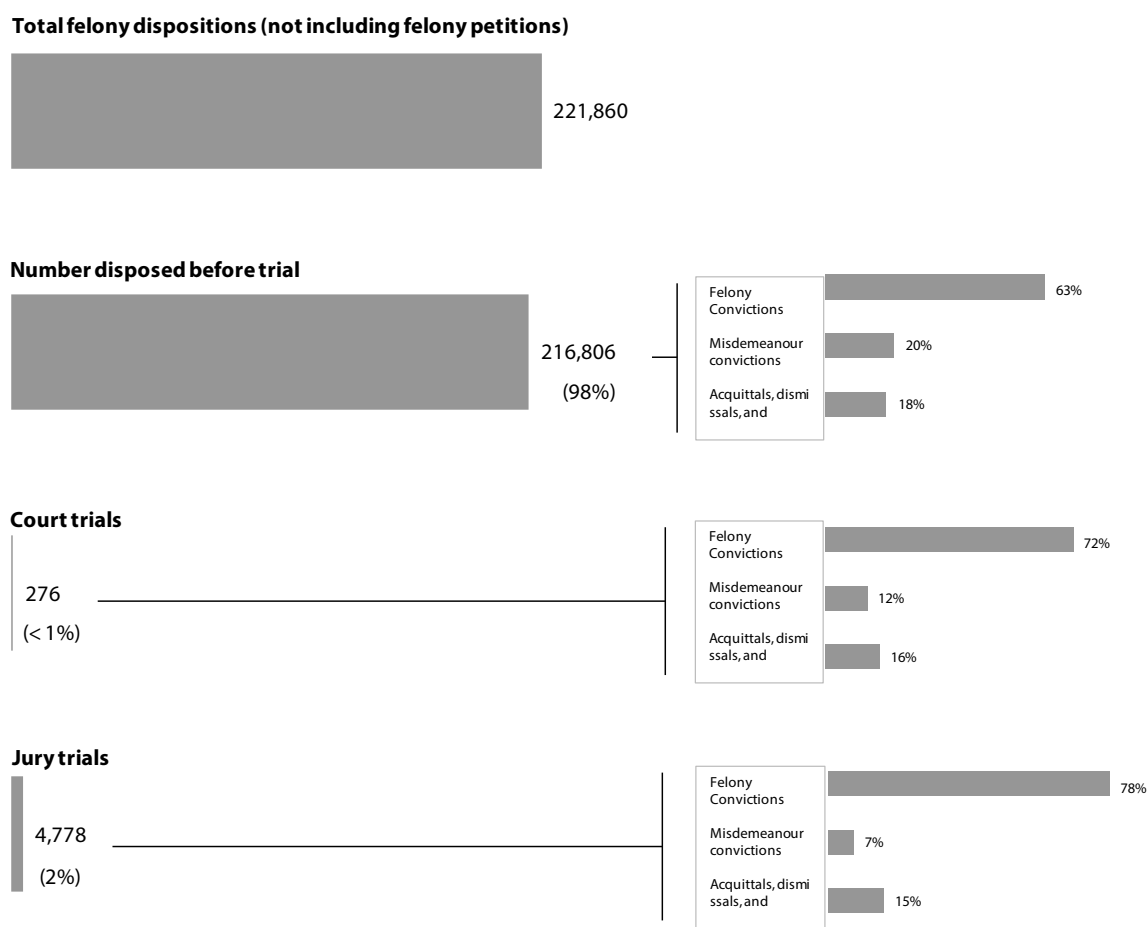
or the 'people', and the public defender, who represents accused persons who cannot afford private counsel, has a profound impact on case flow management in a court. Each county has its own elected district attorney, who is responsible for charging criminal matters. In some jurisdictions, the court, district attorney, and public defender meet regularly to discuss case flow management and administrative issues that they have in common. These courts anecdotally report that the mutually respectful relationship results in better collaboration and problem-solving. For example, district attorneys and public defenders who work collaboratively will try to resolve cases through plea agreements in order to reach a resolution more quickly than taking a case to trial. These negotiations are contingent on both parties trusting that the other is making the best possible offer and can require compromise and flexibility. While each of those entities has their own agenda and mission, coming together to resolve common issues creates a problem-solving atmosphere that may result in better outcomes for all involved.

In those jurisdictions where the relationships either are not as positive or where there is no overt

coordination, there is less negotiation and compromise, and courts relate anecdotally that this appears to create obstacles to better case flow management. The trial rate data collected in the *Annual Court Statistics Report* is indicative of this issue. While the law provides for a defendant's right to a speedy trial, most matters are resolved at an earlier stage in the case, resulting very few trials. Trials are extremely resource-intensive, requiring much more staff and other resources to conduct. For example, in a trial, a court reporter must be present to create a written record of the proceedings. During trials, clerical staff assigned to the judge must be present in the courtroom, meaning that they cannot attend to other matters while the court is in session.

The average jury trial rate for felonies, as shown in Figure 3, is 2 per cent, meaning that of all the felony cases that were disposed of in a particular year, that proportion was resolved by jury trial. For courts where the relationship between the two entities is more adversarial, the trial rate can be considerably higher, tying up limited resources to hear those cases.

FIGURE 3. Felony Dispositions for Fiscal Year 2016–2017 by Type of Disposition



Source: 2016 Court Statistics Report

Legislative Changes Affect Court Workload

Changes in the law relating to prison population and sentencing have changed both the volume of cases coming to courts and the role of courts in managing criminal workload. Since 2009, a series of legislative reforms (AB 109, criminal realignment, Proposition 47) have sought to reduce the number of crimes that are prison-eligible and alleviate severe overcrowding in the prison system by creating alternative punishments that could be locally served. While improving outcomes for society at

large, these measures added new responsibilities to the courts that increase the number and type of hearings and create other forms of workload. One type of change is that courts are now responsible for conducting hearings that were formerly conducted by another state agency.

Another recent change brought about by Proposition 47 reduced many lower level felony offences to misdemeanours. This changed court workload by decreasing the number of felony cases filed, which are more time and labour intensive

for court staff and judicial officers to process, and increased the number of misdemeanour filings. The new law also made it possible for persons who had been previously convicted of one of the felony crimes that was downgraded to a misdemeanour under Proposition 47 to apply for a reclassification. Since a felony conviction is a major barrier to employment, many people chose to take advantage of the opportunity. This created additional workload for courts, both to process the applications for reclassification and to locate the original court records for the applicants, as the law encompassed any eligible felony conviction regardless of the age of the conviction.

Recession and Impact on Workload Analysis

The recession had a severe impact on trial court funding, and today, even though the recession officially ended in 2009, trial court funding has not recovered fully. After a succession of steep cuts to the court budget beginning around 2012, the courts are funded at about 75 per cent of the total amount needed according to the courts' workload-based funding model.

One silver lining to the reduced funding was that it caused trial courts to overhaul their operations to make them as efficient and cost-effective as possible. Some courts closed outlying locations that were no longer cost-effective to operate. Courts analysed their business processes, studied their operations, and consolidated functions in an effort to stretch their limited resources.

Despite these changes, it came as a surprise to some that a recent time study of court case processing staff showed that some types of cases were taking more time to complete compared to previous

years.⁸ The assumption among many had been that fewer filings and more efficient practices would mean that courts would be operating in a more streamlined manner and require fewer resources. The data showed otherwise. As described previously, legislative changes designed to improve outcomes for litigants have increased court workload. These changes appear to have outweighed or at least neutralised efficiencies gained through business process re-engineering efforts.

This illustrates that case flow management is not completely under the control of courts; while courts can institute some oversight over processes that move cases towards disposition, outside entities and external events also influence workflow in the courts.

CONCLUDING THOUGHTS

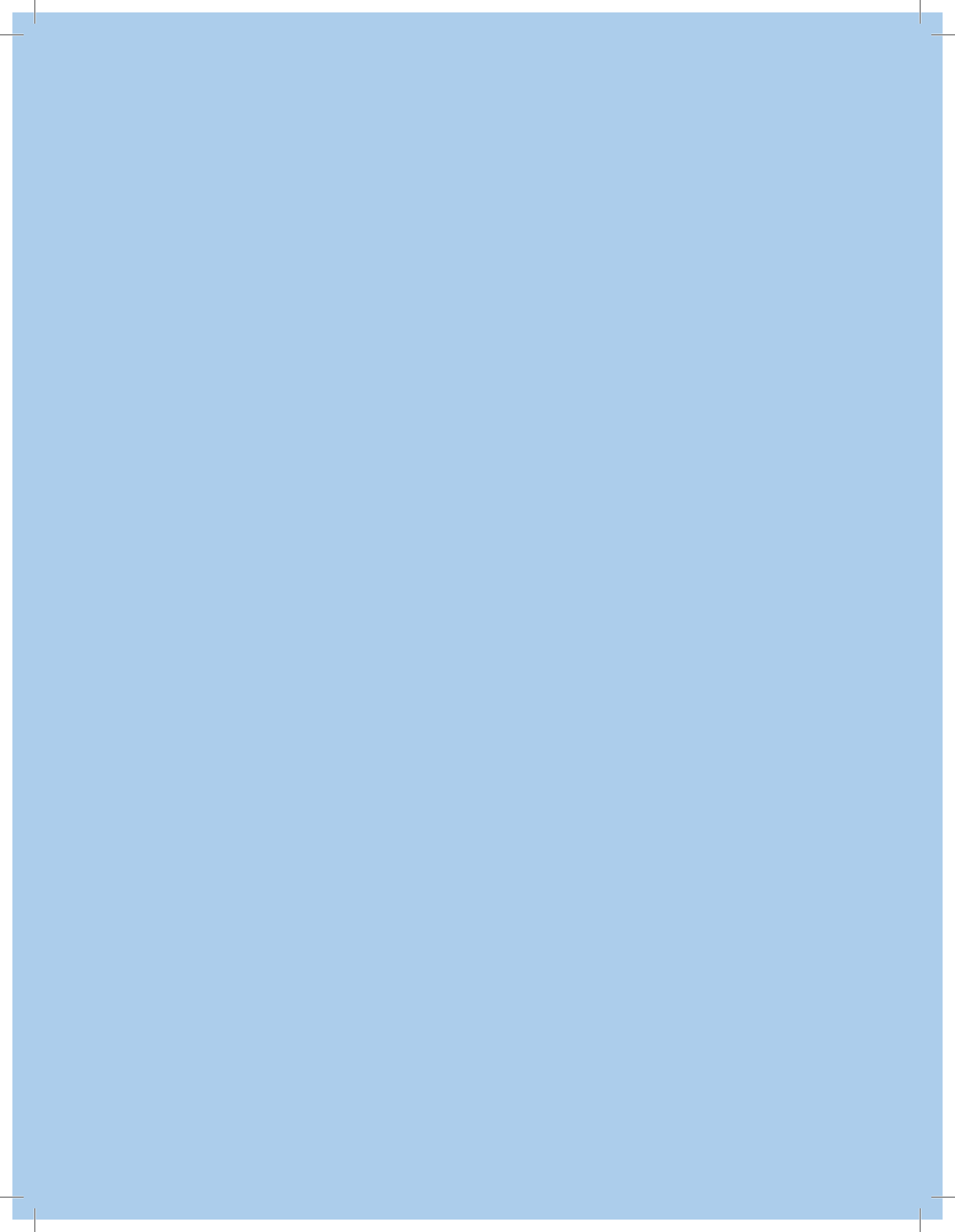
Judicial administration and case flow management are critical to better understand the court workload and branch funding need. California continues to work towards improving its efforts to enhance measurement and data collection in this area. Looking forward, there are many initiatives underway. On the data management side, many courts are upgrading ageing or failing case management systems to enhance data collection. This may present opportunities to review data definitions and seek ways to establish communication across disparate case management systems. On the resource side, California continues to improve its workload models and allocation of judgeships to make the best use of its funding. All of these efforts are undertaken in the spirit of the core mission of the California courts: to increase access to justice for all Californians.

Notes

1. A more detailed delineation of the two judicial systems can be found at <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (accessed on 27 September 2017).
2. The fiscal year starts on 1 July and ends on 30 June.
3. Known as the Lockyer-Isenberg Trial Court Funding Act of 1997 (Assembly Bill 233), available online at <http://www.courts.ca.gov/partners/documents/TCFWG-Meeting-11-6-12-Goals-of-Trial-Court-Funding-Act.pdf> (accessed on 27 September 2017).
4. Section 6389, California Family Code, available online at https://leginfo.ca.gov/faces/codes_display-Section.xhtml?sectionNum=6389.&lawCode=FAM (accessed on 27 September 2017).
5. California Rules of Court, available online at www.courts.ca.gov/rules.htm (accessed on 27 September 2017).
6. The Trial Court Delay Reduction Act is available online at https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=&title=8.&part=&chapter=2.&article=5 (accessed on 27 September 2017).
7. Judicial Council of California. 2016. *Court Statistics Report: Statewide Caseload Trends*. San Francisco: Judicial Council of California. Available online at <http://www.courts.ca.gov/12941.htm> (accessed on 27 September 2017).
8. The study findings were presented to the Judicial Council at its July 2017 meeting. The final report is available at <https://jcc.legistar.com/View.ashx?M=F&ID=5338582&GUID=FA2962D0-141A-40D4-B9CA-CB5C2467A49C> (accessed on 27 September 2017).

SECTION FOUR

**ACTORS IN
THE JUSTICE SYSTEM**



One Dispute, Many Cases: Overcoming the Numbers Game in Litigation

P.N. Prakash

Abstract

In this chapter, the author, a sitting judge of the High Court of Madras, discusses how litigation is beset by frivolousness and multiplicity of cases, illustrating this through a brief empirical study of cases that appeared in his own court hall. He notes that recording sound statistics on both frivolous and purposeful litigation is important to strengthen judicial mechanisms and combat unnecessary litigation. Failure to do so, he warns, will lead to a weak judiciary, and that is a peril to democracy.

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I drew inspiration to pen this chapter after reading DAKSH's report, titled the *State of the Indian Judiciary* (Report), published in 2016. Undoubtedly, the Report was an eye-opener to me. Justice M.N. Venkatachaliah, a colossus in the judicial firmament, has, in his foreword to the Report, made the following sagely observation: 'The stereotyped, top-down system has really suffered banality, which has foreclosed any fresh look at the problem. Any light from outside is not only not welcome but, indeed, is seen as an intrusion into judicial independence.'¹

The Report shows the real face of the judiciary with its scars and pimples. The massive backlog of pending cases does appear alarming and may justify the clamour for expansion. But, expansion of the system by increasing the strength of judges and courts is fraught with other ills too. Parkinson's Third Law, 'Expansion means complexity and complexity decay', will indubitably pull down the system to the nadir. To the best of my knowledge, there has been no empirical study to assess the nature of litigations that come to each court.

I did a study of the cases that appeared in my court hall between 1 February 2016 and 30 April 2016, when I sat on the Madurai Bench of the High Court of Madras. The portfolios that I dealt with were bail matters, quashing of first information reports (FIRs) and charge sheets, and criminal writ petitions. A brief distribution of the cases as per subject matter can be seen in Table 1.

TABLE 1. Details of Cases Heard by Author between 1 February 2016 and 30 April 2016

Nature of case	Number of cases filed
Bail	370
Anticipatory bail	1,773
Direction Petitions	
Not to harass	295
Register the complaint	1,433
SC/ST directions	179
To file final report	224
Contempt petitions	89
Quash	
FIR quash	145
CC quash	117
Compromise quash	170
Transfer investigation and trial	128
Writ Petitions	
<i>Aadal paadal</i>	139
<i>Aadal paadal</i> with police protection	338

It may not be immediately clear as to what kind of cases are characterised as ‘not to harass’, ‘register the complaint’, ‘file final report’, and ‘*aadal paadal*’. These are concepts which have evolved over a period of time and are so entrenched that one cannot easily shake their edifices. Their interconnections can be best explained by way of a fictitious anecdote.

Laurel and Hardy are good friends. Laurel buys a 400 ft² house plot from Hardy. Several years later, when Laurel wants to build a house on that plot,

he finds that 20 ft² of area on the north side of the property has been encroached upon by his neighbour. The legal remedy that is available to Laurel is to file a suit for recovery of possession against his neighbour. This would entail the payment of court fees coupled with prolonged litigation. In order to avoid this, Laurel sends a complaint by post to the police, alleging that Hardy sold a plot to him for which he has no title. After sending the complaint by post and even before the complaint reaches the police, Laurel files a petition under Section 482 of the Code of Criminal Procedure (CrPC), 1973 for a direction to the police to register an FIR on his complaint, in terms of the law laid down by the Supreme Court in *Lalita Kumari v. Govt. of UP*.²

When the petition comes up for admission before the court, the prosecutor represents that the police have received the complaint by post and are looking into it. Since Hardy is neither a party nor has the right of a pre-decisional hearing at that stage, the court has no means to ascertain the truth. So, the court passes a standard order directing the police to conduct an enquiry within six weeks, following the guidelines laid down by the Supreme Court in *Lalita Kumari*. If no action is taken by the police, Laurel files a contempt petition against the police for inaction. The moment the contempt notice is received, the police hurriedly registers an FIR against Hardy. This fact is reported to the court by the prosecutor when the contempt application comes up for hearing and after recording the same, the contempt application is closed.

If the FIR is registered, Laurel files a petition to transfer the case to the Central Bureau of Investigation (CBI) or prays for a direction to the police to complete the investigation in a time-bound manner. Pressure mounts on the police to arrest Hardy. Hardy may file a petition for a direction to the police not to harass him or may file a

petition for anticipatory bail. After insulating himself from arrest, Hardy files a petition for quashing the FIR.

One fine day, both of them appear before the High Court and pray for sending the matter to the Mediation and Conciliation Centre, where they strike a compromise and file a joint petition to quash the FIR by relying upon *Gian Singh v. State of Punjab*.³ In the end, Laurel and Hardy, with their petty civil dispute, generate eight forms of criminal litigation in the High Court. This is apart from the injunction suit and other civil litigation which they both are capable of generating. The multiplicative capability of litigiousness was pointed out by late Justice V.R. Krishna Iyer, who spoke of this capability in the following words:

The plaintiff prepares his suit-formalities, court-fees, many miscellaneous fees and paper after paper. The court registry checks with an eye on Order VII, finds flaws, returns the papers, representations, argumentation on the mistakes, questions of limitation, cause of action and court fee are raised, with more explanatory paper work and orality in court. Delays, lubricants and numbering of the suit and petitions follow. Service of summons by the court's process server personally, with more attempts than one, is dilatory but is the only sanctified method.... Written statements, issues and arguments on burden of proof plus revisions to the High Court on tremendous trifles, are inevitable. If the records of the trial court are sent to the higher court in connection with any interlocutory appeal or revision it is stuck, even if the case there is disposed of. The party interested can freeze the records in the higher court and postpone the trial for long years. The great faith in formal proof of indisputable documents, the insistence on oral evidence with examinations, cross-examination and re-examination with objections, arguments on relevancy, revisions thereon and so on—with many side-dramas like injunctions, commissions and receiverships each finding within its womb the capability for combats for a few years;—these are all in the litigative drama. What a *leela* of the law?⁴

Coming to *aadal paadal* (song and dance) writ petitions, there are hundreds of village temples in Tamil Nadu, each with its own quota of factional feuds and caste rivalries. Song-and-dance programmes in the night hours are part of these temple festivities. As long as there is harmony between the factions and castes, these programmes will go on without any glitch. Unfortunately, places of worship are becoming reservoirs of violence. One faction will submit a representation to the police for setting up of microphones for conducting a song-and-dance programme and will immediately file a writ petition seeking a mandamus to direct the police to consider the representation and pass orders. The rival party will also make a similar request and file a writ petition for police protection to conduct the programme. One wonders what serious constitutional issues an *aadal paadal* programme raises. A constitutional court is now reduced to deciding which of these factions must have the right to use the mic set!!

From my little experience on the Bench, I have sound reasons to believe that the moment an FIR is registered, a quashing petition under Section 482 of the CrPC follows. Similarly, if a charge sheet is filed, the next moment, a petition to quash the charge sheet is filed. All orders passed under Sections 91 and 311 of the CrPC and proceedings under Sections 107, 110, 145, etc. of the CrPC are challenged. Admitting these petitions, even without any interim order, is good enough to stall the investigation or trial.

Then comes the category of outlandish petitions. For instance, a petitioner, who sent a representation by registered post to Barack Obama, former President of the United States of America, prayed for a direction invoking Section 482 of the CrPC to give him police protection alleging that there is an international conspiracy to kill him (petitioner). Fifteen minutes of judicial time were spent hearing the petitioner before dismissing the petition. I

am sure that most courts in India have their quota of such quixotic litigation. Thus, precious judicial time is wasted on interlocutory matters and silly litigation, leaving no room for disposal of important matters such as criminal appeals and revision petitions.

Increase in litigation is touted as one of the justifications for expanding the judiciary. A small study conducted by me, as given above, in my own court, shows that the nature of litigations is indeed not serious. The warning bell sounded by Lord Macaulay is worth recounting. He said:

The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws and by bad Judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice. And the public will never long entertain such an opinion without good reason.⁵

If frivolous litigation has increased, this may mean, as pointed out by Lord Macaulay, the public entertains an unfavourable opinion of the court system. This worries me, as it appears, even scriptures, such as *Srimad Bhagavata Purana* seem to have predicted this decline in our judicial system.

श्रीशूक उवाच

ततश्चान्दिनं धर्मः सत्यं शौचं क्षमा दया ।
कालेन बलिना राजन् नङ्क्ष्यत्यायुर्बलं स्मृतिः ॥

लिङ्गमेवाश्रमख्यातावन्योन्यापत्तिकारणम् ।
अवृत्त्या न्यायदौर्बल्यं पाण्डित्ये चापलं वचः ॥

Sri Suka began again:

Thenceforward, day after day, by force of the all-powerful time, O King, righteousness, veracity, purity (of mind and body) and forgiveness, compassion, length of life, bodily strength and keenness of memory will decline.

External marks will be the only means of knowing the *asrama* or stage in life (of an individual) and the (only) guide in determining the mode of greeting which people should adopt when meeting one another. Justice will have every chance of being vitiated because of one's inability to gratify those administering it, and voluble speech will be the (only) criterion of scholarship.⁶

Is it not true that garrulous watermouths are masquerading as jurists?

Before planning to expand the judiciary, we should have sound statistics about the nature of litigation that arises from every court, from subordinate courts to the Supreme Court. The importance of statistics was felt by Mr Fali S. Nariman who introduced a private member's Bill titled, 'The Judicial Statistics Bill, 2004' in the Rajya Sabha, which died a natural death as any other private member's Bill. This Bill provided for the collection of judicial data, including data relating to the legal nature of disputes from the taluk level courts to the level of the High Courts. Had this Bill been passed, by now we may have had at hand, the nature of disputes that arise in each taluk and it would have been easier for us to find solutions locally. Even in the absence of a law, the government can engage the services of non-governmental organisations such as DAKSH to undertake studies and submit comprehensive reports. These studies should also include the time spent by courts on frivolous litigation and purposeful litigation along with the ways and means to stymie the former.

Humans defected from jungle life on the premise that *matsya nyaya*—the right of the strong to prey on the weak—is unjust, and sought to build institutions for the protection of the weak from the strong. The judiciary is one such institution. Once we allow our judicial system to become weak, democracy will surely be in peril. In 1984, Nani Palkhivala lamented that if affairs do not improve, the system of administration of justice

would collapse within the end of the decade. Three decades have passed since then and the spectre of his prophecy holds as good today as it did in 1984. Litigious consciousness and judicial conscience must be balanced by the constitutional mandate for upholding systemic identity.

Thanks to the common Indian, democracy has survived here for 70 years and in return, what we, in the judiciary, can give him as quid pro quo is quality and timely justice at an affordable cost. For that, one should clear the encroachers on the road to justice, with an iron hand.

Notes

1. M.N. Venkatachaliah. 2016. 'Foreword', in Harish Narasappa and Shruti Vidyasagar (eds), *State of the Indian Judiciary: A Report by DAKSH*, pp. v–vii. Bengaluru: DAKSH and EBC, p. vii.
2. (2014) 2 SCC 1 (*Lalita Kumari*).
3. (2012) 10 SCC 303.
4. V.R. Krishna Iyer. 1984. *Indian Justice, Perspectives and Problems: Sir Asutosh Mookerjee Memorial Lectures*. Indore: Vedpal Law House.
5. Upendra Baxi. 1982. *The Crisis of the Indian Legal System*. Delhi: Vikas Publishing, p. 54.
6. 'Verses 1 and 4', Book 12, Discourse II. *Srimad Bhagavata Purana*. Gorakhpur: Gita Press.

Beyond Reasonable Doubt: A Prosecutor's Views on the Criminal Justice System

Jude Angelo

Abstract

The author, a public prosecutor working in Tamil Nadu, shares her experiences and understanding of the criminal justice system in this chapter. The author examines the nuances of the system, as well as its successes and failures. She also discusses the role of a prosecutor in the criminal justice system as well the daily challenges that prosecutors face.

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India, being a common law country, follows the Roman model of the dispensation of criminal justice, or an adversarial system of jurisprudence. In this system, the accused is presumed to be innocent, and the burden of proof is placed on the prosecution to prove the accused guilty beyond reasonable doubt.

The key actors in the criminal justice system in India are the victim, accused, police, prosecutor, defence counsel, and the judge. As a prosecutor, I have had the chance to understand the nuances of the system, as well as its successes and failures. In this paper, I will discuss the role of a prosecutor in the criminal justice system, the challenges we face daily, and my observations on the Indian criminal justice system.

THE ROLE OF A PROSECUTOR

For a case to enter the criminal justice system, a complaint has to be lodged by the victim or complainant with the police and a first information report (FIR) has to be registered. The FIR is then drafted into a charge sheet against the accused (who

is mentioned by the complainant in his/her complaint). Once the charge sheet is filed, it is the prosecutor who presents the case against the accused and represents the police.

The primary duty of the prosecutor is to make sure that the victim is indemnified and the charge against the accused is proved beyond reasonable doubt. The prosecutor does this by examining the victim and witnesses in the court and presenting evidence to the court.

The prosecutor has numerous duties with respect to witnesses, key amongst which is to ensure that all witnesses mentioned in the charge sheet are examined thoroughly and properly. In my experience, in the courts I have worked in, and based on the cases I have handled, even if a charge sheet for a crime is filed today, the case will come up for hearing only after three or four months. Given this time gap, there is a chance that the complainant will forget the minute details of the crime and the complaint. The duty of the prosecutor is to refresh the memory of the complainant using the complaint and the charge sheet. The prosecutor always calls the complainant as the first witness in the case to give testimony before the court.

THE COURT AND THE CASES

Court

At the time of writing this chapter, I worked as a public prosecutor at a District Munsif-cum-Judicial Magistrate Court in Thirumayam Taluk, Pudukkottai, Tamil Nadu. The court is presided over by a single judge who hears both civil and criminal cases.

Cases

There were between 700 and 800 criminal cases pending before the court. The average number of new criminal cases filed every month was 100–130. The average time a case spends in the court depends on the number of witnesses. The charge sheets of most cases contain nine or 10 witnesses, and once cases like these come up for trial, they are finished in three to four months. The total time taken for disposal on average is between eight and 10 months, from the filing of the charge sheet to the completion of the trial.

I deal with any criminal case which can be tried by a magistrate. These include cases of causing hurt, criminal intimidation, forgery, and cheating.

THE PROSECUTOR AND THE CRIMINAL JUSTICE SYSTEM

Other Actors

In my experience, barring a few exceptions, most of the other actors in the system, such as the law enforcement authorities, defence counsel, and judge, work very well with the prosecution to ensure cases proceed smoothly through the system. To ensure smooth functioning and cooperation, there is a significant onus on the prosecutor not to be biased, and not to condemn the accused outright.

Police

I feel that the police are at the heart of the criminal justice system. They have multiple duties through

the course of a case and work closely with the prosecutor. Their key responsibilities are prompt delivery of the summons to witnesses and the recovery of weapons and property relevant to the case before the trial commences. It is very important to a prosecutor that both these tasks are carried out diligently so that the prosecutor can examine witnesses and present evidence in trial. In my opinion, if and when police are able to serve the summons in a timely manner (usually within 15 days) and produce witnesses in time for scheduled hearings, trials will conclude in a month. The judges usually consult with the police before they issue summons and set dates for witness examination. The judges understand the capacity of the police, given the shortage of police personnel.

Defence Counsel

Though the defence counsel is naturally opposed to the prosecutor in terms of duty, they too are keen on ensuring that the trial process goes smoothly and ends quickly. Their primary duty is to disprove the prosecution, and generally, they do not interact much with prosecutors. In my experience, many defence counsel are committed to the speedy disposal of cases. However, there are some defence counsel who are absent on purpose when the prosecution examines the witness, and later approach the court with a petition filed under Section 311 of the Code of Criminal Procedure (CrPC), 1973. A petition filed under Section 311 of the CrPC allows the defence to summon any person as a witness, or examine any person in attendance, or recall and re-examine any person already examined. This practice causes delays in the trial.

Judges

The most important duty of the judge in criminal cases is to decide the case purely on merits. Save

a few, most judges work diligently, prudently, and perform their duties without bias. However, in the process of disposing of pending cases speedily, many a time, judges end up concentrating only on bringing cases put forth by the prosecution to judgment.

The presiding officer in a magistrate's court is vested with enormous powers, yet he or she also shoulders an excessive burden. The presiding officer is expected to work mechanically, with no other resort, due to high-pressure expectations to dispose of a large number of cases every month. While delayed judgments are not ideal, neither are hurried judgments. In my opinion, the judiciary should be commended for its tireless work.

CHALLENGES FOR A PROSECUTOR

For the most part, I do not encounter too many challenges and my everyday work proceeds smoothly. The one problem I do face regularly is threats made by the accused, which results in the complainant turning hostile. It is common knowledge that the accused threaten and try to coerce victims. Often, I see cases that come up for trial where the victim testifies well before the court, but the case comes to a halt thereafter because the accused then threatens the victim, and when the victim comes forward for cross-examination, he or she turns hostile owing to fear. When we try to elicit any information about these threats during the witness examination, most witnesses refuse to testify.

Another difficulty prosecutors face is defence counsel asking for a compromise between the victim and accused midway through the trial. This makes the victim withdraw, and though they have testified earlier, they state that they do not want to continue with the trial. This usually happens

in cases which deal with the voluntary causing of hurt, under Sections 323 and 324 of the Indian Penal Code, 1860. We do try to fulfil our duty to explain to the victims that they should not compromise or withdraw, but many times, our efforts are in vain. Our hands are tied, and we are not able to take action for perjury, the reason being that the accused and the victim have compromised. At this point, all efforts made by a prosecutor to strengthen the prosecution's case lose value.

The main systemic hurdle that I face as a prosecutor is the interruption in the flow of a case, and the time taken between hearings. Daily, between 10 and 15 cases are in trial, and each has between three and five witnesses. However, sometimes there is a gap of more than a month between each examination of a witness in a single case. I feel that a reduction of the time gap between the examination of witnesses to a week or 10 days, instead of a month, would improve the overall flow of the case. If judges were more firm during the examination of witnesses, the case is likely to proceed much more smoothly. This means that the judges should not allow the defence counsel to file petitions under Section 311 of the CrPC for the recalling of witnesses unless essential, and be more firm in disallowing adjournments.

I have spoken to judges and registrars about this particular hurdle, and while they agree in principle, they have stated that it is not possible to post the same case continuously since all cases need to be heard. In addition, they have stated that while hearing witnesses and cross-examination is very important, it is not their only duty.

Other than minor procedural hiccups that leads to some mental stress, I do not face any significant challenges on a daily basis. Most accused usually behave reasonably, and I have not encountered any specific challenges or faced any bias as a woman prosecutor.

IMPROVING EFFICIENCY

Existing Measures

I have seen several measures to ensure that cases in the criminal justice system are disposed of speedily. A reform I would like to highlight is in the subordinate courts in Tamil Nadu, where one in every five days is dedicated to working on and hearing cases pending for more than five years. Witnesses are brought in specifically for these cases, and this is resulting in disposal of long-pending cases. I feel that if this measure is practised a little more diligently, with the summons being served more efficiently and witnesses appearing before the courts on the scheduled dates, then overall pendency can be brought down significantly.

Tamil Nadu also has an effective Lok Adalat system which speedily disposes of cases such as matrimonial and land disputes. Legal aid has also proven to be effective in Tamil Nadu. Legal aid officers go to remote areas and educate people on how to resolve disputes, whom they can approach to resolve disputes, and which fora to file a case in. This creation of awareness helps people avoid taking the wrong path to resolve disputes, which further improves efficiency.

A positive trend in Tamil Nadu is that not many FIRs are being registered in police stations for petty offences. The police try to resolve some simple offences such as minor cases of hurt, public abuse, and disputes relating to money at the station through enquiry and with both parties present. This has, of course, a corollary that the police should not exercise excessive powers. However, when practised in a limited way, it can be very positive for the system.

Suggested Reforms

If a trial proceeds quickly, the chances of witness tampering will reduce. A speedy trial also helps witnesses in providing solid and reliable evidence, makes it easier for the police to produce the witnesses at a stretch, and reduces the chances of the prosecution witnesses becoming vulnerable to manipulation. It is easier to conduct speedier trials in sessions courts, because there are fewer cases being tried, given that it is a superior court. Though it may be very difficult to adopt, the method of fixing dates of hearing in advance in the lower courts, where the amount of day-to-day work is greater, if put into practice, will make work easier for all actors in the system, while paving the way for clear and transparent disposal of cases.

Most of my suggestions to improve the system and overall efficiency of processes revolve around the police, who play a key role in the production of witnesses, since they deliver the summons. However, travel to remote regions, and unavailability of witnesses results in the failure of delivery of summons and appearance of witnesses. I do not blame the police, as they are extremely overburdened. The strength of the police force should be increased to allow them to work optimally. The ideal number of cases the police can work on in a week is about 10, as they have a significant amount of clerical work as well.

ON BEING A PROSECUTOR IN THE SYSTEM

It is the treatment of the prosecutor that challenges the efficiency of the trial process and the criminal justice system. If the judge construes what the prosecutor presents properly and the court gives

adequate support, trust, and credit to the prosecutor, the way the trial proceeds can be improved greatly.

Prosecutors can affect the timely disposal of the cases by doing their duty correctly and fairly. They should take special care to prepare the victim for evidence and cross-examination, and help refresh their memory. The prosecutor should mentally prepare the victim for the complete trial process and provide moral support. In addition, they should read all documentary evidence thoroughly and prepare notes on the same. If prosecutors do not get too personally involved with victims and complainants, educate victims, and examine witnesses in a quick and fair manner without taking anything to heart, then the trial process will go smoothly. By personal involvement, I mean becoming emotionally involved in the case, though it is difficult not to become emotionally involved with the victims and their plight.

The fact that I would have a daily opportunity to support the side of truth was what drove me to be a prosecutor. The main reason I chose to go down this path was to fulfil my dream to bring justice to the victims of crimes. My initial expectations have more than met the reality of my work. Standing up for victims was why I started this job and that is why I still do it.

My thoughts about the system are positive. I feel that the biggest positive of the criminal justice system in India is that it does not condemn a person with guilt at first sight. Despite the difficulties actors in the system face, they work diligently. There are processes in place to achieve true efficiency, they only require a little more clarity and proper application. Finally, I feel, for the criminal justice system to be truly effective, the most important thing is that everyone involved be true to their conscience.

Trusting the Police: Challenges of Criminal Investigation and Trials in India

R. Sri Kumar

Abstract

The police are one of the three main actors in the criminal justice system and their activities are key to rendering justice in criminal cases. The police play a crucial role through the course of an investigation and in establishing the guilt of the accused during trial. In this chapter, the author, who retired as the DGP & IGP of Karnataka, discusses the challenges that the police face during investigation and trial of criminal cases, and the manner in which the police can work with other actors to improve the efficiency of the criminal justice system.

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The criminal justice system in India has three important players, namely, the police, the prosecution, and the judiciary. The activities of the police are crucial to rendering justice in criminal cases and affect the operations of the entire criminal justice system. The police are usually the first to make contact with the victims, the witnesses, and the accused. The police play a key role through the course of investigation, particularly in the identification of the accused, and establishing the guilt of the accused during trial in criminal cases.

As a former head of the police force (DGP & IGP) of Karnataka, I have had the opportunity to understand the nuances of the criminal justice system in great detail. I find that the system mostly works for the benefit of the rich and the powerful, and not for the innocent victim or the cause of justice. In this chapter, I will touch upon some of the prevailing aberrations in the criminal justice system, the challenges that the police face, and the ways in which the police can work with other stakeholders, especially the judiciary, to improve the overall efficiency of the criminal justice system.

THE ROLE OF THE POLICE

The police perform myriad duties throughout the course of a criminal case. The responsibility of the police and the specific approach to a case varies from time to time, depending upon the person handling the case. Once the charge sheet is filed, the investigative efforts made to collect, preserve, and adduce evidence in court are abandoned, and these efforts become systematically diluted, thus affecting the output of the case handlers. From the service of summons and warrants, to bringing witnesses to the courts to depose about the true facts, and refreshing the witnesses' memory, any of these processes, when altered, can affect the delivery of justice.

Prior to Investigation

The role of the police during investigation is to search for truth as per the law of the land, and they should be unfettered in this search. However, in practice, myriad influences work on the investigators. At times, the police play the role of a mediator in resolving disputes informally, even before matters go to court. Criminal cases fall under two categories, cognisable and non-cognisable. As per law, only in cognisable cases can a police officer carry out investigations *suo motu* and make an arrest without a warrant. Cognisable cases are those which involve offences such as murder, rape, theft, and robbery. Non-cognisable cases are those where a police officer has no authority to carry out arrests without a warrant. In these cases, the police cannot start an investigation without a court order. In any police station, one invariably finds that non-cognisable cases are more in number than cognisable cases. Police officers spend more time and have greater interest in resolving such non-cognisable cases.

While in service, I used to receive several calls in a day, requesting my help and intervention in resolving non-cognisable cases. People believe that the police should step in to resolve such cases and become offended when they are directed to approach the court. Added to the enormous time and resources spent on such matters, undue police interference in a case can also give rise to malpractice and breeds institutional corruption, such as minimising a cognisable crime and making it non-cognisable. For instance, many dowry death cases are palmed off as accidental death cases for a price. It has been argued that the difference between cognisable offences and non-cognisable offences should be done away with. If the distinction between the two is removed, all reports of all registered cases can go directly to the jurisdictional magistrate, and the magistrate can identify what aspect of the crime needs to be investigated and what needs to be further verified by the police before a full-length investigation is launched.

Burking, or minimising and not registering crimes, is just one general malady. Police investigation of heinous cases suffers from insufficient allocation of resources (money, time, as well as manpower). In most states, police station staff definitely do not have separate allocation of moneys required for investigation of crime, for example, crime scene preservation and photography.

The cases that police officers are most often asked to resolve out of court relate to recovery of money, property, marital disputes, domestic violence, and civil contracts, where one party feels cheated.

During Investigation

The investigating officer (IO) is ordinarily in charge of the investigation of a case until the final report is filed. Frequent transfers of IOs (mostly due to political reasons) affect investigations adversely.

For instance, in dowry death cases, investigated by the Criminal Investigation Department (CID) in Karnataka, one sees at least four to five IOs handle a single case. When the IO of a case is transferred, the question of whether he or she has the locus to continue to work on the case until the new IO takes over the case comes up for debate quite often. There are two opposing viewpoints on this. While the majority view is that an IO should maintain a hands-off policy once the case is ordered to be transferred, the other view is, once an IO, always the IO of the case. I have had a personal experience in the Telgi case of being the IO conducting the investigation, and having had the case transferred to the Central Bureau of Investigation (CBI) on the orders of the Supreme Court. When transfers like these occur, the question arises as to what the remedy is for an IO like me, if I find that the case is taking a different turn subsequently? I believe that in such cases, the court could be approached for a hearing.

The Supreme Court has ruled repeatedly that in the field of crime investigation, the supremacy of the investigating police should be maintained, and the executive or the judiciary should desist in taking control of the investigation. Of course, the courts or the executive could order a change of the investigating team if required, after recording reasons in writing. However, in the ordinary scheme of things, a criminal investigation should be allowed to proceed unhindered and without unwanted intrusions and subversions. Any change of IO mid-case, for external reasons, should be considered an unwanted interference in the investigation.

Trial

During trial of cases, it is another IO, called the holding IO, who is responsible for placing the evidence before the court. The IO who investigated the case and filed the final report appears in the

court several times as a witness and is often asked to help in the examination of key and crucial witnesses. During the trial and appeal stages, the superior police officer's role becomes crucial for the successful conduct of the case and for keeping a watch on the prosecutor's role in handling evidence.

CHALLENGES FACED BY THE POLICE

Lack of Trust

The general credibility of the police and the investigation agencies in the country is very low. However, branding all police officials as untrustworthy is in my view preposterous. As a member of the criminal justice system, I find it abhorrent that all police are mistrusted by default under law. This mistrust means that the police are not able to perform their duties in the pursuit of justice. It is high time that such mistrust in the police, a colonial legacy, which undermines all their work and causes the abject failure of the rule of law, is changed. It is up to the judiciary to set an example and openly display support for and trust in the police. For instance, they can do this by allowing custodial interrogation as and when the police request for it.

Custodial Interrogation

One of the challenges that the police face most commonly while working on an investigation is the inability to repeatedly interrogate an accused to verify the veracity of the statements made by the accused. The accused is quite obviously, the key figure in an investigation, who knows all the attendant circumstances, and it is only by a thorough and sustained interrogation of the accused that the police can find out relevant details about the crime. However, police custody and interrogation is limited to only

14 days. Not allowing continued contact between the police and the accused in custody defeats the purpose of investigation. Even when the accused is in judicial custody, repeated interrogation as and when fresh facts surface will help in investigation.

Custodial interrogation facilitates the police in confronting the witnesses and the accused, and obtains leads for corroboration from them. Police custody and interrogation therefore must be allowed as a matter of right to the police. The 14-day period of police custody need not be a continuous period. In fact, police officers would prefer it to be intermittent, as confronting the accused with evidence collected is very important towards the end of an investigation. In Japan, before the matter is taken to court for adjudication, the prosecutor discusses the issues with both sides and facilitates plea bargaining. The result of this is speedy justice.

Securing Evidence

The police often cite lack of proper investigative tools, hostility of witnesses, and general apathy and lack of trust in the police force as the reasons for their failure to secure a conviction against a criminal. The CBI's conviction rate in corruption cases, where the accused spends over a month in jail, is 3.96 per cent. The greatest challenge in crime investigation is to capture all the evidence connecting the crime with the criminals responsible and to ensure preservation of the same in a tamper-proof condition, and in a legally permissible manner. Most loss of evidence (especially primary evidence) usually takes place after collection and during the investigative process. We need to innovate a techno-legal solution to preserve evidence in a sound manner. A central repository for preservation of all evidence should be set up in each district court. The modernisation and digital transformation of the court *malkhana* or storehouse is called for. Affidavits should be filed digitally under

Section 164 of the Criminal Procedure Code (CrPC), 1973¹ to preserve oral evidence. Physical evidence can be secured in bank lockers or court *malkhanas* where no human manipulation is feasible. Documents need to be preserved with the ability of easy retrieval and further research. In the Rajiv Gandhi assassination case, the documentary evidence was digitally scanned and preserved in optical disc drives after subjecting them to the court authentication process. This was done so that secondary evidence would be available in case primary evidence was destroyed by terrorists. Ease of inspection and production of the secured evidence for forensic and judicial examination is crucial. It is key that evidence is preserved for posterity without fear of manipulation and wilful destruction.

THE ROLE OF THE JUDICIARY

The Malimath Committee has made recommendations to strengthen the adversarial system by adopting, with suitable modifications, some of the good and useful features of the inquisitorial system. The recommendations include making it a duty of the court to assign a proactive role to judges, to give directions to investigating officers and prosecution agencies in the matter of investigation, and leading evidence with the object of seeking the truth and focusing on justice to victims.

Currently, Section 311 of the CrPC gives the court the power to summon any material witness, or examine any person present.² Similarly under Section 165 of the Indian Evidence Act, 1882, the judge has the power to put any questions or order production of a document or thing in order to discover or to obtain proper proof of relevant facts. However, these provisions do not cast a positive duty on the court to use the power to summon witnesses 'in order to seek the truth' but only for 'proof

of relevant facts' or for 'just decision' in the case. In light of these provisions, the recommendations of the Malimath Committee have to be appreciated.

Investigation

Though practices may vary between individual courts and judges, it is clear that the judiciary should play a greater and firmer role in investigative proceedings and search for truth to give justice to the victims of crime. Court-supervised investigation can help all criminal cases and thus help improve overall efficiency in the system. Magistrates before whom criminal cases are pending should play a greater role in assigning specific tasks to the police during the course of the investigation to collect and preserve evidence essential to prove the guilt of the accused beyond reasonable doubt. The courts could also specify matters that need to be probed deeper during the investigation stage. If lacunae in the investigation are directly pointed out by the court, it can prevent further delays at later stages of trial or appeal. Many issues can be settled at the investigation level and do not need to be discussed during a protracted trial. Court-supervised investigation will improve the overall standard of investigation and help in avoiding procedural mistakes. This means that the jurisdictional court where the FIR is filed after its registration exercises the powers already given to it by law, and does not require intervention from a higher court.

Efficiency

The most significant challenge that the criminal justice system in India faces today is the sheer number of cases. In order to deal with this workload, judges need to be methodical. There are of course individual judges who are organised and well-prepared; however, systemic reform is required in

order to improve overall efficiency. Some measures that the judiciary can take to improve efficiency in the criminal justice system are:

1. Hear and dispose of cases on a first-come, first-served basis. This will allow judges to hear cases with a set order and in an organised manner.
2. Sessions trials, as the name suggests, must be heard in a single session. Currently, sessions trials are heard in parts, which means that judges often lose track of proceedings.
3. Both issues and statements of witnesses must be framed in advance.
4. Technological processes must be used to improve efficiency. For instance, it is now possible to send and verify summons through email and WhatsApp. If this is done, precious court and police time will be conserved.
5. Processes should be separated out into procedural and substantive, and judges should concern themselves mainly with substantive matters. Procedural matters, such as issuing of notice or summons, can be carried on by other officers of the court. This will allow court processes to be carried out in parallel.
6. It is not essential that all matters need to have an actual hearing in the court. The court can consider documents for certain issues instead of having a hearing in court. This is a process that is followed in other countries, such as Japan.
7. The classification of evidence must be improved. For instance, experts providing forensic evidence do not always need to come in person before the court. They can send the evidence to court through documents or other means.

8. Methods such as plea bargaining³ can be used in appropriate cases to settle simple matters and to prevent clogging of the courts.

Judicial Supervision

Judicial supervision of processes in the criminal justice system will help all actors in the system, as well as all processes. Though non-interference of the judiciary in the investigative process is the hallmark of our judicial system, it is clear that the judiciary is at the apex of the criminal justice system and has a duty to supervise. The judiciary must take both preventive and corrective steps with regard to process, wherever necessary in every case.

It is the prerogative of the courts to bring together all the involved parties in a case. Each organisation or actor in the criminal justice system, whether it is the police or the prosecutor and defence, cannot function in watertight compartments and in isolation. All the actors have to work in consonance and act as checks and balances to each other.

CORRUPTION

The efficiency of the criminal justice system is greatly hampered by corruption. Corruption in the judicial system impedes and often nullifies the good work of the police. Corrupt practices are prevalent not only amongst the police but also in the judicial and legal circles, as well as the forensic and other fraternities. Justice has now become a 'buyable' commodity. Corruption can be dealt with only by practising a strict zero-tolerance policy. The way the Panama papers were handled by the two German journalists and their newspaper *Süddeutsche Zeitung*⁴ is worthy of emulation in all big scam-related investigations. As with all

other problems, corruption can be redressed only through systemic changes and eternal vigilance.

I feel one of the key duties of a retired police officer is to speak about corruption openly and expose it.

CONCLUSION

Criminal investigation can be improved by making each investigation a team effort. A central repository for all investigation records and collected data should be created and duly protected with access rights. Each member of the investigating team should have access to all relevant case data, but no individual member can scuttle an entire investigation. The accused does not know from where the next missile will come. The only challenge is that, unlike an investigative journalist, the IO has to ensure that relevant facts are translated into admissible evidence in the proceedings of the trial court. That is a tough challenge and needs suitable amendments to Section 164 of the CrPC to include preservation of all relevant evidence. But the first step is to start working on building a repository of knowledge and information pertaining to the material evidence that is collected at source, and that it is validated, verified, and correlated with other bits and pieces during the arduous investigative processes. Experts should be able to analyse material facts from wherever they are and add value to the appreciation of evidence. All relevant facts can thus be collected and preserved digitally in a legally admissible form.

Reforms in the criminal justice system are urgently needed in India. Today, a number of policemen are ready for police reforms, but unless the judiciary makes it a pointed action programme, the political class will not allow this to happen.

Notes

1. Section 164 of the CrPC reads:

Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

2. Section 311 of the CrPC reads:

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

3. Section 4 of the Criminal Law (Amendment) Act, 2005 introduced Chapter XXI-A (Sections 265-A to 265-L, which deal with plea bargaining) to the CrPC. These provisions came into effect on 5 July 2006. The complete text of this chapter is available online, at http://mha.nic.in/sites/upload_files/mha/files/pdf/CriminalLawAmendmentAct,2005.pdf (accessed on 12 October 2017).
4. The Panama Papers are 1,15,00,000 leaked documents that detail financial and attorney–client information for more than 2,14,488 offshore entities. An unidentified whistleblower, titled only as ‘John Doe’, leaked the documents to German journalist Bastian Obermayer from the newspaper *Süddeutsche Zeitung* (SZ). After SZ verified that the statement did in fact come from the source for the Panama Papers, the International Consortium of Investigative Journalists (ICIJ) posted the full set of documents on its website. SZ asked the ICIJ for help because of the amount of data involved. Journalists from 107 media organisations in 80 countries analysed the documents. More details can be found at <https://panamapapers.icij.org/> (accessed on 12 October 2017).

Judicial Tenure: An Empirical Appraisal of Incumbency of Supreme Court Judges

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Abstract

This chapter is an empirical analysis of the tenure of Supreme Court judges in India. With the purpose of introducing a more objective layer to the debate on judicial appointments, the authors tabulate the various time elements connected with Supreme Court judges—their tenure in the Supreme Court, their tenure in the High Courts, and the representation of various parent High Courts in the Supreme Court. The authors compare the tenures of judges appointed by the executive and the collegium, and note the representation of parent High Courts in the Supreme Court based on the regularity and duration of representation of judges from such High Courts in the Supreme Court of India. Finding that the analysis of tenures reveals some unquestionable historical disparities, the authors opine that this should just be the beginning of a more sustained inquiry on the institutional the impact of the tenure of judges.

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I n recent years, the Supreme Court decision¹ which invalidated the creation of a National Judicial Appointments Commission revived engaged discussions about the manner of appointment of judges to the higher judiciary in India. The most common point of discussion in this area invariably centres on identifying the better process of appointment of judges and the framework of discussion is mostly on choice of appropriate qualitative norms while appointing judges. In the alternative, the discussion is on the different processes of appointment, namely, appointment by the executive and appointment by the collegium. The usual conversations focus primarily on the differences between these two methods of appointment and also on the benefits and shortcomings of each

method. However, such debates generally hinge on the subjectivity of value choices and do not lend themselves to a determinative conclusion as to the method that would be more suitable for selection of judges.

This chapter is an effort to introduce quantitative considerations in the debate on judicial appointments. Thus, we focus on an aspect of judicial appointment which can be quantitatively assessed—tenure of judges. We attempt to explore the dynamics of the tenure of Supreme Court judges from different perspectives. First, we examine the tenure of the judges in the Supreme Court of India in terms of length (longest and shortest tenure) and representation of the High Courts in the Supreme Court to see what kind of changes, if any, have taken place since the change of the appointing authority from the executive to the collegium. Additionally, we delve into the representation of the High Courts in the Supreme Court and the time spent by judges from different High Courts in the Supreme Court, irrespective of the collegium or executive appointment process involved.

This chapter will show that the average tenure has drastically reduced under the collegium system of appointment and that the collegium appoints more frequently than the executive did, prior to 1994. As far as representation of the High Courts in the Supreme Court is concerned, a fair presumption would be that the oldest courts in the country would surely have considerable representation in the Supreme Court throughout the years and this notion has been affirmed. Judges from High Courts of Allahabad, Bombay, Calcutta, and Madras had constant uninterrupted representation in the Supreme Court with very few gaps in the timeline—a gap being the period in the Supreme Court where a High Court remained unrepresented. We are not arguing in favour of a rigid equitable region-based representation in the Supreme Court. Our effort is to have a data-based appreciation of how

region-based representation has historically manifested itself in terms of tenure.

SOURCE OF DATA

Data for this paper has been sourced mostly from the official website of the Supreme Court of India and the individual websites of different High Courts. The research of George H. Gadbois, Jr has also been of considerable help.²

The latest judge whose tenure has been included in the study is of Justice Pinaki Chandra Ghose, who retired on 27 May 2017. Six judges who assumed responsibilities of the Supreme Court at the time of adoption of the Constitution were the erstwhile judges of the Federal Supreme Court of India. In relation to them, their appointment to the Supreme Court of India has been considered as the beginning of their tenure. Out of the six, only two (J. Sayyid Fazl Ali and J. Harilal Jekisundas Kania) were appointed prior to the independence of the country.

To analyse the tenure of judges in the Supreme Court of India from various perspectives, we have categorised judges into three categories:

1. Judges who could not complete their tenure due to death.
2. Judges who did not complete their tenure due to resignation.
3. Judges who completed their tenure.

The average tenure of a judge in the Supreme Court of India is 2,024 days. That is approximately five-and-a-half years on the Bench. The 13 judges who resigned from office had served an average of 2,341 days before resigning. The 12 judges who died in office had an average tenure of 1,131 days.

While it would require another inquiry into the reasons, it needs to be noted that as many as 11 judges appointed by the executive resigned from office, and only two judges appointed by the collegium resigned from their office. We also found that 11 judges appointed by the executive died in office whereas that misfortune befell only one judge appointed by the collegium. Tables 1 and 2 contain lists of judges who resigned from the office and those who died in office respectively. Figure 1 represents the average tenure of Supreme Court judges who completed their tenure, those who died in office, and those who resigned from office.

TABLE 1. Supreme Court Judges Who Resigned from Office

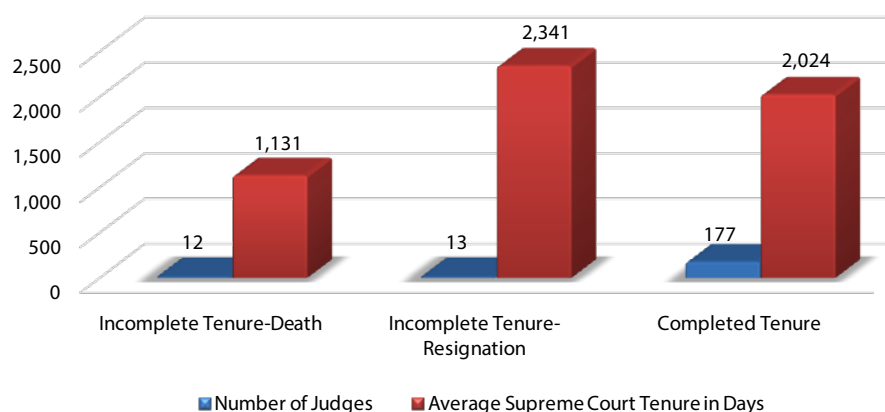
SI No.	Name	Date of appointment	Date of resignation
1.	Bijan Kumar Mukherjea	14 October 1948	31 January 1956
2.	B. Jagannadhadas	09 March 1953	26 July 1958
3.	Syed Jaffer Imam	10 January 1955	31 January 1964
4.	J.R. Madholkar	03 October 1960	03 July 1966
5.	K. Subba Rao	31 January 1958	11 April 1967
6.	J.M. Shelat	24 February 1966	30 April 1973
7.	K.S. Hegde	17 July 1967	30 April 1973
8.	A.N. Grover	11 February 1968	31 April 1973
9.	Hans Raj Khanna	22 September 1971	11 March 1977
10.	Baharul Islam	04 December 1980	12 January 1983

SI No.	Name	Date of appointment	Date of resignation
11.	R.S. Pathak	20 February 1978	18 June 1989
12.	Dalveer Bhandari	28 October 2005	27 April 2012
13.	Swatanter Kumar	18 December 2009	19 December 2012

TABLE 2. Supreme Court Judges Who Died in Office

SI No.	Name	Date of appointment	Date of death
1.	Harilal Jekisundas Kania	20 June 1946	06 November 1951
2.	Ghulam Hasan	08 September 1952	05 November 1954
3.	P. Govinda Menon	01 September 1956	16 October 1957
4.	P. Satyanarayana Raju	20 October 1965	20 April 1966
5.	Subimal Chandra Roy	19 July 1971	12 November 1971
6.	A.K. Mukherjea	14 August 1972	23 October 1973
7.	S.N. Dwivedi	14 August 1972	08 December 1974
8.	S. Murtaza Fazal Ali	02 April 1975	20 August 1985
9.	Sabyasachi Mukherjee	15 March 1983	25 September 1990
10.	R.C. Patnaik	03 December 1991	30-05-1992
11.	Yogeshwar Dayal	22 March 1991	02 August 1994
12.	M. Srinivasan	25 September 1997	25 February 2000

FIGURE 1. Average Supreme Court Tenure



SUPREME COURT TENURE AND PARENT HIGH COURTS

The majority of judges in the Supreme Court of India are appointed from various High Courts. Out of 202 judges we analysed (including the judges who died in office or resigned from office), only four were appointed from the Bar. That amounts to less than 2 per cent of the judges. Thus, we decided to examine whether there is any correlation between the tenure of judges and their parent High Court. The parent High Court of a judge is the High Court where he first became a judge and not the High Court where he was serving at the time of his appointment to the Supreme Court. A judge can be expected to have served in more than one High Court before being appointed to the Supreme Court.

This analysis was tricky as information on the parent High Court of a judge is not always simple to ascertain. In the last 70 years, many High Courts have been dissolved and many High Courts have been created. Thus, we had erstwhile High Courts of Oudh, Nagpur, Patiala and East Sindh States Union, and Mysore, which no longer exist. The geographic regions over which they had

jurisdiction were brought under the jurisdiction of another High Court. At the same time, new High Courts have been created for geographic regions which were earlier under the jurisdiction of other High Courts, with the earlier High Courts continuing to exist and exercising jurisdiction over other geographic regions. For example, High Court of Delhi was established in 1966. After independence, the region of Delhi was under the jurisdiction of the erstwhile High Court of Punjab. The High Court of Delhi also exercised jurisdiction over the geographic region of Himachal Pradesh until 1971. With the creation of Himachal Pradesh as a separate state, the said jurisdiction was divested from the High Court of Delhi and the High Court of Himachal Pradesh was created.

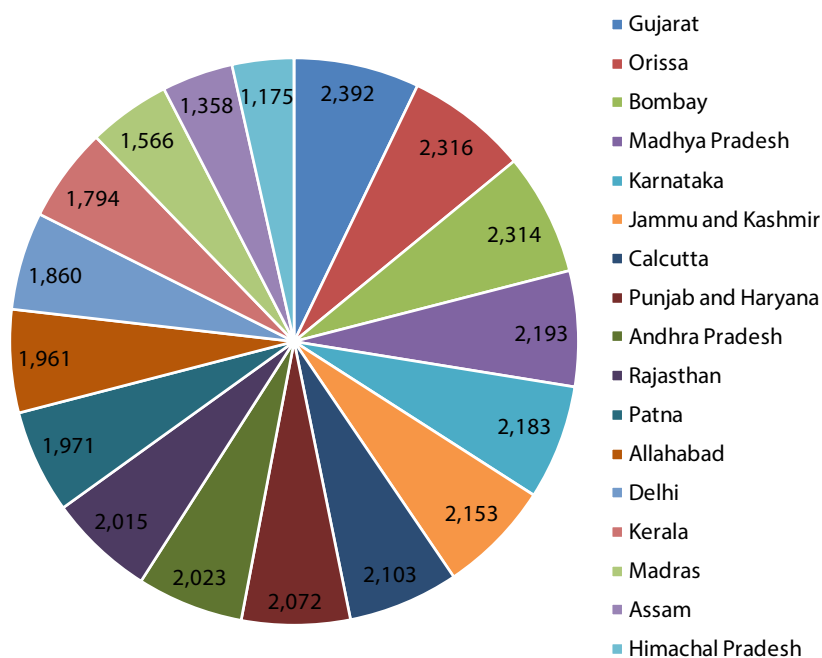
Thus, we decided to streamline the analysis of these variations. We decided to not consider the parent state of a judge and instead focused on the parent High Court. A judge of the High Court of Madhya Pradesh in the 1990s could be from the geographic region which today comprises of the state of Chhattisgarh and comes under the jurisdiction of High Court of Chhattisgarh. However, it was not possible to verify such details objectively. Thus, the parent High Court of such a judge has

been determined as Madhya Pradesh. On the other hand, there have been judges who served in High Courts which no longer exist. Let us take the example of an individual who was a judge of High Court of Mysore when appointed to the Supreme Court of India. The High Court of Mysore ceased to exist in 1973 and the jurisdiction of that High Court was transferred to the High Court of Karnataka. In such a case, we have considered the parent High Court of the Judge to be the High Court of Karnataka.

For tenure of the judges in the Supreme Court analysed on the basis of which parent High Court they belonged to, we have not considered judges who did not complete their tenure (death/resignation) and judges appointed directly from the Bar.

We have also excluded from this analysis Justice Mehr Chand Mahajan, who was a judge of the High Court of Lahore before he was elevated to the Supreme Court of India. The total number of judges analysed in this respect is 173.³ Figure 2 depicts the average tenure of judges in the Supreme Court in the context their parent High Courts. The average tenure of those who are appointed from the Bar is 2,886 days.⁴ It also should be noted that the parent High Court with the shortest average tenure (Himachal Pradesh) has had only one judge. On the other hand, the parent High Court with the second shortest average (Assam) has had six judges. This analysis is important as it shows that there is substantial and consistent disparity in the tenure of judges depending on which High Court they come from.

FIGURE 2. Average Supreme Court Tenure and Parent High Courts



Note: The average tenure is expressed in days.

SUPREME COURT TENURE AND APPOINTING AUTHORITY

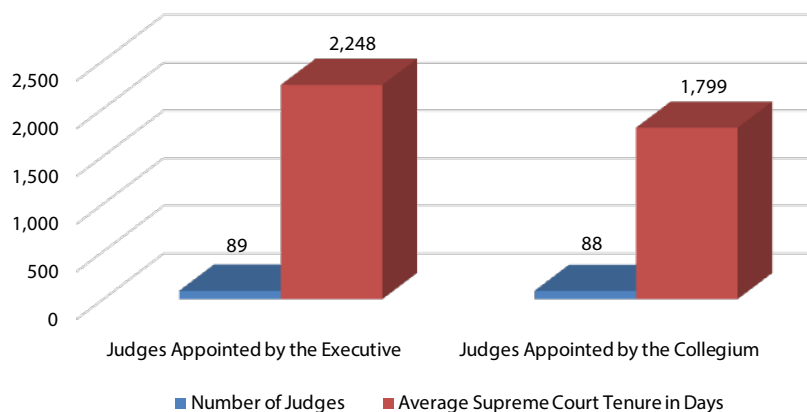
The Constitution of India stipulates that judges to the Supreme Court of India will be appointed by the President. The Constitution originally prescribed a mandatory consultation with the Chief Justice of India and allowed consultation with other judges of the Supreme Court and the High Courts. Though the opinion of the Chief Justice carried great weight, it was understood that his opinion is not binding.⁵ Then, by two decisions of the Supreme Court,⁶ the system was reversed. Currently, the final say in the appointment of judges belongs to a collegium of judges comprising the Chief Justice of India and the four most senior judges of the Supreme Court.

Given these rather opposing schemes of appointment in the same country, we wanted to explore if the introduction of the collegium system of

appointment has brought about any change in the average tenure of judges. While looking at this aspect, we did not include in our analysis judges who did not complete their tenure due to death or resignation.

We found a difference of 449 days in the average tenure of judges appointed by the collegium and the executive who completed their tenures. Judges appointed by the collegium spent on an average 25 per cent lesser time in the Supreme Court compared to the judges appointed by the executive. Figure 3 shows this comparison between the two means of appointment. This trend of shorter tenures perhaps also explains⁷ how the collegium has appointed 91 judges in 24 years⁸ while the executive appointed 109 judges⁹ in 46 years. Thus, while the ratio of appointment for the executive was 2.36 judges per year, it has been 3.79 judges per year for the collegium.

FIGURE 3. Average Supreme Court Tenure and Appointing Authority



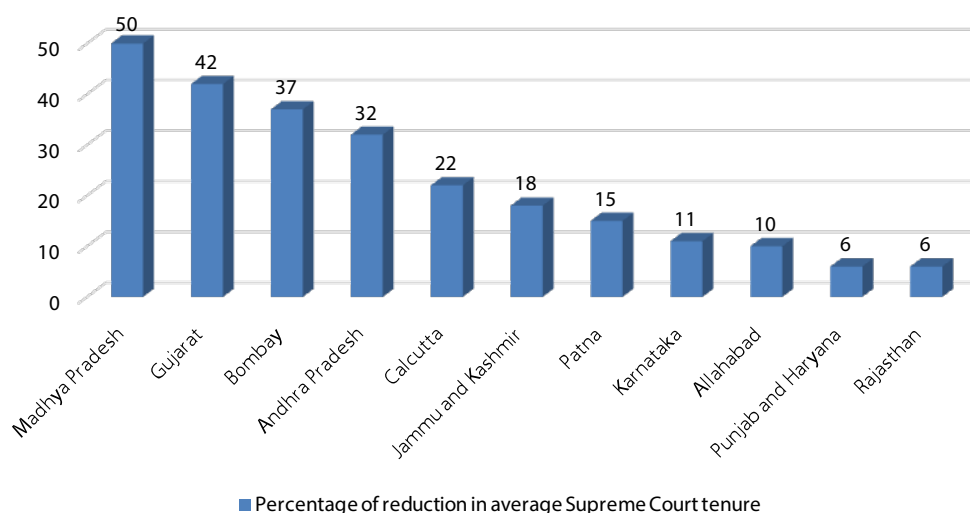
This difference is more starkly visible when we compare the average tenure of judges from different parent High Courts appointed by the executive and the collegium.¹⁰ Of the 16 parent High Courts from which judges have been appointed both by

the executive and the collegium, there has been a reduction in the average tenure of judges from 13 parent High Courts. Figure 4 illustrates this reduction. The highest reduction in the average tenure has occurred in relation to judges from the

parent High Courts of Madhya Pradesh, Gujarat, Bombay, Andhra Pradesh, and Calcutta. Although the reduction in case of the High Court of Orissa is 34 per cent, the sample includes only one judge appointed by the executive. The difference in relation to High Court of Delhi is merely days and it

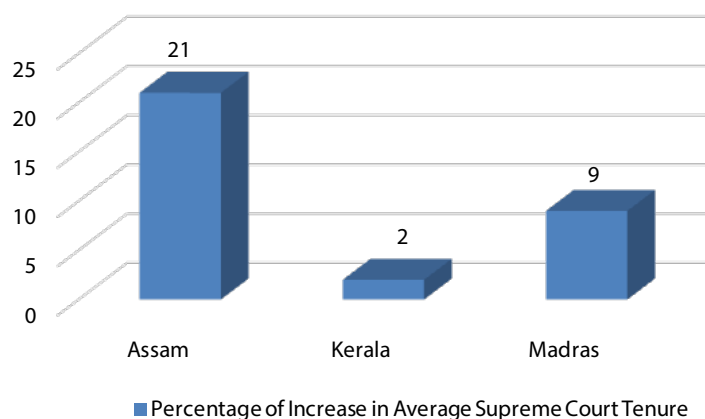
also includes only one judge appointed by the executive. On the other hand, in relation to the parent High Courts of Assam, Madras, and Kerala, the average tenure of judges appointed under the collegium is higher than that of the judges appointed under the executive.¹¹ Figure 5 shows the increase in tenure.

FIGURE 4. Average Supreme Court Tenure: Percentage of Reduction



Note: Orissa and New Delhi have not been included in this figure as only one judge was appointed by the executive from each of these High Courts.

FIGURE 5. Average Supreme Court Tenure: Percentage of Increase



LONGEST AND SHORTEST SUPREME COURT TENURES

Of the 20 judges who have served the longest completed tenures in the Supreme Court of India,¹² 17 were appointed by the executive and three were appointed by the collegium. Of the 20 judges who have served the shortest completed tenures in the Supreme Court, 10 were appointed by the executive and 10 by the collegium. Tables 3 and 4 provide lists of judges with the longest and shortest completed tenures, respectively.

TABLE 3. Longest Completed Tenures in Supreme Court

SI No.	Name of the judge	Supreme Court tenure in days
1.	P.N. Bhagwati	4,904
2.	Y.V. Chandrachud	4,700
3.	M. Hidayatullah	4,398
4.	J.C. Shah	4,119
5.	E.S. Venkataramiah	3,937
6.	A.P. Sen	3,717
7.	A.S. Anand	3,636
8.	K.G. Balakrishnan	3,624
9.	S.P. Bharucha	3,596
10.	Sudhi Ranjan Das	3,540
11.	K.N. Wanchoo	3,484
12.	A.K. Sarkar	3,404
13.	S.M. Sikri	3,369
14.	O. Chinnappa Reddy	3,356
15.	Bhuvneshwar Prasad Sinha	3,346
16.	P.B. Gajendragadkar	3,344
17.	M.M. Punchhi	3,290
18.	B.N. Agrawal	3,283
19.	S.H. Kapadia	3,207
20.	Ranganath Misra	3,176

TABLE 4. Shortest Completed Tenures in Supreme Court

SI No.	Name of the judge	Supreme Court tenure in days
1.	K.N. Saikia	806
2.	N. Chandrasekhara Aiyar	854
3.	M. Fathima Beevi	936
4.	A. Alagiriswami	1,094
5.	P.K. Balasubramanyan	1,096
6.	K.S. Paripoornan	1,096
7.	N. Venkatachala	1,096
8.	N.D. Ojha	1,096
9.	Jaswant Singh	1,097
10.	V. Khalid	1,100
11.	Vikramajit Sen	1,101
12.	B.L. Hansaria	1,107
13.	Chockalingam Nagappan	1,110
14.	D.P. Madon	1,118
15.	D.P. Wadhwa	1,140
16.	D.G. Palekar	1,142
17.	Ranjana Prakash Desai	1,142
18.	A.K. Ganguly	1,143
19.	M.Y. Eqbal	1,145
20.	Faizan Uddin	1,148

HIGH COURT TENURE OF SUPREME COURT JUDGES

As we have indicated earlier, the overwhelming majority of judges in the Supreme Court are appointed from amongst serving judges in the High Courts. Thus, we decided that it would be instructive to analyse the High Court tenure of judges who were appointed as judges of the Supreme Court.

Gathering data on this aspect was challenging. The Supreme Court website does not have uniform data on the High Court tenure of judges. In the end, we could not ascertain the exact dates of appointment of six judges to the High Court.¹³ In relation to five other judges,¹⁴ we found that there was a gap in their tenure as a High Court judge and their appointment as a Supreme Court judge, that is, they were no longer a judge in any High Court at the time of their appointment to the Supreme Court. Thus, we excluded these judges from our analysis as well as the judges who were appointed from the Bar. That left us with 187 judges.

While trying to ascertain the exact tenure of judges in High Courts, we found that there are three kinds of data available in relation to their date of appointment in the High Court:

1. Date of appointment as an additional judge.

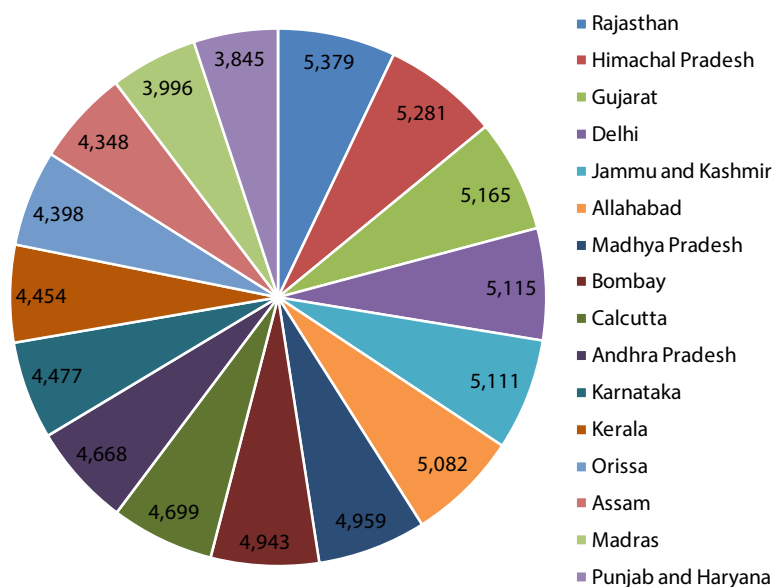
2. Date of appointment as a permanent judge.

3. Date of appointment without any reference.

Wherever both the dates of appointment—as additional and permanent judge—were available, we considered the date of appointment as an additional judge as the beginning of the tenure. For the other judges, we had to settle for what data was available. For 34 judges, data was available only in relation to their date of appointment as a permanent judge. For 42 judges, there was no clarity whether the date of appointment referred to their appointment as an additional judge or as a permanent judge.

We found that judges, on an average, spent 4,770 days in the High Courts before being appointed as a Supreme Court judge. Figure 6 depicts the average tenure of judges from different parent High Courts before they were appointed to the Supreme Court.

FIGURE 6. Average High Court Tenure of Supreme Court Judges: Parent High Court

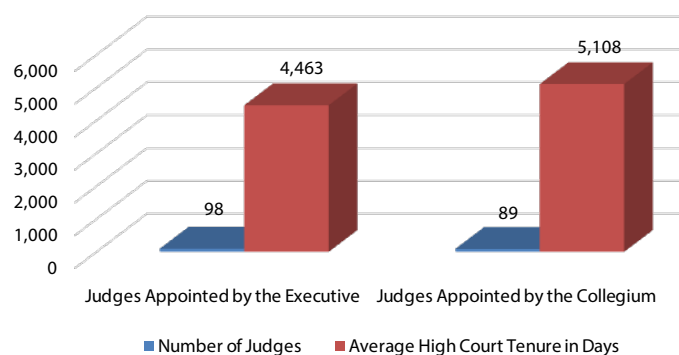


APPOINTING AUTHORITY AND HIGH COURT TENURE

Depending on the appointing authority is the collegium or was the executive, there is a clear difference in the amount of time a judge spent in the

High Court before being appointed as a judge of the Supreme Court. Figure 7 illustrates this difference. The time a Supreme Court appointee spends as a High Court judge has increased by more than 14 per cent under the collegium system as compared to the time when the executive appointed judges.

FIGURE 7. Average High Court Tenure of Supreme Court Judges: Appointing Authority



This shift is even more evident when we compare the average High Court tenure in terms of parent High Courts. Of the 16 parent High Courts from which Supreme Court judges have been appointed by both the collegium and the executive,¹⁵ the average time spent as a High Court judge increased in

relation to 13 High Courts. Figure 8 depicts this increase of time. The difference is the starkest in the High Courts of Assam, Orissa, Punjab and Haryana, Rajasthan, and Gujarat. Figure 9 shows the states in which the time decreased.

FIGURE 8. Average High Court Tenure of Supreme Court Judges: Percentage of Increase

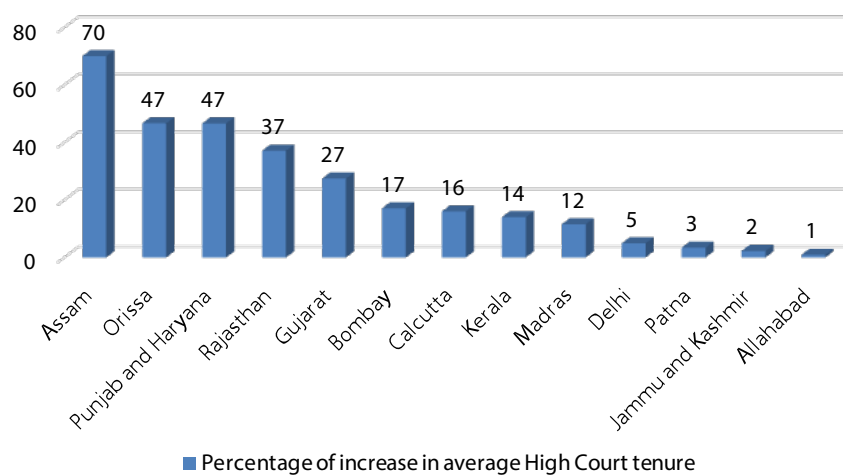
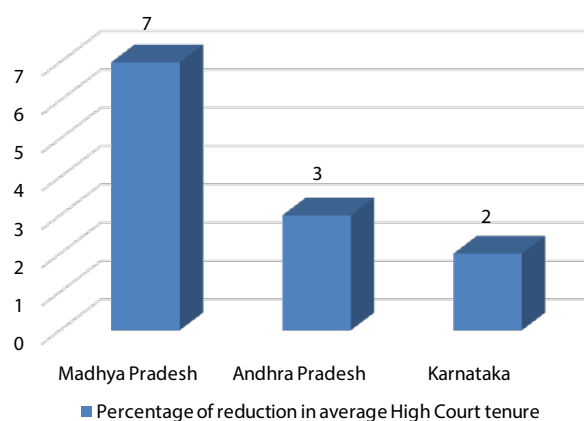


FIGURE 9. Average High Court Tenure of Supreme Court Judges: Percentage of Reduction



LONGEST AND SHORTEST HIGH COURT TENURES

Tables 5 and 6 list the names of 20 judges with the longest and shortest tenures, respectively, as High Court judges, before being appointed to the Supreme Court. Of the 20 judges with the longest tenure at the High Courts, 12 were appointed by the executive and eight by the collegium. Of the 20 judges with the shortest tenure as a High Court judge, not even one was appointed by the collegium.

TABLE 5. Longest High Court Tenures of Supreme Court Judges

SI No.	Name of the judge	Number of days as a High Court judge
1.	N.P. Singh	7,004
2.	A.K. Mathur	6,904
3.	S.P. Kurdukar	6,548
4.	M.H. Kania	6,387

SI No.	Name of the judge	Number of days as a High Court judge
5.	P. Jaganmohan Reddy	6,374
6.	G.S. Singhvi	6,324
7.	Aftab Alam	6,317
8.	G.L. Oza	6,301
9.	V. Ramaswami ¹⁶	6,274
10.	Yogeshwar Dayal	6,231
11.	Vishishtha Bhargava	6,216
12.	S. Murtaza Fazal Ali	6,202
13.	K. Jagannatha Shetty	6,154
14.	S.J. Mukhopadhaya	6,153
15.	J.M. Panchal	6,138
16.	Sujata V. Manohar	6,133
17.	N.L. Untwalia	6,118
18.	J.S. Verma	6,108
19.	M.Y. Eqbal	6,073
20.	P.B. Sawant	6,035

TABLE 6. Shortest High Court Tenures of Supreme Court Judges

SI No.	Name of the judge	Number of days as a High Court judge
1.	T.L. Venkatarama Aiyar	912
2.	B. Jagannadhadas	1,687
3.	A. Alagiriswami	2,259
4.	R.S. Sarkaria	2,288
5.	P.K. Goswami	2,313
6.	K. Ramaswamy	2,564
7.	Sudhi Ranjan Das	2,607
8.	J.L. Kapur	2,779
9.	A. Varadarajan	2,855
10.	Natwarlal Harilal Bhagwati	2,934
11.	A.K. Sarkar	2,960
12.	Jaswant Singh	2,973
13.	M. Hameedullah Beg	3,104
14.	E.S. Venkataramiah	3,178
15.	M. Patanjali Sastri	3,188
16.	P. Govinda Menon	3,323
17.	J.M. Shelat	3,336
18.	Kuttyil Kurien Mathew	3,408
19.	Hans Raj Khanna	3,425
20.	B.C. Ray	3,428

REPRESENTATION OF THE VARIOUS PARENT HIGH COURTS IN THE SUPREME COURT

In order to get a better idea of the representation of the High Courts in the Supreme Court of India, we mapped the Supreme Court judges based on their parent High Court. ‘Influence’ would be a strong word but we wanted to see how often a High Court

has been represented in the Supreme Court and for how long. During the analysis, we also considered the continuous uninterrupted period of representation of a particular High Court in the Supreme Court, which means the consecutive number of days for which at least one judge of a particular parent High Court was present in the Supreme Court. The uninterrupted period would extend beyond the tenure of just one judge if another judge from the same High Court is appointed to the Supreme Court before the earlier judge completes his or her tenure, thus providing an overlap and extension of the period of representation of that High Court in the Supreme Court. For this analysis, we have considered the tenures of the last judge from a parent High Court to have retired before 1 June 2017.¹⁷

Our initial assumptions were correct in that the older High Courts of Judicature, which predated the Constitution, had better representation in the Supreme Court. One startling observation was the track record of the High Court of Delhi. It was not represented in the Supreme Court until 1987, which is 21 years after its creation. However, since 1987, it has been continuously represented. Among the older High Courts, Calcutta had a near perfect run but for the seven-day period in December 1998 where nobody represented the High Court of Calcutta. Except those seven days, there has always been a judge from the High Court of Calcutta in the Supreme Court. The High Court of Madras had several short gaps, because of which its longest uninterrupted period was not as impressive as those of its ilk, the High Courts of Calcutta, Allahabad, and Bombay.

Another way to look at the data would be to see for how long the High Courts have been unrepresented. The general discussion in terms of parent High Courts and the Supreme Court tends to centre on the number of judges who have been appointed to the Supreme Court from such parent High Courts. However, we feel that a better indicator

is the amount of time such judges have spent in the Supreme Court. Figure 10 shows that certain

High Courts have had constant representation in the Supreme Court.

FIGURE 10. Continuous Uninterrupted Period of Representation of Parent High Courts (in Years)

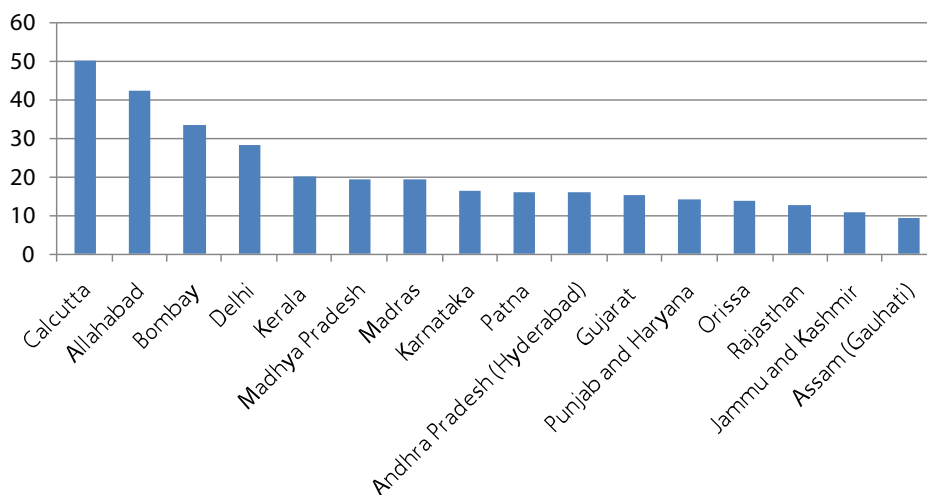


FIGURE 11. Period of Non-representation of Parent High Courts in Supreme Court (in Days)

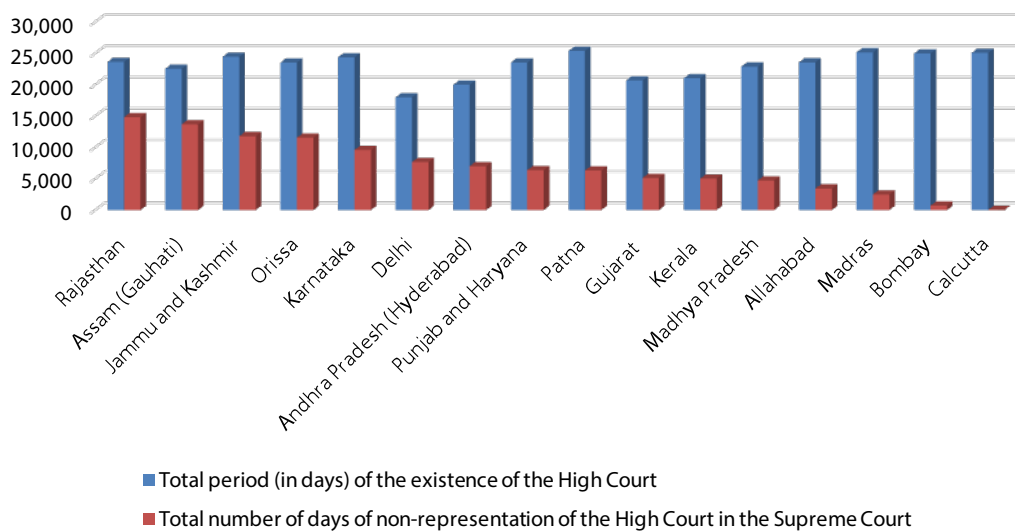


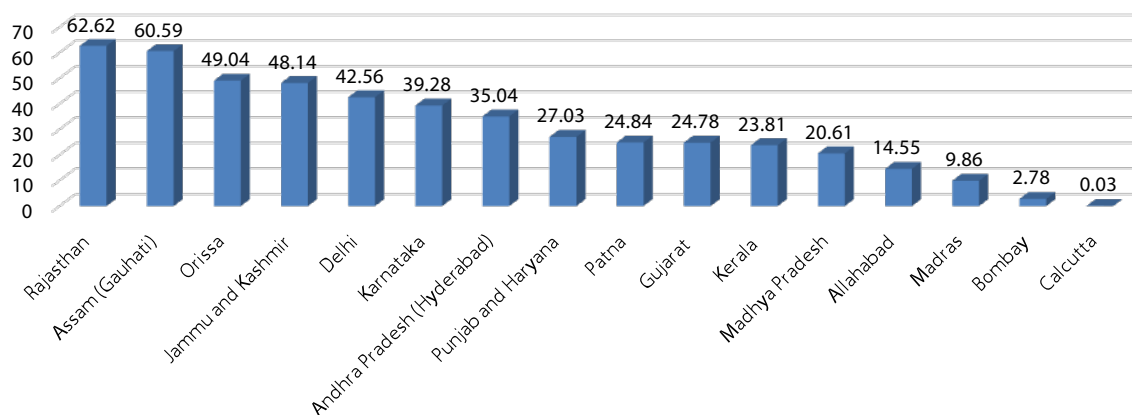
Figure 11 shows the period of non-representation as a percentage of the existence of the High Court. This analysis focuses on the length of time served by the judges in the Supreme Court. For this

analysis, the starting point is the date of creation of the High Court. For the High Courts created before the Constitution came into force, the period is calculated from the start of the tenure of the first

judge appointed to the Supreme Court of India or the Federal Supreme Court as the case maybe. For example, the start of the period of existence of the High Court of Delhi has been taken as 31 October 1966 as it was created on that day. Whereas, the start date for calculation of the period of existence of the High Court of Calcutta is taken as 14 October 1948 since that is the date of the beginning of the tenure

of Justice B.K. Mukherjea, who was appointed to the Federal Supreme Court from the High Court of Calcutta. We must clarify that there also exist High Courts which have never been represented in the Supreme Court of India—High Courts of Chhattisgarh, Jharkhand, Manipur, Meghalaya, Sikkim, Tripura, and Uttarakhand. As is evident, they are comparatively new High Courts.

FIGURE 12. Percentage of Non-representation of Parent High Courts in Supreme Court



In Figure 12, the High Court data has been arranged in the decreasing order of days of non-representation of a High Court in the Supreme Court. Also, only those High Courts that have had contributed at least one judge to the Supreme Court of India have been considered. As can be clearly seen, the four oldest High Courts have had the least number of days when a judge representing it was not present in the Supreme Court.

To simplify, the High Court of Rajasthan has been unrepresented in the Supreme Court for a little over 62 per cent of the time since the existence of the High Court of Rajasthan. Meanwhile, as was expressed before, the High Court of Calcutta has been unrepresented for 0.03 per cent of the time. Figure 12 also shows that although Delhi had a

long uninterrupted period, it still has a high percentage of non-representation, since a judge from the High Court of Delhi was not appointed for almost 21 years after its creation in 1966. Hence, the non-representation of High Court of Delhi comes to 42 per cent.

CONCLUSION

The issue of judicial tenure has significant implications for judges at an individual level and for the judiciary at an institutional level. The expected tenure of a candidate is known clearly when being considered for appointment. Thus, when data

reveals consistent trends in this respect, it is difficult to presume that the trends are merely accidental. Analysing the patterns of how tenures of judges are being structured can be an inquiry in itself. As is evident from the findings of this study, such an inquiry can reveal disparities which are consistent and may be prone to being labelled as systematic. When there are substantial differences in how often and for how long judges are appointed in the Supreme Court from different jurisdictions (See Figures 10, 11, and 12), it raises questions on the representative character of the Supreme Court in terms of the diversity of thought or perspectives accommodated in the institutional framework. This study proves without a doubt that the Supreme Court has not had a tradition of equitable distribution in tenure of judges when it comes to regional representation. There is also the need to examine the issue of tenure from other perspectives, such as social background of the judges, legal background of the judges,¹⁸ and so on. While a rigid rule of representative distribution might not be the ideal, unidimensionality of patterns, as can be seen in this chapter, is not encouraging for a country as diverse as India. The overwhelming dominance of certain states in terms of representation in the Supreme Court and the negligible presence of others is likely to have created an imbalanced networks of influences, which must be examined further.

Once it is clear that the tenure of judges is a product of deliberate decision-making, it is also imperative to consider the impact of such decision-making (in relation to tenure) on the judicial process and the justice delivery mechanism.

While the finding from the analysis of tenures of judges of the Supreme Court itself reveals some unquestionable historical disparities, we believe that this exploration should just be the beginning of a more sustained inquiry. The way tenure of judges is structured in reality is likely to have ramifications at various levels. For example, some

questions immediately trigger curiosity. Does the length of tenure have any effect on the disposal rate achieved by judges? Does the disposal rate of judges improve with more time in the office? Is the per day disposal rate of judges affected by the length of time they have spent in the office? Does length of tenure have any effect on judicial behaviour? For example, is there any marked similarity in the judicial behaviour of judges who have had longer or shorter tenures? Is there a connection between the tenure of judges and the kind of matters they are assigned to adjudicate? How often are judges with shorter tenures involved in the Constitution Benches? Do judges with shorter tenures have anything in common in their profiles? Do judges with longer tenures share some common attributes? Does the uninterrupted presence of judges in the Supreme Court from the parent High Court of a state have any implications on the behaviour of litigants originating from such states? Have litigants (state and non-state) from such states approached the Supreme Court more frequently during such uninterrupted presence? Do judges appointed from the Bar in the High Courts have a better probability of reaching the Supreme Court and staying there for longer in comparison to the High Court judges who are appointed from the subordinate judiciary?

The tenure of a judge can have direct effect on the capacity of the judge to influence constitutional policy and judicial legacies. Judges with shorter tenures would obviously stand at a natural disadvantage in comparison to judges with longer tenures. At an institutional level, the manner in which the tenure of judges is structured is reflective of the choices concerning the stability and continuity of judiciary as an institution, since systematic shorter tenures mean more frequent change of personnel.

All the above cited issues have substantial impact on the way the justice delivery mechanism in the highest court of the land is structured and the way

it functions. We believe that without a strong quantitative base, most discussions on qualitative aspects of judicial reforms are bound to end up in an endless cycle of subjective value assertions. It is hoped that the findings in this chapter will provide a layer of nuance in that endeavour. For example, one can consider all the judges with a tenure less than the average tenure, and examine if there is anything in common amongst such judges. One can also scrutinise litigant behaviour originating from states such as Uttar Pradesh, West Bengal, Maharashtra, and Tamil Nadu and contrast the same with Rajasthan, Assam, and Odisha, and examine if the tenure pattern of judges from such states has had any impact on the litigant behaviour of petitioners and advocates from such states. One can also examine the output of judges with shorter and longer tenures to assess if there are any differences and consider the requirement of having the most efficient structuring of tenure. We should also explore the possibility of structuring the tenure of judges in a manner that facilitates the most efficient management of judicial output.

Notes

* The authors would like to acknowledge the contributions of Shwetav Singh, 2nd-year student, National Law University Odisha, and Bismay Mishra (manager, Gilead Sciences Inc.) in data collection and data analysis.

1. *Supreme Court Advocates-on-Record-Asn. v. Union of India*, (2016) 5 SCC 1.
2. George H. Gadbois, Jr. 2011. *Judges of the Supreme Court of India (1950-1989)*. New Delhi: Oxford University Press.
3. Justice S.C. Roy was appointed from the Bar and died in office. So he is included in two lists.
4. This is from a sample size of three judges. Justice Subimal Chandra Roy, who died in office, had a very short tenure of 116 days.
5. *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.
6. *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441 (*Second Judges case*) and *Special Reference No. 1 of 1998, re*, (1998) 7 SCC 739.
7. However, it should also be taken into account that the sanctioned strength of judges in the Supreme Court in the initial years was much lower than what it was when the collegium system was introduced.
8. The first appointments under the collegium system were the judges appointed in December 1993 after the *Second Judges case*, which was decided in October 1993. The last executive appointment prior to December 1993 was in July 1992. This noticeable gap overlapped with the hearings in the cases.
9. Here, we have excluded two judges who were appointed prior to independence.
10. We have not considered three judges appointed from the Bar. We have excluded Justice Lokeshwar Singh Panta, who was appointed by the collegium. His parent High Court was the High Court of Himachal Pradesh. No judge from High Court of Himachal Pradesh was appointed by the executive. We have also excluded Justice Mahajan, whose parent High Court was the High Court of Lahore.
11. The number of judges appointed from the High Court of Assam (Guwahati), Madras, and Kerala by the executive are 2, 11, and 7 respectively. The number of judges appointed from the High Court of Assam (Guwahati), Madras, and Kerala by the collegium are four, six, and six respectively.
12. It is interesting to note if this were a list of the longest tenures in the Supreme Court, completed or not, Justice R.S. Pathak (4,136 days), Justice K. Subba Rao (3,357), and Justice Sayed Jaffer Imam (3,308 days) would comfortably make the cut.
13. Justices Ghulam Hasan, Harilal Jekisundas Kania, N. Chandrasekhara Aiyar, Sir Sayyid Fazl Ali, S.S.M. Quadri, and Syed Jaffer Imam.
14. Justices Baharul Islam, Mehr Chand Mahajan, N. Rajagopala Ayyangar, V.R. Krishna Iyer, and Fathima Beevi.
15. We have excluded Justice Lokeshwar Singh Panta, who was appointed by the collegium, from this calculation. His parent High Court was the High Court of Himachal Pradesh. No judge from High Court of Himachal Pradesh was appointed by the executive.
16. There were two judges by the name of Justice V. Ramaswami in the Supreme Court. Here, we refer to the first one, who served between 1965 and 1969.
17. The last judge taken for consideration is Justice Pinaki Chandra Ghose, who retired on 27 May 2017.
18. Legal background would mean the presence of family members who have excelled in the legal profession, whether as lawyers or judges.

Judicial Budgets: From Financial Outlays to Time-bound Outcomes

Avanti Durani

Rithika Kumar

*Neha Sinha**

Abstract

In India, budgets for the judiciary are prepared based on recurring historical expenses, such as salaries, allowances, and minimum operational costs, without planning for capacity building or targeting desired outcomes. In this chapter, the authors argue that allocation and management of judicial budgets is directly correlated to the efficient operation of courts. As a case study, the authors present the budget of Maharashtra's Law and Judiciary Department. The authors call for linking financial outlays in budgets to time-bound outcomes, through a framework of performance indicators, to improve judicial efficiency.

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‘**N**o matter how capable our judges, they cannot be effective unless adequate resources are provided,’ noted Michael L. Bender, Chief Justice, Colorado Supreme Court, United States of America, in his address on the State of the Judiciary to a Joint Session of the General Assembly in 2011.¹ The judiciary in India, as in several developed and emerging economies, will confirm that the above quote applies universally.

Budgets are an integral component of any institution's success, and the judiciary is no exception. Budgets for the judiciary in India have been based on historical recurring expenses, and have not involved a scientific planning process. A Ministry of Law consultation paper of 2001² noted, ‘In the past 50 years, there has been no proper allocation of funds commensurate with the increase in population, legal awareness, increase in legislation.’ The paper also noted, ‘The result is that there is, in terms of international Covenants and resolutions . . . a clear violation of the basic structure of the

Constitution and of the basic human rights resulting in an excessive “overload” of cases.’

Budgets for the judiciary have simply taken care of establishment costs, which essentially means that funds cover salary, allowances, and minimum operational costs of the judiciary, and do not provide for capacity building. In effect, budgets have merely reinforced the status quo. Central schemes are the favoured route for capacity addition. However, coordination and incentive structures are marred by the involvement of multiple agencies, without a clear demarcation of authority under the constitutional lists. In 1977, Entry 11-A was introduced in the Concurrent List of Schedule 7 of the Constitution of India by the 42nd Amendment Act of 1976. By this amendment, the subject ‘Administration of Justice: Constitution and organisation of all courts, except Supreme Court and High Courts’ was brought jointly under the purview of the centre and the states. However, a report by the Supreme Court of India on the National Court Management System showed that despite policies to promote equal participation, states were lacking in their contribution to court budgets.³

This chapter is organised in the following manner. The following section analyses the judicial budget for Maharashtra to understand certain contemporary budgeting practices in India. Thereafter, past schemes directed towards increasing capacity and budgetary capability within the judiciary are examined. Finally, performance indicators based on global best practices are discussed.

ANALYSING PRESENT-DAY BUDGETING PRACTICES IN INDIA

In this section, the judicial budget of Maharashtra is used as an illustration of existing budgeting

practices in the country. Maharashtra, which is home to one of the oldest courts in India, is one of the most advanced states by state gross domestic product (GDP) in India.⁴ In comparison to other states, it also allocates a greater proportion of its yearly budget to the judiciary.⁵ Yet, it makes up for 3.46 per cent of India’s total pending cases, second only to Uttar Pradesh.⁶

This section considers the budget of the Department of Law and Justice (DOLJ) of Maharashtra and then uses the case of district courts in Maharashtra (from the DOLJ’s budget) to understand current budgeting practices in the state. The data has been collected from the Budget Estimation, Allocation and Monitoring System (BEAMS)⁷ of the Department of Finance under the government of Maharashtra.

The budget for the daily functioning of the justice machinery in Maharashtra is prepared by the DOLJ based in Mantralaya, Mumbai. The DOLJ is a technical department with two arms, administrative and legal. The administrative arm deals with matters concerned with the establishment at Mantralaya, the judiciary, and law officers among others, while the legal arm looks at drafting opinions, litigation, and conveyancing.⁸ In its current form, the various courts, quasi-judicial bodies, sub-departments, etc. under the DOLJ at Mantralaya, are categorised as ‘programmes’. Therefore, in terms of judicial budgets, this means that each level of the judiciary within the state is identified as a programme in itself. These programmes are subsumed within major budget heads which are representative of the main functions of the DOLJ of Maharashtra. The budget heads are:

1. *Administration of justice*: This budget head subsumes programmes related to all the levels of courts within the judicial hierarchy. It covers the establishment costs of courts within the state.

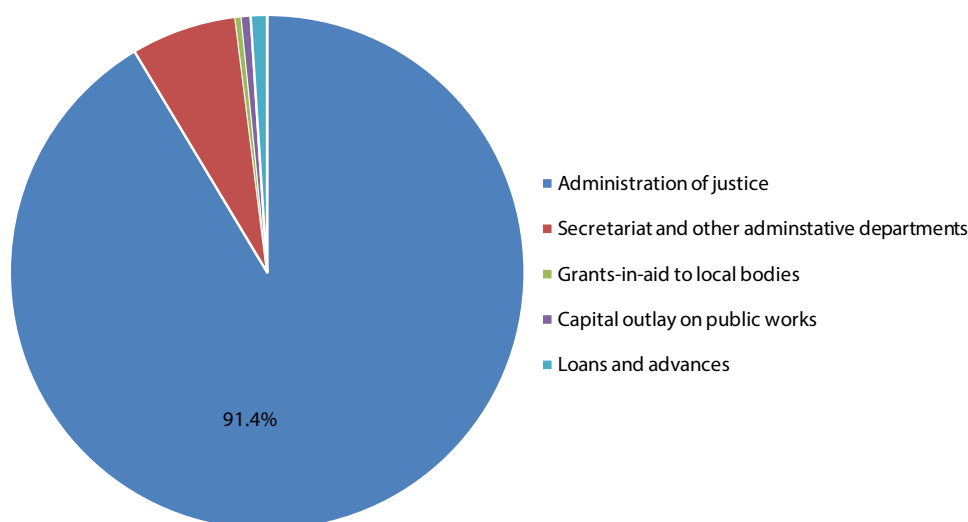
2. *Secretariat general services*: This budget head includes the establishment costs for the Secretariat (at Mantralaya) and other administrative sub-departments within DOLJ.
3. *Grants-in-aid to local bodies*: This head includes funds from the central government for specific projects.
4. *Capital outlay on public works*: Under this head, funds are allocated for the acquisition of land and construction of new

buildings—either for courts or for other departments related to administration.

5. *Loans and advances*:⁹ This budget head allocates money for purchase of computers, new building material, conveyance, and other immediate expenses.

Figure 1 shows the composition of the DOLJ budget for 2016–2017. A total of ₹1,919 crores was allocated to the department under the five budget heads discussed earlier.

FIGURE 1. Budget Allocation for DOLJ of Maharashtra, 2016–2017



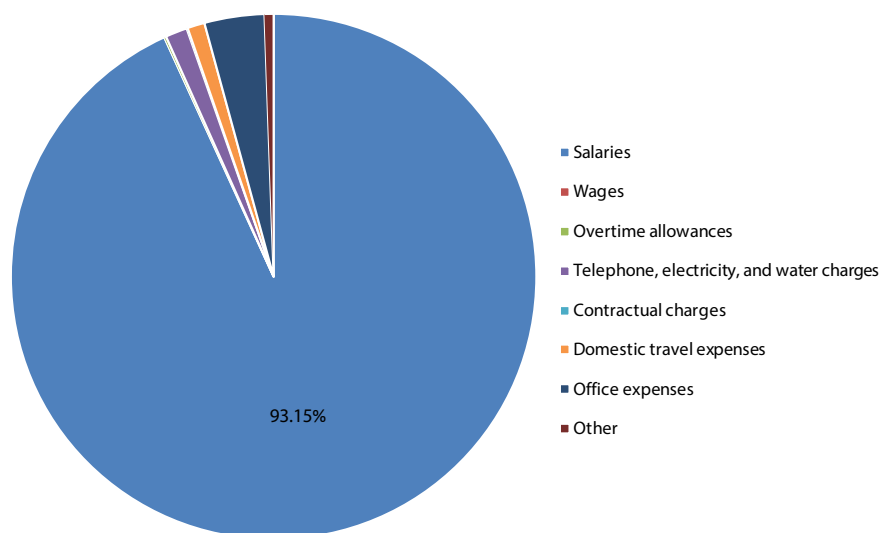
Source: BEAMS and authors' calculations.

Over 91 per cent of the DOLJ's budget is spent on 'administration of justice'. This budget head subsumes the allocation of funds to all courts in the judicial hierarchy of Maharashtra. A closer look at it is relevant for this chapter, to understand what it takes for the state to really deliver justice. For the purpose of this analysis, we focus on district and sessions courts, because the pendency in these courts¹⁰ is the highest among all courts in the

judicial hierarchy. Pendency indicates the average number of days that a case spends in court awaiting resolution.

As per the DOLJ budget for 2016–2017, the total allocation under the 'Civil, Sessions and Criminal Court'¹¹ programme was ₹1,177 crores. Of this amount, the district and sessions courts were allocated ₹1,044 crores, and the distribution of funds can be seen in Figure 2.

FIGURE 2. Budget Allocation for District and Sessions Courts of Maharashtra, 2016–2017



Source: BEAMS and authors' calculations

Over 93 per cent of the ₹1,044 crores is spent on salaries of judges and other permanent staff working at the district and sessions courts. The remaining 7 per cent of the budget is allocated to other operating costs, such as office expenses (3.7 per cent), utilities (1.35 per cent), travel (1.05 per cent), etc. These costs leave no room for financing training, digital upgradation, or other capacity-building initiatives.

A LOOK AT PAST SCHEMES

Outcome-based budgets help deliver efficient services and increase accountability. However, our analysis of the DOLJ budget reveals that funds are mainly spent on salaries of judges and other permanent staff. This leaves a limited budget for systemic changes. Even though India has ostensibly moved to an outcome-based budget, this has not been adopted universally across states and different departments, and 'the outcome budgets being

produced by ministries are in fact, not outcome budgets, they are in effect "outlay budgets" only'.¹² A careful assessment of budget allocations vis-à-vis the ultimate outcomes expected from the departments and public institutions is needed.

A World Bank report on modern budgeting practices for the judicial sector¹³ demonstrates that good budgets can substantially assist in raising the performance of the judicial sector. The report acknowledges that in the last decade, there has been an increase in awareness about the direct impact of legal and judicial reforms on economic and social development. The report notes that the concept has gained traction in emerging economies as well, and the key element of the judicial reform process has involved reorganisation and modernisation of the judiciary and the court system.

Digitisation is the favoured route to modernise the Indian judiciary. A study by Vidhi Centre for Legal Policy¹⁴ notes that various schemes for digitisation have been implemented since the early 1990s, of which, the most recent is the 'e-Courts'

project, which focuses on digitisation of the lower courts. Substantial success in the digitisation of the Supreme Court and High Courts has facilitated a higher rate of disposal of cases. However, the lower courts have experienced limited success in digitisation.

The study also notes that the budget for e-Courts has been repeatedly and drastically revised, indicating imprecisions in budgeting techniques. In 2007, the first phase of the e-Courts project was approved with a budget of ₹442 crores, which was more than doubled and revised to ₹935 crores in 2010. However, on the ground, it suffered from progressive under-spending. Subsequently, the budget for the second phase, estimated at ₹1,670 crores, was approved with a significant delay.

OUTCOME BUDGETS AND PERFORMANCE INDICATORS

India is notorious for delayed justice, albeit not denied. There are more than 2.4 crore cases pending in the lower judiciary in India.¹⁵ At the end of 2015, there were more than 2.7 crore cases pending in the district courts, almost 39 lakh cases in the High Courts, and about 60,000 cases in the Supreme Court.¹⁶ This issue of high pendency is especially stark in the lower judiciary, with cases routinely taking more than 1,000 days to conclude.¹⁷ Cases which have not reached their timely conclusion not only stymie judicial efficiency, but tie up the litigants' mental and physical time away from other productive activities. In Maharashtra, there are 2,566 judges at the district and taluk level to manage 32,76,689 pending cases.¹⁸ With a high pendency rate, the backlog in the system detracts from an efficient judiciary and imposes an economic cost on society, almost 0.5 per cent of GDP.¹⁹

Outcome-based budgets stress the importance of measuring various performance indicators to evaluate the effectiveness of financial allocations in improving a system.²⁰ Outcome-based budgeting is a process in which the formulation of the budget centres on a set of defined objectives and expected outcomes. These outcomes help justify resource requirements, financial and otherwise, which are derived from and linked to such outcomes. The progress in achieving these outcomes is measured by specific performance indicators.²¹ Thus, the most important elements of an outcome-based budget include clearly defined objectives or outcomes, specific performance measures of such outcomes, linking of financial decisions to outcomes, and finally accountability based on these outcomes.²²

The primary indicator used to assess the performance of the Indian judiciary is pendency. Other measures, such as workload of judges, cost of access to justice, and frequency of hearings, form a secondary part of the analysis.²³ Official and public discourse on the subject of the performance of the judiciary also stresses on the issue of high pendency in Indian courts.^{24,25} It is a useful tool in understanding the workload and backlog of the court. In India, pendency is generally measured by court type and case type. Statutes and executive rules dictate the time frame within which a case must be disposed of, but in practice, these time limits are typically overshot, resulting in a backlog of cases in the judiciary.

Experts in the field^{26,27} acknowledge that focusing on pendency alone is a limited approach to evaluating the performance of the judiciary since it fails to capture ground realities, including vacancies. Vacancies in the judiciary adversely affect the rate of disposal of cases, since the workload of sitting judges correspondingly increases. Understaffing of administrative and clerical staff also leads to a backlog, which reflects the overall performance of the judiciary. Therefore, indicators such as pendency,

vacancy, workload, disposal rate, etc., are all inter-linked in the way that they affect the effective functioning of the judiciary.

While these indicators look at the symptoms of inefficiency that need to be addressed imminently, they do not diagnose the depth of the problem. Developed economies, such as Singapore, United States of America, United Kingdom, and others, adopt a more nuanced approach using budgetary allocations. Budgeting, for them, includes myriad indicators that examine the performance of all the different departments within the judiciary, especially the adjudicating and administrative branches. The performance of these branches is used to determine allocations. They carefully review the experience of all the stakeholders of the judiciary, including adjudicators, administrators, and litigants, in order to determine the performance standards of the court system. Besides measuring performance using adjudication indicators,^{28,29} some courts even use administrative or management indicators and customer satisfaction indicators.^{30,31,32} Some of these measures include court user satisfaction, court file integrity, and employee engagement.^{33,34} The International Framework for Court Excellence recommends ‘eleven key measures across all court activity that reflects a high-level fair representation of a court’s overall performance’.³⁵ These key measures include court-user satisfaction, access fees, case clearance rate, on-time case processing, pre-trial custody, court file integrity, case backlog, trial date certainty, court engagement, compliance with court order, and cost per case.

Moreover, the methodologies used to assess these indicators carefully review the qualitative effects of quantitative changes in the budget. They closely examine how current and proposed budgetary changes impact court performance. For example, the Missouri judiciary developed methodologies ‘to demonstrate how budget reductions would impact both revenues to the state and the courts’

ability to fulfil their mission’ and also attempted to ‘estimate the impact of investing in technology that will potentially improve efficiency and reduce costs’.³⁶ Not only do they calculate how an increase in budgets would affect performance, but they also estimate how a decrease in budgets would affect performance standards.

It must also be recognised that in practice, the budgeting exercise is always a work in progress evolving alongside a changing governance structure. For instance, New Zealand³⁷ embarked on performance budgets alongside reforms in the public sector and financial management in the late 1980s. The government conducts a periodic review of ‘output prices’ mutually agreed between departments and the treasury, rather than relying on input cost. The outcomes are easy to assess using a range of quantifiable outputs. For example, in the case of district courts, the outcome of safer community and fairer justice system is determined using parameters such as number of cases managed vis-à-vis annual target, levels of satisfaction amongst survey respondents towards case management, file preparation, and courtroom support against a target of meeting expectations for 80 per cent of the respondents. In a more recent evolution of the budgeting process, each department prepares an annual strategy document, ‘Statement of Intent’ and discerns how outcomes are arrived at from the policies and resourcing decisions of the government.

USING BUDGETS TO ACHIEVE OUTCOMES

Allocation and management of judicial budgets directly correlates to the efficient operation of courts. Similar to budgetary allocation heads, performance indicators should also fall within distinct categories, to guide efficiency in the judiciary and

foster accountability. In India, the court administrative staff (or clerical staff) prepares court budgets, which are then presented to the respective judges, before being sent to the state governments for their approval. Most judicial officers are not experts in budgeting practices and merely forward historic budgetary requirements for the following year.³⁸

The success of budgets depends on linking financial outlays to time-bound outputs and outcomes, through performance indicators. The Union Budget of 2017–2018, in a marked departure from the historical methods of budget formulation, embarked on an outlay-output-outcome framework of formulating and tracking budgets for public schemes and projects under different ministries.³⁹ The framework will measure ‘output’ as direct and measurable products of activities, expressed in physical terms or units, while ‘outcomes’ will be collective results of qualitative improvements brought about in delivery of services. The centrally sponsored schemes for development of infrastructure of subordinate courts and the central sector scheme of e-Courts Mission Mode Project Phase II, under the Ministry of Law and Justice, will be budgeted for and tracked under this new framework. While this is a step in the right direction, for it to become truly revolutionary, this framework needs to be developed for the entire judiciary.

Rationalising court budgets and monitoring their performance are two key factors in outcome budgets based on performance indicators. Under this approach, courts should prepare an annual budget proposal with holistic information, including the number of expected incoming cases for a year by case type, the available personnel and material resources, other court performance information, including length of proceedings, number of pending cases, expected number of judicial decisions, etc. and an estimated budget that is necessary to realise these expected outputs. At the end

of a budget year the management of the courts should prepare an annual report, outlining the utilised budget and court performance.⁴⁰ The framework should require, at the level of each court, regulations on the budget, which clearly demarcate phases, schedules, persons-in-charge, and goals that must be achieved at each stage. These regulations and the outcomes should be regularly updated and available publicly in order to monitor the process and foster accountability.⁴¹ The framework should also include measurement of performance indicators and a monitoring and evaluation system, among other things, implemented cohesively by all agencies involved.⁴² Looking at a limited set of indicators, particularly pendency, in a vacuum from other performance measures such as increase in litigation by enactment of new laws, court user satisfaction, etc., and pumping funding into misaligned budget heads will not ameliorate the state of the Indian judiciary.

In a data-scarce country such as India, it may be prudent to even set intermediate outcomes such as improving data quality and availability of data for seamlessly tracking the complete judicial procedure, towards achieving the final goal of judicial efficiency. Schemes meant for capacity development should have a sunset clause and strict timelines on fund utilisation. This will promote re-evaluation of their effectiveness and keep incentive structures in place for achieving outcomes. Targets that need to be met under each budget head must be outlined, refined, and regularly monitored, by court administrators and professional accountants and auditors, in order to optimise the utility of judicial budgets as well as the time and capabilities of judicial officers. A dynamic process of evaluating the needs of an effective judiciary, and aligning the budgets accordingly, is an important step towards achieving an efficient judiciary.

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- * The authors would like to thank Arushi Mishra and Aarti Seksaria for their able research and editorial assistance.
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Index

A

Access to Justice, 9, 56, 132, 184, 229
Additional Commissioner, 167
Adjudication Indicators, 230
Administration of Justice, 226
Administrators, 119
 appointment of full-time, 119
Admission, 190
ADR methods, 127
Alternative Dispute Resolution, 127
Anticipatory bail, 191
Arbitrariness, 3
Arbitration and Conciliation Act, 1996, 41
Arrears Committee, 44
Arrest, 70, 71
 cognizable offence, 70
 complaint, 70
 rights of persons, 70
 warrant by the police, without, 70
Arrest, power of, 70
Arun Jaitley, 126
Assessment of budget allocations, 228
Assistant Registrars, 118
Australia, 133

B

Bail, 72
Bail petitions, 118
Banaras Hindu University, 39
Barack Obama, 191
Bibliography of Books Read by Mahatma Gandhi, 81

Budgetary allocation heads, 230
Budget Estimation, Allocation and Monitoring System, 226
Budgeting practices, 226
 India, in, 226
Budgeting techniques, 229
Budgets, 225
 funds
 allowances, 226
 minimum operational costs, 226
 salary, 226
 judiciary, for, 225
 funds, 226
 outcome
 performance indicators, and, 229
 tool to achieve outcomes, as, 230
Bureaucracy, 164
Bureaucrats, 149

C

California court system, 177
California Judicial Branch, 173
California's court system, 175
California's Judiciary, 174
California's trial courts, 173
Capital outlay on public works, 227
Case Clearance Rate, 112, 144
 civil and criminal cases, in, 112
 Judges' Strength, and, 112
Case Flow Management in California
 Annual Court Statistic Report, 182
 California's judiciary, 174
 centralised case processing system, 179
 Courts in the United States, 174

Case Flow Management in California (*contd.*)

- court workload, 180
- judicial workload measurement, 176
- Legislative Changes Affect Court Workload, 183
- local, 179
- statewide workload model, challenges of, 177, 178
- trial court unification, 176
- Workload Analysis, Recession and Impact on, 184

Central Board for Direct Taxes, 167

Central Bureau of Investigation, 190, 203

Central government, 74, 164

Central government revenues, 165

Centralised case processing system, 179

Central sector scheme, 231

Centre for Development, Planning and Research, 10

Charge sheet, 202

Cheating, 74, 127

Cheque bounce cases, 127, 129

- criminalisation of, 127

Chief Judicial Magistrate, 139

Chief Justice, 117

Chief Metropolitan Magistrate, 139

Civil and Criminal Litigation in India, 113

- case clearance rates in, 112
- percentage of population involved in, 113

Civil litigation, 176, 191

Code of Criminal Procedure, 1973, 70

Cognizable offences, 70, 127, 202

Commissioner, 167

Committee for Implementing Legal Aid Schemes, 57

Complaint, 128, 190

Complaint Case, 144

Constitutional Lists, 226

Constitutional Reform Act, 2005, 119

Constitution of India, 127, 226

Contempt notice, 190

Corporate social responsibility, 7

Corruption, 206

Cottage-industry, 117

Counterfeit notes, 127

Court, 121, 164, 190, 196

- cases, and, 196
- primary duty of, 137

Court Administrative staff, 231

Court clerks, 117

Court Statistics Report, 179

Court Workload, 183

- legislative changes affect, 183
- outcome' of the justice system, 180

Crime in India Report, 68

Criminal appeals, 192

Criminal breach of trust, 127

Criminal case, 144

Criminal investigation, 201, 206

- challenges, 201
- role of police, 202
- trials in India, and, 201

Criminal investigation department, 203

Criminal Justice System, 195, 201

- burden of proof, 195
- charge sheet, 195
- complaint, 195
- corruption, 206
- existing measures, 198
- first information report, 195
- improving efficiency, 198
- Indian, 195
- investigation, 202
- prior to, 202
- judiciary, 201
- judiciary, role of, 204
- or an adversarial system of jurisprudence, 195
- police, role of, 195, 201, 202
- prosecution, 195, 201
- prosecutor and, 196
- reasonable doubt, 195
- reforms in, 206
- roman model of, 195
- suggested reforms, 199
- trial, 203

Criminal liability, 127

Criminal litigation, 191

Criminal matters, 176

Cross-examination, 134

Customer satisfaction indicators, 230

D

DAKSH database, 127, 166
DAKSH's State of the Indian Judiciary Report, 189
Data, 91
Debt recovery tribunals, 150
Defence Counsel, 197
Democracy, 3, 6
Democratic society, 3
Department of Law and Justice, 226
Detention, 71
Developed economies, 230
 budgetary allocations, 230
Dharmakshetra, 83
Digitisation, 228
Dishonour of cheques, 125, 127
Dispute Resolution in India, 9
 data collection, 10
 data elements, 11
 findings, 11
 challenges of dealing, 13
 costs, 13
 nature of disputes, 12
 navigating justice, 11
 religion, 14
 judicial, 9
 methodology, 9
 monitoring, 11
 non-judicial, 9
Dispute resolution mechanisms, 39
Dispute resolution process, 43
District Legal Services Authorities, 54
 functions of, 54
Diversification, 149
Double jeopardy rule, 127

E

e-Courts, 229
 budget for, 229
e-Courts Mission Mode Project Phase I, 231
'e-Courts' project, 228
e-Courts website, 91, 110, 119

Executive functions, 164
Experts, 229

F

Fali S. Nariman, 192
Family and juvenile law, 176
Fast track courts, 133
Financial services, 134
Forensic science laboratories, 121
Formal legal system, 53
France, 133, 134
Frivolous Litigation, 192

G

General Assembly, 225
 Joint Session, 225
Geographic diversity, 177
Government, 164
Government Litigation, 163
 definition of, 163
Government officers, 58
Governments of union territories, 164
Grants-in-aid to local bodies, 227
Gross domestic product, 226
Gujarat government, 169
Gujarat High Court, 167
Gujarat Value Added Tax Act
 (GVAT Act), 2003, 167
Gujarat Value Added Tax
 (Amendment) Act, 2006, 167
Gujarat Value Added Tax Tribunal, 167

H

High Court judges, 118
High Court Legal Services Committee, 55
High Court tenure, 216
 appointing authority, and, 218
High-density urban areas, 176

Higher judiciary, 117
Hong Kong, 60
 Legal Aid Department, 60
 nodal authority, 60
 Legal Aid Services Council, 60
 consists of, 60
Human resource management, 118

I

Incarceration, 68
Income tax, 165
Income Tax Act, 1961, 167
Income tax appeals, 169
Income Tax Appellate Tribunal, 167
Indian judicial system, 149
 diversification, 149
Indian Parliament, 126
Information and communication technology, 121
Information technology processes, 118
Injunction suit, 191
Integrated knowledge management
 information system, 121
Intellectual Property Appellate Board, 150
Interlocutory matters, 192
International conspiracy, 191
Investigating officer, 202
Investigation, 190

J

Jagannadha Rao Committee, 142
Jails, 121
Joint Registrars, 118
Judges, 197
 duty of, 197
Judicial Administration, 173, 184
 Case Flow Management in California, and, 173
Judicial budgets, 230
 allocation and management of, 230
Judicial Council of California, 173

Judicial delays
 India, in
 deconstructing, problem
 analysis, 92
Judicial officers, 55
 Legal Services Institutions, 55
Judicial reform process, 228
Judicial Statistics Bill, 2004, 192
Judicial system, 118, 163
 maximising judicial time, 119
Judicial Tenure, 209
Judicial workload measurement, 176
Judiciary, 68, 164
 adjournments, 121
 administrative functions of, 118
 budgeting for, 225
 e-courts project, 121
 efficiency, 205
 functioning of, 121
 guardian of justice, 57
 higher, 117
 investigation, 205
 judicial supervision, 206
 office of the Chief Justice, 117
 role of, 204
 subordinate, 117
 to reform, 118
Justice, Access, and the Nation's Approaches, 39
Justice delayed, justice denied, 137
Justice hurried, justice buried, 137
Justice N.H. Bhagwati Committee, 57
Justice System Partners, 180
 role of, 180

K

Karnataka Appellate Tribunal, 121, 149
 appeal, 150
 grounds for, 157, 158
 provisions used for, 158
 appeal rate, 157
 Bengaluru, 150
 comprised of, 150
 efficacy at, 156
 efficiency at, 151

Karnataka Appellate Tribunal (*contd.*)

- official website, 151
- outcomes, 159
- purpose, 151
- reversal rate, 159

Karnataka Appellate Tribunal (KAT) Act, 1976, 150

- provisions of, 156

Karnataka government, 169**Karnataka state legal services authority, 55****Karnataka Value Added Tax Act, 2003, 167****Karnataka Value Added Tax Tribunal, 167****L****Law Commission of India, 127, 129, 133**

- 14th Report, 56
- 129th Report, 44
- 213th Report, 125

Law Ministry Consultation, 225**Lax arrest laws, 70****Legal aid**

- free, 53
- refers, 53

Legal aid camps, 54**Legal aid models, 59**

- comparison with, 59
 - Legal Aid Department³⁸ (LAD) of Hong Kong, 60
 - legal aid in New South Wales, 60
 - Legal Aid Ontario, 61
 - Legal Aid South Africa, 62
 - legal aid system in Scotland, 61

Legal aid programs, 54**Legal aid system, 53**

- office-bearers in, 56

Legal practitioners, 62**Legal process**

- internalising, 121
- hearings, 121

Legal Services Authorities Act, 1987, 54, 127**Legal Services Institutions, 56**

- functions of judicial officers, 55
- Right to Information applications, 55

Legislature, 68**Liberal democratic society, 3****Loans and advances, 227****Local government, 176****Local self-government bodies, 164****Lok Adalats, 127****Lord Macaulay, 192****Los Angeles County, 176****LSA Act, 58**

- subordinate judicial officers, 58
- subordinate judiciary, 58

M**Magistrate, 71****Magistrate's courts, 137, 197**

- case clearance rate, 144
- distribution of cases, 140
- methodology, 138
- structure of, 139
- suggesting reforms, 146
- working of, India, 137
- workload, 140

Mahatma Gandhi, 79, 80

- autobiography, 80
- barrister, 80
- believed in natural law, 80
- Champaran, 85
- coolie barrister's' experiences, 83
- freedom movement in India, 80
- historical actions, 84
- idea of justice
 - arise, to, 79
 - different and unique, 80
 - reasoning on, 80
- inspired by the ideals of truth, 80
- jurisconscience, 79
- movements for Indian citizens' rights, 80
- practice in South Africa, 80
- Sabarmati, 86
- satyagraha, 85
- thoughts on legal justice, 82

Malimath Committee, 44, 204

- recommendations, 204

Malimath Committee Report, 142
Mandamus, 191
Mediated settlement agreement, 47
Mediation
 in Indian practice, 46
 Court-annexed, 46
 ENSURING A DIFFERENT FUTURE, 48
 Private, 47
 legal developments affecting, in India, 44
Mediation and Conciliation Centre, 191
Mediation Gap, 43
Mediator, 44, 202
Metropolitan Magistrate Court, 144
Michael L. Bender, 225
Microphones, 191
Ministry of Defence, 165
Ministry of Law and Justice, 231
Missouri judiciary, 230
M.N. Venkatachaliah, 189
Moksha, 83
Mumukshu, 83
Municipalities, 164
Muslims, 75
 Scheduled Castes, 75
 Scheduled Tribes, 75

N

National and Policy Action Plan, 121
National Center for State Courts, 177
National Court Management System, 226
National Crime Records Bureau, 68
National Judicial Data Grid, 112, 138
National Judicial Data Grid website, 138
National Legal Services Authority, 54, 74
 nodal authority, 54
Natural law, 80
Negotiable instrument, 126
 Section 138, key elements of, 126
 what is, 126
Negotiable Instruments Act, 1881
 history of, 127

New South Wales, 60
 Legal Aid Commission
 responsible for, 60
 legal aid in, 60
N.H. Bhagwati, 56
Non-bailable offences, 127
Non-cognisable cases, 202
Non-cognisable offences, 202
Non-governmental organisations, 57
Non-judicial institutions, 39
Nyaya Peetha, 40

O

Ontario, 61
 Legal Aid Ontario, 61
 board of, 61
 consist of, 61
 Legal Aid Services Act, 1998, 61
Outcome-based budgeting, 229
Outlay-Output-Outcome framework, 231

P

Panchayats, 164
Parent high court, 212
 Supreme Court, in, 220
 representation of, 220
Parkinson's Third Law, 189
Parliament, 70
Penal Code, 1860, 127
Pendency, average
 calculation of, 110
 civil and criminal cases in
 subordinate courts, of, 110
 civil and criminal cases in
 Subordinate Courts, of, 98
 civil, criminal, and writ cases in
 High Courts, of, 97, 110
 disposal in subordinate courts, and, 101, 111
 disposal of execution cases, and, 113
 High Courts, in, 110
 subordinate courts, in, 110

Pendency In India, 94
Pendency of appeals, 170
Pending Cases, 93
 High Courts, in, 99
 Subordinate Courts, in, 100
Police, 196
 challenges faced by, 203
 custodial interrogation, 203
 lack of trust, 203
 securing evidence, 204
 role of, 202
Police force, 201
Police officers, 202
Political executive, 164
Principles of natural justice, 150
Private mediation institutions, 48
Probate, 176
Proposition 47, 183
Prosecution, 121
Prosecutor, 195
 and the criminal justice system, 196
 challenges for, 197
 court and, 196
 duties, 196
 primary duty of, 196
 role of, 195
 views on the Criminal Justice System, 195
Public interest, 164
Punishment, 70

Q

Quasi-judicial bodies, 226
Quasi-judicial institutions, 149

R

Rajya Sabha, 192
Rate of arrest, 71
Rationalising court budgets, 231
Registrar General, 118
Registrars, 117, 118

Retired judges, 149
Revision petitions, 192
Right of revision, 167
Rule of law, 164

S

Saddharma Nyaya Peetha, 39
 authorities, 41
 courts, 41
 disputes, 40
 enforceability, 41
 functioning of, 40
 institution, 40
 justice, 42
 parties, 40
 resolution, 40
Sadhana, 83
Sales tax, 166
Schemes, 231
Scotland, 61
 Legal Aid (Scotland) Act, 1986, 61
 legal aid system, 61
 Scottish Legal Aid Board, 61
Second appeal, 167
Secretariat general services, 227
Senior administrative personnel, 117
Shivamurthy Shivacharya Mahaswamiji, 39
Singapore, 133
Social justice litigation, 54
Social welfare project, 57
Social workers, 149
Social workers, and members of civil society, 149
South Africa, 62
 Legal Aid South Africa, 62
 Legal Aid South Africa Act, 2014, 62
Speedy trial, 69, 132
 access to justice, and, 132
Sri Taralabalu Jagadguru Brihanmath, 39
 role of, 39
Stakeholders, 230
State government, 74, 164

State Legal Services Authority, 54, 74
State of the Indian Judiciary: A Report by DAKSH, 110
Stringent bail laws, 70
Subordinate Courts, 117, 128, 231
 agenda for change, 8
 average pendency, 110, 111
 civil and criminal cases, of, 110
 delay and pendency in, 117
 disposal in, 111
 flow management rules, 119
 functioning of, 119
 judicial workload of
 category of, 111
 stage-wise distribution of hearings in cases in, 111
Subordinate judicial officers, 58
Subordinate judiciary, 55, 58, 117
 Judges in, 121
Summary Cases, 144
Summons, 134
Supreme Court Bar Association, 57
Supreme Court Judges, 209, 216
Supreme Court Legal Services Committee, 55
 functions, 54
 functions of, 55
Supreme Court of India, 212, 226
Supreme Court Tenure, 212, 214
 appointing authority, and, 214
 longest and shortest, 216

T

Taluk Legal Services Committees, 55
 functions of, 55
Tax Appeals, 163
Tax department, 165
Telecom Disputes Settlement and Appellate Tribunal, 150
Theft, 71, 74
Transvaal Government Gazette, 85
Trevor Harries Committee, 57

Trial Court Delay Reduction Act, 1986, 179
Trial Court Funding Act, 1997, 176
Tribunalisation, 149
Tribunals, 149
 pendency, and, 149

U

Undertrial incarceration, 68
Undertrial prisoners, 75, 118
 demographic composition, 75
Undertrials in India, 67
Unification, 176
 effects of trial court, 176
Union Budget of 2017–2018, 231
United Kingdom, 119, 133
United States, 133, 174
 courts, in, 174
United States of America, 225
 judicial systems, 174
 federal judiciary, 174
 State judiciary, 174
Untraceable and untaxable money, 127

V

Vacancies, 229
Value added tax, 166
Vidhi Centre for Legal Policy, 150, 165
V.R. Krishna Iyer, 191

W

Witnesses, 196
Workload Analysis
 recession and impact on, 184
Workload-based funding model, 184
Workload of Subordinate Courts, 100
World Bank report, 228