

JUSTICE FRUSTRATED





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The Systemic Impact of Delays in Indian Courts

Edited by
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B L O O M S B U R Y
NEW DELHI • LONDON • OXFORD • NEW YORK • SYDNEY

BLOOMSBURY INDIA
Bloomsbury Publishing India Pvt. Ltd
Second Floor, LSC Building No. 4, DDA Complex, Pocket C – 6 & 7,
Vasant Kunj New Delhi 110070

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First published in India 2020
This edition published 2020

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ISBN: HB: 978-93-89714-18-0; eBook: 978-93-89714-19-7

2 4 6 8 10 9 7 5 3 1

Typeset in Agaramond by Manipal Technologies Limited
Printed and bound in India by [insert printer name and address]

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Introduction

Shruthi Naik

Shruti Vidyasagar

‘I often think about how litigation or the threat of litigation affects people. It takes over one’s whole life. The fear of the lawyers and the courts, the delay, the tension when you have to appear.... It is time-consuming, expensive and nerve-racking.’

Leila Seth, *On Balance*

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Judicial delay’, ‘backlog’, ‘pendency’—these are terms that have now become commonplace in discussions about litigation, courts, and the judiciary in India. The enormity of the access to justice problem, caused by an overburdened judiciary, is also well known. DAKSH’s two publications, titled *State of the Indian Judiciary* (2016) and *Approaches to Justice in India* (2017), have shed light on the problem of judicial delay through an empirical approach to understanding not only the effect of delay on citizens’ access to justice but also to examining the performance of the judiciary.

The dominant discourse in understanding judicial delays on a large scale involves studying the judiciary’s functioning through the lens of either procedural irregularities that preclude a speedy and effective trial or through the perceived lack of an adequate number of judges. Doing so means viewing the problem as internal to *one* institution—the judiciary—and overlooking the ripple effects of its inefficiencies on other institutions and individuals. In analysing the impact of judicial delay, it is imperative to go beyond calculating the costs and time spent on attending court hearings to a more nuanced understanding of the cascading effects of judicial delay.

Thus, in conceptualising this volume, we sought to go beyond dissecting the problem of judicial delay (and its causes and manifestations) and gain insight into the effects of delay—to understand the practical

repercussions of judicial delay on the lives of people, organisations, institutions, and society itself. To this end, the chapters in this volume address the effects of judicial delay on society, bring to light the socio-economic impact of judicial delay on various categories of litigants as well as on different types of cases, and shed light on some lesser discussed ways to understand the problem of judicial delay.

CONSTITUTION, RULE OF LAW, AND SOCIETY

Is there a universal understanding of what constitutes ‘delay’? What are the effects of judicial delay on the idea of justice? Do different people or stakeholders experience the effects of delay differently? Contributors to the first section of this volume ruminate on these questions in search of an answer.

The first in the volume, Justice Jayasankaran Nambiar’s chapter, is a lament on how judicial delay has shaken the faith of the public in the judiciary. While noting his disquiet on this, Justice Nambiar describes how the legal fraternity—both lawyers and judges—suffer on account of delays. He reminds us that citizens’ trust in the justice delivery system stems from their respect for the judiciary as an institution, which was willed into existence by the same people when we gave to ourselves the Constitution, the fount of our legal system. He mentions the constitutional promise of access to justice, which means not merely having an adjudicatory mechanism to settle disputes but having one that is both adequate and effective. With this in mind, he reiterates the vision of the Constitution and exhorts all stakeholders in the justice system to take ownership of ensuring the steady and speedy progress of cases in court. He calls upon the government to provide adequate budgets for the judiciary to function effectively as a modern institution with all the necessary infrastructure,

including technological infrastructure. Justice Nambiar calls upon citizens too, asking them to consider alternative means of dispute resolution, and tasks the government with the responsibility of increasing awareness about these pathways.

In their analysis of delays in the Indian legal system—causes and effects—S.S. Naganand and Sharada Naganand point out that one of the most unfortunate consequences of failure to obtain speedy disposal of cases in the judicial system is the resort to extra-legal remedies through the informal sector, some of which border on being illegal. Further, delays also lead to increased corruption and nepotism in governmental functioning. The authors urge the government, whom they cite as the biggest litigant in the country, to resolve disputes through mediation or conciliation to reduce the ever-growing burden on the judiciary and also advocate improvements to justice delivery through institutions, such as Gram Nyayalayas and Lok Adalats. To improve the judiciary’s functioning, they call for appropriate standards to be framed to make the government a responsible litigant and to provide the judiciary time frames within which cases must be decided, failing which penalties must be levied.

In his chapter, Harish Narasappa eloquently demonstrates why it is difficult to ascribe a numerical value in terms of time as to what constitutes ‘judicial delay’. He likens the plight of litigants to Trishanku, a king in Hindu mythology, who lives in a world that is neither heaven nor earth but somewhere in between, highlighting the ambiguity and uncertainty that always accompanies judicial delay. Illustrating this through four different cases decided by the Supreme Court, Narasappa points out how the concept of delay and its effects on litigants and society differ vastly from case to case and from litigant to litigant. He argues that a lengthy judicial process has the effect of rewarding illegal behaviour, with legality and illegality converging;

eroding the socio-economic well-being of people, even across generations; and most significantly, increasing lawlessness and disincentivising respect for the rule of law.

In order to understand the reasons for lengthy judicial processes and its effect on access to justice, Amulya Ashwathappa reviews Arun Shourie's book, *Anita Gets Bail*, as a starting point to provide context to the nature of hurdles faced by litigants in the judicial process. Ashwathappa uses Arun Shourie's experience as the backdrop to her survey of litigants and cases in the Faridabad courts to examine how inefficient listing practices, the culture of adjournments, and lack of court infrastructure can affect the timely delivery of justice. She concludes that while procedural irregularities in a specific case can be seen as an isolated example and detrimental to that case alone, institutional inefficiencies affect all cases before the court and have a wide-scale, negative impact on society.

LITIGANTS AND JUDICIAL DELAY

The socio-economic impact of judicial delay on litigants varies considerably, depending on a person's gender, their socio-economic status, and whether they are victims or accused of a crime. Judicial delay also affects legal entities and shapes their business decisions, and even affects the economy. In the second section of this volume, we focus on how various kinds of litigants experience the impact of judicial delay.

One section of the society that is most affected by delays in the criminal justice system is undertrial prisoners. In his chapter, Vijay Raghavan draws on his experience of working with undertrial prisoners to describe in bleak detail the various difficulties felt by such prisoners and their families, especially children. Undertrial prisoners and their families have

to deal with the loss of their jobs and the economic drain on their (often) meagre resources, mental health problems, social stigmatisation and exclusion, and isolation. The women prisoners face even more acute troubles. In emphasising the hardships faced by undertrial prisoners on account of judicial delay, particularly the lack of agency with how their trials progress, Raghavan demonstrates a correlation between prisoners belonging to marginalised or socioeconomically disadvantaged groups and their increased distress.

The impact of a lax justice system on persons belonging to socioeconomically disadvantaged communities is even more evident when the plight of victims of human trafficking is studied. In their chapter, John Richard Ebenezer, Tina Kuriakose, and Ruth Thomas present the struggles faced by victims of human trafficking in their search for justice. Their account underscores how an inactive or lethargic justice system not only leads to socio-economic hardship for victims of human trafficking, especially sex trafficking, but also to deep mistrust of the justice system, resulting in very few people willing to stand up and fight against the atrocities they face. Acknowledging how various factions of the justice system fail the victims of human trafficking, the authors go on to recommend measures to be taken by the government, police, legal aid authorities, and the judiciary to alleviate the suffering of such victims on account of a systemic failure in guaranteeing their rights.

The social stigma and exclusion faced by those involved in a criminal case is well known. However, for a member of a marginalised community, the stigma is only accentuated. The chapter by Arpita Biswas explores the impact of litigation on members of the transgender and intersex community. Biswas explains how transgender and intersex persons are affected by the insensitive response of the justice system and society, not only when they are accused of crimes, but even as victims of crimes perpetrated against them. Aptly ascribing the problems they face

due to ‘invisibilisation’, Biswas notes that detailed studies regarding the effects of judicial delay on members of this community are limited, owing to lack of information collected by official sources on the crimes that involve them—whether as victims or accused.

While it could be argued that companies do not experience the trauma of delay with the same intensity as individuals do, prolonged litigation and judicial delay on corporate entities have a significant economic impact that needs to be measured and studied. Manaswini Rao does so by using judicial data and data from a private database. Rao meticulously analyses the impact of judicial delay on economic outcomes for companies—sales revenue, wage bills, profits, and legal charges. Specifically, Rao looks to understand variances in correlation between court performance and economic outcomes in different districts and states, and finds, among other things, that the effect of judicial delay on companies varies depending on their geographical location.

Almost every litigant that goes through the judicial process in India is inevitably affected by delays in the system. However, some are capable of anticipating the repercussions of litigation and planning their future course of action. One such litigant is a corporation. The chapter by Neha Munjral and Shelly Saluja explains how corporate entities handle the impact of judicial delays on business operations. It is said that companies often adopt a policy of proactive dispute prevention due to the time, costs, and efforts involved—of not only just legal teams but also key business executives. Companies often weigh the expense of running a legal dispute against its possible benefits and choose to assess their risks and identify ways to mitigate them. Munjral and Saluja also explain why some companies may choose a cautionary approach in handling disputes with the government or public sector undertakings, as litigation could hinder relations and hamper future business opportunities.

NATURE OF DISPUTES AND DELAYS

The extent of delay in cases is likely to be affected by the nature of the case being litigated, or its subject matter. Cases whose subject matter is complex are likely to take longer to be resolved than petty matters. Similarly, both the effects of judicial delay and the persons affected by it vary depending on the nature of the dispute. With this in mind, Section 3 of this volume seeks to understand the socio-economic impact of judicial delay based on the nature of litigation.

In his chapter on the burden of land acquisition cases, Alok Prasanna Kumar reveals intriguing patterns in the way litigation operates in such cases. Based on a study of cases in Karnataka, Kumar highlights the difference in case life-cycle patterns which are contingent on whether the land acquisition cases are appeals or original petitions, whether they concern questions of compensation or ownership of land, and the party moving the litigation forward—government or non-government parties. Mentioning numerous infrastructure projects being undertaken across the country to improve economic growth for which land acquisition is essential, Kumar stresses the need to identify bottlenecks and bring about appropriate reforms to tackle delays in land acquisition litigation to prevent them from affecting economic progress.

In any modern society, social progress hinges on ensuring the existence of a healthy democracy. Ritwika Sharma and Titiksha Mohanty discuss the manner in which election petitions are handled by the judiciary and analyse the reasons for delays in such cases. They find that prescribed timelines for disposal of cases are breached often, and by long margins, in violation of the legislative spirit that mandates expedited disposals of election petitions. Sharma and Mohanty call for the implementation of reforms to urgently address delays in the

adjudication of election petitions to ensure sanctity in the democratic process.

The socio-economic prosperity of a society can be adversely affected by the problems faced by its labour and employment sector. In her chapter on the impact of judicial delay in labour litigation, Shruthi Naik examines litigation in the labour and industrial courts of Maharashtra to understand the life cycle of varied kinds of labour and industrial disputes, and how the disputes are adjudicated in court. An analysis of the cases showed that labour litigation significantly overshoots statutorily prescribed timelines, with contested labour matters taking a longer time to be disposed, as well as constituting a far higher proportion of cases, than uncontested matters. Recognising that labour and industrial disputes are likely to have a different impact on each stakeholder in such litigation, Naik discusses the effects of such litigation on employees, employers, and society. Naik also notes that conciliatory processes are effective in the speedy resolution of labour disputes, and advocates strengthening such measures.

With the Indian judiciary overburdened with crores of pending cases, looking at alternative means of dispute resolution is critical for ensuring speedy access to justice. But what if even such alternative means of dispute resolution require the support of the judiciary to be effective? Poornima Hatti explains how the support of the judiciary is vital to the arbitration process and examines how the procedural delay affects the progress of arbitration cases. Analysing the progress of cases in the backdrop of the 2015 amendment to the Arbitration and Conciliation Act, 1996, Hatti finds that the amendment is only partially successful since timelines are not being strictly enforced by the courts in the cases examined.

In another chapter, Aparna Ravi reviews the progress of insolvency proceedings under the Insolvency and Bankruptcy Code and assesses

delays in cases before the National Company Law Tribunal (NCLT). Ravi notes that most cases used to bypass prescribed timelines, often citing pending litigation as the reason. However, with the passing of the amendment in 2019 to the Insolvency and Bankruptcy Code, 2016, which extends the timeline and restricts any further extension on the ground of pending litigation (though the amendment has, to an extent, been diluted by the Supreme Court's ruling in the Essar Steel case in November 2019), Ravi remarks that only time will tell if this will have the desired impact of timely insolvency proceedings. She also cautions against the development of a policy bias in favour of resolution over liquidation and states that a balance ought to be struck between pushing for a resolution and preferring liquidation, as forcing a resolution may only have the effect of delaying an inevitable liquidation. As the value of distressed assets deplete rapidly with time, economic and social costs of delayed insolvency proceedings will prove detrimental, she says, to the stakeholders with the passage of more time.

It is now common knowledge that the government is the largest litigant in the country and contributes heavily to the large volume of litigation pending before the courts. Any efforts to address the problem of a burgeoning caseload with the judiciary and the delays therein will inevitably be affected by the pace of litigation of cases involving the government. In his chapter on government litigation, Ajay Gupta discusses the efforts being undertaken by the central government to ameliorate delays in government litigation. Discussing the features and capabilities of the central government's Legal Information Management and Briefing System (LIMBS), Gupta highlights the initiatives of the government in identifying, tracking, and responding in a timely fashion to cases pertaining to all ministries of the Government of India and their departments, sub-departments, and attached offices.

Malini Mallikarjun digs deeper into a specific kind of government litigation affecting numerous

individuals directly and indirectly, which involves the education departments of states. Mallikarjun describes the challenge of tackling education litigation as a ‘wicked problem’ that is rooted in technical, social, and cultural challenges. While several factors may contribute to exacerbating the issue, Mallikarjun notes that the most problematic aspect is that the education departments are forced to dedicate so much of their time and energy to tackling their litigation that it has a direct impact on the attention that they ought to devote towards other critical functions such as school visits, field support to blocks, and assessing reports to ensure positive learning outcomes in education.

SYSTEMIC INFLUENCES

Are there any systemic influences that affect the functioning of the judiciary? Would an increase in judge strength improve the disposal of cases? Will the current functioning and workload of the judiciary determine its future functioning and workload? Do we have access to adequate information to estimate the impact of judicial delays? In the final section of this volume, we try to understand systemic influences on judicial delay and examine some limitations to effectively understand the impact of judicial delay.

A recurring suggestion to tackle judicial delays is increasing judge strength. But would increasing the number of judges result in a positive effect on case disposals? Surya Prakash B.S. and Siddharth Mandrekar Rao investigate this claim. Beginning with an explanation of the reasons for, and process of, establishing new courts, they conduct a careful statistical analysis of the performance of courts in two districts of Karnataka both prior to and post the introduction of new judicial posts. Prakash and Rao demonstrate that the introduction of new courts

does not lead to better court performance, but in fact results in worse performance overall, thus breaking the traditionally held view that appointing more judges will result in speedier disposal of cases. Their analysis is a strong indicator that other causes for judicial delays must first be tackled, if we hope to see an improvement in the functioning of the judiciary and reduce judicial delays, and not merely focus on creating new courts or increasing the number of judges.

Arunav Kaul and Gaurav Banerjee argue that critically analysing and understanding the future workload and life cycle of cases is crucial in the quest to demystify delays, as well as reduce their occurrence and impact. Using predictive modelling tools, Kaul and Banerjee predict the future workload of courts and call for more attention to be paid to predicted workloads in order to be more prepared to tackle the problem of judicial delay. Further, recognising that the delay in disposing cases could be dependent on a host of factors, they analyse the correlation between disposal times for civil and criminal cases and various factors such as the number of days spent at the stages of evidence, notices, appearance, etc. to determine other causes that lead to judicial delay.

In a bid to quantify and measure judicial delay in terms of the time and effort spent on hearing cases, Sridhar Pabbisetty and Ritwika Sharma utilise the concept of ‘transaction costs’ from management studies to understand the cost of judicial delay. Through case studies of public interest litigation, Pabbisetty and Sharma analyse the time spent on hearing cases and estimate the transaction costs of such litigation. Advocating that the judiciary re-engineer data management systems to enable a more nuanced understanding of the impact of judicial delay, they demonstrate—as a first—how the impact of judicial delays can be understood from a managerial perspective, leading to a more informed understanding of the costs of judicial delay.

FAITH AND TRUST

Judicial delay affects all stakeholders in the justice system adversely, and while the impact of such delay is borne primarily by litigants, our society and economy cannot escape its cascading effects. It is imperative for justice delivery institutions to not only recognise the impact of institutional failures in providing speedy and effective justice, but more importantly, work towards ameliorating the detrimental socio-economic effects of institutional inefficiencies in justice delivery. With a steady

backlog of pending cases in courts across the country and lakhs of litigants directly affected by judicial delay, it is time to stop feeling resigned to judicial delay or accept it as an inherent part of adjudication. It is time to devise innovative methods to reduce systemic delay and critically reflect on ways to alleviate the often traumatic consequences of delays. Not doing so, and with alacrity, will only reinforce and harden citizens’ feelings of mistrust, dismay, and cynicism in the justice system. And that will be a continuing betrayal of our constitutional values.



SECTION ONE

CONSTITUTION, RULE OF LAW, AND SOCIETY



Judicial Delays: A Judge's Lament

Jayasankaran Nambiar A.K.

The efficacy of a judiciary lies not only in its ability to dispense justice but also in the timely delivery of it to its citizens. 'Justice delayed is justice denied' is the mantra often chanted by our superior courts, and that too for a good reason. The exasperation of our litigating public with the delays that plague our system cannot go unnoticed.

Our Constitution is unambiguous when it states that the resolution of our people, while giving to ourselves the Constitution, was to constitute India into a sovereign, socialist, secular, and democratic republic. By democratic republic, we envisaged governance based not only on democratic principles but also subject to the rule of law. The government comprises three organs—the legislature, entrusted with the task of making laws; the executive, entrusted with the task of implementing those laws; and the judiciary, entrusted with the task of interpreting the laws and supervising the actions of both the legislature and the executive so as to ensure that the said organs functioned in accordance with the constitutional mandate. The framers of the Constitution did not envisage a strict separation of powers between the three organs, as suggested by Montesquieu, but preferred to have a system of checks and balances operating between them so that each would check the inadequacies, or excesses, in the functioning of the other.

We have now completed close to seven decades of 'working a democratic constitution' to borrow the title of Granville Austin's treatise on our Constitution, and these years have seen the judiciary grow in stature from being the least important democratic institution, to an all-powerful legal juggernaut that is ready to take on any task of governance that is thrown in its way. The metamorphosis from the classical role as an interpreter of the laws, that was played out in the initial years since the adoption of the Constitution, to the defiant activist role played

during the post-emergency years, and the almost messiah-like role that it has adopted today, was no doubt prompted by political circumstances, but it has catapulted the institution to dizzying heights of stardom in a nation that is exasperated with the failures of the legislature and the executive. Our judges, who are very often seen as high priests of our civic religion, must realise, however, that what really preserves judicial power in any society is the towering respect and esteem in which the public holds the judiciary.

The legal system in India emerges from a Constitution that ‘We, the people of India’, have given to ourselves, and hence the judiciary, as one of the organs of governance, is an institution of our own making. Since we have willed into existence the institution itself, the duty to respect its decisions is something we have agreed upon as citizens of this nation. This does not, however, mean that once the institution begins to function, its efficacy will be ensured through a mechanical adherence by the public to its judgments. To command respect and esteem from the public, it is essential that a certain independence and dignity becomes an integral part of every aspect of the judicial system in our country. The faith in the judicial system must stem not from veiled threats or coercive measures, but from a respect that evolves in the minds of the citizens. The citizen must get the feeling that the procedure in court is one that will not prejudice his case in any manner. He must see the court as a place where his legal claims will be carefully scrutinised by erudite persons who will correctly apply the law and tell him whether his claim is one that is legally sustainable or not. It should not matter whether he ‘wins’ or ‘loses’ his case. He must be convinced of having received a fair hearing and feel that justice has been done.

It is here that a timely disposal of cases assumes importance. An employee in an organisation who challenges the denial of a promotion gets no justice if his claim for promotion is upheld on the eve of

his retirement from the organisation or, as often happens, after his retirement. Many a claimant for pension dies without seeing his money and this persists despite rulings that recognise pension as a property of the citizen for the purposes of Article 300A of our Constitution. The frustration of an undertrial prisoner in custody, waiting for his case to be taken up, cannot be understated. Delays such as these erode the confidence that the litigating public has in our justice delivery system and hence, we need to adopt a policy of zero tolerance towards such delays, whatever may be the justification offered for it.

There is yet another aspect to this matter. The concept of access to justice is one that is recognised not only as an invaluable human right but also as a fundamental right in most constitutional democracies. The concept finds recognition in the Magna Carta of the United Kingdom, the Universal Declaration of Human Rights drafted in 1948, as also in the International Covenant on Civil and Political Rights drawn up in 1996, and is best summed up in the Roman maxim *ubi jus ibi remedium*—for every right that is breached, there must be a remedy. Inherent in the concept is the obligation of the state to make available to its citizens the means for a just and peaceful settlement of disputes between them as to their respective legal rights. In our country, a person’s access to justice has been recognised as an integral aspect of his right to life under Article 21 of our Constitution (In *Imtiyaz Ahmed v. State of Uttar Pradesh*,¹ the Supreme Court held that the rule of law, independence of the judiciary, and access to justice are conceptually interwoven). The position has been reiterated by a Constitution Bench in *Anita Kushwaha and Ors v. Pushap Sudan and Ors*.² Access to justice can also be seen as a facet of the right to equality before the law and equal protection of the laws guaranteed under Article 14 of our Constitution. Absence of an adjudicatory mechanism or the inadequacy or inefficacy of such a mechanism effectively robs a citizen of this valuable right and renders it a teasing illusion. If the process of adjudication is time-consuming

and laborious, it would be frustrating for the litigant and could even dissuade him from seeking justice altogether. Thus, delays in the justice dispensation system effectively deprive a citizen of his fundamental rights under our Constitution.

The legal fraternity too suffers on account of delays. A lawyer is expected to advise his client not only on the merits of his case and the prospects of his succeeding in the litigation but also on the time frame within which such litigation will end. Prolongation of the indicated time would inevitably result in the lowering of the client's confidence in his lawyer. Sometimes, the delay in the listing of a case results in timely interim orders not being obtained. While the delay may be on account of a fault by the registry, the client would invariably look to the lawyer for an explanation. Similarly, delays in adjudication of important and recurring issues, especially involving finance and taxation, make it impossible for lawyers to offer timely advice to their clients in such matters. Apart from the gloomy uncertainty, this could also entail the unnecessary locking-up of funds that would otherwise be available for commerce.

As for judges, nothing is more annoying and painful than having to adjourn a case in which they have come prepared for adjudication. Deferring the hearing to another date results in waste of judicial time and effort since the time spent on the case could have been more effectively utilised to prepare for another case. It also upsets the court schedule of the judge for that day, as the daily cause list might have been prepared after taking note of the adjudication time required for that case. Therefore, a system that ensures that only those cases that will be heard on any particular day are actually listed will eliminate such delays.

We have to understand that a legal system is meant for the people and a system that does not offer timely redressal of disputes is of no use to the citizens. The first step in solving the problem would be to identify the reasons for the delays that the citizens encounter.

Delays can arise from within the system and also from without. Foremost among the reasons cited from within the system is the frequent requests for adjournments made by lawyers. While one cannot rule out instances where a lawyer is unable to attend the court on account of illness or bereavement in his family, courts have to be strict while considering requests for adjournments on grounds such as non-receipt of instructions from the client or the non-availability of a client to sign affidavits or other such documents. A strict approach by the court in the matter of granting adjournments would, to a large extent, ensure that the hearing on the next date of posting of the case is an effective one. In appropriate cases, costs could also be imposed while granting adjournments so as to deter the litigant from seeking avoidable adjournments. Similarly, excessive posting of cases in a court by the registry can often lead to many matters not being taken up on a given day. Posting of cases in a court has to be preceded by a study that assesses the average time taken by the concerned judge to dispose a case in his court. Monitoring the disposal of cases in that court over a short period of time, such as a fortnight or a month, can easily capture such data. When it comes to individual judges, there is a need to maintain strict discipline in the matter of timely delivery of judgments. There can be no justification whatsoever for reserving judgment in cases for periods in excess of one month from the last date of hearing. Excessive delay in pronouncing judgments can only be counter-productive to the administration of justice, since the finer legal points that were argued by counsel would be forgotten with the passage of time.

With regard to external factors, one cannot ignore the lack of infrastructure and support systems that plague our subordinate courts. Infrastructural deficiencies also manifest in some of our High Courts. The requisite funds for financing the infrastructural requirements have to come from the respective state governments and not all of them are liberal in their budgets when it comes to allocation of funds for the judiciary. The state judiciary is often treated as

yet another department of the state government, and the most neglected one at that. This practice must stop and the executive governments must take steps to assess the needs of the judiciary for the forthcoming year and make suitable provisions in their annual budget to allocate the necessary funds to the judiciary. Without this, the constitutional vision of an independent judiciary would remain a mere aspiration.

Infrastructural support, in modern times, calls for improved technological infrastructure. With data capture emerging as the most important tool for designing efficient systems within an organisation, the judiciary has to be equipped with the latest software for ensuring a smooth workflow. The task of bringing about a uniform procedure that will govern all courts in the country will, without doubt, require Herculean efforts, but we cannot shy away from the task. Further, while going about the said task, we need to constantly update our technology to make it user-friendly to members of the legal fraternity as well as the litigating public.

Lastly, we need to remind ourselves that while computerisation, digitisation, and use of artificial intelligence can ameliorate the problem of delay to a large extent, what is most important is the attitude of all stakeholders to the system of justice dispensation. Apart from judges, lawyers, and court

staff, whose acts or omissions could contribute to a delayed dispensation of justice, as remarked previously, litigants would also need to adopt an altered mindset when it comes to a redressal of their grievances. They should explore alternate dispute resolution options, such as arbitration, mediation, or conciliation, so that they do not put pressure on an already overburdened curial infrastructure. The government has to take proactive steps to bring about increased awareness of the efficacy of these alternate dispute resolution options among the citizens and it has to instil in the people a confidence in such mechanisms.

Unless each of the stakeholders takes up a proactive role in addressing the issue, a solution cannot be found. Can we not, as responsible citizens, overcome our selfish desires and do our own bit to build a robust justice delivery system? I believe we can. We, the people of India, gave to ourselves our Constitution, and we owe it to ourselves to render effective the rights that it guarantees.

Notes

1. (2012) 2 SCC 688.
2. (2016) 8 SCC 509.

Dimensions of Delay: An Analysis of the Indian Legal System

S.S. Naganand

Sharada Naganand

2

INTRODUCTION

There are two well-known adages in legal circles. They are:

1. Justice delayed is justice denied and justice hurried is justice buried.
2. The winning litigant is really a losing litigant and the losing litigant is a dead litigant.

It does not require too much discussion to emphasise that an important facet of governance in any civilised society is an independent, proper, functional, efficient, and speedy justice delivery system. It is now well recognised that an independent judiciary is the bedrock of a democracy. A welfare state is not modelled entirely on the *laissez faire* principle but envisages an important role for the state in a country's development; that of reforming its methodologies and institutions and making them responsive to society's needs—social, economic, and otherwise. Among these institutions, a well-functioning and efficient judicial system is perhaps one of the most significant, as it is regarded as an institutional prerequisite for not only just social well-being—for the protection of the fundamental liberties of citizens—but also for robust economic growth. As a nation and its instrumentalities progress, their reliance on formal institutions increase and the judicial system is cast with the formidable task of redressing the grievances of litigants and protecting their rights that are guaranteed by law. An important question that arises at this juncture is whether justice delayed is really justice at all. In an ideal world, the justice system is expected to deliver expeditious and affordable justice in a manner that advances the rule of law and upholds the principles of fairness, equality and judiciousness, unbound by the tediousness of procedure.

CAUSES OF JUDICIAL DELAY

While the causes of judicial delay in India are numerous, some key factors that contribute to a sluggish judiciary and lead to delays in imparting justice are attributable to the state. Often, the executive is unable to control its own organs, which results in aggrieved citizens resorting to legal remedies. An analysis of all litigation involving constitutional law¹ reveals that more than 50 per cent of the cases involve infractions of law and citizens' rights by state instrumentalities. The Action Plan to reduce Government Litigation by the Ministry of Law and Justice, which is dated 13 June 2017, states that the government, including its autonomous bodies and public sector undertakings, are party to as much as 46 per cent of all current litigation,² making the government, as a single entity, the biggest litigant in the country.

Influential sections of society, including the corporate sector, also consume a substantial part of judicial time by high-flying, as well as sometimes frivolous, litigation that burdens the judiciary. The dilemma here is that the fees paid by these corporations to file such cases do not compensate adequately for the burden they place on the judiciary. It costs a mere ₹ 100 to file a Writ Petition before the High Court of Karnataka³ and ₹ 15 to file a Miscellaneous First Appeal⁴, which is less than a negligible cost for most corporations. However, the numerous expenses on the courts, including the salaries of staff, administrative expenses, etc., remain largely unaccounted for or are a burden on the state exchequer, not to mention consumption of the court's time comprising several days and several hours.

A major contributing factor to judicial delay is the lack of guidelines with nation-wide applicability across the judiciary, instituted to ascertain the 'average time' a case should take, beyond which a 'pending' case becomes 'delayed'. No record is kept

of this information and hence no consequences arise therefrom. Resultantly, since no record of timeframes is kept, the possibility of reducing the incidences of delay and imposing penalties, when cases cross over from being pending to being delayed, does not arise. Developing such standards requires large-scale, quantitative research across courts, surveys of legal practitioners and litigants, studies of procedure across case types, as well as a host of other steps, which need to be undertaken. Some government reports have attempted to set such standards, such as the 14th (1958) and 79th (1979) Law Commission of India Reports, in which the Law Commission laid down timeframes (although not mandatory) within which different case types should be disposed of. The Malimath Committee in 2003 and the Jagannadha Rao Committee in 2003 also suggested that cases pending for more than two years should be considered delayed. While these reports and suggestions are definitely a step in the right direction, their effectiveness to curb delay remains questionable in view of the absence of obligatory rules and penalties framed to limit the time taken to hear individual cases based on the type of case, when the aforementioned rules are violated.

Additional widespread inefficiencies that lead to a slower justice system range between those attributable to the court itself, such as an absent judge, insufficient time given to hear a case, the registry failing to perform its tasks on time, etc. Inefficiencies that are present in significantly higher proportion are, however, on the counsel side, such as an absent counsel, absent party, or seeking repeated adjournments, etc. The lack of a formal system of checks and balances, keeping track of the number of adjournments sought by the counsel or reasons, and timeframes for delays in the registry, as well as the imposition of severe consequences and penalties on the perpetrators thereof, be it the court registry, inefficient judges, litigants, or their counsel, perpetuates these inefficiencies and prevents the efficient functioning of the courts.

EFFECTS OF DELAY—SOCIAL AND ECONOMIC

The Civil Procedure Code of the 20th century still holds the field in the 21st century. The criminal justice system is assisted by the Code of Criminal Procedure of 1973. Both these have ensured that the orderly, systematic, and quick disposal of cases is nearly impossible. Such delays affect the citizens enormously and lead to a situation where they no longer have the confidence of obtaining justice within a reasonable time in the judicial system. This has led to extra-legal remedies that the society has fashioned in the informal sector. These mechanisms are not formal, based on law, or even recognised by law. An inefficient judicial system encourages corruption and nepotism in governmental functioning when greasing palms is taken for granted and everybody resorts to the same method. This also percolates to the judicial system, thereby eroding the faith of the masses in the judicial system.

The brunt of these shortcomings, unfortunately, is most often borne by the less fortunate members of our society. Litigation in such an environment makes the remedy of judicial adjudication illusory for those below the poverty line. The middle-income groups too cannot afford the cost of legal services, have no resilience for the arduous adjudication process, and remain at the mercy of non-state providers of justice, resorting to extra-legal methods, becoming victims of corruption, and sometimes even taking criminal recourse. The affluent, however, reap the benefit and get a greater return on their investment than the poor, who cannot afford litigation because of unavailable quality legal aid, notwithstanding the lofty ideals of the Legal Services Authority Act, 1987.

An inefficient judiciary, while a problem in itself and for all the players, also has more far-reaching, long-lasting repercussions for the nation. A reputedly slow judiciary implies a lawlessness of

sorts, or an environment in which there may be law, but the enforcement of that law is lax. It implies an environment rife with breach of contract and puts investors, firms, or any external organisation on guard, hampering investor confidence and thereby discouraging investments and creating an unfavourable economic environment in which economic growth is stifled. Policymaking and state administration are also hampered as a result of judicial delays due to delayed decision-making on issues that are the subject matter of litigation, which results in slower administrative processes.

The legitimate tax revenue of the government is also seriously affected by the delay in disposal of cases arising in the field of taxation. Unscrupulous tax payers are able to evade the payment of taxes and the government has become helpless. This leads to the introduction of draconian laws, which affect honest tax payers and places an unfair burden on them. Various government and quasi-government bodies also depend on the justice delivery system to enable the implementation of various schemes and measures for the development of society. For example, the power of eminent domain which the government exercises for acquiring private property for public purposes, is often interdicted by courts and takes many years to adjudicate disputes arising therefrom, leading to an enormous cost overrun and delays in the implementation of economic reforms. Thus, government bodies and government companies, which are meant to subserve public good, are handicapped. Lastly, the judiciary itself is under great pressure to perform when it is over-burdened and under-staffed. The casualty is justice itself when the courts have to find rough and ready methods to reduce their tax at the cost of providing justice. When the justice delivery system is plagued by so many problems, a rule of law society is a utopian dream.

The problem of delayed justice is even more alarming in the case of undertrial prisoners or those awaiting trial in prison without having been convicted

of a crime. A recent Amnesty International study, *Justice Under Trial: A Study of Pre-Trial Detention in India*⁵, states that undertrial prisoners account for two out of every three persons in Indian prisons and are as many as 2.8 lakh people, currently being held in Indian prisons during their trial or are awaiting a trial, with many remaining in prison for a longer period than the maximum formal sentence for the crime. This is an inexcusable statistic that reflects a blatant denial of human rights and basic individual liberty. While minor delays in judicial processes do not deny victims the opportunity to obtain remedies, significant delays and the cumulative effect of several minor delays undermine the value of available remedies. Inordinate delays very often even result in evidentiary problems, frustrate victims, drain them of their faith in the judicial system, deter or frustrate claims by other victims, and on the whole undermine the legitimacy of the judiciary.

RECOMMENDATIONS TO REDUCE JUDICIAL DELAY

There is no doubt that judicial delay causes enormous stress in society and leads to a failure of the judicial system. Merely increasing the number of courts and judicial officers will not solve the problem, until the government (the majority litigant) implements a proper in-house review mechanism to safeguard the deciding authority from being subjected to unnecessary and vindictive probing and investigation by anti-corruption agencies, such as the Lokayukta, Vigilance Commission, and by the criminal investigation departments of the state governments and central government. A kind of extreme reluctance has set in among administrators in the government and public sector enterprises, and the sense of confidence to make decisions has been completely eroded. This is evident from the small number of matters involving public sector companies, which are resolved by mediation or

conciliation in the country, even though the law has now attained majority age of 21 years, since 1996, when the Arbitration and Conciliation Act was introduced. The extreme reluctance among government administrators to make decisions by mediation or conciliation is a classic instance of systemic failure at the governmental level, which is a major bottleneck for the delivery of justice speedily.⁶

There are several steps that can be taken to reduce the ever-growing burden on our judiciary. Greater reliance on alternative dispute resolution (ADR) mechanisms and the encouragement of institutions and mechanisms providing ADR, making them more widespread and effective, will go a long way towards alleviating the burden on the judiciary. First and foremost, at the grassroots level, the state must establish and encourage the functioning of Gram Nyayalayas as per the Gram Nyayalayas Act, 2008. Based on my experience, one of the major drawbacks of judicial recourse in India is its inaccessibility to a large percentage of the population, mainly in rural India, who have been completely excluded from the ambit of justice delivery. The strict encouragement and implementation of the Gram Nyayalayas Act would alleviate this to a large extent. Despite being a decade-old enactment, which envisaged the setting up of over 5,000 Gram Nyayalayas, only a few hundred Gram Nyayalayas exist today.⁷ The Act envisaged a Gram Nyayalaya for every Panchayat or group of contiguous Panchayats that would function akin to a mobile court with a Nyayadhikari, who presides over them and enjoys the same power, salary, and benefits as a Judicial Magistrate First Class. If encouraged and promoted, they could function as a dynamic, first response unit/institution to settle small disputes immediately and prevent disputes from exacerbating into lengthy court battles.

Another ADR mechanism whose effectiveness has not been harnessed to its full capacity is that of the Lok Adalat that could easily be encouraged and expanded to become a gamechanger in ADR, allowing parties to overcome organisational and

procedural barriers that would otherwise hinder their access to justice. Some small steps that would promote their functioning would include regular organisation of Lok Adalats without pomp and ceremony. Lok Adalats could even tie up with law schools and recruit law students or the staff of reputed law colleges to provide managerial support as a part of legal education thereby solving the problem of being understaffed.

Technology must also be utilised to speed up the judicial system and its processes, as far as it can. E-filing should be made mandatory and must include e-registration of cases and payment of court fees online. Auto-generating cause lists can also be tailored to an individual advocate's name, court hall number, party name, date, etc. This would significantly reduce the burden on court registries, that would have more time to undertake other tasks as well as significantly reduce the paperwork involved in court processes.

In addition to the aforementioned measures, various simple reforms in court management could go a long way to speed up the judicial system. Reforms like fixing rosters of judges keeping in mind the expertise of the judge or even the judge's passion for the subject, releasing the daily cause list well in advance to prevent unnecessary adjournments, and fixing timeframes for oral arguments will help reduce the burden. Officers of the court should be made responsible for ensuring that these measures are adhered to and penalties for violating the same should be enumerated and levied with diligence. Heavy costs must be levied on parties for infractions of the rules framed and the norm at the end of a litigation proceeding should be a policy of awarding costs against the losing party that include actual legal costs and actual advocates' fee paid. This would act as a severe deterrent to individuals pursuing vexatious litigation and also discourage the dilatory tactics that parties and their counsel frequently indulge in. Furthermore, Section 35B of the Civil Procedure

Code provides that a court can levy any amount it deems fit as cost on parties if they fail to take a step that is required or if they obtain an adjournment to perform it. If this provision were utilised more liberally, then, perhaps, the counsel would be more cautious before engaging evasive tactics to stall an ongoing hearing.

In 2010, addressing the problem that the predominant litigant in the country is the state and its agencies, the National Litigation Policy (NLP) was launched to steer the government towards becoming a 'responsible and efficient litigant'. The guidelines framed by the NLP include not misleading court, not being a compulsive litigant, prioritising welfare litigation concerning social reform, the interests of weaker sections of society, and senior citizens, etc. While the NLP was definitely a step in the right direction, it has failed as an initiative due to being replete with ambiguity and containing no scope for implementation. The present policy fails to provide a yardstick for determining responsibility and efficiency, and mandates 'suitable action' against officials violating the policy, whereas it fails to specify the nature of the suitable action and prescribes no method to conduct disciplinary proceedings against violators, etc. The present NLP needs to be upgraded to contain clear objectives—it must stipulate the roles of functionaries and outline mandatory minimum standards to be satisfied to conduct litigation, it must put in place accountability mechanisms, and, most importantly, it must enumerate and implement the consequences of violating the policy.

The dismal picture painted earlier has a silver lining in the form of erudite judges of independent minds with zeal and commitment, working tirelessly and valiantly. In the famous poem 'Casabianca', the opening words ring in our minds—'The boy stood on the burning deck.' Our great judges remind us all of that boy who is doing his best to save a sinking ship from fire, bravely and fearlessly, doing his bit to avoid or delay the sinking of the ship. We, therefore,

need to salute the judges who are bearing the brunt of a collapsing justice delivery system.

While the process of reforming the judiciary and reducing incidences of judicial delay require the investment of state infrastructure, time, and funds, they also require the co-operation of legal practitioners and parties. The introduction of the aforementioned reforms would go a long way in making the state and its organs stronger, more efficient, and more capable of functioning in unison. More importantly, it would restore reliance on justice and bring the judiciary into its 'coming of age'.

Notes

1. The power vested in the High Court under Articles 226 and 227 of the Indian Constitution.
2. Department of Justice, Government of India. 2017. 'Action Plan to Reduce Government Litigation', available online at <http://doj.gov.in/page/action-plan-reduce-government-litigation> (accessed on 22 February 2019).
3. Schedules 1 and 2, Karnataka Court Fees and Suits Valuation Act, 1958.
4. Schedules 1 and 2, Karnataka Court Fees and Suits Valuation Act, 1958.
5. Amnesty International India. 2017. *Justice Under Trial: A Study of Pre-Trial Detention in India*. Bengaluru: Amnesty International India, available online at <https://amnesty.org.in/justice-trial-study-pre-trial-detention-india/> (accessed on 8 May 2019).
6. The Arbitration and Conciliation Act was introduced in the year 1996.
7. As of March 2015, 159 Gram Nyayalayas were said to be functional out of the 194 notified Gram Nyayalayas. Ashwini Obulesh. 2016. 'Institutionalising Justice: Gram Nyayalayas and Consumer Courts', in Harish Narasappa and Shruti Vidyasagar (eds), *State of the Indian Judiciary: A Report by DAKSH*, pp. 197–206. Bengaluru: DAKSH and EBC, available online at http://dakshindia.org/state-of-the-indian-judiciary/34_chapter_19.html#_idTextAnchor485 (accessed on 26 February 2019).

A Trishanku Existence: Complex and Adverse Consequences of Judicial Delay

Harish Narasappa

3

According to Hindu mythology, Trishanku was a noble king who led a good life and his place in heaven was guaranteed. However, Trishanku desired to go to heaven in his human form even though it was against known cosmic laws. The sage Vishwamitra agreed to help Trishanku achieve his desire by performing a series of yagnas. Trishanku ascended to the heavens as a result of the yagnas, but the gods did not allow him to enter heaven in his human form. He started to fall back to earth upside down. He appealed to Vishwamitra again, who created a new world for him so that he could live there, but still upside down. Trishanku then lived there, always upside down, and continues to live there even today, belonging neither to heaven nor earth.

THE SOCIO-ECONOMIC DIMENSIONS OF JUDICIAL DELAY

A judicial proceeding involves a contestation among people about their rights that are varied in nature, arising primarily out of human or commercial relationships. In a criminal trial, the life and liberty of individuals (accused, victim, and people at large) are at stake, while in civil matters, it is generally property or money that is at stake. While the rights involved in judicial proceedings are very important not only for the litigants, but for the society at large, except for a few circumstances, it is unlikely that the ordinary lives of litigants come to a standstill until the completion of such proceedings. Life continues outside legal proceedings, although undoubtedly, it will be affected by the incident causing the initiation of such proceedings, as well as the conduct of and outcome of such proceedings. In criminal matters, it is very likely that the incident leading to the proceedings has indeed brought life to a standstill—most certainly for the victims and their families, depending on the crime, and also for the accused

and their families, based on whether the accused is/are released on bail when proceedings are pending.

The parties involved in judicial proceedings will, therefore, continue with their regular jobs, pay taxes, raise children, meet their family obligations, take on or discharge economic obligations, and generally go about life like everybody else. They do not get an exemption from regular life during the pendency of proceedings. If judicial proceedings take a long time, demanding throughout such period the consistent and full attention of the parties and requiring them to spend time and money, it will adversely impact their day-to-day lives. In its simplest form, the adversity could be in the form of time and money. Can one take leave from work or simply leave their young children or old parents under someone else's care on each day the case goes on? Who will pay for the increased cost of doing so? If it is a company whose assets are the subject matter of litigation, will it be able to continue functioning normally and meet all its obligations towards its employees, contractors, customers, etc.? If it is unable to do so, how can one control the negative consequences of such inability? Similarly, if the sole property that one owns is the subject matter of litigation, and there is an interim order not to deal with it in any fashion, the party who owns it and depends on it for his day-to-day living will suffer on a daily basis until the litigation ends.

In a criminal proceeding, if the accused is in jail when the trial is ongoing, not only will his reputation, dignity, and standing in society be affected, but also, more importantly, his ability to earn and support his family will be taken away completely. With his liberty curtailed, he may also lose his employment, family, friends, and other social relationships, even though he has not yet been convicted. Others in his family will have to modify their lives to meet the gap created by his absence. They would need to find new means of economic and social support. In addition, they will have to help the accused defend himself in court by interacting with his lawyers and paying for them.

In India, as on 3 April 2019, there are more than three crore cases pending in the judiciary, from the lowest courts to the High Courts and the Supreme Court. The socio-economic effects that are briefly described previously multiply with each pending case and for every day during which these cases continue to languish in courts pending final disposal. According to the data available in the DAKSH database,¹ the average pendency of cases in the High Courts is three years, and average pendency of cases in the subordinate courts is six years. In the High Courts, the average pendency of civil cases varies anywhere between 1.7 years and 6.9 years, the average pendency of criminal cases varies anywhere between one year and 3.4 years, and the average pendency of writ cases varies anywhere from 1.1 years to 4.6 years. In the subordinate courts, the average pendency of civil cases varies between 2.7 years and 10.1 years, and the average pendency of criminal cases varies between three years and nine years.

Very much like Trishanku, litigants who face severe delays in Indian courts live in uncertainty for years without knowing the status of their rights and unable to take decisions that affect their personal, social, and economic lives. Unfortunately, they do not have the help of a modern-day Vishwamitra to cushion their uncertain status by creating an alternate world for them, insulating them from the adverse impact of judicial delays.

UNDERSTANDING THE SOCIAL AND ECONOMIC CONSEQUENCES OF JUDICIAL DELAYS

The social and economic consequences of judicial delay—on litigants, on the legal system, and on society at large—are difficult to measure scientifically as there is not only absence of data and information that can form the basis for measuring the consequences, but also a paucity of scholarly work.² However,

various types of consequences can be identified and understood by examining real-life situations. While studying individual cases does not help us in analysing systemic trends, they are invaluable in examining socio-economic consequences, particularly in the absence of indicators on a larger scale. In this chapter, I look at four cases decided by the Supreme Court³ to identify, understand, and explain different types of socio-economic consequences.

1. On 20 February 2004, a nine-year old girl had taken the buffaloes (owned by her family) to graze in the fields, when she was sexually assaulted. A first information report (FIR) was lodged on the same day by her mother. The girl identified the accused during an identification parade. The girl was also examined medically, and sufficient medical evidence of the assault having occurred and to link it to the accused was gathered. The trial took place six months later, during which the girl denied that the sexual assault had taken place and also refused to identify the accused in the dock. The accused was acquitted. In an appeal by the state, the High Court of Gujarat observed that the sheer passage of time and the consequential delay in trial had allowed the accused to win over the girl (and her family). The High Court found that the medico-legal evidence available in the case was sufficient to show that the accused had committed the crime and that the denial by the girl was not enough to let the accused go scot-free and convicted the accused. In an appeal by the accused, the Supreme Court, on 28 September 2018, upheld the judgment of the High Court and agreed with the finding that the girl, who was from a poor family, had been won over by the accused through ‘coercion, intimidation, persuasion and undue influence’. The court considered whether the girl should be prosecuted for perjury but rejected the idea, observing that the girl ‘was barely 9 years old on the date of occurrence, that the occurrence

had taken place 14 long years ago, she may have since been married and settled to a new life, all of which may possibly be jeopardised, we refrain from directing her prosecution, which we were otherwise inclined to order’.⁴

2. In June 1992, Hardeep Singh, a teacher, was arrested and brought to the police station in handcuffs, photographs of which appeared in the local newspapers. He was accused of taking money from various people for obtaining and providing, in advance, the question papers for certain pre-medical examinations. In August 2004, the trial court acquitted him. Hardeep Singh filed a writ petition seeking compensation for the trauma that he suffered, and the harm to his dignity and reputation caused by wrongful prosecution as well as the violation of a right to speedy trial due to the delays caused by the prosecution. An important fact was that Hardeep’s elder sister died a few days after his arrest, as she was apparently shocked to see Hardeep in handcuffs and suffered a heart attack. While a single judge of the High Court dismissed the writ on the ground that many adjournments had been sought by Hardeep during the trial, on appeal, a division bench of the High Court awarded him compensation of ₹ 70,000, primarily on the ground that for five years between 1999 and 2004, the prosecution had not taken timely steps to produce and examine the witnesses. The division bench held that an expeditious trial resulting in an acquittal would have restored Hardeep’s dignity. The Supreme Court, on appeal, increased the amount of compensation to ₹ 2,00,000.⁵
3. In 1952, Ram Prashad was allotted a house in Delhi by the government. The documents executed were between him and the government. He later allowed his brothers Krishan Gopal, Madan Lal, and Manohar Lal to stay with him. In 1977, the three brothers

filed a partition suit against Ram Prashad, claiming that the property belonged to a Hindu joint family. The suit was dismissed in 1982, against which an appeal was filed and dismissed in 2000. An appeal to the Supreme Court was also dismissed in 2001. In 1992, Ram Prashad filed a suit for mandatory injunction, seeking to evict his three brothers from the property and seeking mesne profits. In 2011, the suit filed in 1992 was still going on after having seen several appeals to the High Court and the Supreme Court on various interim orders passed by the trial court. In 2011, the matter came to the Supreme Court on the question of whether costs imposed by the High Court on the appellants (legal heirs of the brothers of Ram Prashad) when they had appealed an order by the trial court regarding whether an issue (relating to court fees and jurisdiction) should be heard as a preliminary issue or as part of the final arguments, was justified. The Supreme Court dismissed the appeal and imposed a cost of ₹ 2,00,000 on the appellants. It noted that the appellants had not only been moving one application or another (all of which had been dismissed with costs) on some pretext but also misleading the court on occasion. The court observed that the appellants had seriously created obstacles during the trial and virtually prevented its conclusion. The court further noted:

We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. It is a typical example how litigation

proceeds and continues and in the end there is a profit for the wrongdoer.

The court also observed:

We are clearly of the view that unless we ensure that wrong doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations [*sic*]. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.⁶

4. On 8 April 1981, on the basis of a complaint alleging a demand for a bribe of ₹ 1,000, a search operation was conducted by the police in Muzaffarpur during which certain chemically treated notes were allegedly recovered from Vakil Prasad Singh, then an Assistant Engineer in the Bihar State Electricity Board. A chargesheet, related to the alleged demand, was filed in February 1982. The Magistrate took cognisance in December 1982. The police filed an application for reinvestigating the matter, which was dismissed in 1983. Nothing much happened in the case until 1987 when it was transferred to Patna. Vakil Prasad Singh filed an application before the High Court in December 1990 seeking quashing of the Magistrate's order taking cognisance of the offence as the Inspector of Police who conducted the investigation did not have jurisdiction to do so. The High Court accepted his plea, quashed the Magistrate's order and directed investigation by an appropriate officer, to be completed within three months. Again, nothing happened until 1998 when Vakil Prasad Singh filed a fresh application before the High Court seeking quashing of the entire criminal proceedings on the ground that no re-investigation had taken place even

after nearly eight years of the High Court's directions for the same. The High Court finally heard the matter on 11 May 2007 (nine years after it was filed). At the time of hearing, the prosecution submitted that a fresh chargesheet had been filed on 1 May 2007! The High Court dismissed the application on 9 July 2007. An appeal was filed before the Supreme Court in 2007 itself and was heard in 2009. The Supreme Court held that Vakil Prasad Singh's right to speedy trial under Article 21 was violated. It noted that the appellant had not contributed to the delay in trial; the prosecution did nothing for almost nine years after the High Court had ordered a fresh investigation; and even before the Supreme Court, the state was not clear if government sanction was necessary to prosecute the appellant and if so, whether such permission had been obtained. The Supreme Court dismissed all proceedings against the appellant, but noted that mere delay in prosecution is not sufficient ground to merit dismissal of charges in all cases.⁷

ONE SYSTEM, MANY RIGHTS, MANY CONSEQUENCES

Case 1 mentioned previously focuses on the rights of the victim, Cases 2 and 4 highlight the rights of the accused, and Case 3 highlights the rights of civil litigants and the impact on those rights due to delay.

In Case 1, a gap of six months between the time of the criminal act and the trial was long enough for the accused to influence/coerce the victim to help him escape the consequences of his criminal act. And he nearly got away with it except for the persistence of the prosecution and the decision by the High Court and the Supreme Court to ignore the retraction by the minor victim. In India, a six-month gap between the commission of the crime

and the commencement of trial would not even be considered a delay in the conduct of trial! This case, however, shows that in certain circumstances, even such a short span of time has severe consequences. The accused would have gone unpunished but for the intervention of the higher courts. The case also highlights the pitfalls of trials that go on for long periods and their potential for derailing the judicial process. The victim's rights, to seek punishment of the perpetrator, would have been extinguished. Society at large would have been the worst hit, as the successful discharge of an accused charged with a serious crime would have engendered a lack of faith in the law, the police, and the judiciary, and contributed to a sense of lawlessness and lack of justice.

The case also highlights the particular susceptibility of the vulnerable sections of society, poor and children in this case, to severe consequences even from a small delay. A similar delay may not have caused the same consequences if the victim had belonged to a different social or economic class. This case is a clear example of the need to ensure a speedy trial in criminal cases, particularly where the victims are disadvantaged because of age and other reasons. The case also shows the rather easy relationship we have with the truth, as the Supreme Court observes that perjury is a serious problem in India and cites examples where victims have had to be prosecuted for recanting their statements. Such prosecution is not only ironical, as it targets victims and witnesses of a crime, but also shows the fragility of our legal system and society—an alarming inability to prosecute serious crimes in a meaningful fashion and reassure victims and society at large.

In Case 2, a long trial—more than 12 years—caused by delays of the prosecution was found to have caused harm to Hardeep's dignity, resulted in trauma, and also violated his right to a speedy trial. More tragically, photographs of the accused in handcuffs were carried in the newspapers, resulting in the death of his sister due to a heart attack. The Supreme Court acknowledges

that an expeditious acquittal would have resulted in restoring Hardeep's dignity, which was adversely impacted because of the criminal charge brought against him. The social and economic impact on Hardeep is obvious enough—being accused of leaking examination papers would certainly have affected his reputation as a teacher and consequently his standing in society as well as his earning capacity. The impact on his family was tragically proven by the death of his sister. The long and unexplained delay by the prosecution also had an impact on the ability of the prosecution itself to prove that the accused committed the crime being alleged. It is not easy for witnesses to properly and accurately remember incidents that are nearly 10 years old, nor withstand serious cross-examination. Similarly, the delay also affected Hardeep's ability to defend himself. Fighting a charge for a long time is not easy. It costs time and money, and money may be difficult to earn for people accused of a serious crime that affects their professional reputation. Moreover, it affects the accused's ability to successfully challenge the prosecution's case, particularly so if the witnesses he expects to rely upon are affected by the passage of time. The essence of a fair hearing that the judiciary promises is eroded by such long delays in criminal matters.

Inter-generational Impact

In Case 3, the cynical attitude of one set of parties saw a civil case being dragged on for more than 40 years even after they had lost their case in the final court. Many of the original parties had died and the litigation was being carried on by their family members even though their rights had been decided by the Supreme Court finally. Not only was there one set of parties continuing to violate a court finding against them, they were also continuing to trample upon the rights of their own relatives.

The social and economic consequences of long judicial proceedings multiply over time as they affect people of multiple generations. In these 40 years, since 1977 (when the proceedings first started) until

2011 (when the Supreme Court asked the trial court to decide the matter within a short time frame!), India has seen 10 prime ministers, witnessed a telecom revolution, and gasped at the marvel of the computer and the internet. However, Ram Prashad and his family were stuck in a time warp, fighting for the one piece of land that is dear to them. The social and economic impact on them is real, but will remain unknown to most of us.

The Supreme Court highlighted some social consequences by pointing out that wrongdoers are benefitting by delaying trials. Such a benefit arises because long trials essentially contribute to a convergence of legality and illegality. If courts do not move swiftly to ensure that an illegality is punished and legality protected, illegality will continue to flourish as there is really no incentive for people to act in accordance with law.⁸ In Case 3, even though there was a final decision in favour of Ram Prashad, his brothers and their families did not move out of the property. And by delaying the trial in the case filed by Ram Prashad for eviction, his brothers ensured that they continued to enjoy the property even when the courts had ruled that they did not have a right in the property. And Ram Prashad, despite having the courts rule in his favour, was unable to enjoy the benefits of such ruling. This convergence between legality and illegality not only benefits wrongdoers at the expense of law-abiding citizens, but also erodes the substantive rights guaranteed by law, which are sought to be protected by the courts.

The Joke Is on the System

Case 4 reads like a comedy of errors. A case is filed, but nothing happens for nearly eight years. The accused claims that the investigation itself was without legal basis after eight years. The High Court agrees with him and orders re-investigation to be completed within three months. The police do nothing. After eight years, the accused files a new petition in the High Court asking for quashing of the proceedings

and pointing out that no re-investigation has taken place. The police do nothing for another eight years. When the matter finally comes up for hearing after another nine years, the police suddenly file a new chargesheet! The High Court says that such a delay does not mean that charges should be quashed. The Supreme Court disagrees and quashes the proceedings after another two years. So, after 27 years, we are none the wiser. We do not know if a crime was committed—maybe it was and maybe it was not! If a crime was indeed committed, we do not know if the accused was guilty.

While the case was in the courts, the accused probably continued in office for all 27 years (as the accused did not argue that he has lost his job and claim wages before the High Court and the Supreme Court). In such a case, what credibility did he have to carry on with his job while the case was pending? Was he able to take decisions in a proper fashion? Or did the pending case ensure that he was not able to perform his job effectively? Further, such long periods of inactivity allow the accused to influence the investigation and the process itself. Case 1 clearly exhibited the possibility of the accused influencing the criminal investigation and the judicial process. It is the credibility of the entire criminal justice system that is at stake in cases like this. What faith will other citizens who wish to file a complaint have in approaching such a system for justice, when it did not even manage to put the accused on trial for 27 years? The impact of such cases on society's fight against crime and injustice is a deleterious and crippling one, to say the least.

No System of Fairness?

A long judicial process and consequential delay in decision-making violates the substantive rights of the parties to the case. Some important characteristics of a judicial system are—(a) the promise of a fair hearing for all parties involved, (b) a reasoned decision based on the applicable law and past decisions, and (c) the guarantee

of the law to enforce the decision made by the court. All of these rights are either negated or adversely affected due to judicial delays. The mere passage of time affects the right to a fair hearing as the party's ability to make herself heard properly is affected, as shown in Case 1. The ability to present a case was compromised, as the victim was subjected to social pressures to deny the crime committed against her.

Both Case 2 and Case 3 show how the concept of a fair hearing is lost by a long-drawn trial. A right to a fair hearing does not comprise only a right to present your case, but a right to present it properly within a reasonable time. Delaying the opportunity to present your case takes away the right of a fair hearing itself. The longer the trial, greater the chances that witnesses become unavailable, memories fade, and evidence becomes stale. Further, in long trials more often than not, judges and lawyers change over the lifetime of the case, adding to the erosion of the fairness of the trial. If one judge takes cognisance of the crime, a second judge records the examination-in-chief, a third records the cross-examination, and a fourth writes the judgment—hence, the element of a fair hearing is seriously compromised. Instead, if the entire process is completed by one judge, there will be better appreciation of the facts, witnesses, and the surrounding circumstances of the case, as the same judge will have interacted with the witnesses, the officers who investigated the case and the accused. For example, if a witness' demeanour suggests that his credibility is in question, a new judge who takes over after the evidence is recorded will miss this crucial element while deciding on the guilt of the accused or while passing a sentence. Similarly, change in legal counsel also affects a party's ability to effectively present his case. All of this erodes the fairness and equality that the judicial system guarantees.

Convergence of Legality and Illegality

A long judicial process means the continued violation of the substantive rights of the parties, or at least

one party to the case. As Case 3 shows, one party's illegality is likely to be rewarded and another's legal rights are continuously violated because of the delay in judicial decision-making. In effect, the law and the judicial process fail to establish clear daylight between legality and illegality, indirectly encouraging the persistence of illegal behaviour.⁹ The social and economic consequences of such convergence are significant. The most obvious consequence is an increase in lawlessness and lack of respect for the rule of law. This further engenders an element of calculated social behaviour which seeks to benefit from the law's failure, as the Supreme Court noted in Case 3. If there is an economic reward for continued wrongdoing or illegality, then there is no incentive to follow the law. In fact, there is a negative consequence of legal behaviour given the lack of economic benefit accompanying such behaviour when confronted with illegal behaviour. And, if there is economic incentive, even if it is a short-term incentive, accompanying illegality, then illegality will thrive. Even when there is a final decision declaring such illegality as wrong, it will be difficult to undo fully the economic and social consequences that have taken place when the judicial process is pending. This essentially forces the successful party to accept a *fait accompli*—a compromise on its substantive rights.

A CONSTANT AND CONTINUOUS EROSION

The socio-economic consequences of judicial delays are always difficult to capture at a systemic level. The monetary cost of delays can perhaps be quantified. DAKSH conducted a survey in 2016 to measure economic costs of delays and estimated that the economic cost of judicial delays on society is almost 0.5 per cent of India's GDP.¹⁰ At a systemic level, social consequences are very difficult to measure, even though it is possible to understand them through individual case studies. Upendra Baxi goes to the

extent of suggesting that it is only literature that can help us understand such social consequences.¹¹

In this chapter, I have attempted to understand the various dimensions of socio-economic consequences of delay through specific case studies. The case studies reveal that irrespective of the duration, delays exacerbate the consequences suffered by a person who is agitating for a redressal of their rights, which have been violated. Such consequences last several generations when the delays are severe, as evidenced by Case 3. Even when there is a short delay, as in Case 1, societal consequences can be detrimental to the rule of law itself. The four cases that I have examined show that while facts, extent of delays, and consequences are unique to each case, what is common is the judiciary's clear failure to understand the adverse impact of delay. The impact is multi-dimensional. The cause is, however, simple and common across all the cases—a failure to decide cases promptly.

Notes

1. Arunav Kaul, Ahmed Pathan, and Harish Narasappa. 2017. 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts', in Harish Narasappa, Shruti Vidyasagar, and Ramya Sridhar Tirumalai (eds), *Approaches to Justice in India: A Report by DAKSH*, pp. 92, 97, 98. Lucknow: DAKSH and EBC.
2. There are a number of studies that examine the social consequences on undertrial and convicted prisoners. For example, see, Razdha Parveen. 2017. 'Impact of Imprisonment: Dimensions and Consequences', *International Journal of Humanities and Social Science Invention*, 6(7): 59; Commonwealth Human Rights Initiative. 2011. *Undertrials: A Long Wait to Justice*, available online at https://humanrightsinitiative.org/old/publications/prisons/UndertrialsPRCReport_2013.pdf (accessed on 19 April 2019). There are also various reports on the overall impact of judicial delays on certain industries, such as banking or financial services. See, Ministry of Finance. 2018. *Economic Survey 2017–18*. New Delhi: Government of India, p. 131, available online at http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf (accessed on 19 April 2019).

3. I chose these cases randomly without following any particular methodology. The common thread among them is that they all showed up when I searched for 'judicial delays', 'consequences of judicial delay', 'fair trial', on the Westlaw India online platform (www.westlawindia.com database for Supreme Court judgments; accessed on 3 April 2019).
4. *Hemudan Nanba Gadhvi v. State of Gujarat*, 2018 Indlaw SC 903.
5. *Hardeep Singh v. State of Madhya Pradesh*, 2011 Indlaw SC 815.
6. *Ramrameshwari Devi and Ors v. Nirmala Devi and Ors.*, 2011 Indlaw SC 411.
7. *Vakil Prasad Singh v. State of Bihar*, 2009 Indlaw SC 2155.
8. Harish Narasappa. 2018. *Rule of Law in India: A Quest for Reason*. New Delhi: Oxford University Press, pp. 157–161.
9. Narasappa, *Rule of Law in India*.
10. 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 19 April 2019).
11. Baxi observes, '[I]t is very difficult to measure the impact of the rule of law, positive or negative, on individual citizens. It is only literature that gives us an understanding of the impact on individuals', in Upendra Baxi. 2004. 'The Rule of Law in India: Theory and Practice', in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, p. 336. London: Routledge Curzon.



Culture of Adjournments and Inaccessibility of Courts: The Litigant Experience

Amulya Ashwathappa

4

INTRODUCTION

There is a mammoth number of cases pending before courts, leading to backlog and undue delay in disposing of cases, which can be attributed to the inadequate number of judges, lack of streamlining of judicial procedures, general lack of awareness amongst litigants, and infrastructural and administrative incompetence. For citizens to truly realise their rights and gain access to justice, it is not merely the final judgment in a case that matters—what is imperative is that the path leading up to that judgment be free of obstacles. Litigants are key stakeholders in the judicial process and if we wish to have an efficient judiciary, it is important to understand the hurdles they cross when they approach the judicial system.

In this chapter, using Arun Shourie's anecdotal evidence of the Faridabad courts in his book *Anita Gets Bail*¹ as a starting point, I analyse the workload and management of cause lists of magistrates in the Faridabad courts. I also report the findings of my survey to understand the physical infrastructure of Faridabad courts and problems faced by litigants during their interactions with the judiciary. Finally, I examine the culture of seeking and granting adjournments that exists across Indian courts, which plagues the judiciary.

ABOUT THE BOOK

In his book *Anita Gets Bail*, Arun Shourie talks about his experience as a bystander to the criminal proceedings initiated against his wife, in the court of the Chief Judicial Magistrate, Faridabad. The book is centred around how his wife Anita Shourie, diagnosed with Parkinson's disease, was listed as a proclaimed absconder for dodging summons

multiple times, when in reality, the summons had never been served on her. Mr Shourie narrates Anita Shourie's experiences with the court in general and sheds light on certain issues that the Indian judiciary is grappling with. He focuses on how the judiciary has dealt with political power play, possible corruption within the judiciary, threat to judicial independence, and failure to implement policies on government advertisements, police reform, improvement of judicial infrastructure, etc.

In the first two chapters, Mr Shourie talks about Jayalalithaa's case² that was filed in 1996 against Ms Jayalalithaa, former chief minister of the state of Tamil Nadu before a special court in Tamil Nadu for accruing assets disproportionate to her income. The judgment in the case was delivered in 2017 by the Supreme Court, shortly after her demise in December 2016. He discusses the tactics lawyers were able to employ, to delay the court proceedings by acting as puppets of the powerful and subverting the judicial process. He notes that filing of frivolous and vexatious motions is a problem that has reached unmanageable proportions, as was evident in Jayalalithaa's case, where an army of lawyers contested every order at every step and with this they were able to undermine the proceedings before the special court constituted to try her case in Karnataka after the case was transferred from Tamil Nadu.

Mr Shourie speaks about the problems of lack of adequate number of judges, overcrowding of prisons, and sheer disregard of the state governments to actually fixing issues at hand and instead, being quick to avoid the situation by citing lack of funds. He also addresses the government's failure in adhering to the orders issued by courts. He quotes instances where the courts have given directions for police reform and better court infrastructure facilities, but the government failed to follow the orders.³ In another instance, a court had directed that a movie should not be banned merely because a 'law and order problem' may arise, but the government had flouted this order and had gone ahead with the ban.⁴

CASE OF STATE V. ANITA SHOURIE BEFORE THE CHIEF JUDICIAL MAGISTRATE

Mr Shourie describes the facts of the case against his wife as follows. An arrest warrant was issued on 2 August 2013 in the name of Anita Shourie, citing that she had evaded summons of the Judicial Magistrate five times. Anita Shourie was accused of building a farmhouse illegally in a retreat in Aravali in 2009 when in fact she, along with Arun Shourie, had sold the property in 2008. The Haryana State Pollution Control Board (Haryana SPCB) had sent multiple circulars to Anita Shourie for violating a notification in which the residents of Aravali could not carry out certain activities without the express permission of the Haryana SPCB, in this case, building a farmhouse.⁵ Mr Shourie and his wife had promptly replied to every circular they received, reiterating that they did not own the land anymore and no farmhouse had been constructed on the said property, but this was of no avail as the Haryana SPCB filed a case against Anita Shourie in 2009 in the court of the Chief Judicial Magistrate, Faridabad. The Shouries were completely unaware that a tremendous case was forming against them until 2013 when Anita Shourie received an arrest warrant for dodging summons. The case dragged on for six years until she was finally acquitted in March 2015.

During the course of this case, Mr Shourie states that he was completely against seeking adjournments. But adjournments were frequently granted. If his case was listed for a particular day, it would be heard a day or a week before, without his knowledge. The case was handled by multiple judges because judges hearing the case would either get transferred or promoted. A judge refused to exempt Anita Shourie from physically appearing before the Court, despite her having Parkinson's disease, because the judge was getting transferred.⁶ At every stage, the proceedings were delayed either because adjournments were regularly sought or

evidence/witnesses were perpetually absent, all of which prolonged the proceedings.

and judge strength of the Judicial Magistrates in Faridabad, since Anita Shourie’s case was filed before the Chief Judicial Magistrate in Faridabad.

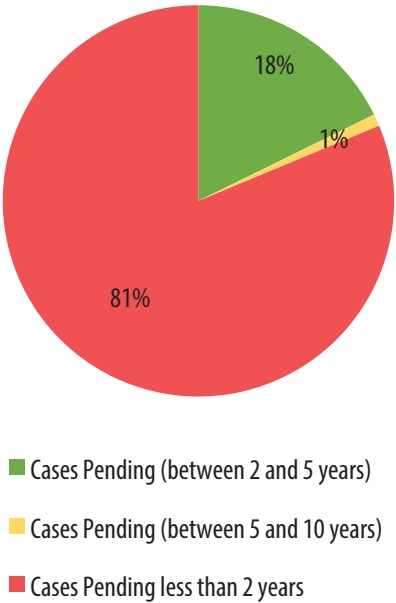
**JUDICIAL MAGISTRATE COURT,
FARIDABAD**

To understand what could be contributing to the delay in proceedings, in this section of the chapter, I look at the number of pending cases, listing practices,

**Case Listing Practices of Judicial Magistrates
in Faridabad**

According to the National Judicial Data Grid (NJDG), there are a total of 35,973 cases pending as of February 2019 before the Judicial Magistrates in Faridabad.

Figure 1.4.1. Number of Cases Pending before the Judicial Magistrates in Faridabad⁷

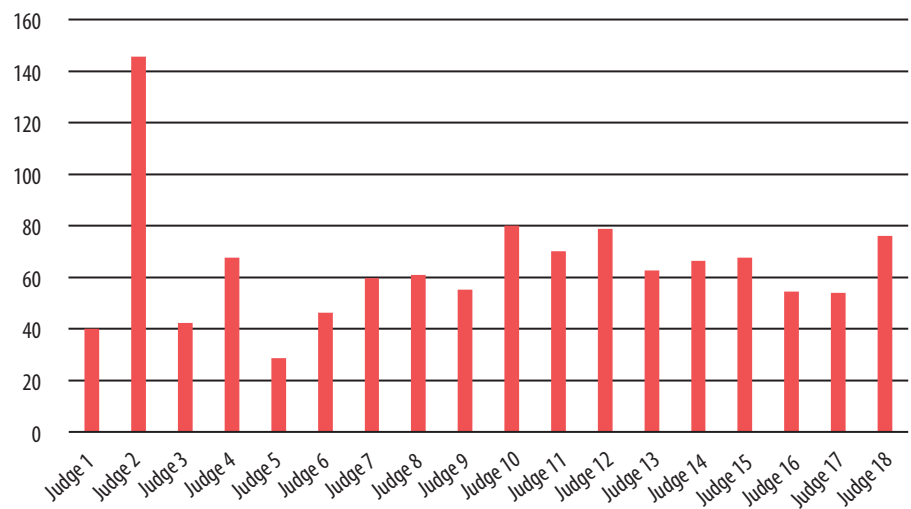


Source: NJDG website.

As seen in Figure 1.4.1, 81 per cent of these cases have been pending for less than two years, while 19 per cent have been pending for more than two years. The number of pending cases and the duration for which they have been pending affect how judges list the cases for hearings.

To understand the workload of the Faridabad courts and how judges list cases for hearing, I studied the cause list of each Judicial Magistrate in Faridabad for a period of one week. The data for these cause lists was gathered from the NJDG and e-courts website.

Figure 1.4.2. Average Number of Cases Listed per Day before the Judicial Magistrates in Faridabad

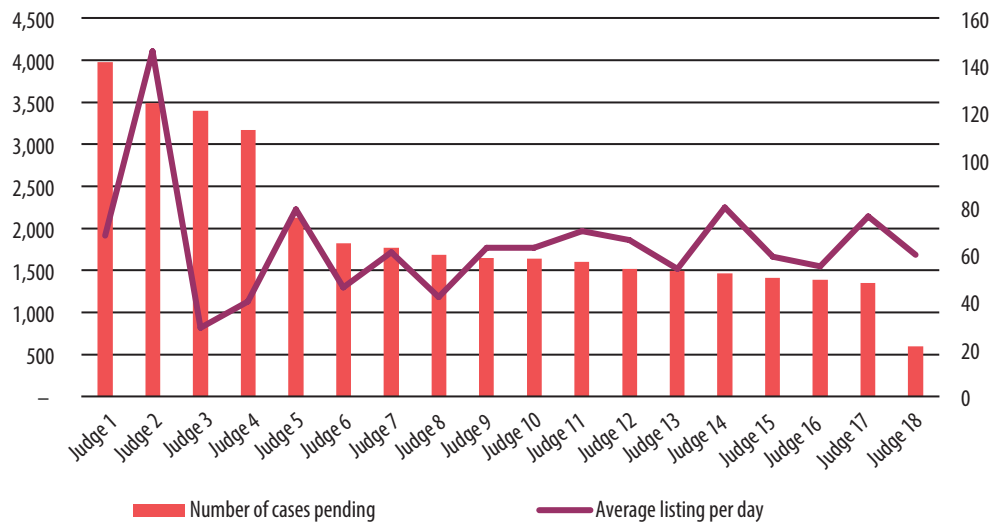


Source: Cause lists collated by the author from the e-courts website.

On any given day, a Judicial Magistrate in Faridabad would have an average of 64 cases listed for hearing. The judges generally fix the date for hearings and the cause list is prepared accordingly by the court clerk. The number of cases that are listed per day

ranges from 5 to 130 on a given date for a Judicial Magistrate in Faridabad. In order to understand how the number of cases pending before a judge could play a role in the listing of cases, let us look at Figure 1.4.3.

Figure 1.4.3. Number of Pending Cases and Average Number of Cases Listed per Day before Judicial Magistrates in Faridabad

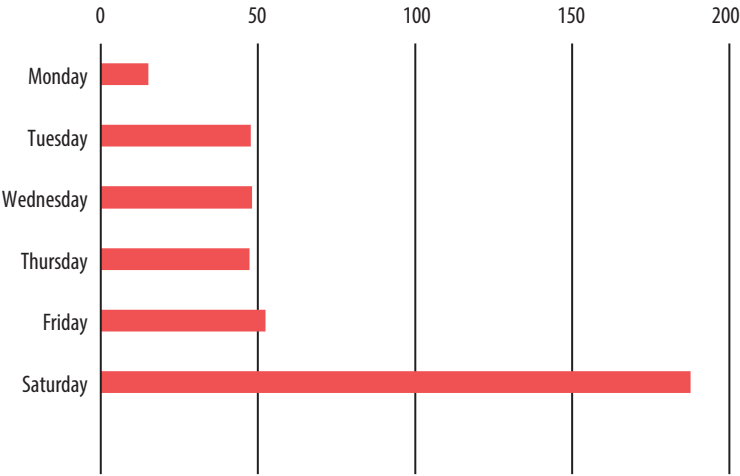


Source: Number of pending cases has been collated by the author from the NJDG website and the average listing per day has been collated by the author from the e-courts website.

It is evident from Figure 1.4.3 that judges do not follow any fixed method while listing cases. Judges with a similar workload follow different listing practices. For example, Judges 2 and 3 have a similar

workload, but Judge 2 listed 146 cases on average, whereas Judge 3 listed only 29 cases. In this regard, it is also interesting to note whether the listing of cases varies based on the day of the week.

Figure 1.4.4. Average Number of Cases Listed per Day before Judicial Magistrates in Faridabad



Source: Cause list from the e-courts website.

The details given earlier show that courts are unable to manage their cause list in a consistent manner. For instance, on the first day of a week, judges tend to list fewer cases with an average of 15 listed cases, and by the end of the week the average shoots up to 188 cases listed per day. This indicates that the judges fail to manage their workload which has resulted in listing an unrealistic number of cases for hearing. However, it is important to note that this pattern is not entirely conclusive, as it is based on data I collected for a week.

Generally speaking, if a judge typically has 5 hours and 30 mins in a day to hear cases, and an average of 80 cases are listed per day, she will approximately have three-and-a-half minutes to hear each case.⁸ However, the time spent on each case is determined by which stage the case is at. Often, a judge is simply unable to hear all cases listed for the day due to paucity of time and therefore adjourns

most of the cases. According to a time and motion study conducted by DAKSH in 2016, it was noted that 33 per cent of judicial time spent in criminal courts was spent on adjournments, and if 50 cases were listed per day only six of them were heard by the judge.⁹

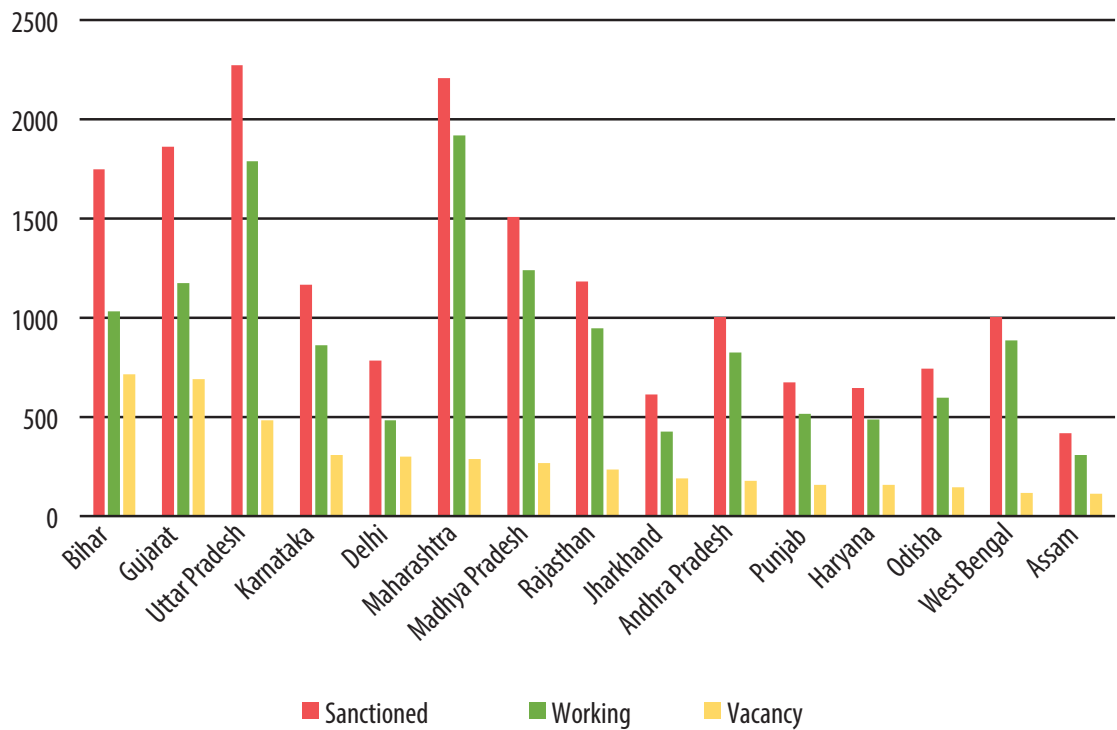
JUDGE STRENGTH

According to the NJDG, the sanctioned judge strength for Judicial Magistrates in Faridabad is 20 judges as of February 2019, out of which 18 courts are functioning, and two are vacant. If one were to look at data across India, there is an overwhelming number of subordinate courts that have vacant benches, that is, no judges have been appointed. As of 2017, there were a total of 5,000 vacant courts out of a sanctioned

strength of 21,572.¹⁰ Vacancies in the courts is a contributing factor to delay in disposing cases. While merely filling vacancies may not necessarily solve the problem of judicial pendency and delay, the staggering number of vacant benches is adding to the backlog. Having an adequate number of judges would be reflective of having an efficient judicial system. India

has one of the highest vacancies in the subordinate courts when compared to countries, such as the United States, China, and Australia.¹¹ According to the National Action plan, the goal is to have 50 judges per million in India.¹² Figure 1.4.5 shows the vacancies prevalent in the subordinate courts, with Bihar having the highest vacancy at 40 per cent.

Figure 1.4.5. Top Fifteen States with the Highest Vacancy in the Subordinate Courts—Average for the Years 2014–2015, 2015–2016, and 2016–2017



Having an adequate number of judges would also ensure that the workload of judges is distributed evenly without overburdening any judge. Currently, most of the subordinate courts deal with both civil as well as criminal cases that increases their burden. Figure 1.4.5 represents the top 15 states that have the highest number of vacancies in the subordinate courts, which need to be filled on a priority basis.

ACCESSIBILITY OF COURTS AND INFRASTRUCTURE

Presence of adequate physical infrastructure is another aspect in enabling citizens’ access to timely justice. Infrastructure forms one of the first interactions of the citizens with courts, and the ease of navigation within the courts depends on the user

friendliness of the structure, availability of facilities, and their inclusiveness. In his book, Mr Shourie has spoken about the difficulty of getting Anita Shourie to court with her constant trembling and muscle rigidity. To understand the current infrastructural state of the Faridabad courts, I inspected the court buildings to see if the physical infrastructure of the court was adequate and enabled the litigants to access justice or hindered them. I also surveyed 15 litigants at random to get their perspective on judicial delay.

Faridabad Court Infrastructure

The Faridabad court complex has judges belonging to three cadres of the subordinate judiciary—Chief Judicial Magistrate, Senior Civil Judge, and District and Sessions Court. There are two court buildings in which these establishments are housed.

According to the National Court Management System Policy and Action Plan, 2012,¹³ the infrastructure should include the physical infrastructure of the court and the availability of other facilities such as:

1. Court building: Court rooms, judges’ chambers, litigants’ waiting area, administrative offices and support facilities.
2. Space for lawyers: Bar rooms for ladies and gents, consultation rooms and cubicles, library and support facilities.
3. Facility centre consisting of other common facilities for the functioning of the court complex not directly related to courts.
4. Utility block for housing the utility services like AC plant, electrical sub-station, DG sets, STP, repair workshop, storage, etc.
5. Judicial lock-ups.
6. Adequate parking facilities for judges, lawyers, litigants, and other visitors.¹⁴

Out of the requirements listed earlier, I checked the Faridabad court to see if basic amenities, such as drinking water, clean toilets, ramps for wheel

chairs, lifts, and parking spaces, are available. The new court building was inaugurated in 2017 and had better facilities in comparison to the old building. The old building has lifts but with restricted access for judges and lawyers only, while the new building has two functional lifts. There was ample parking space outside the court complex premises. Table 1.4.1 draws a basic comparison between the two buildings.

Table 1.4.1. Infrastructure in the Faridabad Court Complex

Facilities	New building	Old building
Lifts	Yes	Yes, but limited access
Separate lifts for disabled people	No	No
Toilets on every floor	Yes	Yes
Separate toilets for disabled people	Yes	No
Designated waiting area	No	No
Visible sign boards	Just on the ground floor	Just on the ground floor
Clean drinking water	Yes	Taps were rusted and the water dispenser was not cleaned

Source: Author.

According to the Supreme Court action plan¹⁵, there should be a designated waiting room for litigants, but there were only benches outside some courtrooms in both the buildings. In the old building, the courtrooms looked very congested, with barely six or seven chairs for lawyers to sit and two tables. There was no clear demarcation of the lawyers’ area and a litigant who was surveyed noted that people often crowd up around the judge and create chaos without having an organised way of calling cases. Many litigants also felt that sign boards could have been placed better to help them navigate through the court.

Litigant Experience

A total of 15 litigants were surveyed on 6 April 2019 to understand their experience with the judiciary and to what extent they were facing issues. I approached litigants present in the Faridabad court complex for the survey. The litigants were randomly chosen for the survey from persons who were present on the day of my visit.

Out of the litigants surveyed, five belonged to the age bracket of 20–29 years, two in 30–39 years, four in 40–49 years, and four in 50–60 years. Out of these, 10 were male and five were female. Three litigants had completed high school, four had reached the pre-university level, two were graduates, one was a post graduate, and five litigants had not attended any school.

Some of the questions that were asked were: Is any party to the case disabled? How far have they travelled to get to the court? For how long have their cases been pending? Which stage has the case reached? What are the reasons for delay? According to them, could anything be done to speed up the litigation process? Should other non-judicial bodies be approached if they are able to settle disputes quicker? Are they aware of free legal aid services? What are the costs incurred by litigants in the course of litigation?

All litigants, except one, said that neither of the parties were disabled. The litigant who answered yes to the question regarding disability stated that he had lost his hand while working as a press operator. He said that despite his loss of a limb the judge was not sympathetic towards him, as his livelihood depended on the compensation he would get, he did not seek any exemption from appearing before the court.

On an average, litigants travelled nine kilometres to get to the court, and one of the litigants had travelled all the way from the United States, which was not considered while calculating the average distance travelled. The Supreme Court has emphasised the

importance of having courts easily accessible and said that the court ‘must be conveniently accessible in terms of distance’ when the court recognised access to justice as a fundamental right guaranteed under the Constitution.¹⁶

When litigants were asked about their perspective on what is causing delay, many did not have any answers; but when leading questions were asked, all of them agreed that there are not enough judges, and the dockets of judges who are working are overburdened. In 2016, DAKSH had conducted a survey of litigants, in which it was found that 50.4 per cent of the people surveyed thought that there were not enough judges, and 64.5 per cent thought that there were too many cases.¹⁷ Some litigants with whom I spoke hinted that muscle and money power play a huge role in influencing the outcome of cases. Mr Shourie also brings up this issue, noting the issue of corruption within the judiciary and speaks of how there was no independent committee set up to probe matters when a *prima facie* case is made out against judges. Ten out of 15 litigants were not aware of free legal aid services, and seven of them were disappointed that their lawyers failed to brief and update them about the progress of the case.

Regarding the point on non-judicial bodies, seven litigants said that they prefer non-judicial bodies such as panchayats, police stations, and religious organisations because these bodies are easy to approach, they settle disputes quicker, and are less expensive. The rest believed that non-judicial bodies should not be approached to settle disputes and that it is against the rule of law. According to DAKSH’s *Access to Justice Survey 2017*, of the people who chose non-judicial means to resolve their dispute, 26 per cent of the people surveyed said that cost of litigation is too high and 21 per cent of them said the system is too complex.¹⁸ A video documentary¹⁹ by DAKSH has also found that the interviewees said that the cost of accessing the judiciary is expensive and people said that they don’t know how to file a case. Citizens

are looking for a cost and time effective method of resolving disputes.

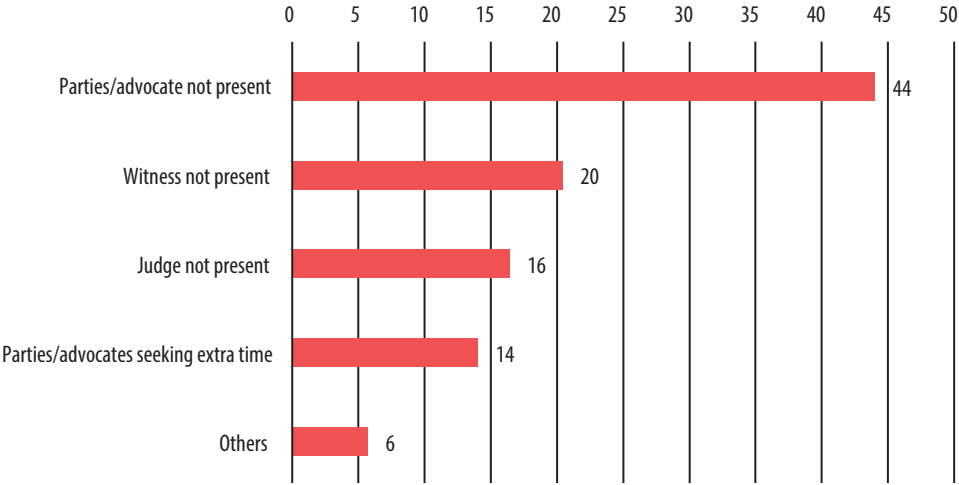
CULTURE OF ADJOURNMENTS

This section examines the existing culture of seeking adjournments in Indian courts and the reasons behind it. Under the Code of Criminal Procedure, 1973 (CrPC),²⁰ a magistrate can postpone or adjourn proceedings from time to time for any reason she thinks fit. The reality in criminal courts, however, is that granting adjournments is not dependent on necessity, but has become a norm. The number of adjournments that can be granted is not prescribed

for criminal cases, however, as per the Code of Civil Procedure, 1908 (CPC), only three adjournments can be sought in a civil case and can be granted only for circumstances that are beyond the control of the parties. That the advocate is engaged in another court is not a good enough reason to seek an adjournment, and the court can proceed to make an order without the presence of the advocate.

Several reports of the Law Commission of India²¹ have noted that granting and seeking adjournments is one of the major factors aggravating delay and pendency of cases. According to a study conducted by DAKSH and Vidhi Centre for Legal Policy,²² 61 per cent of all hearings in a case resulted in adjournments, and on an average 32 adjournments are granted per case.

Figure 1.4.6. Reasons for Adjournments



Source: Study by DAKSH and Vidhi Centre for Legal Policy.

The study also noted the main causes for adjournments in subordinate courts.²³ As seen in Figure 1.4.6, 44 per cent of adjournments were due to the absence of the party or advocate, 20 per cent were due to the absence of witnesses, 16 per cent were due to the judge not being present, and 14 per cent of the adjournments were due to a party or advocate seeking extra time. In terms of the person responsible for the adjournments, it was found that 58 per cent of the adjournments

were sought by advocates and only 20 per cent of the adjournments were due to the absence of the judge. Advocates play an active role in enabling the seeking of adjournment culture to flourish. In the 230th Law Commission Report, Justice Ganguly said that lawyers and judges must be punctual, and the judge should utilise his working hours to the full extent, and lawyers should not ask for adjournments unless it is absolutely necessary.

In the Report, Justice Ganguly also remarks that the ethics of the lawyers are questionable.²⁴ The Bar Council of India Rules²⁵ state the duties of lawyers towards the court and his clients, and one of them is to protect the interest of the clients and follow fair practices. Though the rules do not explicitly hold the advocate liable for seeking unnecessary adjournments, the Bar Council should implement these rules and advocates should be held accountable for seeking unnecessary adjournments.

SUGGESTIONS

Improving court efficiency is an indispensable part of the justice system. Improving court efficiency involves developing mechanisms to cater to the needs of the litigants by streamlining judicial processes, ensuring the presence of adequate judges, legal awareness, and access to free legal aid services. To this end, it is recommended that:

1. Case Flow Management Rules that have been notified in the State of Haryana should be strictly adhered. The Case Flow Management Rules prescribe two cause lists to be prepared based on the current stage of the case—procedural or substantive. The judge will hear cases that are at the substantive stages while the registrars will hear the cases at the procedural level.
2. Order 17 of CPC dealing with adjournments should be amended to a realistic number of adjournments per suit and the judges should impose high costs as deterrence.
3. Under the CrPC, there is no provision that deals with the number of adjournments that can be sought in a criminal case, a provision should be enacted which sets a realistic number of adjournments per case.
4. Listing of cases and adjournments are interconnected, if more cases are listed then the judge tends to allow more adjournments.

Hence, the cause list should be well managed, and cases should be listed based on the cases pending to bring in certainty in each hearing.

5. Vacancy of benches in subordinate courts should be filled in quickly and the Supreme Court should at the earliest assess whether a centralised selection mechanism should be implemented.

Improving accessibility of courts is a facet of improving court efficiency. Infrastructural changes and facilities should be made to ensure that the litigant's right to access justice is truly realised. In order to improve accessibility, it is recommended that:

1. The Supreme Court's direction to the High Courts for improving court infrastructure should be followed through.
2. The central and state governments should implement the directions of the Supreme Court in making all public buildings completely accessible by 2019 as envisaged under the Disability Act, 2016.²⁶
3. There must be proper planning of budgets to ensure that funds are appropriately utilised as central and state governments mainly utilise their budget for operational costs of the judiciary leaving little or no funds for infrastructural development.²⁷

CONCLUSION

As Shourie's book notes and as I found in my brief survey, litigants face a variety of issues when they approach the judiciary. As a citizen, the litigant's access to justice can be understood in two ways from this chapter—first, from the perspective of procedural delays, and second, the infrastructural challenges they face in the court. From a procedural aspect, the culture of adjournments has caused substantial delay in having their cases decided speedily. The lack of adequate judge strength in the subordinate courts has adversely affected

citizens' ability to access timely justice as they are the first point of contact if a dispute arises. The lack of adequate number of judges also leads to overburdened judges and poor listing practices. Infrastructural facilities too affect the basic functioning of the court which in return can hamper the litigants' right to access justice. The Faridabad court lacks basic infrastructural facilities as recommended by the Supreme Court action plan. Citizens are the key stakeholders in the judiciary. For the judicial system to be efficient it has to engage the citizens and implement policies with a citizen-centric approach.

Notes

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3. Shourie, *Anita gets Bail*, pp. 91–103.
4. Shourie, *Anita gets Bail*, pp. 91–103.
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6. Shourie, *Anita gets Bail*, pp. 2–22.
7. National Judicial Data Grid. 2019, available online at <http://njdg.ecourts.gov.in/njdgnew/> (accessed on 30 March 2019).
8. Harish Narasappa. 2017. 'Maximising Judicial Time: Measures to Combat Delay and Pendency in Subordinate Courts', in Shruti Vidyasagar, Harish Narasappa, and Ramya Tirumalai (eds), *Approaches to Justice in India: A Report by DAKSH*, p. 120. India: EBC.
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17. DAKSH. 2016. *Access to Justice Survey*, available online at <http://dakshindia.org/access-to-justice-survey/> (accessed on 21 May 2019).
The survey was conducted between November 2015 and February 2016. The sampling objective of the survey was to ensure nationwide representation. Surveyors physically visited 305 locations in 24 states in India.
18. DAKSH. 2017. *Access to Justice Survey*, available online at <http://dakshindia.org/access-to-justice-2017/index.html> (accessed on 21 May 2019).
19. DAKSH, JANA Documentary series, available online at <http://dakshindia.org/jana/> (accessed on 21 May 2019).
20. Section 209, CrPC.
21. Law Commission of India. 2009. *Reforms in the Judiciary: Some Suggestions*. Report No. 230. New Delhi: Government of India, p. 593, available online at <http://lawcommissionofindia.nic.in/reports/report230.pdf> (accessed on 20 May 2019).
22. DAKSH and Vidhi Centre for Legal Policy. 2017. 'Creating Order from Chaos: A Study on Caseload Management in Courts'. DAKSH Judicial Reform and Education. Unpublished report.
For this study, 303 cases in the six subordinate courts with 16,063 hearings were carefully analysed. The study was conducted by DAKSH for the Department of Justice under the scheme of 'Action Research and Studies on Judicial Reforms'. Thirteen per cent of the hearings which did not provide any information on the reasons for adjournments were not taken into consideration in the analysis.
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SECTION TWO

LITIGANTS AND JUDICIAL DELAY



Delays in the Criminal Justice Process: Consequences for Undertrial Prisoners and Their Families

Vijay Raghavan

INTRODUCTION

The Criminal Justice System (CJS) in India is characterised by innumerable arrests, overcrowded jails, and courts with lakhs of pending cases. According to the Prison Statistics 2015,¹ there are around 4.19 lakh prisoners in the country with around 67 per cent being undertrial prisoners. There are a number of reasons that are beyond the scope of this chapter, which have led to the current crisis in the system.² Some of these problems include a poor judge-population ratio, lack of prompt and competent legal aid services, delays in filing of chargesheets, unnecessary adjournments in the trial process, witnesses not turning up in court, delays in submission of forensic evidence, non-production of undertrial prisoners on their court dates due to lack of police escorts, and so on.³

Prison populations have remained at the margins of welfare and development and have seldom been viewed to be in need of or deserving of social services. With the development of criminology as a discipline, a gradual shift has taken place whereby the individual alone is no more held responsible for norm or law violating behaviour. This shift has led to law and policy changes advocating a moving away from torture and debilitating forms of punishment, imprisonment *as* punishment and not *for* punishment, more humane custodial conditions, protection of legal and human rights, and finally a focus on retraining, rehabilitation, and social re-entry. The prison welfare and rehabilitation measures were established keeping in mind the convicted prisoner, as prisons were primarily meant to house those convicted by law for the offences they were charged with. A minor focus of prisons was the housing of undertrial prisoners—those awaiting trial and kept in judicial custody, till the completion of their cases in courts. However, one fact that the authorities and civil

society did not take note of for a long time was the rising number of undertrials in the prisons of our country.⁴

This chapter tries to capture the situation of undertrial prisoners on account of delays in the trial process and its impact on their family situation.

Since the chapter is largely based on the situation of undertrial prisoners in Maharashtra, it would be in order to present some snapshots of the situation of delays in the trial process of undertrials in the state. The data presented here is based on the information available in the National Judicial Data Grid (NJDG), as on 29 January 2019.

Table 2.1.1. Proportion of Pending Criminal Cases in Maharashtra

Number of years cases are pending for	Civil cases	Criminal cases	Total cases	Proportion of criminal cases to total cases
0 to 1 year	3,23,578	6,84,516	10,08,094	68%
1 to 3 years	3,57,293	8,05,401	11,62,694	69%
3 to 5 years	2,30,240	3,77,393	6,07,633	62%
5 to 10 years	2,20,892	3,26,316	5,47,208	60%
10 to 20 years	51,052	1,59,528	2,10,580	76%
20 to 30 years	7,047	46,069	53,116	87%
Above 30 years	2,071	13,706	15,777	87%
Total	11,92,173	24,12,929	36,05,102	67%

Source: National Judicial Data Grid (NJDG) as on 29 January 2019.

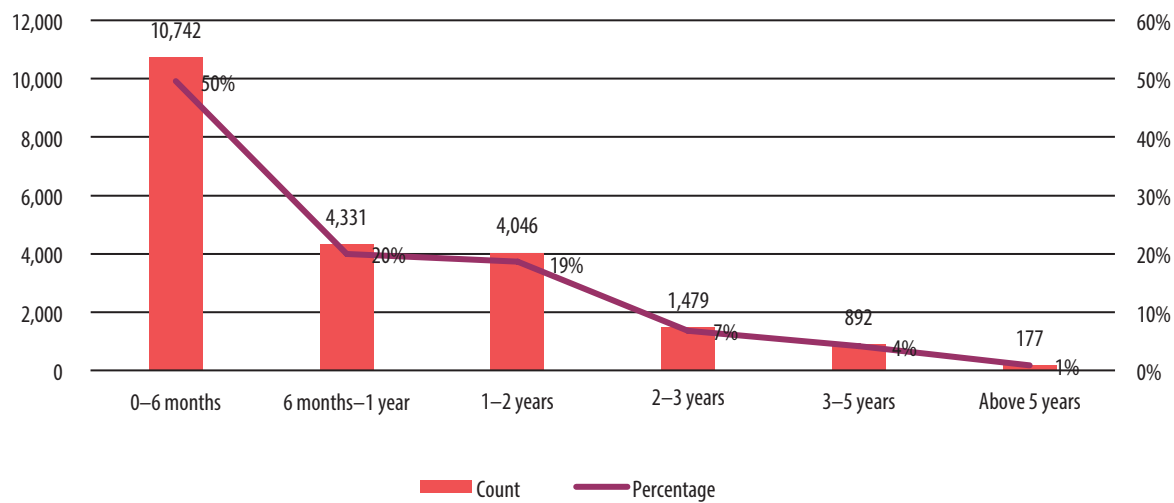
As per Table 2.1.1, it emerges that the percentage share of criminal cases takes the lion's share of the total number of pending cases across categories in terms of number of years. It must be noted that these cases include cases where the accused is out on bail.

If one refers to pendency of cases of undertrials languishing in prison, the situation presents a better picture. As per the data available in *Prison Statistics India Report 2015*, out of the 21,667 pending cases with undertrial prisoners as on 31 December 2015, the pendency of cases was as shown in Figure 2.1.1.

The figure shows that almost 50 per cent of the cases were pending for less than six months and nearly 70 per cent cases were pending for up to a year. The data also reveals that about four per cent cases were pending between three to five years, and less than one per cent cases were pending beyond five years.

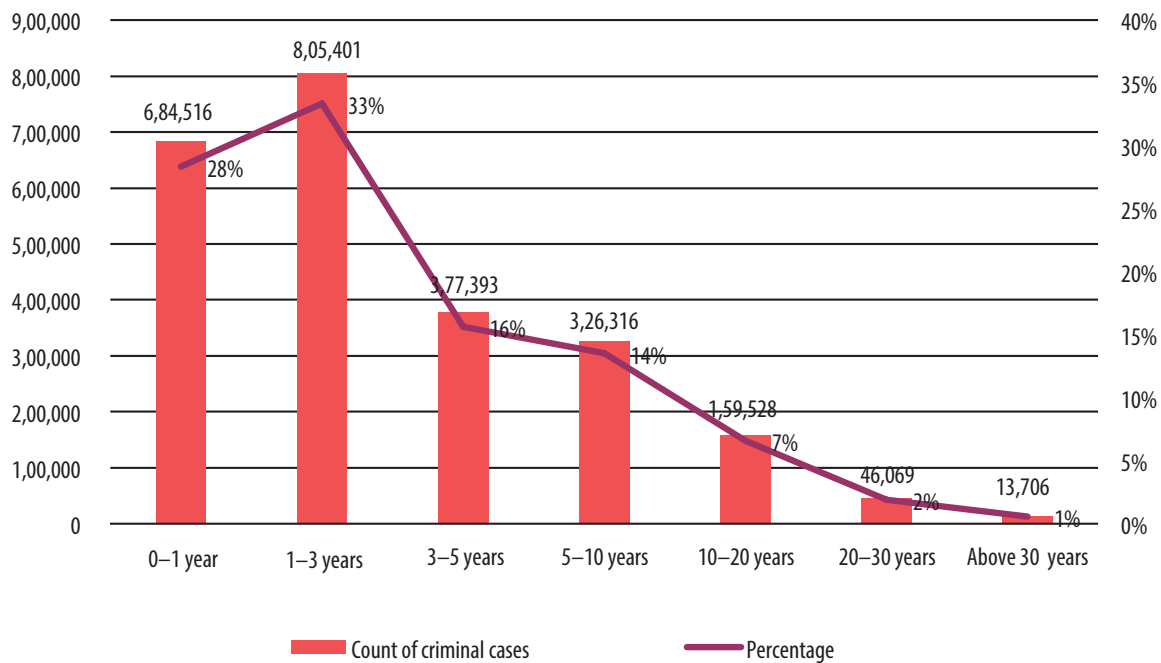
It would also be interesting to look at the pendency of criminal cases and how many cases remain pending at each age bracket. This is presented in Figure 2.1.2. Figure 2.1.2 reveals that 60 per cent of cases remain pending for less than three years, and about 10 per cent of the cases remain pending beyond 10 years.

Figure 2.1.1. Pendency of Cases with Undertrial Prisoners



Source: Prison Statistics India Report 2015.

Figure 2.1.2. Pendency of Criminal Cases in Maharashtra: According to Age



Source: National Judicial Data Grid (NJDG) as on 29 January 2019.

Table 2.1.2. District Wise Pendency of Cases as on 29 January 2019

Districts as available on NJDG	Civil	Criminal	Total	Percentage of criminal cases to total
Ahmednagar	62,066	83,483	1,45,549	57%
Akola	16,833	50,854	67,687	75%
Amravati	25,886	69,442	95,328	73%
Aurangabad	43,633	89,435	133,068	67%
Beed	36,366	46,970	83,336	56%
Bhandara	6,671	13,582	20,253	67%
Buldhana	18,979	49,655	68,634	72%
Dhule	14,108	22,959	37,067	62%
Gadchiroli	2,162	5,671	7,833	72%
Kohlapur	43,690	50,361	94,051	54%
Latur	31,434	34,589	66,023	52%
Nanded	25,625	49,865	75,490	66%
Nandurbar	5,168	10,259	15,427	67%
Nashik	52,945	1,15,904	1,68,849	69%
Osmanabad	30,891	29,949	60,840	49%
Parbhani	21,635	39,361	60,996	65%
Raigad	36,751	36,327	73,078	50%
Ratnagiri	9,219	10,771	19,990	54%
Sangli	35,113	35,026	70,139	50%
Satara	40,104	40,710	80,814	50%
Sindhudurg	7,183	4,224	11,407	37%
Solhapur	53,269	81,179	1,34,448	60%
Thane	79,587	2,22,231	3,01,818	74%
Wardha	10,711	51,459	62,170	83%
Washim	9,497	21,269	30,766	69%
Yavatmal	23,226	73,032	96,258	76%
Chandrapur	15,112	51,253	66,365	77%
Gondia	5,970	15,804	21,774	73%
Jalgaon	30,288	53,997	84,285	64%
Jalna	18,031	30,749	48,780	63%
Nagpur	61,477	1,80,503	2,41,980	75%
Pune	11,1016	2,69,085	3,80,101	71%
Mumbai City Civil & Sessions Court	70,488	23,516	94,004	25%
Mumbai CMM Court	2	4,39,484	4,39,486	100%

Source: National Judicial Data Grid (NJDG) as on 29 January 2019.

Note: The cells highlighted in green represent districts that have the lowest proportion of criminal cases, and the cells highlighted in blue represent districts that have the highest proportion of criminal cases.

Table 2.1.2 reiterates the finding that the number of pending criminal cases is leading to an increase in the total number of pending cases. The lowest percentage share of criminal cases to total cases pending are in Mumbai City Civil and Sessions Court (25 per cent), Sindhudurg (37 per cent), Osmanabad (49 per cent), while the highest percentage share of criminal cases to total cases are in Mumbai Chief Metropolitan Magistrate's Court (100 per cent), Wardha (83 per cent), and Chandrapur (77 per cent).

It would be interesting to do a study to find out the reasons why these districts show the lowest and highest number of pending criminal cases.

THE APPROACH

It is in the foregoing context that this chapter becomes important. While there is quantitative data available from official sources and academic studies on the situation of undertrial prisoners, there are few studies that give us an insider's perspective about the reasons leading to delays in processing of cases of undertrials. This chapter is written based on my experiences of being associated with Prayas, a field action project of the Tata Institute of Social Sciences (TISS), which has been working with undertrial prisoners in the young male and women's sections since 1990. The project aims to protect the legal rights of undertrial prisoners and rehabilitate them.^{5,6} I was the first social worker appointed for the project and worked at the Arthur Road Prison (otherwise known as the Mumbai Central Prison) from 1990 to 1993. Since then, I have continued being part of the Prayas team in various capacities. I have drawn from my experiences as well as the experiences of my teammates for this chapter. I have also drawn from the work of Praveen Kumar, a TISS alumnus who is a TISS Criminal Justice Fellow, working with undertrial prisoners in Patna, Bihar, since 2015.⁷

My first interaction with undertrial prisoners was when I was a student of social work (with specialisation in criminology and correctional administration) at TISS from 1988 to 1989. I was placed in the *Baba*⁸ Barrack of Arthur Road Prison for field work training by my faculty supervisor in the second year of my master's programme at TISS. It was during this period that I first learnt about the situation of undertrial prisoners. Mumbai is known as the commercial capital of the country. It is also known as the hub of economic offences, organised crime and gang rivalries, and the parallel economy.⁹ Arthur Road Prison is, therefore, a natural destination for housing dangerous criminals, alleged gangsters, film stars, politicians, and businessmen accused of committing various crimes.

Socio-legal Consequences of Arrest

The first lesson I learnt (during my student days and later as a social worker with Prayas) while working with undertrial prisoners in the *Baba* Barrack was that there were two types of undertrial prisoners—those with family and/or financial support and those without. The rights of undertrials enshrined in the Constitution, Code of Criminal Procedure, 1973 (CrPC), and prison manuals are accessible mainly by the first category. They have access to a decent lawyer; their family members often come for *mulakat*,¹⁰ and they invariably meet their family and friends on their court dates; some of them have access to home cooked food;¹¹ many of them hardly ever miss their court dates (as police escorts are invariably available for them to be taken to court); they have money (through money orders sent by their family members¹² or money brought illegally inside) to buy coupons for purchase of daily use items from the prison canteen;¹³ and they can grease the palms of prison officials or the convict warders¹⁴ to get a better place to sleep in the barrack which has more air and lighting, or is away from the toilets. Most importantly, their chances of getting released on bail are higher, as they are able to arrange

suitable sureties or cash amount required to satisfy the bail conditions, once passed by the courts. Once out on bail, their trials take longer (years) as cases of undertrial prisoners get priority over those out on bail. In such a scenario, their chances of getting discharged or acquitted are higher for reasons such as their witnesses not turning up in court (getting 'lost' due to the passage of time) or turning hostile on account of undue influence by the accused; and the investigation officer not turning up to present the evidence on account of getting transferred to another police station (outside the jurisdiction of the court or to another city or district).

The situation of undertrial prisoners who have weak or no family support or financial backing is very different from the situation described previously. First, they have no or poor legal representation. Often times, a lawyer comes forward and signs the *vakalatnama*¹⁵ within the first few days of arrest. The lawyer's name is often suggested to the undertrial by a police officer or a constable from the police station or in court. The lawyers take whatever money the undertrial prisoners are able to arrange through their family or friends, with the promise of getting them out on bail. Such lawyers usually appear in court on the behalf of the undertrial prisoners on their first one or two dates and vanish once they are transferred from police custody to the prison (judicial custody). These undertrial prisoners have their 'advocate on record' but no one appears on their behalf on their subsequent court dates. Magistrates often do not take note of this breach of trust and go along with the case, especially during the period when the undertrial prisoner is a remand prisoner.¹⁶ Then there are others who simply do not have a lawyer to represent them in court and the impasse continues till the legal aid system kicks in or the magistrate/judge takes notice, or a civil society organisation intervenes. There are also those who have lawyers appointed by their families but their appearance on court dates are irregular and they hardly ever

communicate the status of the case to the prisoners or their family members. The situation of women undertrial prisoners is far worse, owing to the fact that most women prisoners have very little formal education, are often unaware of their legal details, and have little family support to speak about. The long and short of this story is that there are a large number of undertrial prisoners who have little or no agency vis-à-vis their trials in court, and it finally depends on whether the magistrate or judge takes cognisance of the same and takes corrective measures like asking the District Legal Services Authority to appoint a lawyer. Prayas's experience over the last 28 years shows that about 20–30 per cent of undertrial prisoners have no legal representation or lack proper legal representation in court.

More than 70 per cent undertrial prisoners in our experience come from family backgrounds characterised by poverty and marginalisation. As per *Prison Statistics India Report 2015*, more than 80 per cent of prisoners belong to SC, ST, OBC, and Muslim communities.¹⁷ Raghavan and Nair's study¹⁸ on the situation of Muslims in prisons of Maharashtra highlights their situation which is characterised by poverty, marginalisation, discrimination, and lack of access to legal and social services. Prayas's experience shows that most undertrials languishing in prison live in abject poverty and their family situation is complicated by issues such as large family size, marital conflict, family violence, alcoholism, and mental health issues. A significant number of undertrial prisoners, especially in cities, are migrants with their families living in their native places. In this complex scenario, it is but natural that *mulakats* are few and far between, they do not receive money orders, court visits by family members are infrequent (but better than prison *mulakats*) and there is no one to follow up on the progress of their cases with their lawyers.

Owing to the lack of social and financial support, these undertrial prisoners are at the receiving end of

the prison system, unless a prison official, a convict warder, or a gang member takes the person under their tutelage. In prison, if one does not have money or a 'godfather', one is likely to end up living in the most crowded and unhealthy spot in the barrack, getting little medical attention (unless the prisoner develops a serious injury or ailment which could be life threatening), missing court dates frequently (due to lack of police escorts), and being a victim of sexual advances or abuse. The prisoners who are likely to be treated the worst by other prisoners and the prison administration include those arrested for sexual violence, especially rape cases, and drug charges, especially those who are arrested for consuming or trading small quantities. This is due to the hierarchy of offences that characterises the moral world of the prison sub-culture.

Due to this binary division of prisoners into haves and have-nots, the system seems to be giving a

message to the lower order prisoner and the message is clear: if one wants to be treated like a human being with some rights, one has to have financial resources at one's disposal or rise up the crime ladder. Petty offenders or first-time offenders with poor family support have no place in this system. I remember an undertrial prisoner telling me, '*Sir, yahan kuch bada kar ke aana chahiye. Chhote mote criminal ko koi nahi poochhta. Usey to yahan sadna padega. Agar kuch bada karke andar aao, toh aapke pass paisa aur log honge. Aapke pass achha lawyer hoga. Jailwale aapko respect se baat karenge ... agli baar kuch bada karke aaoonga* [Sir, if you come here, you should commit a major crime and come in. Small time criminals have no existence here. He has to languish inside. If you commit a big crime and come in, you will have money, a good lawyer and people around you. Prison officials will speak to you with respect ... next time, I will come in for a serious offence.]'

Box 2.1.1. Case Study 1: Justice Delayed and Impact on Family

Rameshwar Lal (name changed) is a daily wage labourer whose income is just enough to feed himself and his 70-year-old mother. His mother lives alone in his paternal village while he used to work in Patna. His father died few years ago. Rameshwar was arrested on 19 November 2016 from National Highway 83 under the Bihar Prohibition and Excise Amendment Act, 2016. He was under the influence of alcohol and was allegedly creating problems in traffic movement by standing and shouting in the middle of the highway.

Praveen Kumar, TISS Criminal Justice Fellow working in prisons of Patna, found Rameshwar languishing in Phulwarisharif sub-prison during one of his visits to the prison in mid-August of 2018. He along with Advocate Santosh Kumar then obtained information about individuals in the prison arrested under the Bihar Prohibition and Excise Amendment Act, 2016. They found that Rameshwar Lal was in judicial custody since 20 November 2016. He had no idea how to get out of prison. Under Section 436A of CrPC, Rameshwar was eligible to be released on a PR Bond.¹⁹ The visiting lawyer from DLSA had done nothing towards bringing his case to the notice of the trial court magistrate or applying for release on PR Bond. Rameshwar remained in prison for 1 year and 9 months, and was released on PR Bond of ₹ 1,000 on 24 August 2018, through an application on his behalf by Advocate Santosh Kumar.

During the entire period when Rameshwar remained in prison, his mother had no source of livelihood and had to depend on the largesse of her neighbours for food and upkeep.

Source: Case records of Praveen Kumar, TISS Criminal Justice Fellow (June 2015 to May 2019).

Children Living with Their Mothers in Prison

It was during the initial years (1990–1991) of Prayas's work in the women's section of Arthur Road Prison that issues relating to children living with their mothers in prison came to our notice. Contact with the adult criminal justice system can be detrimental to children and families. Children below six years are allowed to live with their mothers in prison, if there is no one to take care of them outside. Living in custody with women prisoners can never be normal for any child of six years or below. Many children are born in prison and they do not experience a normal childhood, sometimes till they complete six years of age. Due to their prolonged stay in a negative and custodial environment, their socialisation gets negatively affected. The only male figures they see are that of police and prison officials. They do not know what a normal home is, and have been found to be behaving and talking like women, with whom they spend all their time. They have been known to scream in fear at the sight of stray dogs or cows they may see on their way to the court while accompanying their mother. They face physical abuse on the hands of their mothers who sometimes take out their frustrations on their children. Observations of Prayas as well as other NGOs like India Vision Foundation (working with children of women prisoners in Tihar Prison) reveal that these children suffer from low self-esteem, and display violent or aggressive behaviour, while some of them are shy and withdrawn.

Every time the mother gets transferred from one prison to another, the children have to adjust to a new surrounding and make new relationships, which can be a very unsettling process at this tender age. Once the children attain six years of age, they are not allowed to stay with their mothers in prison as per the prison manual. The mother and children have to face the trauma of separation during such times and they are either transferred to child care institutions or to the care of a guardian or a caretaker. Undergoing so many changes during their early childhood phase

can have a long-lasting negative impact on the personality of these children.

Children Left Outside

One of the major findings from Prayas's work with undertrial prisoners has been the mental stress and agony they go through on account of not knowing the situation of their close family members, especially their children left outside. This is especially true in the case of women undertrial prisoners. The first question that a woman undertrial prisoner with children would ask the social worker is whether she can find out the situation of her children left outside. Women get worried sick wondering how their children are in the absence of communication with their families. Prayas's work and a study conducted in 2002 reveal that the situation of children of women prisoners left outside is precarious. Children have been found to be eating infrequently with not enough to eat, falling sick more often and lacking medical care, sleeping outside the house (with 'caretakers' taking over their house), dropping out of school, running away from home or eloping with a lover, dealing with the stress of going for *mulakats* or court visits, having to handle the lawyer's demands for money or documents, and taking care of each other, especially their younger siblings at home.²⁰

In the absence of guardians or caretakers, children of prisoners get admitted to child care institutions where they have to stay till they complete 18 years of age or till their parent gets released from prison and claims them back from the Child Welfare Committee, whichever is earlier. If there are two or more siblings, they may get separated by being admitted to different institutions, due to lack of space in the same institution. This may happen more often if the siblings are of different sexes. In such situations, entire families may get separated from one another for long periods of time—the parent/s in prison, the siblings living in different institutions. It is the responsibility of childcare institutions to

arrange regular *mulakats* between the children and between the parent/s in prison and their children, but this often does not happen or happens rarely, due to institutions being short-staffed or simply uncaring.

The *mulakat* process between the children and their parent/s is often a stressful exercise, especially if it is done across a wire mesh or glass partition. The *mulakat* room is a noisy place with too many people trying to communicate with each other at the same time, the time allotted for *mulakat* is often too less (due to pressure on the prison staff of too many people whose *mulakats* have to be arranged on any given day) and the children end up feeling very dissatisfied at the end of the meeting, with both sides ending up in tears feeling depressed.

The situation of children in spousal murder cases is particularly disturbing. Often, the children live with the grandparents or families of the murdered spouse, and they influence the children against the parent in prison. We have come across dozens of cases where the mother in prison pines for her children but is unable to meet them, as the deceased husband's family either does not allow them to meet the mother or the children 'learn' to despise her for murdering their father. In some of these cases, the child may have been a witness to the murder and has to undergo the additional stress of deposing before the court as a child witness. The trauma of witnessing the murder and the stress of taking sides (of one parent against the other), especially if the child is slightly older, can have long-term and deep psychological impact on the child.

Box 2.1.2. Case Study 2: Forced Separation

Meena (name changed) was admitted to the women's section of a prison where Prayas works in June 2013. She had been arrested for the murder of her husband under Sections 302 and 34 of the Indian Penal Code, 1860. Meena told Prayas that her nine-year-old daughter and eight-year-old son were with their paternal grandparents in Odisha. At the time of her arrest the children were also with her since it was their summer vacation.

The Prayas social worker contacted the police station from where they got the contact number of Meena's brother. On contacting the brother, Prayas got information about the children. Prayas then contacted the CWC, Mumbai with a request for arranging a *mulakat* between mother and children in Odisha. The CWC, Mumbai, opined that they cannot take a decision because the children cannot be produced before them as they were living in Odisha. The CWC, Mumbai, suggested that Prayas should contact the CWC in her native district in Odisha where the children were living. Correspondence and telephonic contact was established with the CWC in Odisha but no appropriate response was received. An application was then submitted by Meena through Prayas to the District Probation Officer in Mumbai. The DPO forwarded her application to the CWC in Odisha. But the application received no response.

Prayas took support from one of the NGOs working in Odisha. The social worker from the NGO paid a home visit and informed Prayas that the grandparents were not in a condition to take care of the children. Therefore, they had been institutionalised in an orphanage in the native place.

Meena again requested Prayas to arrange for a *mulakat* with her children. The Prayas social worker wrote to the District Collector, the CWC, and the District Child Protection Officer in her native place to arrange for a *mulakat* between the mother and her children, but received a negative response from them. Later, Meena requested Prayas to try and get photographs of the children. Through the support of the NGO, Prayas was able to get the photographs of the children from superintendent of the institution where the children were living.

The photographs were handed over to the Superintendent of Byculla District Prison, who in turn, handed them over to Meena.

Prayas decided to approach Meena's trial court judge in the Sessions Court to look into the matter of arranging a *mulakat* between the mother and children who had not met each other for more than two years. The Sessions Court judge ordered the Prayas social worker to pay a home visit and institutional visit and to enquire about the children and the family. The Prayas social workers visited her native district and met the CWC members, the Project Officer, ICPS, the superintendent of the institution where the children were housed and the Collector's Officer. They also paid a home visit to the grandparents' house. None of the officers were *suo moto* willing to take the responsibility of transferring the children from her native place to Mumbai nor were they willing to arrange for a *mulakat* with their mother. They said that they would do the needful if they got orders from the Sessions Court.

Meena was finally released from prison after being acquitted. In the absence of family support, she was admitted to a shelter home after release as she did not have a place to go in Mumbai. She later went to her native place and met her children after three years.

Source: Prayas, TISS.

Social Stigma

Goffman's pioneering work on stigma,²¹ drawn extensively from autobiographies and case studies, defines stigma as 'attributes that are deeply discrediting' to the individual. Through his work, he drew out the strategies used by stigmatised individuals to deal with social rejection. The consequences of social stigma include 'abominations of the body' (physical deformities), 'blemishes of individual character' (societal labelling through records of unemployment, imprisonment, mental illness, homosexuality, etc., and being perceived as weak-willed, treacherous, dishonest, etc.), and 'tribal stigma of race, nation, and religion' (contamination of all members of the particular family through lineages). The person is first stigmatised through a process of interaction between the individual and the social audience, leading to he/she becoming what the stigma implies. Once stigma is applied, it is very difficult to overcome it.²²

While theoretically, an undertrial prisoner is 'innocent until proved guilty', in reality every prisoner, under trial or convicted, is likely a victim of social stigma. Not only does the undertrial

prisoner suffer from stigma and social exclusion, his/her family also have to suffer a similar fate, especially children of the prisoners. Some of these issues have been highlighted in earlier sections. In my experience, families of undertrial prisoners have had to face a range of consequences, such as:

1. Taunts and hostile responses from neighbours;
2. Loss of job or disruption in business on account of having to go for *mulakat*, attend court dates, or meet the lawyer;
3. Physical and mental health problems due to the stress of dealing with the arrest and trial process of the undertrial family member;
4. Drastic reduction in the family income because of the bread winner being in prison;
5. Compelled to move to another area of residence on account of not being able to pay the rent.

The problems faced by family members of women undertrial prisoners are far greater and complex. In a patriarchal society, 'wrongs' committed by men are forgiven but women and their families have to face lifelong character assassination and social exclusion. For example, in the case of women arrested in spousal murder cases, the children mostly end up being raised by the

marital/spousal family who discourage any contact between the children and the mother, leading to scarring of the children's psyche. Even in property offences, rejection by family members in case of women prisoners are much higher than in the case of men. This has serious implications in terms of post release problems faced by women prisoners, especially with regard to shelter and social networks. Our experience has shown that lack of stable shelter and relationships can lead to increased dependence on anti-social and exploitative elements which leads to getting enmeshed in a life of crime and sexual exploitation.

Social Exclusion and Denial of Citizenship Rights

The situation of prisoners (including those of undertrials) fits well with the definition of poverty and social exclusion given by Amartya Sen,²³ whereby he defines it as a symptom of existing social problems and an inability to achieve full human potential due to the lack of access to public goods and services. He, therefore, views social exclusion as capability deprivation that includes material (food security, housing, education, etc.) and non-material (access to social relations, voting rights, etc.) deprivations. He further emphasises that human living implies life of dignity and self-respect, and structural barriers that make living with dignity difficult are key elements of poverty arising out of social exclusion. Our work with undertrial prisoners has revealed that a large number of them do not have access to citizenship documents such as voter identity card, caste certificate, ration card, or even a bank account. The absence of these documents leads them to be treated like non-citizens, and their life and work encounters take place outside the pale of the formal sector. Many of them have no access to formal housing, government schemes, bank loans, health insurance cards, or voting rights. Prayas workers have to often struggle to even get their bank accounts opened, which is a stepping stone to enter the formal sector.

CONCLUSION

It can be seen from this chapter that a large majority of undertrial prisoners come from extremely poor and marginalised backgrounds. They have little access to legal aid or resources to get a fair chance vis-à-vis their cases in court, their family and social networks are weak and their stay in prison is characterised by isolation, stress, and negative experiences. Their families, especially their children, go through economic and social hardships, and find it hard to deal with the consequences of the arrest and imprisonment of their family member. Social stigma and exclusion associated with imprisonment negatively impacts the lives of undertrial prisoners and their families, turning them into non-citizens over a period of time. Given the fact that many of these cases end up in discharge or acquittal, there is an urgent need to take steps towards ensuring that they do not languish in prison and their families get adequate support to deal with the socio-legal consequences of the arrest and imprisonment of their near and dear ones.

Notes

1. National Crime Records Bureau. 2015. *Prison Statistics India Report 2015*, available online at http://ncrb.gov.in/statpublications/psi/Prison2015/Snapshots-2015_18.11.2016.pdf (accessed on 7 December 2018).
2. V. Raghavan. 2016. 'Under Trial Prisoners: Long Wait for Justice', *Economic and Political Weekly*, LI (4) (January 23): 17–19.
3. V. Raghavan. 2015. 'Indian Criminal Justice System: Voices from Field', *Indian Police Journal*, 42(1): 4–15.
4. Raghavan, 'Indian Criminal Justice System'.
5. V. Raghavan and S. Menezes. 2017. 'Prayas: Demonstrating Criminal Justice Social Work', *Indian Journal of Social Work*, 78 (2): 225–254.
6. V. Raghavan. 2013. 'Social Work Intervention in Criminal Justice: Field Theory Linkage', in S. Singh (ed.), *India Reader*, pp. 265–289. Lyceum Books: Chicago.

7. For details, see <http://www.tiss.edu/view/11/projects/all-projects/criminal-justice-fellowship-program/>.
8. In most prisons in the country, young male prisoners in the age group of 18–21 or 23 are housed in a separate barrack, to prevent ‘contamination’ and criminalisation of youth and wean them away from ‘habitual’ and gang elements. These barracks are informally known as *Bachha* Barrack, *Kishore Vibhag*, or *Baba* Barrack, which are synonyms to mean young adults in Hindi language.
9. Parallel economy implies the illegal economy run by organised crime gangs comprising activities like gambling, betting, illicit liquor business, extortion, drug trafficking, prostitution rackets, illegal arms trade, etc.
10. A supervised meeting between a prisoner and his/her family members is known as *mulakat* in prison parlance. Under trial prisoners are allowed to meet their blood relatives once a week and convicted prisoners are allowed this facility once a month as per the provisions of the Maharashtra Prison Manual. These rules are more or less similar across the country. The *mulakat* usually takes place across a wire mesh or glass partition, in some states aided by an intercom facility (as in Maharashtra). Children below 18 years are allowed in some states to meet their parents in prison through face to face encounters inside prison (as has been introduced in Maharashtra last year). Prisoners are also allowed to speak to authorised family members through telephone facility at regular intervals in many states including in Maharashtra. These reforms have taken place based on recommendations of prison reform committees and advocacy efforts of civil society organisations like Prayas, and judicial orders passed by the courts in various public interest litigations in recent years.
11. Undertrial prisoners are allowed to eat home cooked food as per prison manuals in most states. In Maharashtra, this rule was changed a decade or so ago on grounds of gang leaders allegedly smuggling drugs inside prison, concealed in their tiffin boxes, and also bringing food in tiffin boxes large enough to feed 10–15 people, to feed their gang members and other prisoners who they could influence by offering them food. Home cooked food is now only allowed through a court order.
12. As per the prison manual, an undertrial prisoner is allowed to receive money from their family members subject to a maximum limit of ₹ 2,000 per month.
13. The prison canteen is a store from where prisoners can purchase daily use items like hair oil, washing or bathing soap, sanitary napkins, biscuits, snack items, cigarettes, cooked meat (once or twice a week), etc. Prisoners are allowed to buy coupons from the cash received through money orders to purchase these items.
14. Convict warders are convicted prisoners usually serving life imprisonment who are tasked with maintaining order and discipline in the prison, for which they are paid wages and are deemed to be public servants under Section 21 IPC. This system of prisoners watching over prisoners was devised by the British colonial administration to keep the staffing expenses to a minimum.
15. *Vakalatnama* is a signed agreement between the accused and a lawyer by which the accused agrees to the lawyer being his/her legal representative in court.
16. A remand prisoner is an undertrial prisoner whose chargesheet is yet to be filed and the trial is yet to have started.
17. National Crime Records Bureau (2015).
18. V. Raghavan and R. Nair. 2013. ‘Over-Representation of Muslims: Prisons of Maharashtra’, *Economic and Political Weekly*, 48(11): 12–17.
19. Under section 436A Code of Criminal Procedure, an undertrial prisoner who has been granted bail and the undertrial continues to remain in prison for more than a one week is eligible to be released on Personal Recognisance Bond, on the grounds of being indigent.
20. Prayas. 2002. *Forced Separation: Children of Imprisoned Mothers*. Mumbai: Tata Institute of Social Sciences.
21. E. Goffman. 1963. *Stigma: Notes on the Management of Spoiled Identity*. New York: Prentice Hall.
22. I. Moyer. 2001. *Criminological Theories: Traditional and Non-Traditional Voices and Themes*. London: SAGE Publications, pp. 180–181.
23. A. Sen. 2000. ‘Social Exclusion: Concept, Application, and Scrutiny’, *Social Development Papers No.1*, Asian Development Bank, June, available online at <https://www.adb.org/sites/default/files/publication/29778/social-exclusion.pdf> (accessed on 9 May 2019).

Systemic Apathy: Victims of Human Trafficking and Their Struggle for Justice

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INTRODUCTION

Human trafficking is the fastest growing organised crime in India and the third largest illegal trade after drugs and arms smuggling.¹ The 2017 Global Estimates of Modern Slavery estimated 4.03 crore victims of slavery worldwide at that time. Of these, 2.5 crore were estimated to be forced labour, with 1.83 crore in forced labour situations in India.² In 2017, the Ministry of Labour and Employment issued a statement making a commitment to release and rehabilitate 1.84 crore bonded labourers by 2030 and obtain 100 per cent conviction in cases.³ In fact, the Government of India has introduced a scheme for the rehabilitation and provision of cash assistance called the Central Sector Scheme for the Rehabilitation of Bonded Labourers, 2016.⁴

The Ministry of Home Affairs described human trafficking as a ‘crime committed in order to target, lead, or drive a human being into an exploitative situation with the aim to make profits. Such exploitation may take many forms, for example commercial sexual exploitation, child labour, forced labour, bonded labour, or illegal organ removal.’⁵

Bonded labour (BL), a form of physical exploitation in human trafficking in India, involves the exploitation of the most disadvantaged social strata. According to the Government of India, nearly 86 per cent of the bonded labourers released and rehabilitated by the government are from the scheduled caste (SC) and scheduled tribe (ST) community.⁶ Poor and uneducated persons from vulnerable communities seek employment in the unorganised sector, most often in unregistered units such as brick kilns, stone quarries, agricultural farms, rice mills, toy-making units, and bindi-making units. They gain employment through middlemen under the promise of a better life. Little do these people know that they and their families will be treated as property; their time, efforts, skills, and family

life will be at the beck and call of the employer or his/her manager. Migrant workers are especially vulnerable owing to language barriers and lack of social networks and protection.

Human trafficking for commercial sexual exploitation (CSE) is a violent form of sexual and physical exploitation where vulnerable people are abused for another's economic gain. People, particularly women and children, from all over India are drawn to metropolitan cities, such as Kolkata and Mumbai, to find work but are instead tricked into the sex trade. Commercial sexual exploitation has evolved to be a highly profitable business, generating over 9,900 crore dollars per year in 2014.⁷ The ILO estimated in 2012 that at least 45 lakh people are forced

into CSE worldwide.⁸ Women and girls represent the highest proportion of victims of trafficking.⁹ In 2014, the UN released findings that 49 per cent of trafficked victims are women, and 21 per cent of all trafficked victims are girls younger than 18 years of age.¹⁰

LEGAL PROVISIONS FOR HUMAN TRAFFICKING OFFENCES

Table 2.2.1 is a representation of India's legislative framework for action against human trafficking, the prohibition of commercial sexual exploitation, and labour exploitation.

Table 2.2.1. India's Legislative Framework

Exploitation	Examples of applicable laws
Any act of physical exploitation	<ul style="list-style-type: none">Bonded Labour System (Abolition) Act, 1976 (BLSA)Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA)Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act)Sections 363A, 367, 371, 374, IPC
Any form of sexual exploitation	<ul style="list-style-type: none">Immoral Traffic (Prevention) Act, 1956 (ITPA)Prohibition of Child Marriage Act, 2006Protection of Children from Sexual Offences Act, 2012Sections 366, 366A, 366B, 370A, 372, 373, 375, 376, Indian Penal Code, 1860 (IPC)
Slavery, practices similar to slavery, servitude	<ul style="list-style-type: none">Bonded Labour System (Abolition) Act, 1976Sections 367, 371, 374, IPC
Forced removal of organs	<ul style="list-style-type: none">Transplantation of Human Organs Act, 1994

Source: Authors' compilation.

Bonded Labour/Labour Trafficking

The operational definition of human trafficking has three parts—acts, means, and purpose (AMP). The purpose of human trafficking is exploitation for sex, labour, or organs. Physical exploitation under the definition of human trafficking (Section 370, IPC) will include exploitation for bonded labour, and can attract provisions of the BLSA which aims to eliminate physical and economic exploitation.

At the same time, there are cases where the elements of human trafficking for the purpose of labour (physical) exploitation are present, but do not attract the elements of the BLSA. Conceptually, however, whether it is bonded labour or trafficking for labour, both deal with physical exploitation or commodification of human beings.

Some cases, where the perpetrator recruits, harbours, or transports the victims from one

location to another location for the purpose of exploitation, including physical exploitation, involuntary servitude, or practices similar to slavery, can be categorised as labour trafficking as well. According to the preamble of the BLSA, bonded labour is a form of physical and economic exploitation of the victims, and therefore, some cases of bonded labour come within the purview of labour trafficking as well. There are laws to protect against labour trafficking, but strong and consistent implementation of these laws across the country remains a problem due to the lack of prioritisation by the criminal justice system and the executive bodies who are mandated to eradicate evils such as bonded labour and sex trafficking. Article 23 of the Constitution prohibits trafficking in human beings and forced labour, naming human trafficking as a punishable offence. This is a unique reference; the Constitution does not call out other such acts, except for the offence of untouchability. The framers of the Constitution intended forced labour to be a crime of a constitutional nature.

The BLSA requires the government to identify, rescue, and rehabilitate victims of bonded labour and prosecute offenders. Unlike other criminal legislation, the District Magistrate (DM) and officer authorised by him has an important role in this.¹¹ Bonded labour is punishable under the SC/ST Act, Section 374 (unlawful compulsory labour) of the IPC, and Section 79 of the JJA. The amendment to Section 370 of the IPC in 2013, which was introduced following the Nirbhaya gang rape and recommendations of the Justice Verma Committee, is an important addition in the efforts against trafficking. This amendment recognises physical exploitation as a human trafficking offence and enhances the penalty for human trafficking to rigorous imprisonment for seven years and which may extend to life imprisonment depending upon the gravity of the offence. Thus bonded labour also comes under the ambit of labour trafficking.

Sex Trafficking

Article 23 of the Constitution prohibits trafficking in human beings for any type of exploitation, including trafficking for CSE.¹² The ITPA details all activities which constitute the offence of human trafficking for CSE. The IPC further defines trafficking of persons and punishes any act of trafficking.¹³

ACCESS TO JUSTICE

Although the laws mentioned are in place in India to combat both bonded labour and sex trafficking, implementation of these laws is sometimes uncertain. Many people might not be able to actually access the justice that is owed to them.

Formal justice mechanisms in India are complex and beyond the reach of the majority of India's population. As the Report of the Working Group for Twelfth Five Year Plan of the Department of Justice India highlights, the cost of litigation has increasingly become prohibitive to large sections of society, especially marginalised populations.¹⁴ Along with low levels of awareness of their rights and little awareness of the measures provided by the government (including legal services), the marginalised face many obstacles in accessing justice, including gender discrimination and illiteracy.

Article 14 of the Constitution guarantees equality before the law and equal protection of laws. Equality before the law means that all parties to a legal proceeding must have equal opportunity to access courts to present their cases. However, in reality, for the indigent, who cannot meet basic economic needs, accessing justice in the court remains a fantasy because they are simply unable to access good lawyers since most of the experienced lawyers are more favourable towards people who can afford to pay their fees. Therefore, as Article 14 is a right enshrined under

the Constitution, the inaccessibility of legal services to poor litigants is not just a problem of procedural law but a violation of constitutional rights.

One of the most serious challenges to the protection of human rights through rule of law is the inability of the justice system to deliver speedy and affordable judgments, indicated by the number of pending cases in Indian courts.¹⁵ India has 3.2 crore pending cases, the majority of which are in district courts, and are related to criminal law and have been pending for over two years.¹⁶

Article 39A (Equal Justice and Free Legal Aid) of the Indian Constitution, under the Directive Principles of State Policy reads: '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.' The Legal Services Authority Act, 1987 mandates State Legal Services Authorities (SLSAs) and District Legal Services Authorities (DLSAs) to work closely with civil society organisations, government agencies, and academic institutions to 'promote the cause of legal services to the poor'.¹⁷ However, many of these authorities are unaware of the nuances of trafficking cases and, therefore, most of the victims depend on the prosecution for their cases.

In the opinion of Justice Bhagwati in *Hussainara Khatoon v. State of Bihar*,¹⁸

This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services, on account of reasons such as poverty, indigence, or incommunicado situation. The State is mandated to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided the accused person does not object to the provision of such lawyer.

With that in mind, this chapter seeks to view access to justice for human trafficking victims from a wide angle since reports¹⁹ indicate that the 'justice system' is not limited to the judicial pillar alone, especially in human trafficking cases where the rescue is done by the state, which includes the police, district administration, and the judiciary. Additionally, this article discusses related aspects, such as the extent of legal awareness and empowerment, availability of legal aid, and victim-sensitive response from public justice officials including the police, prosecutors, and judges.

Human trafficking victims cannot access justice immediately through courts, mainly because the crime is a heinous criminal offence. The state takes responsibility, and the primary implementers are the jurisdictional district judge, judicial magistrate, and the police system. While the litigant in such cases is the state, the initial phases of the FIR and chargesheet are handled by the police, who do not act as service providers for the victim. In most cases, if an NGO does not follow up with the trafficking cases, the FIR filing gets delayed, and the 161 statements²⁰ and investigation are done callously which end up in an unsatisfactory chargesheet. This simultaneously leads to contradictions in court evidence, thus ending up in acquittals. In most cases, the victims seldom follow an investigation or trial process, mainly because they are unaware of the procedures.

Our analysis on the justice system focuses on the police system mainly because in trafficking cases, the primary implementer for a victim is the police or the district magistrate. Most victims are trapped in areas of flesh trade and forced labour and their rescue from these exploitative situations marks the first step towards justice. In order to stop the perpetrator from perpetuating crimes, a legal battle is necessary and, therefore, a lot of work involves the police; it is only during the later stages that the courts become their agents of justice. Therefore, most of our data revolves around the police system and less on the judicial system.

We place our findings under four fronts, which are deemed to be the most significant barriers to justice in human trafficking cases.

1. Survivors' level of confidence in the public justice system (PJS).
2. Survivors' knowledge about accessing the PJS.
3. The detrimental costs associated with accessing justice (this includes police, district administration, and the judiciary).
4. Institutional challenges.

These categories will be addressed in relation to bonded labour/labour trafficking and sex trafficking as separate crimes, although they are linked under the umbrella of human trafficking, therefore, common obstacles to justice may overlap. To examine access to justice for trafficking victims, we analysed a total of 150 cases from several states, using data from five International Justice Mission (IJM) offices. The data from these cases is analysed under the heading 'Detrimental Costs and Delays'.

Table 2.2.2. Number of Human Trafficking Cases Examined in This Chapter

Office	Specialism	Number of cases analysed (2013–2016)
Bengaluru ²¹	BL	24
Delhi ²²	BL	7
Chennai	BL	49
Mumbai	CSE	53
Kolkata	CSE	17

Source: Data from five International Justice Mission offices.

Note: The cases range from the stage of FIR to chargesheet and trial.

This report contains qualitative assessments of access to justice, resulting from interviews with five advocates and two social workers²³ who have worked extensively on the topic of low access to justice in cases of labour trafficking. For sex trafficking cases, IJM interviewed five lawyers and one social worker, who have worked with sex trafficking victims.

Survivors' Level of Confidence in the PJS

Bonded Labour/Labour Trafficking

Most bonded labour victims are from marginalised communities. Owing to generations of exploitation, there is a general mistrust in the PJS that has consistently failed and excluded them. Many have come to accept violent exploitation as inevitable, and have no expectation of justice. 'They do not even recognise that what is being done to them is a crime,' says one advocate. In an interview with a social worker in Bengaluru, it was suggested that many survivors do not have a notion of, or desire for, justice as we tend to perceive it. In addition, exploitation is normalised to such an extent that many victims are not ready to oppose their exploiters.

Victims are often trafficked by person(s) from their village or an adjoining village; approaching the police then becomes a great risk, since victims and/or their families live in close proximity to the trafficker or his/her relatives or friends, who usually are local elites or have powerful connections that can result in intimidation. 'We have not been able to provide adequate victim protection, and this is another reason victims are often afraid to approach the criminal justice system,' the advocate said. Survivors are generally intimidated by the institutions that are intended to protect them. Reliving the trauma of their past experience is unpleasant, particularly when the victim is unsupported. Hostile environments, the stressful possibility of meeting their former oppressor in court, and lack of resources dissuade survivors from engaging with the PJS. In some cases, survivors beg the pro bono lawyers and social workers to leave them alone. Some tribal communities prefer not to approach the criminal justice system at all, choosing to settle matters internally with the help of community leaders.

Police are not seen as an adequate source of protection by survivors. One of the social workers said that 'even when the victim is from a SC or

ST background, and when he faces atrocities, the police see them as an accused.²⁴ Therefore, survivors' level of confidence in approaching the police for criminal investigation or rescue is low. There was an incident in which some victims escaped from their workplace and approached the police for rescue, but at the insistence of the perpetrators they were beaten and sent back to the workplace. The perpetrators claimed they were 'cheating the owners by not repaying the cash advance'. The major hindrance seen is the manner in which the government responders perceive the issue; they sympathise with the perpetrators, rather than the victims.

Interestingly when compared to previous years, it has been observed that more released bonded labourers/labour trafficking victims are now approaching the District Administration (DA) directly, particularly in four northern districts of Tamil Nadu (Kancheepuram, Thiruvallur, Vellore, and Thiruvannamalai). In these districts, while the Released Bonded Labourers' Association is becoming proactive in taking complaints to the DA, their confidence comes from their prior experience in being rescued.

Sex Trafficking

All of the lawyers and social workers interviewed by IJM were unanimous in their stand that sex trafficking survivors do not have confidence in the PJS. However, it was suggested that the confidence of survivors could be built by counselling from social workers and lawyers, coupled with *in camera* trial, interim victim compensation, and allowing child survivors to give their evidence within a month.

When victims are trafficked to brothels, they are often brainwashed into believing that they are culprits of a crime. They are made to believe that the police intend to incarcerate them, not release them. It is difficult to break that initial barrier of mistrust.

There are general misconceptions among the police about the consent of CSE victims. Police are often rude to victims during a rescue, believing that the girls are doing this of their own free will. This insensitivity creates a lack of confidence among the victims in the PJS and can even lead to re-victimisation by the police.

Additional factors include:

1. Lack of compensation schemes: In Maharashtra, there is no compensation scheme for any kind of trafficking victim. Victims are awarded compensation by the courts under Section 357 of the Code of Criminal Procedure, 1973 (CrPC) but never actually receive the amount due to 'insufficiency of funds'.
2. Lack of rehabilitation facilities: Due to the lack of infrastructure to provide good rehabilitation facilities for victims, social reintegration becomes a huge problem. Victims feel as if they have been rescued from one prison (the brothel) and put into another (the shelter home). This often leads to re-trafficking, as the girls do not have the resources to start a new life and get a new job.

Survivors' Knowledge about Accessing the PJS

Victims of human trafficking for CSE and victims of bonded labour/labour trafficking have very low levels of awareness of their rights and how to access the PJS. Most victims, on average, have studied up to the fourth or fifth standard. According to social workers experienced in handling cases related to sex trafficking and labour trafficking, victims' general awareness about the PJS or their legal rights is little to none.

Unlike other offences, where the police respond and initiate criminal investigation, offences under bonded labour/labour trafficking can be dealt with by the police and officials within the DA. Unfortunately, bonded labour/labour trafficking

victims do not know about these authorities and struggle to approach them. Even after being rescued, victims of bonded labour/labour trafficking are given little to no guidance or information regarding their rights.

In one case reported by an advocate, the police told the victims to leave and be grateful that they had received their back-wages. The police empathise with employers as they are seen as providers of employment, thus helping the local economy. An advocate reported that in one workplace, the victims testified that the police had approached them and told them not to say anything, if anyone approached them regarding being rescued. The employers belong to the powerful elite in the village, so the police often choose to be complicit with them.

The general perception of PJS implementers is that bonded labour is a labour issue, not a crime, and therefore, need not be treated as a priority by law enforcement. Corruption exacerbates the slow or lacking response. Many feel that the DMs do not think that this is an issue that needs to be addressed; labourers and NGOs wait for hours to meet the DM for a response to a complaint. As a result of these perceptions and institutional apathy, victims do not know how to access justice.

Detrimental Costs and Delays

Bonded Labour

Costs and delays are intrinsic to the process of accessing justice for any victim of trafficking. Bonded labour cases in particular are defined by delays, from the filing of FIR to prolonged investigation to the trial process itself.

Bonded labour survivors engage with the PJS directly at three instances: (a) determination of status as a bonded labourer and issuing of release certificate (by the Sub-Divisional Magistrate (SDM)), (b) recording of statements by the police

(under Section 161, CrPC) or by the Magistrate (under Section 164, CrPC), and (c) testimony in court. Practically speaking, the victims are sent back and forth multiple times due to delays in the process at every stage, with no daily allowance for food or travel. Even though there are provisions for payment of reasonable expenses under the CrPC (Sections 160 and 312), this is rarely paid.

Delay in investigations and trial affect recall of memory for victims, weakening the body of evidence required to bring conviction, which may already be slim due to investigation done without due care and attention. For example if low priority is given to the case by the police, then less time is spent on thorough evidence collection. Similarly, there is no provision for a time-bound trial, leaving no obligation on the judges to conduct speedy trials. If there is a speedy trial, there is less likelihood of victim intimidation or bribery and the victims would be in a better position to remember the facts and state them boldly without fear. This is likely to lead to a better judgment.

FIR and Chargesheets in BL Cases

There are significant delays reported with filing of FIRs in bonded labour cases. The victims are unaware of their rights in a police station, and often face difficulties in communicating the details of their case. Although the IPC stipulates that there are consequences for not recording an FIR or complaint, in reality the police are not held accountable if they fail to do so and often choose not to. In child labour crimes and SC/ST atrocities, there is strong pressure from the government to file FIRs, as a result of which police officials are more diligent. If the SDM does not mention the relevant sections when filing the FIR, the police register it under soft sections, leaving out Section 370, IPC and sections prescribing stronger punishments. The sections filed under BLSA are bailable, meaning the accused can access bail easily, leaving them free to threaten the victims and force them to drop the case.

The lengthy delays in filing chargesheets are peculiar to all the bonded labour cases that were analysed. In one case, the rescue was conducted in 2015 but the chargesheet was filed only in 2018. Over time, the factual history of the case is forgotten, and the victims' testimony becomes weaker. If the police think that the victim cannot afford the trial, they do not bother to file a chargesheet; police negligence of this kind leads to poor outcomes in court. In a few cases, chargesheets were filed within 90 days

(a surprisingly short amount of time). However, none of the victims were cited as witnesses in these cases; only the friends of the perpetrators were cited as the witnesses.

The data below (Tables 2.2.3 and 2.2.4), gathered from IJM's case data in Chennai, Bengaluru and Delhi, show the average duration that can be expected in the process of accessing justice in bonded labour cases.

Table 2.2.3. Labour Trafficking Cases in Chennai

Indicator	2013	2014	2015	2016
Percentage of cases where rescues are conducted within seven days from complaint*	100	100	100	93
Percentage of cases where it took one day or less from rescue to FIR**	21	36	91	93
Percentage of perpetrators arrested [#]	40	18	48	43
Percentage of cases where it took 90 days or less from investigation to chargesheet ^{##}	0	14	0	0

Source: IJM Chennai (49 cases).

Notes:

* The number of cases where days of complaint to rescue is within seven days/total number of IJM cases in that year.

** The number of cases where days of rescue to FIR is one day/total number of cases in that year.

[#] The number of perpetrators arrested/total number of perpetrators.

^{##} The number of cases where it took 90 days and less from FIR to chargesheet/total bonded labour cases where chargesheet is filed.

Analysis: When the perpetrators know that the DA is going to inspect the workplace, the survivors are very often sent out of the workplace or intimidated by the perpetrators. To counteract this, IJM tends to make a complaint only when the DA has agreed to do an inquiry quickly. The high percentage of response shows

that the DA is sensitive to this issue. This is a relatively new trend that was not the case in earlier years.

In the year 2013 and 2014, the DA was not very keen on initiating a criminal case against the perpetrator, hence there were few FIRs filed

Table 2.2.4. Labour Trafficking Cases in Bengaluru

Indicator	2013	2014	2015	2016
Percentage of cases where rescues are conducted within seven days from complaint*	100	89	75	75
Percentage of cases where it took one day or less from rescue to FIR**	71	89	25	100

Indicator	2013	2014	2015	2016
Percentage of perpetrators arrested***	0	54	18	50
Percentage of perpetrators that spent 14 days or more in judicial custody [#]	0	46	9	6
Percentage of cases where it took 90 days or less from investigation to chargesheet ^{##}	0	56	0	50

Source: IJM Bengaluru (24 cases).

Notes:

* The number of cases where days of complaint to rescue is within seven days/total number of cases in that year.

** The number of cases where days of rescue to FIR is one day/total number of cases in that year.

*** The number of perpetrators arrested/total number of perpetrators.

[#] The number of perpetrators who spent 14 days in judicial custody/Total number of perpetrators.

^{##} The number of cases where it took 90 days and less from FIR to chargesheet/total cases where chargesheet is filed.

because the DA had not given a complaint to the police. Since then, DA has shown greater resolve to register bonded labour complaints as criminal cases.

Analysis: The progress over time indicated by the data is interpreted as a result of the constant push of advocacy by IJM, other experts, and lawyers who intervened in these cases.

1. Rescues are done up to seven days after the complaint and not immediately.
2. There is proactivity seen in filing FIRs. Police in Karnataka have been proactive in filing FIRs immediately.
3. The arrest rate is comparatively low as most of the owners are powerful, leading to reluctance among police to conduct arrests.
4. Judges grant bail easily in BL cases; moreover, police charge the accused with sections that are bailable even when offence committed is non-bailable.
5. There is a significant delay in filing chargesheets. Most of the cases take an average

of one year despite constant push from IJM representatives.

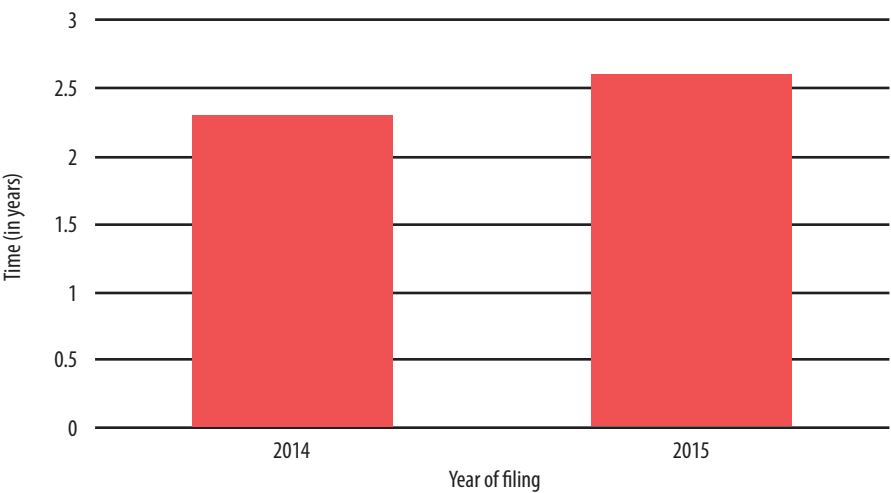
Data on Pre-trial and Trial for Bonded Labour Cases in Bengaluru

The following data analyses seven cases from 2014 and 2015 from the IJM Bengaluru office to determine the way that bonded labour cases are treated in pre-trial and trial.

For the purposes of this section, the terms ‘pre-trial’ and ‘trial’ shall mean:

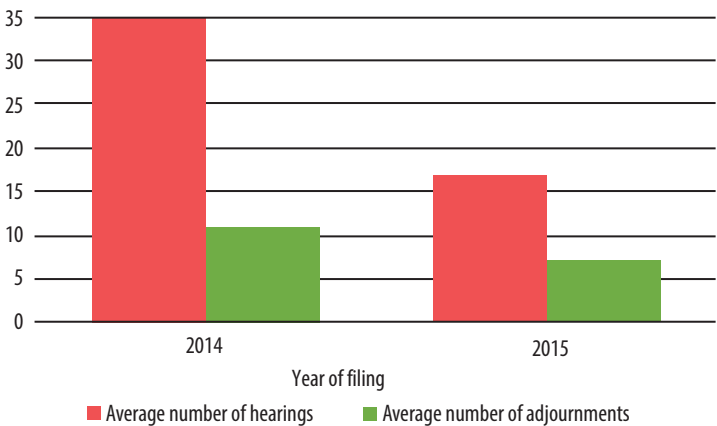
1. Pre-trial: The stage from when the judge took cognizance of the crime till the stage where one witness came and testified. The period includes filing of the chargesheet, registration, committal, framing of charges, and summons being issued.
2. Trial length: The length of time between a witness testifying in a case and the case reaching judgment. This stage includes the period from the time the first witness testifies in the case, other witness’ testimony, arguments, and the judgment.

Figure 2.2.1. Average Duration of Trial (in Years)



From Figure 2.2.1, we can see that trials on disposed cases²⁵ on average took 2.3 years (845 days) for cases filed in 2014 (four cases were analysed and the average number of years calculated) and 2.6 years (948 days) for cases filed in 2015 (three cases were analysed and the average number of years calculated).

Figure 2.2.2. Average Number of Hearings and Adjournments



From Figure 2.2.2, we can see that there was an average of 11 adjournments out of 36 hearings during trial for the 2014 cases (four cases were analysed and averages calculated). There were an average of seven adjournments out of 17 hearings during trial for the 2015 cases (three cases were analysed and averages calculated). After analysis of the cases, we have determined that the reasons for the adjournments were:

1. Judge was absent

- 2. Accused was absent
- 3. Survivor witness was absent
- 4. Strikes/boycott
- 5. Police officer was absent
- 6. No translator provided for survivor witness
- 7. Non-bailable warrant was issued
- 8. Public Prosecutor was absent
- 9. Labour official was absent

Out of these, the most common reason (21 per cent of the adjournments) was that the judge was absent from court. This used to occur when judges were asked to go for an inspection, or they went on leave, or were transferred.

From Figure 2.2.3, we can see that the length of pre-trial (from chargesheet to trial) varied between 77 days to 4.2 years for all of IJM’s pending cases.

Table 2.2.5. Average Time Taken for Pre-trial Process

Year	Average length of pre-trial (years)
2013	4
2014	2
2015	1.2
2016	All these cases are still in pre-trial

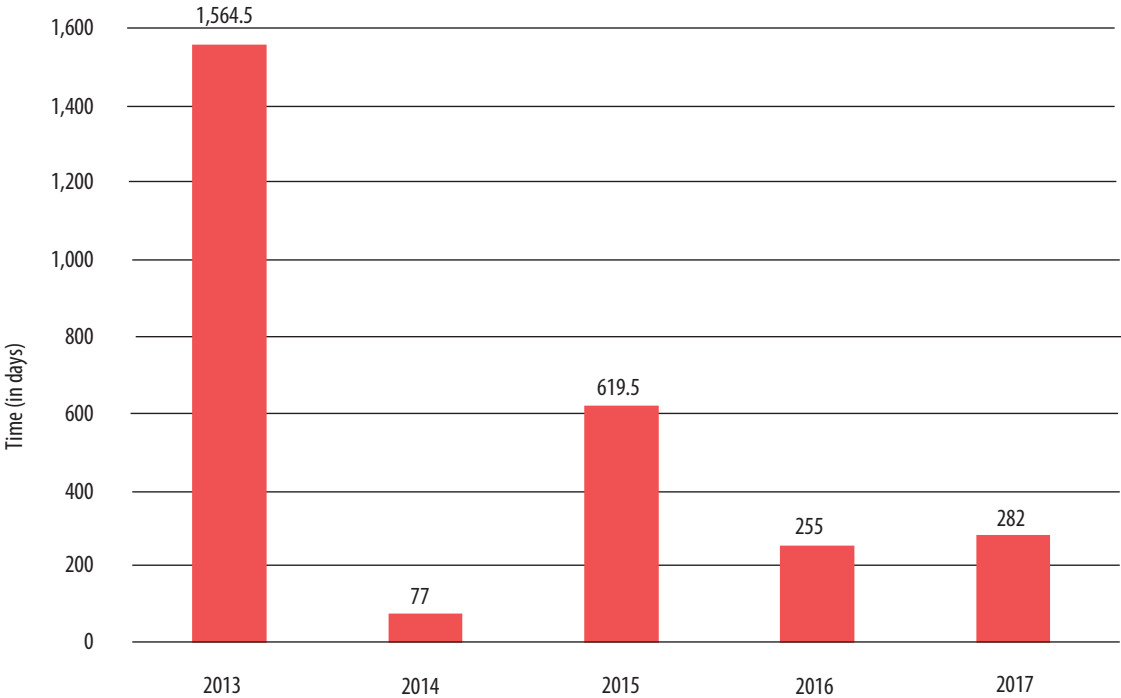
Source: Authors’ calculations.

While cases filed in 2013 took the most time, this has gradually decreased over the years.

Effects of Trial Delays

Once a bonded labour case reaches trial, the series of delays continue. When victims, who are in most cases landless daily wage labourers, are repeatedly summoned to the court due to multiple

Figure 2.2.3. Average Time Taken from Chargesheet to Trial (in Days)



Source: Author calculations.

adjournments, they and their children are often left to suffer with an empty stomach. They do not have sufficient resources to pay for the costs associated with attending trial. Some communities migrate together for work and so going to court causes the entire community to be held back and lose out on work. Hence, they prefer to not go to court at all.

Interestingly, some trial courts are generous in issuing witness warrants to tribal witnesses if they do not appear in the court, and the police are extremely duty-conscious in executing these warrants. In one case, a special court in a northern part of Tamil Nadu issued a witness warrant to a family living in Tuticorin, the southern part of Tamil Nadu. The police were more than happy to execute the warrant and travelled 600 km one way to arrest the husband and wife under witness warrant. The family took their children along

with them. After the trial, the police hastily put them on a bus, which went only halfway (to Madurai). This family did not have money to feed their children or money to continue the journey beyond Madurai. The desperate couple had to beg for food and for their bus fare in the Madurai bus station.

The situation for inter-state trafficking victims is even worse. Many of the victims rescued in Karnataka are trafficked from Odisha. Having been rescued by officials in Karnataka the victims are repatriated and rehabilitated in Odisha, however, FIRs and chargesheets are filed in Karnataka. Many such cases get closed and acquitted due to lack of victim evidence, because victims are unable and unwilling to make the journey to court in the destination state. On average, it takes a minimum of two days to reach Bengaluru and another two days to return.

Table 2.2.6. Estimated Costs of Travel and Allowances for Victim Witnesses from Odisha

Activity	Estimated cost (rupees)
Travel from Odisha	700 (350 each way, general train ticket)
Local travel	200 (bus fare)
Accommodation	1000 (500 per night, for 2 nights)
Food	400 (100 per day, for 4 days)
Total	2,300

Source: Authors' calculations.

In addition, each day spent on travelling and in attending court proceedings results in the loss of a daily wage. The estimated cost to a labourer from Odisha to appear in court is ₹ 854²⁶ (exclusive of travel, accommodation and food expenses). According to the minimum wage for brick making in Odisha, the labourer stands to lose ₹ 213.50 per day for four days.

The court and prosecution should have a victim-centric approach for the victims who are from downtrodden sections and are inter-state migrants. Currently, transformation has been observed with judges and magistrates in Karnataka in the way they conduct trials, especially when a victim witness comes

for trial. Even if the defence pleads for adjournment for cross-examination, the courts usually reject such adjournments or impose a cost of ₹ 350–500 from the defence to the victims. During an interview with a lawyer for the victim, the lawyer stated that ‘judges who are presiding trials this year in Sessions Court at Ramanagara and Bengaluru Rural have ensured that the defence do not seek unnecessary adjournments when the victim witnesses are present in court and ready for testimony’.

Sex Trafficking

Sex trafficking cases are characterised by delays and slow filing of chargesheets.

Table 2.2.7. Sex Trafficking Cases in Kolkata

Indicator	2013	2014	2015	2016
Percentage of cases where rescues are conducted within seven days from complaint*	100	100	100	100
Percentage of cases where it took one day or less from rescue to FIR**	100	100	100	100
Percentage of perpetrators arrested***	100	100	100	100
Percentage of perpetrators that spent 14 days or more in judicial custody#	100	100	100	100
Percentage of cases where it took 90 days or less from investigation to chargesheet##	67	100	50	100

Source: IJM Kolkata (17 cases).

Notes:

* The number of cases where days of complaint to rescue is within seven days/total number of cases in that year.

** The number of cases where days of rescue to FIR is one day/total number of cases in that year.

*** The number of perpetrators arrested/total number of perpetrators.

The number of perpetrators who spent 14 days in judicial custody/total number of perpetrators.

The number of cases where it took 90 days and less from FIR to chargesheet/total cases where chargesheet is filed.

Analysis: Due to the fact that only one agency is involved in the process of rescuing the victim and arresting the perpetrator (police), there are fewer delays in the early stages of sex trafficking cases in comparison to bonded labour cases. There are rarely delays between the complaint being received, the rescue taking place, and the FIR being filed. However, significant delays are still evident in the filing of chargesheets.

Institutional Challenges in Accessing Justice

Challenges Related to Inter-state Cases

Qualitative research on accessing justice for trafficking victims has highlighted that while NGOs have played an important role in supporting victims towards rehabilitation and restoration, there are a few NGOs involved in prosecution. The processes in handling interstate cases pose several problems for NGOs logistically and legally, ultimately affecting the outcomes of cases. Lack of collaboration and referrals between NGOs across states has been identified as a likely contributing factor in FIRs not being filed and cases not being pursued.²⁷ This cannot replace the need for protocols between states for coordination on interstate rescues, necessary funds and personnel,

standard operating procedures to handle victim repatriation to home states, their rehabilitation and follow up prosecution. The fact that presently India's policy for rehabilitation of bonded labourers is linked to conviction of accused, is detrimental to the sustained rehabilitation support victims of labour trafficking need. The slow and poor rate of conviction of offenders needs to be strengthened while delinking it from the rehabilitation needs of survivors and their families.

Public Justice System Response

The demands of law and order and the general trend in addressing 'more serious crimes' on a priority basis makes trafficking a low priority issue for the police. The police are often not trained or sensitised to the issue of bonded labour and trafficking, and do not treat the victims with the sensitivity required. Because of their status in society, victims are not extended adequate support and respect when they are in the police station or the court. Aspects of caste hierarchies, perception of the victims as deserving the offence owing to their social class or compulsions come into play in the process of accessing justice. While high violence and sexual abuse of victims can help gain some attention, courts are unable to treat these cases with the openness and sensitivity they require.

Non Co-operation from the Police

At times when a civil society organisation has information about a victim being forced into prostitution, the information is taken to the police. Often, the police are unwilling to conduct a rescue operation. The police either do not believe that the girl is being forced, or often, the police receive bribes from that brothel for their inaction. This becomes a major hurdle for organisations.

Lack of Police Infrastructure and Capacity

The police are often ignorant of trafficking laws and provisions, and therefore, do not know what to do when faced with a trafficking case. The police often do not have sufficient resources to investigate trafficking crimes, which leads to inadequate investigation.

Absconding Perpetrators

After getting bail, perpetrators often abscond to avoid punishment. This leads to the case stalling in court and the police not being able to trace them.

Ineffective Vigilance Committees

The BLSA provides for Vigilance Committees (VCs) to be formed to address the crime, however, the VCs do not meet regularly as they are mandated to do, and members of the VCs are often unaware of their responsibilities. The cost for the VC members to travel to villages is not borne by the government, leaving no incentive for the VCs to carry out their duties.

Multifaceted Challenges Faced by Shelter/ Rehabilitation Homes

Lack of funds is the biggest issue faced by shelter homes trying to rehabilitate trafficking victims. Due to paucity of funds, they are unable to carry out vocational training programmes and rehabilitation facilities for the girls, making it difficult to reintegrate them into society. Shortage of staff (well-trained

counsellors and officers) means that sometimes there is only one counsellor or officer in charge of more than 10–15 girls. This makes it difficult for them to cope and cater to the basic needs of every girl. Finally, the homes are unable to implement minimum standards of care for their girls. This leads to the girls not getting adequate rehabilitation facilities.

Exacerbated Injustices: Caste-based Response of PJS

The majority of bonded labour victims are from the SC and ST communities, and Section 3(1)(h) of the SC/ST Act can be applied to bonded labour cases.

Our legal system, including the police, is anti-Dalit and anti-poor. The death penalty laws' wrathful majesty, in blood-shot equality, deals the fatal blow on the poor not the rich, the pariah not the brahmin, the black not the white, the underdog not the top dog, the dissenter not the conformist.... The law barks at all but bites only the poor, the powerless, the illiterate, the ignorant.

Justice V.R. Krishna Iyer²⁸

Even though the quote mentioned relates to the death penalty, in reality it applies to the Dalits in all cases, whether they are a victim or an accused. The conviction rate for the offences under the SC/ST Act is abysmally low in Tamil Nadu.²⁹ Interestingly, this is one of the offences in which Part III of the Constitution (Article 17) is called to punish.

Often the quick fix solution for acquittal is to increase the punishment, but this ignores the fact it should be preceded by fair and efficient investigation, prosecution, and adjudication. Even though there are problems in our criminal justice system, the problem is unique for offences under the SC/ST Act due to institutional apathy.

Apathetic Adjudication

The SC/ST Act has a lot of sections that look victim-friendly, but there is a clear lack of implementation

in courts. The courts are very technical in their approach to adjudication of SC/ST offences, and the sad fact is that evidence is poor due to inadequate investigation and lack of good witness testimonies during the trial. Due to this, victims are denied justice by acquitting the accused. The poor conviction rate and impunity for the offenders suggests that a relic of the 1882 mindset (when the Indian Evidence Act was first enacted) is still lingering somewhere in the minds of Indian judiciary. The trial court judges need not wait for the police and prosecution to unfold the truth; the judges can pursue truth. Section 311 of Criminal Procedure Code allows the court to summon witnesses (if both the police and prosecutor fails to) and the judges are given the power to question any witness (under section 165 of Indian Evidence Act). All these measures are designed to promote 'just decisions'. Unless judges pursue truth, justice will be elusive.

Usually, the Constitutional Court is insulated from such prejudices. The observation of the Supreme Court in *Dr Mahajan's case*³⁰ is not an isolated incident. This liturgy of 'false case and hostile witness' is reverberating even in the trial courts and by the police. Until the judicial system mainstreams social justice, even if parliament drafts the most comprehensive laws, justice will remain a mirage for the socially excluded. Justice V.R. Krishna Iyer³¹ once said, 'A socially sensitised judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it.' This holds true for the most marginalised, SC and ST, who are trafficked and exploited as bonded labourers.

WAY FORWARD

This chapter has highlighted and analysed the difficulties that continue to present significant obstacles in the way of trafficking victims' access to

justice. Some recommended action points, for key stakeholders, that can enable access to justice for victims of human trafficking are listed further.

Government

1. Provide quick compensation and rehabilitation for the victims of human trafficking. The Supreme Court of India has emphasised the need for timely, simultaneously and effective rehabilitation of victims of bonded labour and noted that delays can result in conditions of re-bondage.
2. The government's commitment to prosecution of bonded labour cases needs to be coupled with a plan of action across states to improve PJS response and encourage state governments to report publicly on action taken to identify, release and rehabilitate bonded labourers, and prosecute offenders.
3. Reminders should be sent to state governments on various standard operating procedures to be followed in cases of BL, child labour, and CSE.³²
4. The state governments should build institutions and fund psychosocial care for the victims of human trafficking.
5. The government should cover reasonable expenses, when the survivors leave their job and home to assist the police investigation and attend the trial.
6. The state government should constitute, fund, and activate Vigilance Committees under the BLSA in every sub division and district.
7. Having more survivor-led events in order to bridge the gap between the government and the survivors.

Police

1. Proactive and victim centric approach in rescuing the victims of sex trafficking by the police.
2. Proactive and victim centric approach in identifying and rescuing the victims of labour trafficking by the District Administration and the police.

Legal Aid Authorities

1. Involve para legal volunteers from the DLSA to assist the victims in engaging with the PJS. Some of the steps could include preparing victims to depose in court truthfully, without fear, making efforts for vulnerable witness guidelines to be followed, and providing immediate assistance to victims in approaching police stations or 'Witness Protection Cells' under the Witness Protection Scheme, 2018 to file complaints when there is a threat from the perpetrators.
2. Accompany victims to all their court proceedings.
3. The DLSA should provide victims free legal aid.
4. There should be greater coordination between the DA, police, and the DLSA in assisting the victims.

Judiciary

1. Encourage the use of video conference facility to testify in the court rather than make them travel long days, especially for interstate victims.
2. The courts should create an active fund so that victims who are summoned to testify are given travel and accommodation allowances.

Media

1. Increased coverage by the media in order to highlight the scope and extent of bonded labour as a crime.

CONCLUSION

A number of laws in India exist to protect people against the crime of human trafficking. Our analysis shows that while survivor confidence in the PJS may be low, incremental improvements in the response and handling of complaints by district officials

and the police help create a virtuous cycle of more victim-centric support in terms of protection and raising awareness on the rights of survivors. It is time that all relevant stakeholders come together and work towards protecting the poorest and socio-economically backward sections of our society from crimes perpetrated against them.

Notes

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 11. Sections 10, 11, and 12, Bonded Labour System (Abolition) Act, 1976.
 12. Article 23, Constitution of India, 1950.
 13. Sections 366A, 366B, 370, 370A, 372, and 373, IPC.
 14. Report, Increasing Access to Justice for Marginalized People: GoI-UNDP Project, p. 6, available online at http://doj.gov.in/sites/default/files/Increasing-A2J_0.pdf (accessed on 30 November 2019).
 15. GoI – UNDP. Access to Justice Project Report, p. 4.
 16. See Sriparna Ganguly Chaudhary. 2019. 'The Winding Road to Justice in India', *Livemint*, 18 January, available online at <https://www.livemint.com/Opinion/pPyGzS0Y7PXmIqI9CBIaMJ/The-winding-road-to-justice-in-India.html> (accessed on 30 November 2019).
 17. Legal Services Authority Act. 1987. Sections 8 and 11.
 18. *Hussainara Khatoon and Ors v. Home Secretary*, State of Bihar, on 9 March 1979. AIR 1369, 1979 SCR (3) 532.
 19. See for example, Dasra. March 2018. *Tipping the Scales: Strengthening Systems for Access to Justice in India*, available online at <https://www.dasra.org/assets/uploads/resources/Tipping%20the%20Scales%20-%20Strengthening%20Systems%20for%20Access%20to%20Justice%20in%20India.pdf> (accessed on 30 November 2019).
 20. Under Section 161 of the CrPC, any police officer may inquire any person to determine the facts of the case. The police officer should inquire orally and then make a true written record of the facts.
 21. Most of the cases had rescues in the jurisdiction of Bengaluru Urban, Bengaluru Rural, Tumkur, Ramanagara and a couple of cases at Hosur.
 22. Cases from the IJM Delhi office were from a range of states including Bihar, Madhya Pradesh, Delhi, Rajasthan, Tamil Nadu, and Telangana.
 23. Advocates: Thomas Saravana, Ruth Anila, Acca Varghese Prabhu and Rajkumar. Social Workers: Venu Gopal and Solomon.
 24. In spite of this, there have been some encouraging (albeit relatively infrequent) stories of police officers who are sensitive in their approach to the victims.
 25. Here 'disposed cases' mean cases that ended in trial courts and it does not include the appeal period.
 26. This is based on raw data available within IJM in one of our cases.
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 32. See SOP Standard Operating Procedure for Identification and Rescue of Bonded Labourer and Prosecution of Offender, available online at <http://uplabour.gov.in/MediaGallery/standard%20operating%20procedures.pdf> (accessed on 12 December 2019); Standard Operating Procedure for Enforcement of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (September 2017), available online at <https://labour.gov.in/acts/standard-operating-procedure-sop-enforcement-child-and-adolescent-labour-prohibition-and> (accessed on 12 December 2019).



3

Institutional Injustice: Prejudices towards India's Transgender and Intersex Persons*

Arpita Biswas

INTRODUCTION

Case backlogs and judicial delay are widespread across all levels of the Indian judicial system. These delays often lead to economic and socio-political setbacks. Other setbacks of this system include excessive litigation costs and over-crowded prisons.¹ This is believed to lead to 'higher poverty rates, higher crime rates, and industrial riots'.²

Referring to India's 'weak' judiciary, Kohling addresses the added consequences of judicial delay. This includes 'languishing' undertrial prisoners, the quality of whose lives are severely impacted by the lack of adequate prison facilities and the nature of such delay. In addition, research shows that these systems specifically discriminate against marginalised groups.³

Raghavan states that prison systems in India have become a 'powerful tool' to control 'unruly classes' of people in order to maintain the status quo.⁴ While it is evident that prisons are over-crowded with disenfranchised groups of people, there is not much clarity on how these systems impact specific communities.⁵

With this in mind, in this chapter, I attempt to map the consequences of a 'weak judiciary' or judicial delay on the lives of India's transgender and intersex population. The transgender and intersex population in India have a long-standing history. The *hijra* community for instance, has been around for more than 4,000 years and members of the community co-habit within a certain familial structure.⁶ Often, members of the *hijra* community identify as transgender or intersex.⁷ I have used the term 'transgender and intersex community' in this chapter⁸ because a large majority of the litigants in the cases involved and the people interviewed identify as transgender or as members of the *hijra* or *kinnar* communities.

While researching this chapter, I noticed that there was a lack of data available on transgender and intersex lives in India. To track down such data, I filed a Right to Information (RTI) application with the National Crime Records Bureau (NCRB) enquiring about the number of undertrial convicted and detained prisoners who identified as transgender or of the third gender. The NCRB responded stating that such statistics were not available.

Available literature focuses on graphic instances of violence and police brutality on persons belonging to the transgender and intersex community. However, not much has been said about the manner in which transgender and intersex people interact with and navigate these systems. Without data or literature, it would be difficult to comprehend the impact of these systems on transgender people. Further, policy recommendations would ideally need to be supported by such data. This chapter attempts to add to the available literature.

DATA ON JUDICIAL DELAY

In this section, I analyse the nature of judicial delay and specifically the delay in cases involving transgender and intersex people.

Several cases and Law Commission reports have examined the status of judicial delay and have made recommendations for the timely disposal of cases.⁹ As far as 'time limits' are concerned, different sources stipulate different durations. The Supreme Court has attempted to set these time limits, but in 2002 in *P. Ramchandra Rao v. State of Karnataka*, the effort to establish time limits was discarded for flexible time frames.¹⁰ The Malimath Committee Report states that a case that goes on for longer than two years would be 'delayed'.¹¹ However, the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India*,¹² divided timelines and introduced

the concept of 'case flow management rules'. As per this system, each case is segregated under a separate 'track', based on the nature of the offence, the quantum of punishment, and the time that is likely to be taken for the completion of the suit.¹³ The NCMS Policy and Action Plan added on to the discussion and stated that there was an 'urgent need to make the Judicial System "five plus free" (that is, free of cases more than five years old)'.¹⁴

In the 245th Law Commission Report on 'Arrears and Backlog: Creating Additional Judicial (wo)manpower', different ways of determining judicial inefficiency were discussed. In this regard, the importance of time frames and case specific time tables were also discussed.¹⁵ The Law Commission states that time frames could be used to determine whether there was delay in a certain case.¹⁶ This would be determined by setting a 'mandatory time limit', beyond which a case would count as delayed.¹⁷ Further, the Law Commission states that case-specific time tables, which would be set by judges during the beginning of the proceeding is a better guideline and indicator of delay.¹⁸

For the purposes of this chapter, I analysed cases involving transgender and intersex people at the subordinate court level to determine how long such cases take to go through the judicial system. The cases I review were filed in Telangana, Delhi, and Rajasthan.

In addition, I have referred to certain figures and indices as a general indicator of delay. I have primarily relied on DAKSH's report on *Approaches to Justice in India*, which contains figures on the 'average pendency' for criminal trials at the subordinate court level in each state.¹⁹ I have also referred to the 'case clearance rate'²⁰ of criminal trials at the subordinate court level in each of these states. For each state, the delay and amount of time for which the cases remain pending have been analysed in a separate sub-section.

In addition to the general delay, it is also important to consider the stage at which each case is pending. The tables below display the number of years a case has been pending, or how many years it took for the case to be disposed in the states of Telangana, Rajasthan, and Delhi.

Telangana

Pravallika, a transgender woman, was murdered in early 2015 in Hyderabad.²¹ It was reported that she was ‘brutally lynched’ by a group of men, who also proceeded to rob her. The accused, Venkat Yadav, is reported to be a notorious serial killer who is known for harassing, abusing, and violating transgender

women. Following the murder of Pravallika, Yadav was arrested in February 2015, but was let out on conditional bail in October 2015.²²

In the following years, Yadav continued to extort and harass transgender women. Several women have alleged that Yadav ‘threatened the complainants and their kin, and intimidated them into withdrawing their cases against him’.²³ As of October 2018, it was reported that Yadav had still not been arrested. An online campaign was launched by Sampoorana, an NGO working on the rights of transgender people, to arrest Yadav.²⁴ As per publicly available information, six FIRs have been lodged against Yadav, the status of four of these have been produced in Table 2.3.1.²⁵

Table 2.3.1. Details of Cases Involving Transgender and Intersex People in Telangana

Case no./FIR no./Case name	Date of filing/ pendency	Legal provisions	Other details and comments
Case no. CC/0100850/2015 FIR no. 335/2014 - Gopalpuram Case name <i>P.S. Gopalpuram v. K Venkateshulu@Venkat@ Chinna and Ors.</i>	This case was filed on 8 July 2015 and has been pending for close to 4 years.	Section 324 (Voluntarily causing hurt by dangerous weapons or means), read with Section 34 (Acts done by several persons in furtherance of common intention) of the Indian Penal Code, 1860 (IPC)	Stage: Pre-trial: Issue of Bailable/Non-Bailable Warrant The hearings for this case have been ongoing since 2016. 12 orders have been passed. The majority of these orders indicate an impending non-bailable warrant to be issued against the accused parties. The orders indicate that none of the three accused have been present at any of the hearings at the same time.
Case no. CRLMP.BAIL/0303297/2018 FIR no. 943/2018 - Banjara Hills P.S. Case name <i>Sai Kumar Yadav v. P.S. Banjara Hills</i>	This case was filed in October 2018 and dismissed in November 2018.	Section 386 (Extortion by putting a person in fear of death or grievous hurt), IPC	Stage: Disposed

Case no./FIR no./Case name	Date of filing/pendency	Legal provisions	Other details and comments
FIR no. 0051/2015 - KPHB Colony	—	Section 302 (Punishment for murder), IPC	<p>Stage: Pending trial</p> <p>This case is currently pending trial. This is the case that was filed after Pravalika was murdered.</p> <p>The delay has been caused by the accused not appearing at the trial.</p>
FIR no. 0501/2015 - Sanath Nagar	—	<p>Section 323 (Punishment for voluntarily causing hurt),</p> <p>Section 324 (Voluntarily causing hurt by dangerous weapons or means), and</p> <p>Section 506 (Punishment for Criminal Intimidation), IPC</p>	<p>Stage: Disposed</p> <p>This case was disposed in February 2016 and resulted in a conviction.</p>

Source: Research by the author as of April 2019.

The average pendency (in years) of a criminal case at the subordinate court level in Telangana is 4.4 years²⁶ and the case clearance rate of criminal cases (close to 250 per cent)²⁷ is the highest amongst all states.²⁸

Rajasthan

In June 2014, Nagma, a *kinmar* person, and her companions were detained for allegedly assaulting a policeman in Ajmer.²⁹ While under custody, her

companions were physically abused, and she was sexually abused. After being produced before the magistrate, she was kept under judicial custody for four days with no access to healthcare.

While travelling from Bombay to Ajmer to attend hearings of the case alleged against Nagma and to follow up on the FIR, she was harassed and assaulted by two men on a motorbike, to allegedly deter her from pursuing the case against the policemen. Table 2.3.2 shows us the details of the FIR filed by Nagma against the police officers.

Table 2.3.2. Details of Cases Involving Transgender and Intersex People in Rajasthan

Case no./FIR no./Case name	Date of filing/pendency	Legal provisions	Other details and comments
FIR no. 73/2014 - Dargah Case name <i>State v. Vijay Singh Chaudhary</i>	This case was filed on 16 November 2016 and has been pending for close to 3 years.	Section 376 (Punishment for rape), IPC	Stage: Pre-trial: Framing of Charge Hearings have been on since 2016. At this stage of the trial, the charge has been framed and the next stage involves the appearance of the accused. While there is no definite time limit by which each stage of the trial must be completed, there seems to be considerable delay in this case.

Source: Research by the author as of April 2019.

The average pendency (in years) of a criminal case at the subordinate court level in Rajasthan is 3.4 years³⁰ and the case clearance rate of criminal cases (110 per cent)³¹ is on the higher side, compared to that of other states. The duration of pendency of this case is close to the average pendency of criminal cases in Rajasthan.³²

Delhi

The DAKSH Report on ‘Approaches to Justice in India’ has a comprehensive set of figures on the

pendency and disposal of cases at the subordinate court level in Delhi.³³ Since all the cases mentioned below have been disposed of, the average number of days to disposal, rather than the average pendency of cases, has been considered. Following the methodology used in the DAKSH report, the average number of days to disposal has been calculated by finding the difference between the date of filing and the date of disposal of all cases.

Table 2.3.3 shows us figures of cases involving transgender and intersex people in the Delhi subordinate courts.

Table 2.3.3. Details of Cases Involving Transgender and Intersex People in Delhi

Case no./FIR no./Case name	Date of filing/pendency	Legal provisions	Other details and comments
Session case no. 63/2014 FIR no. 200/2011 - Mangolpuri Case name <i>State v. Bobby Kinner</i>	This case was committed to the sessions court in 2013, and the judgment was pronounced in 2014.	Section 307 (Attempt to murder), Section 120B (Punishment of criminal conspiracy), and Section 201 (Causing disappearance of evidence of offence, or giving false information to screen offender), IPC	This case was disposed in approximately one year and nine months from the date on which it was committed to the sessions court. The average time taken to dispose sessions cases is two years. ³⁴

Case no./FIR no./Case name	Date of filing/pendency	Legal provisions	Other details and comments
Case no. Suit no. 186/2014 Case name <i>Sonu @Sophia v. Lallu</i>	The claim petition for this case, which related to a motor vehicle injury, was filed in November 2010. The hearing was held in September 2015, which is also when the judgment was pronounced. This case was disposed in close to 5 years.	Section 140 (Liability to pay compensation in certain cases on the principle of no fault), and Section 166 (Application for compensation), Motor Vehicles Act, 1988	This is far beyond the average time taken to dispose Motor Accidents Claims Tribunals Cases, which is 3.1 years. ³⁵
Case no. Crl. appeal no. 23/2011 Case name <i>Rani v. State</i>	The case was instituted in 2011, and the judgment was pronounced in 2011.	Section 34, Bombay Prevention of Begging Act, 1959	This case was disposed well within the average time taken to dispose Criminal Appeals cases, which is 8.5 months. ³⁶
Case no. Crl. appeal no. 85/10 Case name <i>Bablu @Sapna v. State</i>	The appellant was in police custody for three months, from 2010-2011. The appeal was presented in 2010, and the judgment was pronounced in 2014. This case was disposed in four years.	The Bombay Prevention of Begging Act, 1959	This is far beyond the average time taken to dispose Criminal Appeals cases, which is 8.5 months. ³⁷

Source: Research by the author as of April 2019.

Based on the data in Tables 2.3.1, 2.3.2, and 2.3.3, one can identify that while it not possible to conclusively say that transgender people face a higher degree of judicial delay compared to cisgender people, it is possible to conclude that there is a general quantum of delay in the proceedings.

The next part of this chapter analyses interviews conducted with lawyers and activists. These interviews help shed light on the reality of judicial delay and its impact on the transgender and intersex community.

PREJUDICE AND VIOLENCE FACED BY THE TRANSGENDER AND INTERSEX COMMUNITY

The biggest problems faced by the transgender and intersex community relate to discrimination and violence, perpetrated by state and non-state actors. The UNDP policy brief on 'Hijras/Transgender Women in India' demonstrates the forms of stigma and social exclusion members of the community face.³⁸ The exclusion is three-fold and includes 'exclusion from social and cultural participation',

‘exclusion from economic participation and lack of social security’, and ‘exclusion from political participation’. For the purposes of this chapter and with regard to the information available, we have divided the instances into societal prejudice and violence, prejudice and violence by the police, and judicial prejudice. This part also includes excerpts from interviews conducted with activists and lawyers working on the rights of the queer community, along with the people who have been on the receiving end of prejudice or violence.

Societal Prejudice, and Violence

As mentioned earlier, nation-wide statistics on crime rates or violence faced by the transgender and intersex community are not available. According to a survey conducted by an NGO called Swasti Health Resource Centre, four out of 10 transgender people have experienced sexual abuse.³⁹ This study was conducted in Maharashtra, Tamil Nadu, and Karnataka, and studied instances of ‘emotional violence’, ‘physical violence’ and ‘sexual violence’.⁴⁰ In addition, the UNDP policy brief states that in a study conducted amongst the MSM (male-sex-male) community and members of the *Hijra* community, 46 per cent reported instances of being raped; 44 per cent reported instances of physical abuse; 56 per cent reported instances of verbal abuse; 31 per cent reported instances of being blackmailed for money; and 24 per cent reported instances in which their lives were under threat.⁴¹

There is also general, unquantifiable stigma that members of the community face from society. This aspect of social exclusion is discussed in the UNDP Report on *hijras* and transgender women:

Most families do not accept if their male child starts behaving in ways that are considered feminine or inappropriate to the expected gender role. Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing up like a girl or

woman. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child.⁴²

Prejudice and Violence from the Police

The police are a constant source of violence and harassment for the community. Legal instruments, like Section 377 of the IPC, the Bombay Prevention of Begging Act, 1959 (now repealed), the Karnataka Police Act, and the Telangana Eunuchs Act have been used by the police to harass, violate, and abuse transgender and intersex people.⁴³

In 2014, the Bangalore Police ‘rounded up’ 200 transgender people, often breaking into houses to apprehend them, and sent them away to beggary colonies. At the time, this act was condemned as ‘illegal, brutal and unconstitutional’.⁴⁴ The Karnataka Police Act and the Telangana Eunuchs Act also allows the police ‘to exert force on transgender population and subject them to arbitrary arrest, detention, extortion or abuse’.⁴⁵

While collecting data for this chapter, I conducted interviews with a *kinnar* person in Delhi (A), who has been harassed by the police multiple times and has also had experiences with detention, most recently in September 2018. This was the second instance of such an occurrence. A stated that the police would physically violate her companions and this would occur on the streets of Connaught Place in New Delhi. According to A, they would also be chided and harassed for attempting to speak to people, and for attempting to beg. They were led to believe that the attempts at begging are what led to detention at both times.

In both instances, they were detained for a few hours, and not overnight. They were physically and verbally abused as well. According to A, abuse from the police was not a result of any specific behaviour of A or her companions but was unprovoked.

Indeterminate arrests and abusive behaviour from a state authority can lead to members of the *kinnar* community policing themselves further. A also stated that abusive and unchecked behaviour from the police was a deterrent to pursuing their traditional means of livelihood. A primarily resorts to attending *badhaais*, but she has stated that begging and sex work are not options due to harassment by the police and the general public as well. This is despite the Delhi High Court decriminalising begging. It was implied that all their means of livelihood, especially ones that the community has relied on for centuries, are kept out of reach from members of the *kinnar* community.

Transgender people are also seemingly attacked for their participation in public life or because of their visibility in the public eye. Due to the unending nature of this violence, there is further deterrence to the work they are allowed to undertake, and it also proves to be detrimental when they are begging.

Judicial Prejudice

To gain insight into the experiences of transgender people while interacting with the judiciary and the impact of judicial delay, I reached out to lawyers and activists working on the rights of transgender and intersex people across the country. In this section, interviews with Grace Banu, an activist who works on the rights of Dalit and transgender people and is affiliated with Trans Rights Now Collective, and Amritananda Chakravorty, a practicing lawyer in Delhi, who specialises in queer issues, have been analysed.

Judicial Indifference

As a practising lawyer who has worked on several cases relating to the rights of transgender people, Amritananda stated that she had witnessed her clients experiencing prejudice and discrimination from judges.⁴⁶ In one case, a transgender man had

filed a habeas corpus petition to secure the release of his partner, who had been held captive by her family due to the nature of their relationship. During the proceedings, the judges commented on the nature of their relationship, stating that it may have been lawful but it was not ‘socially acceptable’. Further, they asked the transgender man to ‘not take advantage’ of his partner and stated that she was in a ‘vulnerable position’.

She also stated that government agencies and judicial bodies have not ‘interacted’ with the transgender and intersex community, and therefore, lack the sensitivity needed to adequately address the rights of those affected.

Grace Banu expressed similar concerns, stating that the process of accessing judicial services was ‘very difficult’ and finding lawyers who understand the transgender experience was a tedious process.⁴⁷ In one instance, when Grace and her friends filed a PIL in the Madras High Court demanding separate reservation for transgender people for education and employment, they had to ‘sensitise’ the lawyer and explain their situation before he filed the case.

She also stated that in certain cases the impact of delay was ‘mentally and physically disturbing’. In one instance, a suit was filed by a transgender person who had appeared for a government exam which had separate cut-off marks for transgender applicants. Despite scoring high marks, they could not be placed since the cut-off had not been announced. This case has been pending for more than a year, the impact of which is grave, since there is little alternate recourse available.

This form of prejudice also leads to a certain amount of judicial indifference, where judges are insensitive to the unique issues in the transgender community. Amritananda implied that judges often ‘invisibilise’ threats of violence in cases where transgender people require protection from their families. This indifference adds to judicial delay as well.

An instance of ‘invisibilisation’ involved one of Amritananda’s clients, a transgender sailor who had served with the navy for seven years and was terminated after coming out as transgender. Since serving with the armed forces resulted in accruing a specific set of skills, the client, who had not completed their formal higher education, found it difficult to find alternate employment opportunities after being terminated. Amritananda implied that this resulted in an erasure or ‘invisibilisation’ of their professional accomplishments.

Lastly, she stated that the judicial system was not ‘built to incorporate a transgender person’s life’. Aside from the judiciary, ‘every level of the government, how spaces are envisaged and how recruitment processes are envisaged’ also implied that the lives of transgender and intersex people were not taken into consideration at any stage.

Structural and Administrative Difficulties

Both interviewees commented on the forms of structural and administrative difficulties transgender people face while navigating the judicial system, and the manner in which these issues exacerbate judicial delay.

Amritananda stated that the first interaction a transgender person has with the judiciary is that of filing a case. At this stage, some of her clients have been unable to get their affidavits notarised. These affidavits have requirements of stating the birth assigned at gender, and in some instances, notaries have ‘created problems’ if their identity cards were not congruent with their perceived gender. These hindrances at the early stages of filing a case also lead to delays in the litigation process.

Lack of proper identification documents, which identify the preferred gender of people, has proven to be a hindrance in matters related to education, employment, and livelihood,⁴⁸ personal finances, and healthcare access as well.⁴⁹ Referring back to Table 2.3.3, it was noticed that most case names

from the Delhi subordinate court mention the birth name, along with the chosen name of the petitioners/respondents. It is unclear whether this practice is necessary and points to issues with gender and documentation which is discussed further in the following section of this chapter.

IMPACT OF JUDICIAL DELAY

Cost of Judicial Delay

Amritananda specified that for most transgender and intersex people, being able to visit courts was difficult, and if they did manage to make it ‘they (would) need all their relief now’.

This is supported by the fact that a large number of transgender and intersex people work in the unorganised sector, mostly making ends meet through begging, attending *badhaais* and through sex work.⁵⁰ Any amount of judicial delay, or follow up, implies a massive economic setback as well, and most transgender and intersex people have no alternate recourse.

Aside from those who choose to seek recourse with the judiciary, there are those who do not have the option or the time. Amritananda referred to her clients as the exception to the norm (having chosen litigation), stating that most people would rather find alternate means of employment once they had been displaced from their original jobs. She stated that it was only in instances of serious threats to life and security that most people would choose to go to court.

Amritananda reiterated that being able to work with lawyers who understood the issues faced by transgender and intersex people was difficult, and trials are cost-prohibitive too.

Further, judicial delay keeps lives on hold, and leads to difficulties in finding employment opportunities.

In the instance of the transgender person who was terminated from the navy, Amritananda stated that the petitioner had spent the entirety of their professional career with the armed forces and did not get a chance to pursue a higher education and thus were not qualified to pursue other career choices. In the aftermath of the judicial proceedings, their case gained public attention, which made it harder to acquire a job. The proceedings are under way and according to Amritananda, would still take about 6–8 months to be completed. Currently, this petitioner has had to go back to their town, where they are ostracised for their identity and have had to face added stigma.

Reluctance to Approach the Judiciary

It is important to note that discrimination within the community could also lead to a reluctance or inability to approach the judiciary. Grace Banu stressed the fact that casteism exacerbated the issues faced by the transgender community, stating that even amongst the community, only those who were upper caste had access to the judiciary. She pointed out that a majority of the landmark proceedings on queer rights in India were dominated by upper caste clients and lawyers.

RECOMMENDATIONS TO ADDRESS JUDICIAL DELAY

One of the major hindrances for transgender and intersex petitioners/respondents seems to be the insensitivity of lawyers and judges alike. As mentioned earlier, transgender and intersex clients often have to sensitise lawyers themselves, which poses as an added burden to a judicial process that is tedious to begin with. Gender sensitisation or sensitivity-based training for all legal personnel would play an important role in this regard.

An easier way to change the ‘gender’ requirement in official documentation or a less stringent requirement for ‘gender’ would also be significant.

Lastly, addressing general issues such as ‘administrative inefficiency, infrastructural deficits and human resource deficits’ would ensure that transgender and intersex people would not have to make multiple court visits and would have quicker access to justice.⁵¹

CONCLUSION

Based on the interviews I have conducted, it is noticeable that the basic process of litigation takes a toll on members of the community. Considering the general length of judicial proceedings in India, it is important to note that there is a need to ameliorate judicial delay; however, there is a more urgent need to sensitise lawyers and judges. As mentioned earlier, their prejudice often gets in the way of timely access to justice. If left unchecked, members of the transgender and intersex community would be vulnerable to further discrimination and violence.

In this regard, it is also important to consider the ‘invisibilisation’ of transgender people. This invisibilisation is evident from the instances of improper identification techniques and the erasure of professional accomplishments of the armed forces personnel post-transition. The erasure of transgender lives and identities, largely by other members of the LGBT+ community, has been well-documented.⁵²

To fight erasure, there is a need to include transgender and intersex people at every stage of decision-making. There is also a need for inclusive policies and reservations, similar to the PIL being heard in the Madras High Court. The Madras High Court recently issued a notice to the State of Tamil Nadu in a PIL demanding ‘horizontal’ reservations.⁵³ Activist Grace Banu filed this PIL with the Madras

High Court, demanding ‘horizontal reservations’ as opposed to ‘vertical reservations’, which is currently the form of reservations available for the ‘third gender’ in the state.⁵⁴ In 2015, a government order created a vertical reservation for transgender people by including them in the ‘Most Backward Classes’ category. However, Grace’s PIL challenges this system of reservation, as it is most likely to overlook the unique challenges faced by members of the community and would also lessen their chances of gaining access to employment/educational opportunities.

Lastly, while it is important to acknowledge and combat gender-based discrimination and violence, it is equally important to acknowledge that these issues do not exist in isolation from other rights related to caste, class, and religion. Going forward, it is important to consider whether the benefits that accrue within the queer community are merely for a select few or whether they are accessible to a wider group of people.

Notes

- * In addition to the people and organisations acknowledged and cited in the chapter, I would like to thank the following organisations for their support and guidance: Point of View (Mumbai), Sambhabona (Kolkata), Queerala (Kerala), ATMA (Manipur) and Nazariya LGBT (Delhi). I would also like to thank Sanjay Suraneni for his help with tracking down cases in Telangana.
1. Wolfgang K.C. Koehling. 2000. ‘The Economic Consequences of a “Weak Judiciary”: Insights from India’. Centre for Development Research, University of Bonn.
 2. Koehling, ‘The Economic Consequences of a “Weak Judiciary”’. This study focusses on judicial systems in 25 states and union territories from 1971 to 1996, and ‘defines the quality of the judiciary in terms of: (a) its speed in deciding trials; and, (b) the predictability of the trial outcome’.
 3. *The Wire*. 2019. ‘One in Every-Three Under-trial Prisoners in India is Either SC or ST: Study’, *The Wire*, 20 January, available online at <https://thewire.in/rights/one-in-every->

- three-under-trial-prisoners-in-india-is-either-sc-or-st-study (accessed on 24 January 2019).
4. Vijay Raghavan. 2016. ‘Undertrial Prisoners in India: Long Wait for Justice’, *Economic and Political Weekly*, 51(4):17–19.
 5. Irfan Ahmed and Md. Zakarai Siddiqui. 2017. ‘Democracy in Jail: Over-representation of Minorities in Indian Prisons’, *Economic and Political Weekly*, 52(44): 98–106.
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 7. United Nations Development Programme. 2010. ‘Hijras/ Transgender Women in India: HIV, Human Rights and Social Exclusion’, India: United Nations, 8–10. available online at http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf (accessed on 3 May 2019).
 8. The reason I did not use the term ‘hijra’ or ‘kinnar’ throughout the chapter is because that would limit the scope of the findings to a specific community and would also exclude other people interviewed for this chapter. I have also not used a broader term like ‘non-normative gender identities’ because that would include anyone who does not exclusively identify as cisgender and may exclude cisgender intersex people as well. This would not be in line with the people interviewed and the data studied for this chapter. Since I would like the findings to be applicable to a larger sub-set of non-normative gender identities, I have used the term ‘transgender and intersex’. Further, in the *NALSA v. Union of India* (W.P. Civil No. 604 of 2013) judgment passed in 2014, the Supreme Court of India recognised the ‘third gender’, which is an umbrella term. Using this term would also not be ideal, since the text of the judgment has several different definitions of the ‘third gender’. These definitions are laid down in paragraph 11 of the judgment.
 9. There are over 10 reports that analyse the causes of judicial delay and make recommendations as well. They are available at lawcommissionofindia.nic.in.
 10. *P. Ramachandra v. Union of India*, (2002) 4 SCC 578 as cited in Law Commission of India, *Report No. 245: Arrears and Backlog: Creating Additional Judicial (wo)manpower*, 5–6.
 11. Ministry of Law. 2003. *Committee on Reforms of the Criminal Justice System (Malimath Committee)*. New Delhi: Government of India, available online at https://mha.gov.in/sites/default/files/criminal_justice_system.pdf (accessed on 3 May 2019).
 12. *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344.

13. In this case, criminal trials relating to 'capital punishment, rape and cases involving sexual offences or dowry deaths' were to be segregated into Track I and these cases were to be completed in nine months.
14. National Court Management Systems. 2012. *Policy Action Plan*. New Delhi: Supreme Court of India, available online at <https://www.sci.gov.in/pdf/NCMSP/ncmspap.pdf> (accessed on 3 May 2019).
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17. Law Commission of India, *Report No. 245*.
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20. Number of cases disposed in a particular year divided by the number of cases filed in that year multiplied by 100.
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24. Scroll.in, 'Online Campaign Urges Hyderabad Police'.
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26. DAKSH. 2018. 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts', *Approaches to Justice in India*, Figure 8, p. 98.
27. DAKSH, 'Deconstructing Delay', Figure 19, p. 106.
28. Apart from the time taken by these cases to go through the judicial system, the larger concern is the fact that Venkat Yadav is still absconding. Regardless of the case at Sanath Nagar resulting in a conviction, reports from 2018 suggest that Yadav is still out on the conditional bail that was granted to him in late 2015. It has also been reported that after he was granted bail, he went on to harass family members of the complainants, while attempting to force them to withdraw complaints. See Scroll.in, 'Online Campaign Urges Hyderabad Police'.
29. Dhamini Ratnam. 2014. 'Ground Report: Crime and Punishment', *LiveMint*, 5 December, available online at <https://www.livemint.com/Leisure/5XCUSYRBJYDccUROFjs4bM/Ground-Report-Crime-and-punishment.html> (accessed on 3 May 2019).
30. DAKSH, 'Deconstructing Delay', Figure 8, p. 98.
31. DAKSH, 'Deconstructing Delay', Figure 19, p. 106.
32. DAKSH, 'Deconstructing Delay', p. 98.
33. DAKSH, 'Deconstructing Delay', pp. 100–103.
34. DAKSH, 'Deconstructing Delay', Figure 13, p. 101.
35. DAKSH, 'Deconstructing Delay', Figure 13, p. 101.
36. DAKSH, 'Deconstructing Delay', Figure 13, p. 101.
37. DAKSH, 'Deconstructing Delay', Figure 13, p. 101.
38. United Nations Development Programme. 2010. 'Hijras/ Transgender Women in India: HIV, Human Rights and Social Exclusion', India: United Nations, pp. 8–10, available online at http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf (accessed on 3 May 2019).
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45. *The Wire*, 'Decriminalising Begging Will Protect Transgender'.
46. Amritananda Chakravorty, Advocate (Delhi, India, 19 December 2018)

47. Grace Banu, Activist, Trans Rights Now Collective (Delhi, India, 24 December 2018).
48. For instance, a lack of proper identification for transgender women in Rajasthan led to difficulties in a skill-training programme.

In an effort to provide transgender women with an alternative means of livelihood, the Rajasthan Skill and Livelihoods Development Corporation (RSLDC) started a skill-training programme in 2017. This programme could not take-off however, due to 'problems ranging from (lack of) funds to identity cards for transgender people'. Out of 22,000 people in the state, only 350 had identification cards which specified that they were transgender. Most transgender women identified as 'female' on their identity cards. The enrolment and registration system for this scheme was based on Aadhaar verification, which proved to be difficult due to a lack of proper identification. This was also supplemented by the fact that several transgender people did not have identification cards because of migration. In this instance, the RSLDC chose to relax the requirement of Aadhaar based verification, for a short period of time.
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52. Viviane Namaste. 2000. *Invisible Lives: The Erasure of Transsexual and Transgendered People*. Chicago and London: University of Chicago Press.
53. PTL. 2019. 'HC Notice to TN Govt. over Reservation Policy for Transgenders', *Business Today*, available online at <https://www.businesstoday.in/pti-feed/hc-notice-to-tn-govt-over-reservation-policy-for-transgenders/story/325169.html> (accessed on 3 May 2019).
54. The case of *Union of India v. National Federation of the Blind and Ors.* (Civil Appeal No. 9096 of 2013) lays down the difference between 'vertical' and 'horizontal reservations':

Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the reservation for categories such as persons with disabilities and ex-servicemen is called horizontal reservation. Horizontal reservation cuts across vertical reservation (in what is called interlocking reservation) and person selected against the quota for persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/General candidates depending upon the category to which they belong in the roster meant for reservation of SCs/STs/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with disabilities and out of two persons with disabilities appointed, one belongs to a Scheduled Caste and the other to general category then the disabled SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate against unreserved point in the relevant reservation roster.



Court Efficiency and Business Outcomes: Measuring the Performance of District Courts

Manaswini Rao

4

INTRODUCTION

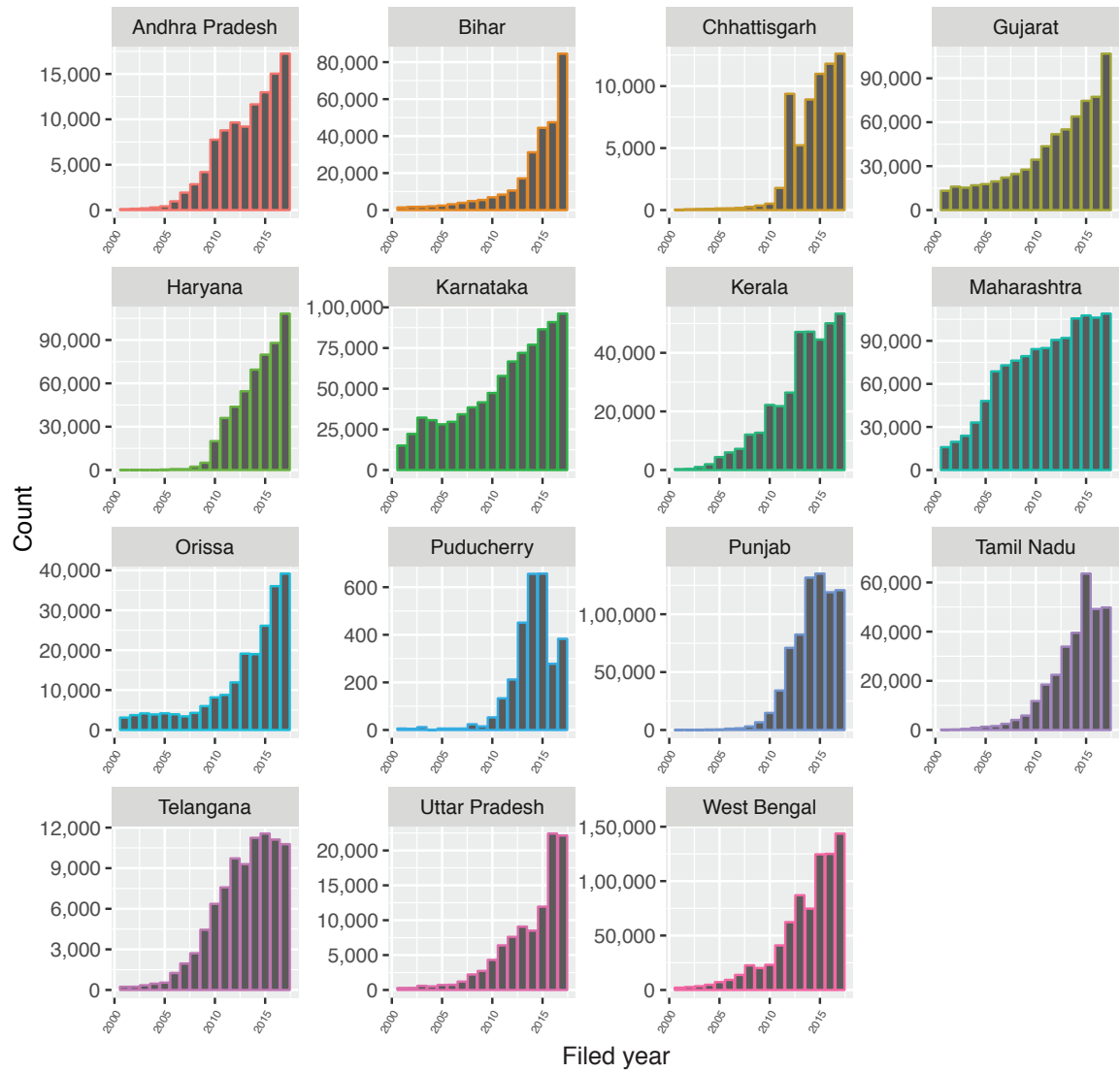
Theoretical literature in economics has emphasised the role of institutions in promoting economic development.¹ As a society develops and becomes complex, informal institutions start playing a complementary role to formal institutions that become more central. Codified rules of governance and transactions become important as the relationship between societies and organisations increase. The judiciary, in its role as an enforcer of rights and contracts, is responsible for maintaining the rule of law. Presence of rights—including property rights—frees up one's own resources from defending their interests, which can be better allocated or invested in making improvements to their production processes. For example, having strong property rights reduces the time devoted to guard labour and increases employment (and thereby welfare) as found by Field² in her study of changes in land titling laws for slum dwellers in Peru. Second, as an enforcer of contracts, an efficient judiciary is likely to be more important for formalisation of industrial and service sector activities in large economies, particularly leading to specialisation and driving innovation. Consequently, judicial inefficiency may force production into the informal sector or give rise to intermediaries driving up transaction costs.³

Earlier empirical work used cross-country variation in institutional structure, including the judiciary^{4,5,6}, to identify the relationship between institutions and economic development. Over time, researchers have used increasingly available sub-national data^{7,8,9,10}, to examine the effects on specific markets, mainly the credit markets. These papers find that well-functioning judicial institutions increase credit availability at lower rates on an average but can also lead to distributional concerns in the presence of credit supply constraints where these benefits are only enjoyed by large businesses.

In this chapter, I examine the nature of judicial institutions in India—specifically, district courts—to uncover their functioning at the smallest level that has a plausible bearing on the functioning of businesses. I use the detailed and novel data from the e-courts system across 195 District and Sessions Courts to construct measures of court performance at the district level for each year between 2010 and

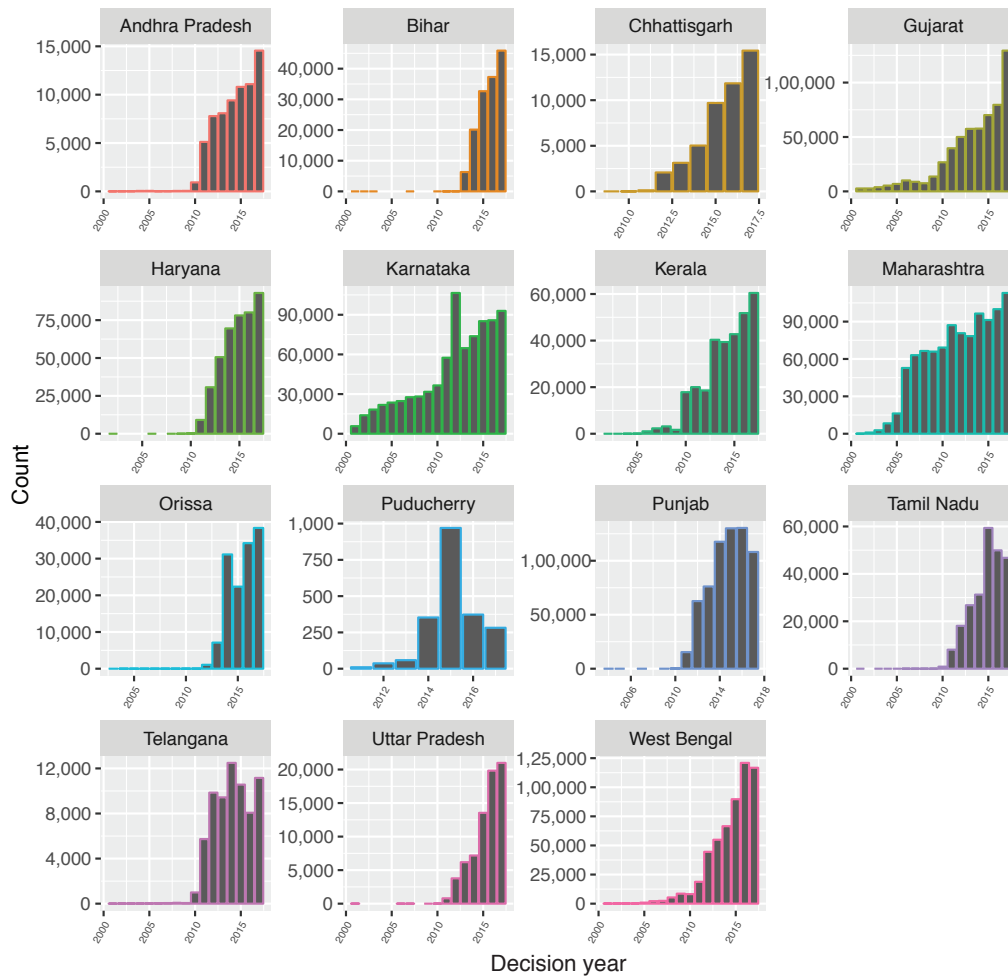
2018. Figures 2.4.1 and 2.4.2 shows the availability of data through histograms. A sharp increase in the number of cases filed and disposed starting from 2010 can be seen, although there are some variations between the states. For example, Karnataka and Maharashtra have data on cases filed and disposed in the years before 2010, whereas for many others, these start from 2010.

Figure 2.4.1. Data Availability (By Year of Filing)



Source: Author's calculations.

Figure 2.4.2. Data Availability (By Year of Disposal)



Source: Author's calculations.

Notes: Above graphs show the histograms of cases by year of filing and year of disposal in this study's e-courts sample database. From these, I infer the correct period for analysis is between 2010 and 2018, when the universe of data from court functioning is available.

Using this data, I present the statistical relationship between court performance and business outcomes. While there has been considerable attention given to the issue of large pendency in Indian courts in policy and media debates, there has been little exploration and discussion on the consequences of pendency. DAKSH's 'Access to Justice Survey' (2016)¹¹ reports that substantial costs are borne by private individual

litigants—around ₹ 500 per day on travel to courts and ₹ 850 to 900 in the form of forgone wages. The cost to businesses and economy, on the other hand, is hard to estimate and could be even larger. This estimation is hard because the channels linking court performance and business outcomes could be both direct (for litigating companies) as well as indirect, in the form of overall business environment, trust in

institutions, and belief in the enforcement of rights and contracts.

I estimate this relationship by examining the business outcomes—namely, annual revenue from sales, annual wage bill, annual profits adjusted for inflation, and annual legal expenses—of all companies incorporated before 2010,¹² and registered in the same location as the district court. Prowess dx academic database published by the Centre for Monitoring Indian Economy (referred to as ‘Prowess’ hereafter), covers annual financial and other performance data on 49,200 companies registered under the Companies Act, 1956. While companies may operate in many more locations than their registered headquarters, the data allows me to only match at this level. Considering that the distribution of all businesses in India leans heavily towards the small firms^{13,14} operating mainly in one location, this strategy seems reasonable. Therefore, my dataset allows me to comment on the combined (both direct and indirect) relationship between court performance on the sample of businesses with the same registered location.

I briefly summarise the findings before discussing them in detail below. First, court performance is not a monolith but comprises many dimensions, of which I am only able to present a few. These are average case duration—which is the life span of a case at the time of disposal; court level disposal rate—which is the ratio of cases disposed relative to active case load (pending cases + new institution); and dismissal rate—which is the proportion of cases disposed that are dismissed. Future research can focus on creating an index of court performance that includes these different components with appropriate weights. Second, I show that there exist patterns of lagged association between business outcomes and court performance; that is, outcomes move one to two years post the movement observed in court performance. Since I include all companies co-located as the court district and not just the litigating ones in my analysis, the lag is understandable, similar to lagged response

to macro-economic variables. I break the patterns down by smaller geographic units and show that they generally hold, except in some cases. Finally, I add caveats to the findings, that they should not be construed as causal, since more research is required to establish the causal link. Having said so, the patterns do speak of the importance of district court performance on business outcomes. Given the heterogeneous associations across states and districts, policy response should be tailored to the local context, beginning with experimentation and pilots before embarking on large-scale reforms.

CONTEXT AND DATA

Judiciary in India is a three-tier unitary system, with the Supreme Court at the apex followed by High Courts at the state level and finally first instance courts at the level of a district and below. My research question concerns the performance of the District and Sessions courts, which are typically the first point of contact for filing cases involving firms, determined by monetary and geographic jurisdiction of the case.

Well-functioning judicial institutions feature as one of 10 key indices in the ‘Doing Business’ indicator developed by the World Bank, where each index pertains to a specific feature of an economy important for the functioning of businesses. These include aspects of the regulatory environment and the functioning of the bureaucracy, including procedures and costs involved in starting a new business¹⁵ as well as measures of judicial quality, such as contract enforcement, resolving insolvency, and protecting minority stakeholder interests. One can also argue that a well-functioning judiciary also has indirect effects—for example, through credit markets that require effective contract enforcement to address the twin problems of adverse selection and moral hazard.

India has consistently ranked low in overall ranking as well as ranking within the specific area of

contract enforcement. Even as the overall ranking has miraculously jumped from 142 in 2014 to 77 in 2018, the ranking under contract enforcement continues to remain poor. India was ranked 163 in 2018, only better than Sri Lanka, Afghanistan, and Bangladesh in the region.¹⁶

I construct the dataset on the court functioning by scraping publicly available case records from 195 administrative districts (see Table 2.4.1) on the e-courts system,¹⁷ detailing case level metadata as well as proceedings from each hearing.¹⁸

Table 2.4.1. Study E-Courts Sample District Coverage

State	Districts in sample	Total districts in state	Fraction (districts)
Andhra Pradesh	6	13	0.46
Bihar	17	39	0.44
Chhattisgarh	6	19	0.32
Gujarat	21	26	0.81
Haryana	16	21	0.76
Karnataka	22	30	0.73
Kerala	11	14	0.79
Maharashtra	16	35	0.46
Odisha	17	30	0.57
Punjab	17	20	0.85
Tamil Nadu	27	32	0.84
Telangana	3	10	0.3
Uttar Pradesh	4	71	0.06
West Bengal	13	19	0.68

Source: Author's calculations.

Notes: Total districts from 2011 Census. The number of districts has changed since but the number of District and Sessions Courts in my sample and their jurisdictions haven't changed since 2011. Note that the sample takes into account formation of the new state of Telangana from Andhra Pradesh in 2014, as reflected in the overall e-courts database. However, the number of districts remain unchanged, with 10 districts of undivided Andhra Pradesh coming under Telangana.

From the case level dataset, I build measures of court performance, namely case duration, and disposal rate. Case duration is measured as the average life of a case by year of disposal, that is, the average life span of cases that are disposed in a given year. Disposal rate is the ratio of number of cases disposed relative to total active cases (pending and newly instituted) in a given year. One could construct additional court speed measures, but I restrict my attention to these two in this chapter. Additionally, I present a plausible measure of court quality—the proportion of cases disposed as a result of being dismissed on

account of procedural or substantive reasons. This measure is constructed using the details contained in the variable—‘nature of disposal’—as recorded on e-courts. A case can be disposed on many accounts, including final judgment upon the completion of trial or dismissal at any stage prior to the completion of full trial typically on procedural grounds, such as lack of evidence, absence of either of the parties for an extended period, or conciliation between the parties, etc. Therefore, I view dismissals as an indicator of plausible improved quality, especially in instances of false claims or out-of-court settlements.

For business outcomes, the Prowess dataset represents over 60 per cent of the economic activity in the organised sector in India, which although a small subset of all industrial activity, accounts for about 75 per cent of corporate taxes and 95 per cent of excise duty collected by the Government of India.¹⁹ I focus on business performance variables that include annual revenue from sale, wage bill, legal charges, and profits adjusted for inflation. The choice of these variables is driven by theoretical models linking institutional environment and firm performance built on Besley and Persson²⁰ and Lilienfeld-Toal *et al.* (2012). The basic idea stems from the view that most businesses are either revenue or profit optimisers. They choose capital and labour as inputs subject to constraints arising out of various markets, institutional, and informational asymmetries. Court performance is modelled as an institutional constraint that limits their ability to utilise optimal levels of inputs for production relative to the unconstrained situation. Therefore, I focus on these measures in this chapter, in addition to legal charges, which is a measure of the direct costs borne by companies to address the institutional constraints including fees paid to legal advisors and law firms.

I exclude some large urban agglomerations, including Delhi and Mumbai, from the sampling to isolate the influence of agglomerative forces that could plausibly affect court capacity in the first place. This yields 13,298 companies in the Prowess database with registered offices in the study's district sample, described in Table 2.4.2 below. The table presents the mean and standard deviation²¹ of the variable listed on the left-hand side across the sample of districts in my study.

A large share of the companies are privately owned (75 per cent), publicly listed (64 per cent), and in non-finance sector (79 per cent). Among sectors represented, 43 per cent are in the manufacturing sector, 30 per cent in business services (of which a large share is financial service companies), and 15 per cent in trade, transport, and logistics sector.

In the next section, I present the different court performance measures as well as look at the association between court performance and business outcomes over time.

Table 2.4.2. Distribution of Companies in Study Sample

	Mean	Standard deviation
Number of companies per district	1,854.135	1,946.777
Company age (years)	27.996	18.818
Entity type:		
Private limited	0.353	0.478
Public limited	0.641	0.480
Government enterprise	0.000	0.017
Foreign enterprise	0.000	0.012
Other entity	0.006	0.076
Ownership type:		
Privately owned Indian company	0.750	0.433
Privately owned foreign company	0.025	0.157
State government owned company	0.015	0.122
Central government owned company	0.008	0.091
Business group owned company	0.201	0.401
Finance versus non-finance:		
Non-finance company	0.789	0.408
Non-banking finance company	0.208	0.406
Banking company	0.003	0.053
Broad industry:		
Trade, transport, and logistics	0.150	0.357
Construction industry	0.054	0.226
Business services	0.300	0.458
Commercial agriculture	0.031	0.173
Mining	0.033	0.179
Manufacturing	0.432	0.495
Companies in study sample	13298	
Districts without companies in Prowess	34	

Source: Author's calculations.

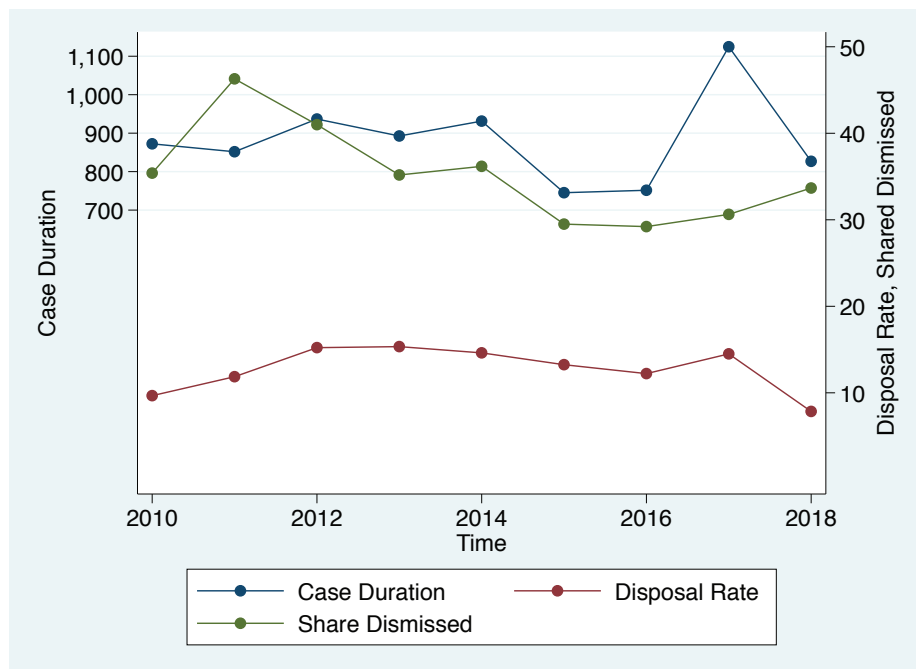
Notes: Thirty-four districts in the courts sample do not overlap with the Prowess sample and hence are excluded in my analysis on business outcomes. The data in the table describes companies incorporated on or before 2010. Entity type, ownership type, and sector/industry types are categorical variables, with each category coded as a binary variable. This implies that the averages are to be interpreted as fraction of companies belonging to a specific type in my overall sample. The standard deviation notes the measure of spread in the corresponding category.

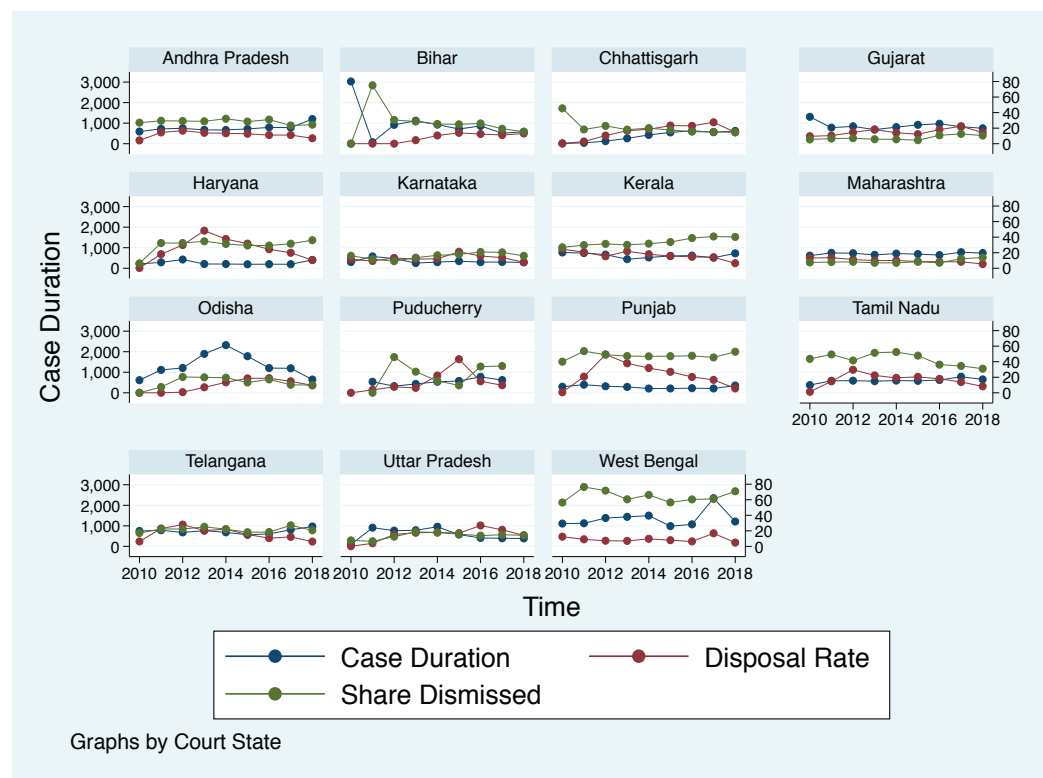
COURT PERFORMANCE MEASURES

Case duration (blue dots in Figure 2.4.3) varies between 750 and 1,100 days across the entire sample exhibiting a drop in 2015, and a spike in 2017, followed by a drop again, as shown in Figure 2.4.3. This measure varies substantially between states, with a few hundred days in Haryana, Punjab, Karnataka, to over 1,000 days in West Bengal and Odisha, while between 500–1,000 days in the remaining states. Disposal rate (red dot) remains fairly stable at 15 per cent, whereas the share of case dismissal (green dot) varies between 35 and 50 per cent. However, there is a wide variation in these measures across the states. Disposal rates are consistently low at around 20 per cent of the active case load that is gradually, but slowly, increasing over the years. Some exceptions are the spikes we notice in Punjab (2012), Tamil Nadu (2012), Haryana (2013), Puducherry (2015), and West Bengal (2017). On the other hand, share of disposed cases that are dismissed vary widely between the states. West Bengal tops this metric,

dismissing close to 70 per cent of the cases it disposes in a given year. However, when viewed along with the case duration metric, it appears as though the dismissals come much later during the case life cycle than earlier on. That is, while the dismissal rate is close to 70 per cent, the duration of cases at the time of their disposal vary between 1,000–2,000 days in West Bengal. On the other hand, Tamil Nadu and Punjab have a relatively high dismissal rate (at about 50 per cent) and when viewed along with case duration at the time of disposal that is under 500 days on an average, it looks like that dismissals are made earlier in the case life cycle. Another interesting juxtaposition is comparing disposal rates with case duration at the time of disposal in a year. Cases in both Odisha and West Bengal tend to have a long life, while disposal rates are low at around 20 percent. While many other states have low disposal rates as well, the duration of cases at disposal are much lower in other states relative to Odisha and West Bengal. One implication of this could be that judges may be prioritising relatively older cases for disposal in some states.

Figure 2.4.3. Court Performance Measures





Source: Author's calculations.

Notes: Case duration (number of days) is presented along the left y-axis whereas disposal rate and share cases dismissed are presented along the right y-axis. The x-axis represents the year of disposal. The left graph presents the patterns in the pooled sample and the right breaks it down by state.

Key Take-away

Court performance has multiple dimensions, which could and should be measured. Juxtaposition of these measures throws some light on the decision-making processes on how cases are resolved across different courts and over time. Some of these measures may have more easily detectable associations with socio-economic outcomes of interest whereas others may suffer from a lack of sufficient statistical power to clearly identify the associations.

I discuss the association between case duration, that is, the average life-span of cases by their year of disposal and business outcomes in further sections.

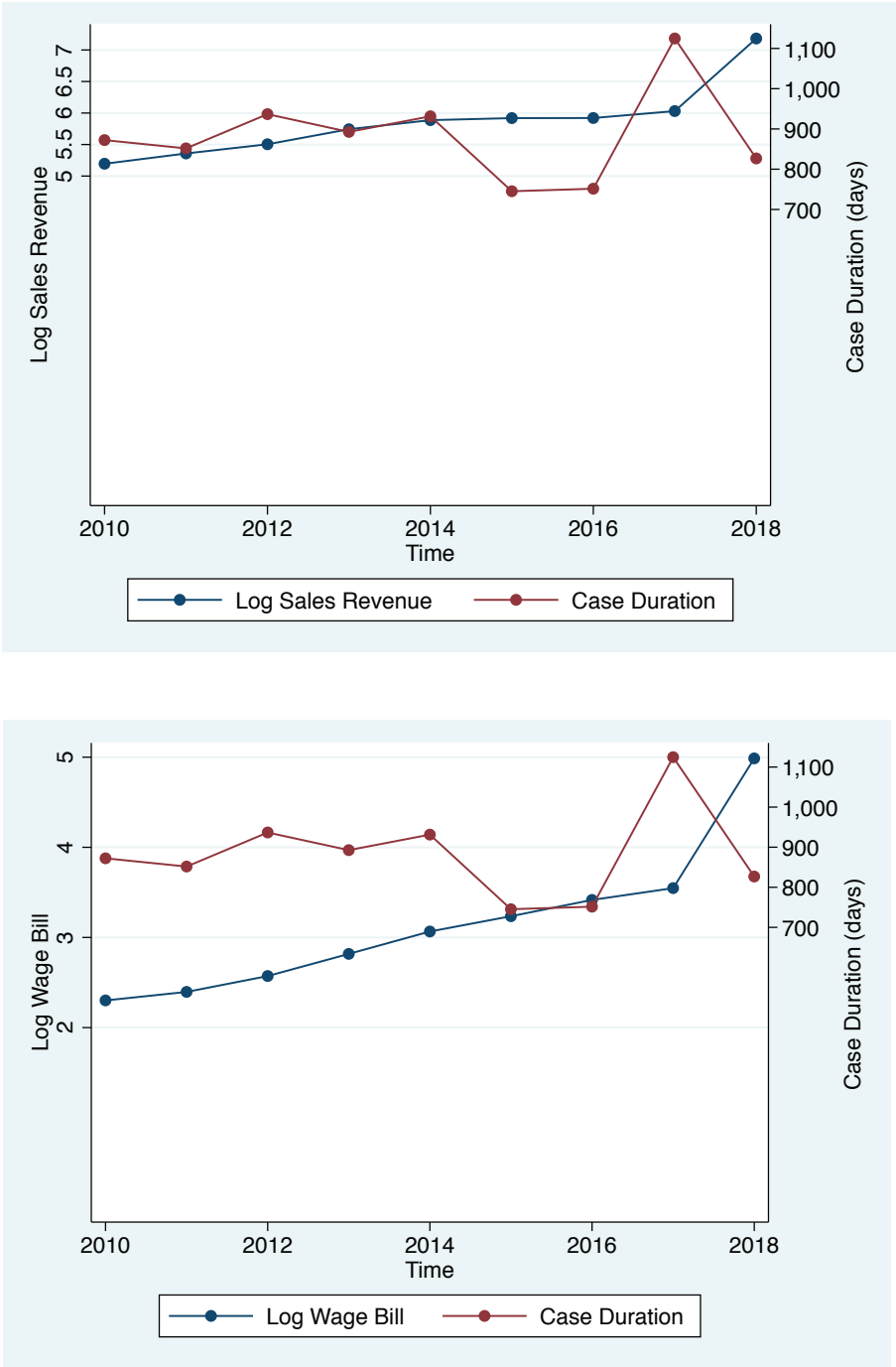
ASSOCIATIONS BETWEEN COURT PERFORMANCE AND BUSINESS OUTCOMES

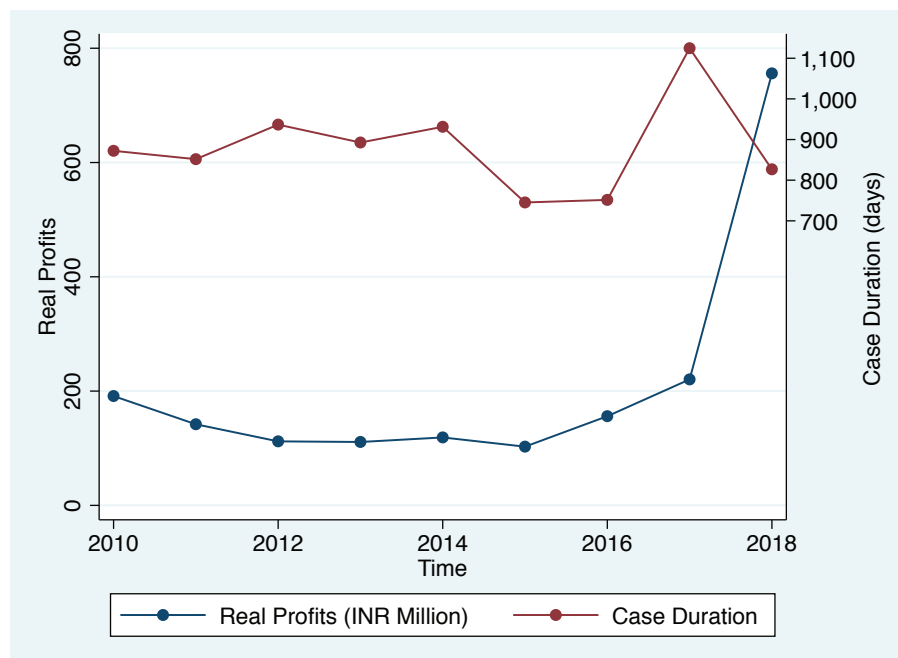
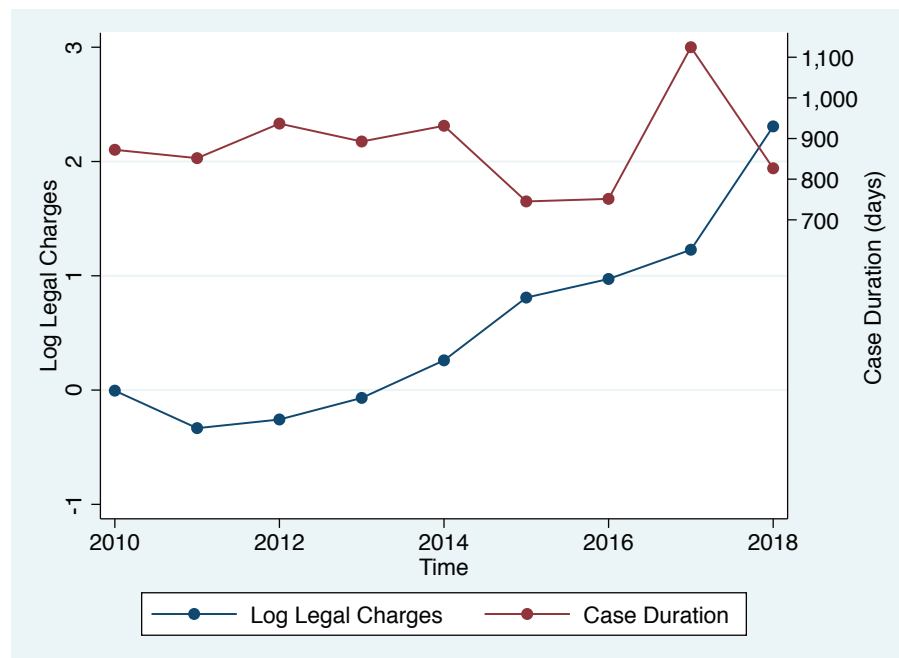
I transform all business outcome variables, except profits, into their logarithmic equivalent so that I can interpret the outcome in terms of year-on-year percentage change. Under the logarithmic transformation, a simple difference between the values across consecutive years gives us the change in the underlying variable in proportion to its initial value. For example, looking at the top-left panel of Figure 2.4.4, we notice that log sales revenue is about 5.2 log units in 2010 and about 5.3 log units in 2011. This implies that the underlying variables—sales revenue—

grows 10 per cent ($5.3 - 5.2 = 0.1$, or 10 per cent when measured as percent change) between 2010 and 2011. However, because profits also take on negative values, I cannot use logarithmic

transformation and, therefore, present them in their raw form after adjusting for inflation. All raw outcome measures are reported in INR million, adjusted for inflation.

Figure 2.4.4. Business Outcomes and Case Duration: All Sample





Source: Author's calculations.

Notes: Business outcomes are presented on the left y-axis and court performance measure on the right y axis. Year of disposal is presented on the x-axis.

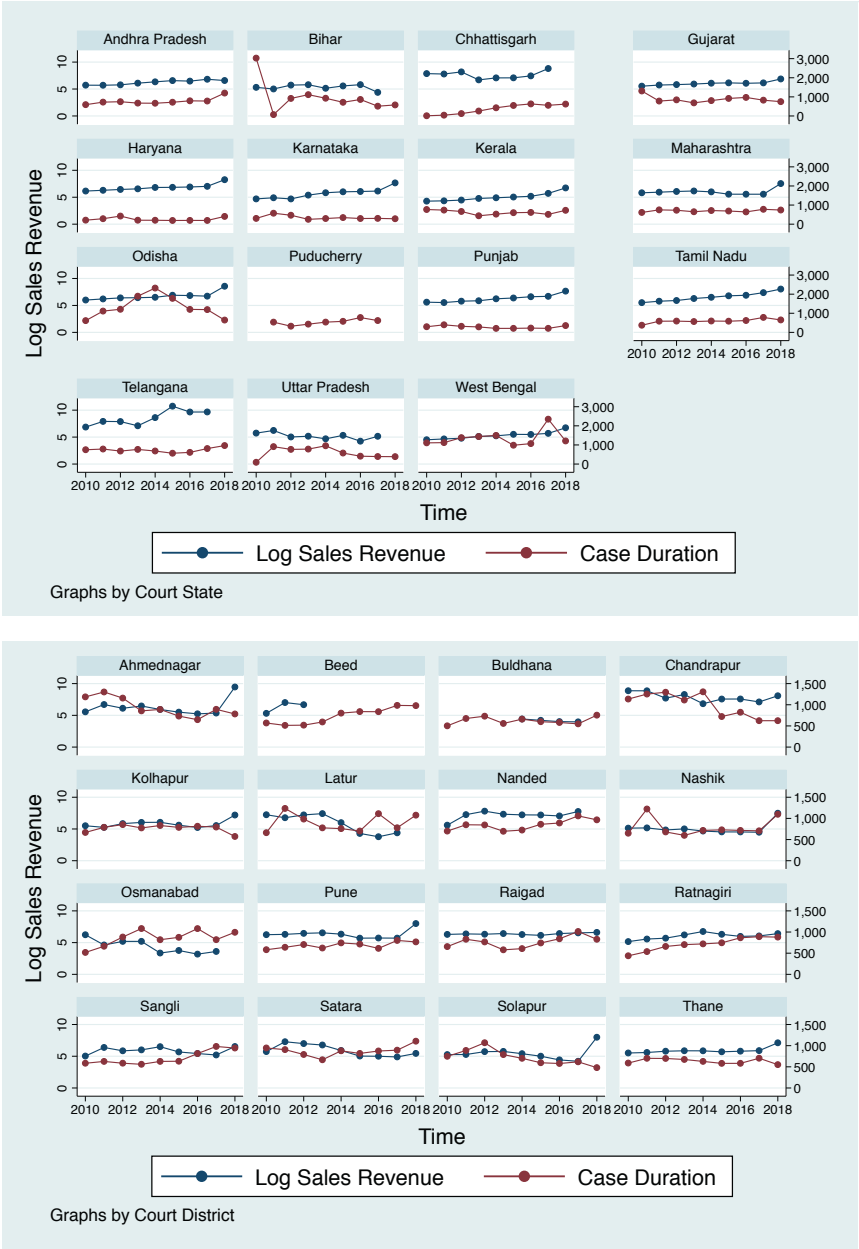
Figure 2.4.4 depicts a lagged association between business outcomes and court performances. That is an improvement, and a reduction in case duration between 2014 and 2016 is associated with an improvement in the business outcomes one to two years later (an inflection in 2017).

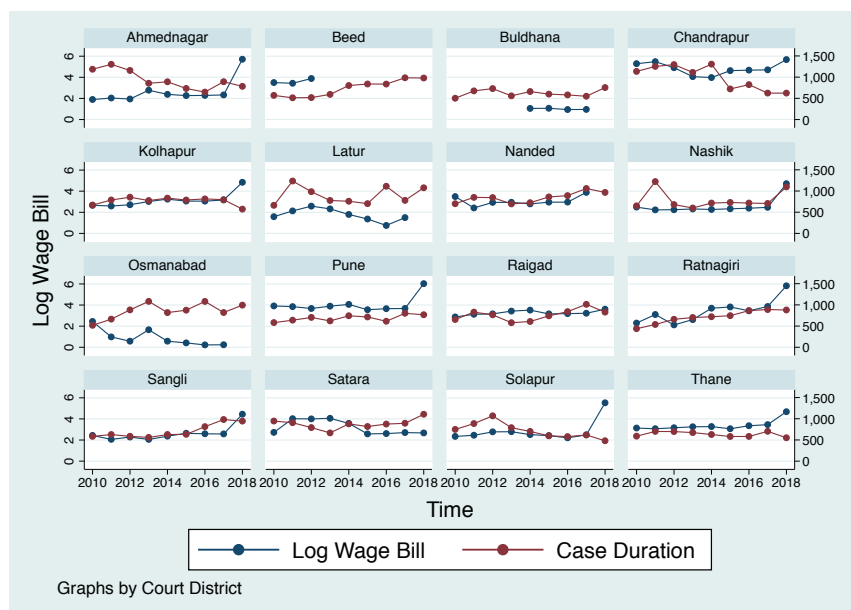
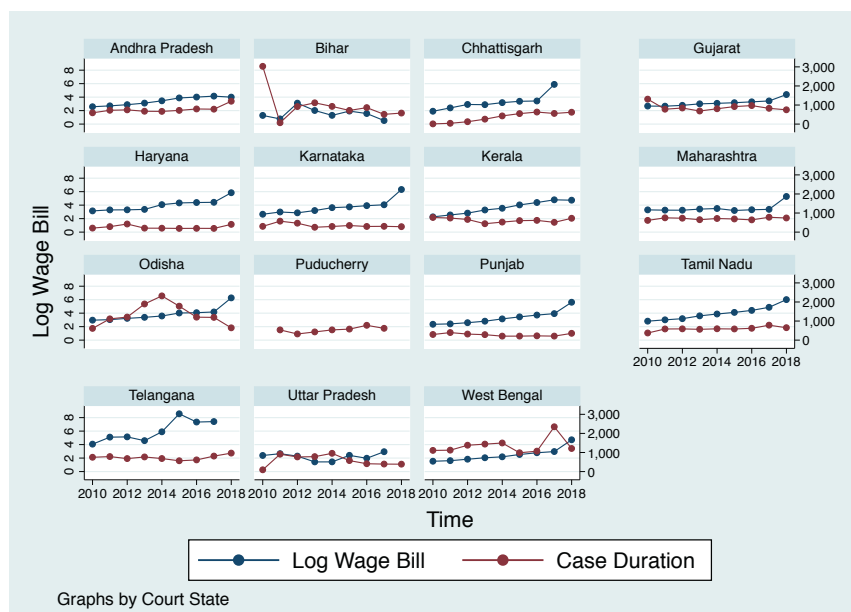
Legal charges grow with time, but show lagged inflections associated with changes in case duration. It is important to bear in mind is that such legal charges are incurred by litigants not just in the form of court fees, travel and board, but also in the form of lawyers' fees, and other preventive and compliance measures that are

dictated by larger macro-economic and policy conditions.

Next, I examine these patterns by state and by district (of a specific state, Maharashtra, for the purposes of illustration²²) to explore any heterogeneous patterns in this association.

Figure 2.4.5. Business Outcomes-I and Case Duration: By States and Districts





Source: Author's calculations.

Notes: Business outcomes are presented on the left y-axis and court performance measure on the right y axis. Some districts have no companies in Prowess database, therefore no associational patterns can be determined. Panels on the left show between state variations whereas panels on the right show variation between districts within the state of Maharashtra.

Sales revenue does not vary substantially between states and shows a modest growth during the period of analysis (with the exception of Chhattisgarh and Telangana). On the other hand, there is greater variation between districts within a state as well

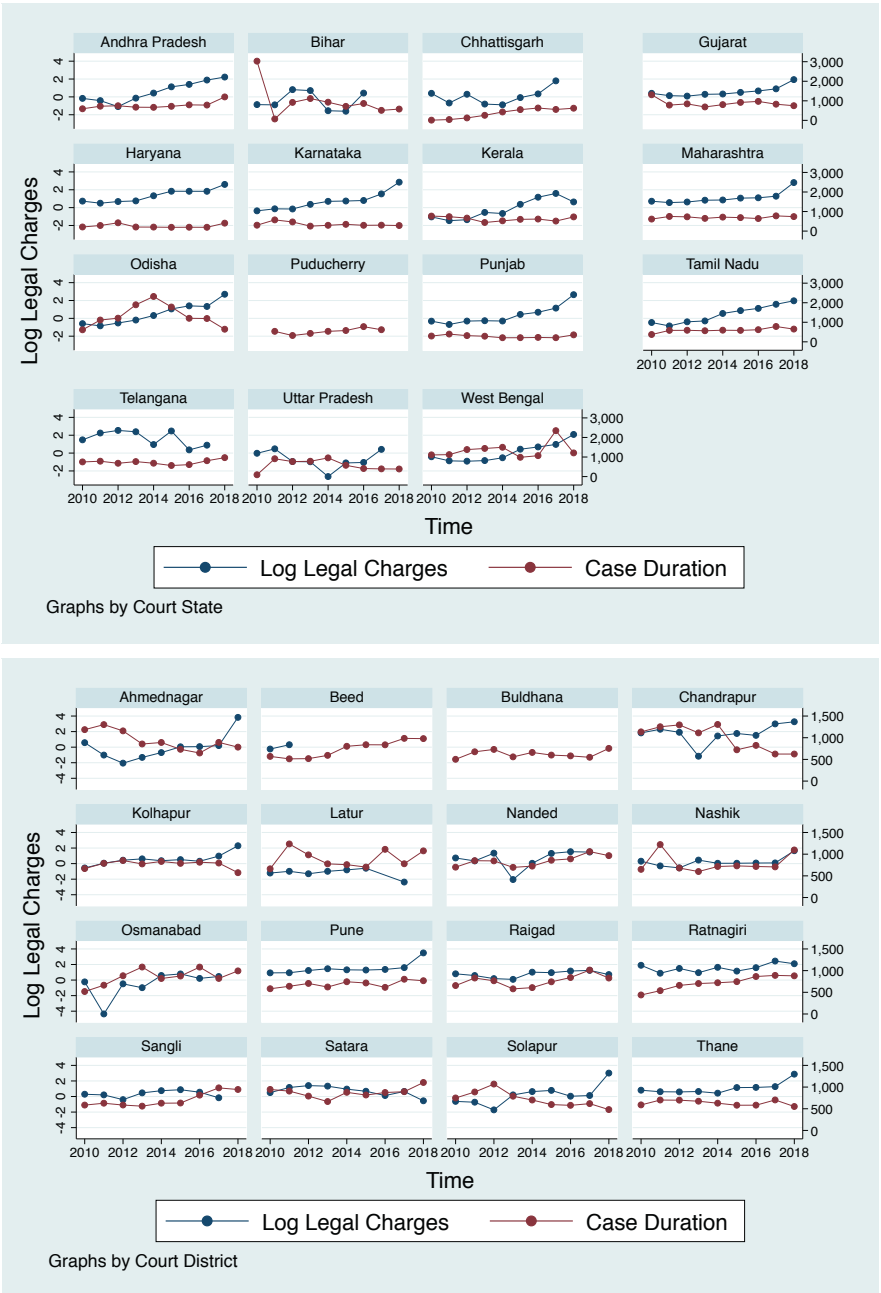
as over time. Focusing on the association between business outcomes and court measures between districts, it can be seen that the growth in sales revenue is negatively associated with case duration (see Osmanabad and Latur, for a clear example).

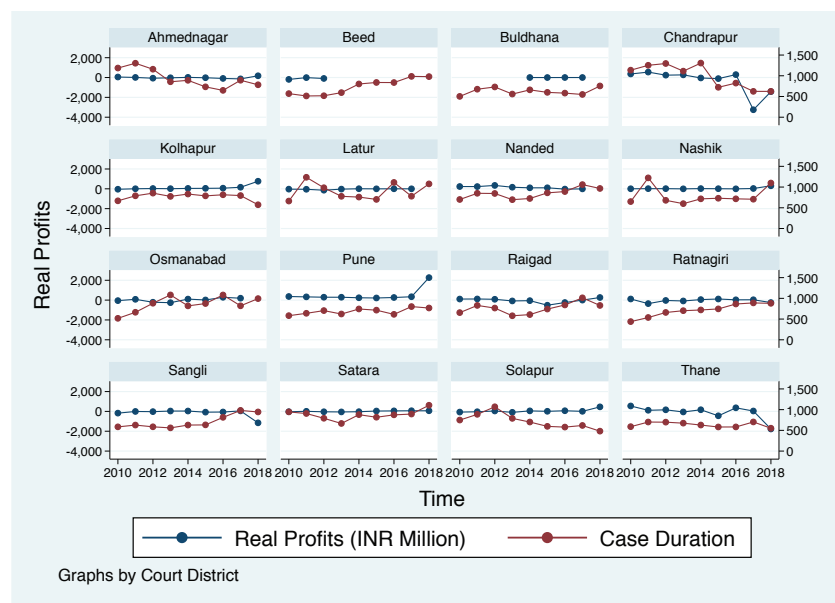
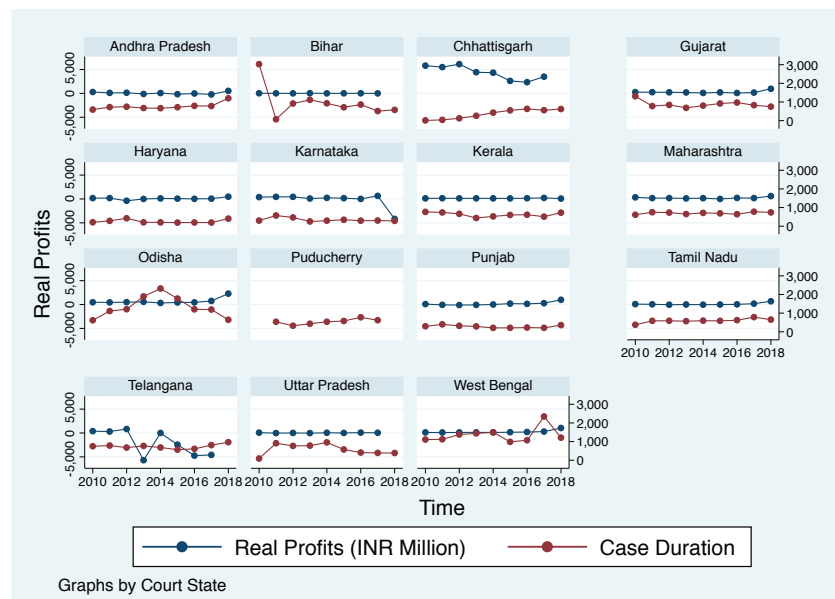
A similar pattern can be observed between states as well, although due to the issue of scale for representation, these variations aren't very obvious.

Wage bills also show a similar pattern. As the case duration increases, the companies appear to

cut back on wage expenditure, which could arise either from stalling recruitment or stalling wage increases. Unfortunately, the data presents only wage expenditure and not number of workers/employees over time to uncover the mechanisms behind changes in wage expenditure.

Figure 2.4.6. Business Outcomes-II and Case Duration: By States and Districts





Source: Author's calculations.

Notes: Business outcomes are presented on the left y-axis and court performance measure on the right y axis. Some districts have no companies in Prowess database, therefore no associational patterns can be determined. Panels on the left show between state variations whereas panels on the right show variation between districts within the state of Maharashtra.

Legal charges show more variation between and within states but do follow an overall increasing trend. In some states and districts, this matches with an increased trend in case duration (for example, Chhattisgarh, Andhra Pradesh among states, and Nashik and Osmanabad

among districts) whereas in others, it is associated with decreasing case duration (for example, Gujarat among states, and Ahmednagar, Chandrapur, and Solapur). A positive correlation between case duration and legal charges is understandable, as the longer a case takes,

the more a company has to spend on retaining lawyers, spending on travelling to court, and associated fees. On the other hand, a negative correlation—declining legal charges with increasing duration or vice-versa—is confusing, but perhaps can be rationalised if higher legal charges are mainly incurred from preventing litigation and compliance purposes in areas with low case duration or if lower legal charges in areas with higher case durations can be rationalised with larger periods of non-activity between hearings that are spread out.

Real profits are generally negatively correlated with case duration, for example, in Odisha, Telangana, and Chhattisgarh among states, and Ahmednagar and Solapur among districts. On the other hand, Chandrapur is an exception where real profits fall with a decrease in case duration. Perhaps, this could be due to unobserved idiosyncratic factors.

Share of case dismissals and disposal rate show a similar pattern (see Appendix) but the latter is relatively weaker. As mentioned earlier, the court performance variables need to exhibit substantial variation between the sample units to have sufficient statistical power to identify these types of associations.

Caveat

While the approach mentioned earlier provides a good measure of the association between court performance and business outcomes, it is possible that unobserved district-level dynamic variables could be driving both business outcomes and court

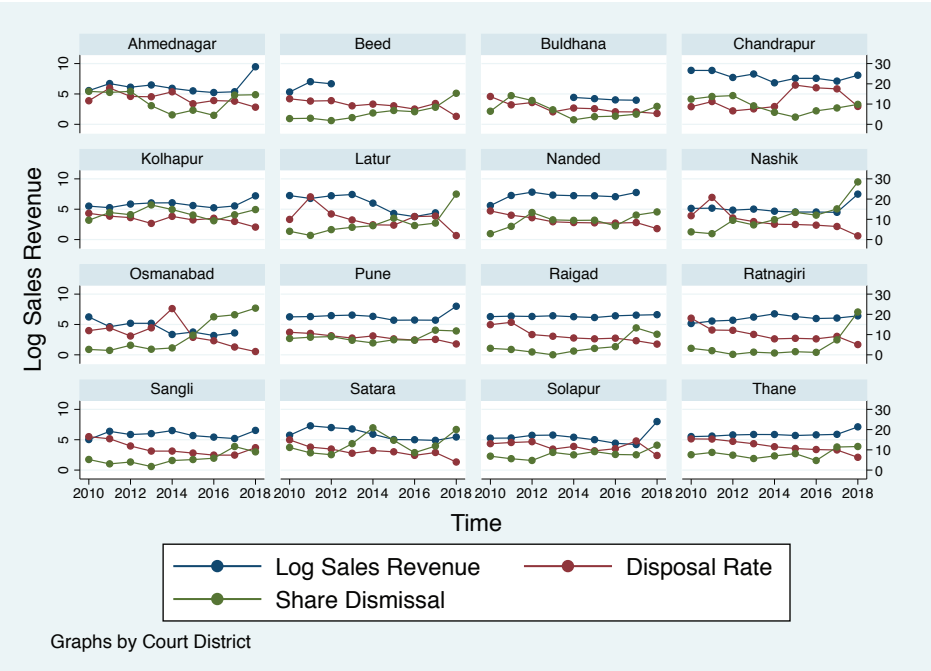
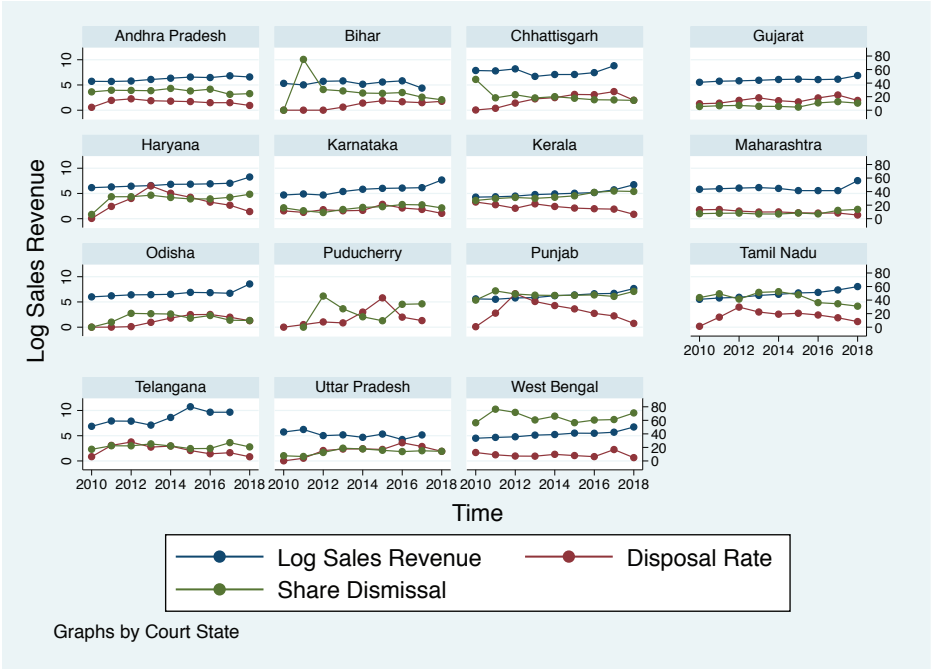
performance. For example, industry or sectoral conditions or migration patterns that evolve differently across districts over time, could affect business outcomes as well as court performance (for example, influx of migrant labour). There is also the possibility of simultaneous causation if firms in slow court districts are also more likely to litigate.²³ I try to address these concerns mainly by not including highly urbanised districts from my analysis and retaining focus on rural districts. However, these challenges do present avenue for future research.

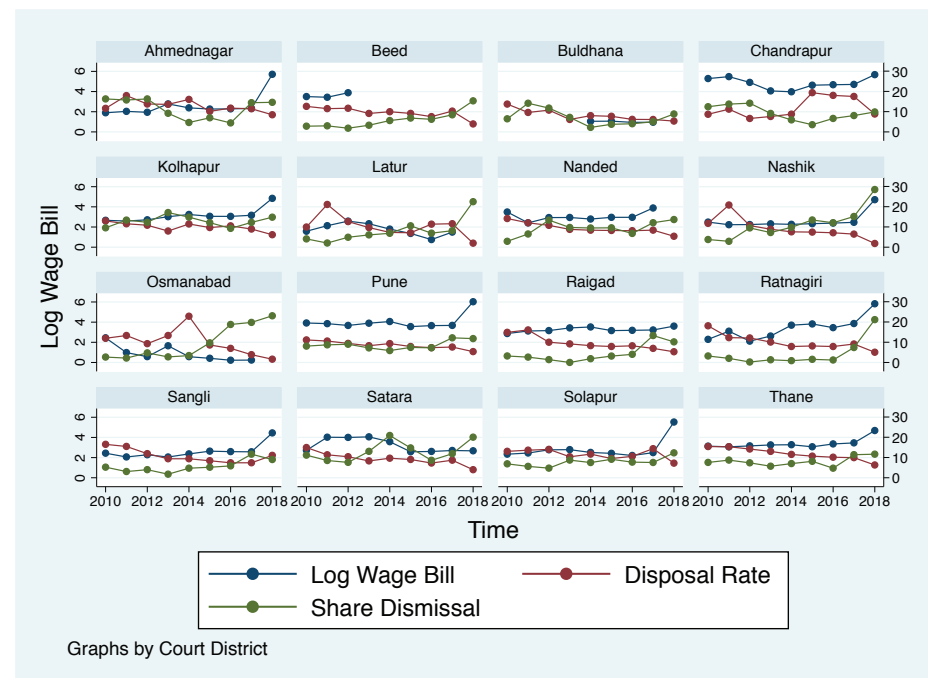
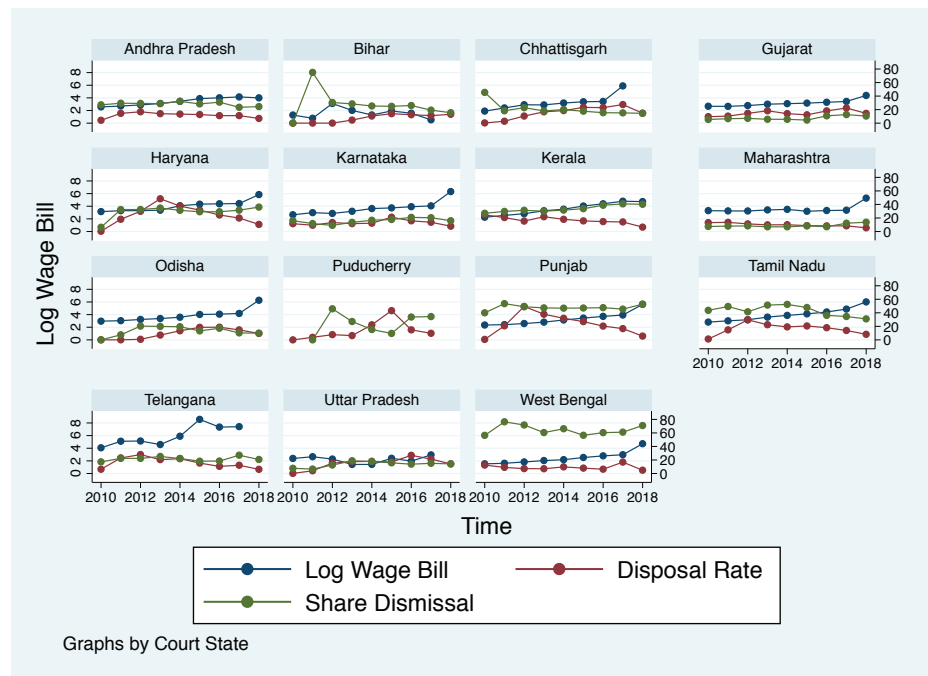
CONCLUSION

To summarise, this chapter presents different ways of measuring court performance and urges policymakers and practitioners to focus on more aspects of performance than pendency alone. Second, I show the patterns of association between court measures and business outcomes—sales revenue, wage bill, real profits, and legal charges. The main business outcomes—sales revenue, wage bills, and profits—are negatively associated with the average case duration at the time of disposal, lagged by 1–2 years, in the overall sample. Breaking this down by states and districts also reveals a similar patterns subject to some idiosyncratic variations within the geographic unit. While I present some caveats to interpreting these associations as the causal response of businesses to district court institutions, these patterns reveal that the institutional environment in the form of effective courts at the entry level is important for business performance.

APPENDIX

Figure 2.4.7. Business Outcomes and Disposal Rate

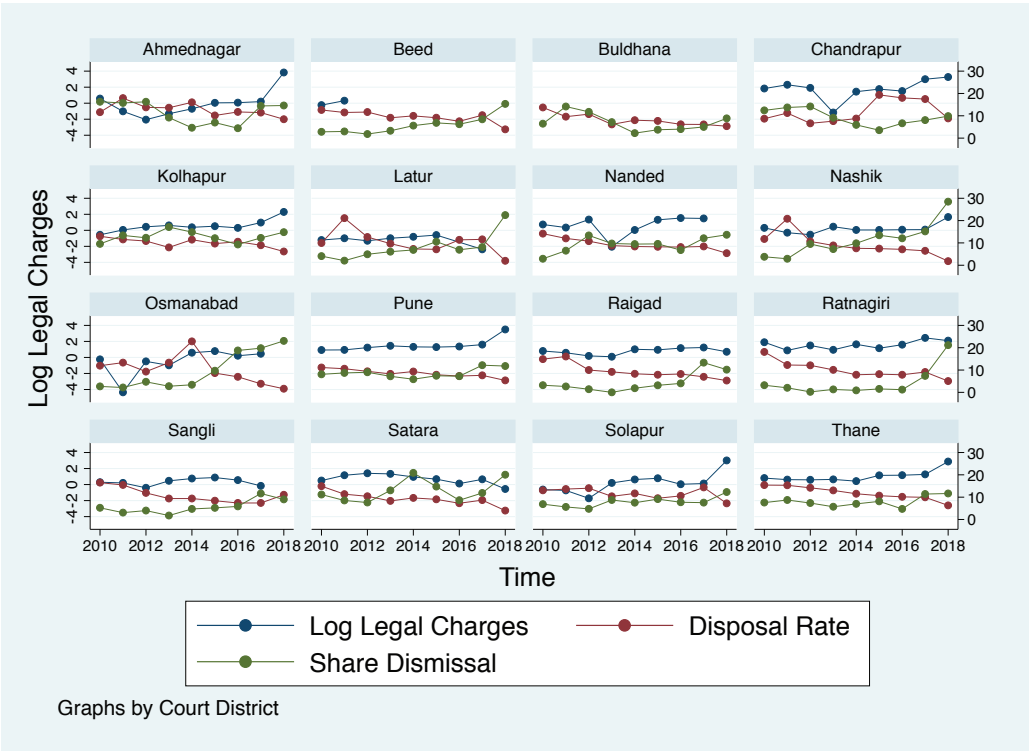
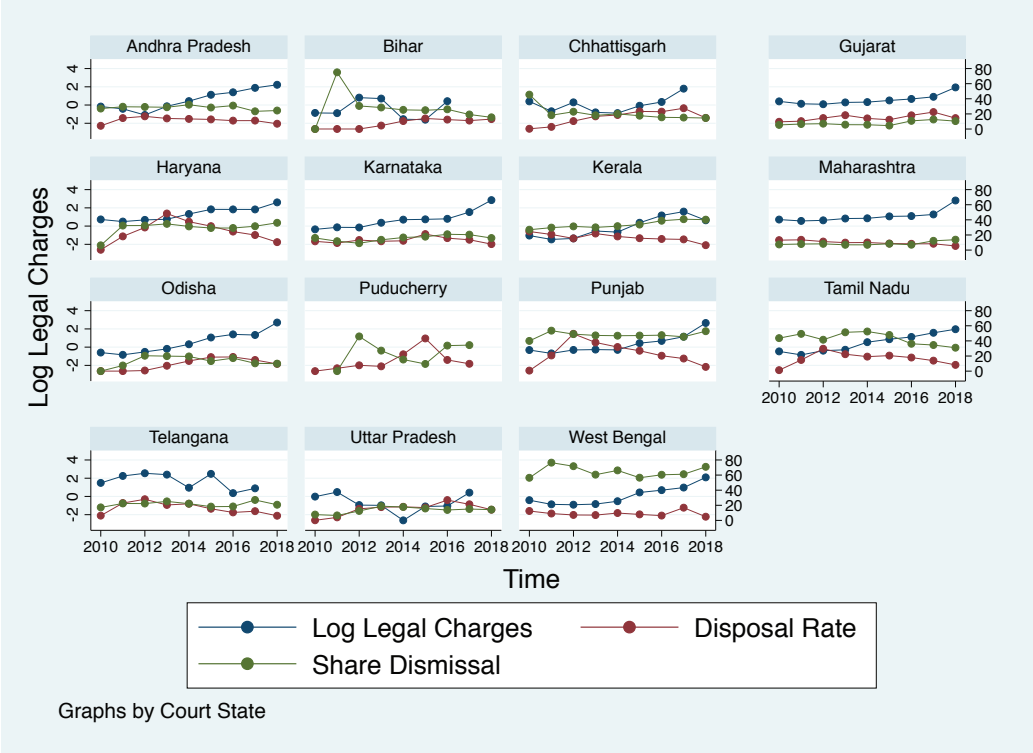


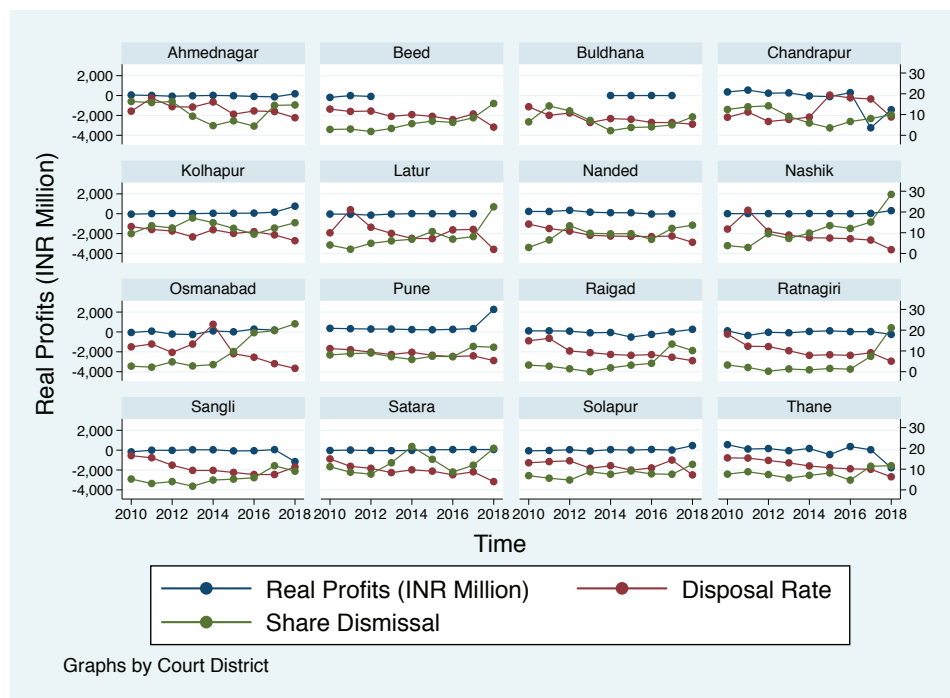
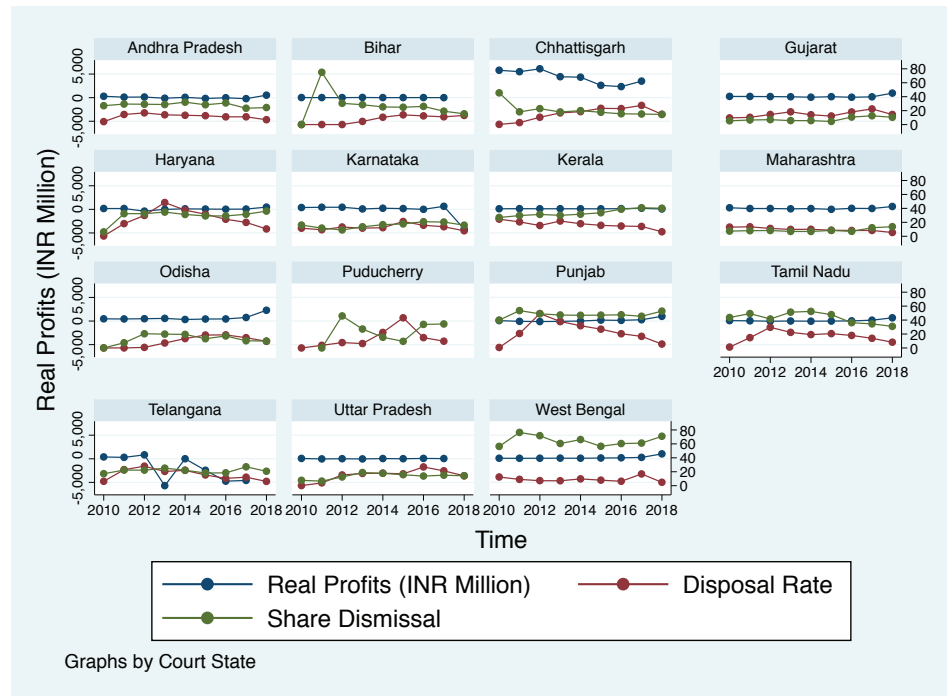


Source: Author's calculations.

Notes: Business outcomes are presented on the left y-axis and court performance measure on the right y axis. Puducherry has no companies in Prowess database, therefore no associational patterns can be determined. Panels on the left show between state variations whereas panels on the right show variation between districts within the state of Maharashtra.

Figure 2.4.8. Business Outcomes-II and Disposal Rate





Source: Author's calculations.

Notes: Business outcomes are presented on the left y-axis and court performance measure on the right y axis. Puducherry has no companies in Prowess database, therefore no associational patterns can be determined. Panels on the left, show the inter-state variations whereas panels on the right show variation between districts within the state of Maharashtra.

Notes

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12. I do this in order to study the association with existing businesses. On the other hand, the institutional environment could also influence start and exit of companies, which I haven't discussed here.
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15. Property registration, construction permits, access to electricity, etc.
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21. Standard deviation is a measure of variance, which when read with the mean (or the statistical average) provides a measure of spread of the corresponding variable. For example, while 1,854 is the average number of companies per district in my sample, some districts have more than this number while some other districts have less than this number. A standard deviation of approximately 1,947 companies implies that there is a large spread in the number of companies registered within a district in my sample. This is not surprising since industrialised districts like Ahmednagar (MH) will have more companies compared to less industrialised districts like Chandrapur (MH).
22. It is hard to present the patterns across 195 district courts graphically and so, I present cross-state comparison and cross-district comparison of one specific state, Maharashtra.
23. For example, an improvement in overall economic environment would lead to an increase in the number of economic transactions which could mechanically increase the number of disputes and litigation in courts.

Corporate Strategy for Litigation Management: Perspectives of In-House Counsel*

Neha Munjral

Shelly Saluja

5

INTRODUCTION

The corporate litigation domain in India has undergone a sea of change in the last couple of years. Steps have been taken to alleviate the obvious challenges faced by litigants in India, in terms of time, cost, and energy diverted in resolving disputes.

The 2017–2018 Economic Survey of India tabled in Parliament, urgently called for the need to address the issues of pendency, delays, and backlogs in the appellate and judicial arenas towards ease of doing business. While India jumped to the 100th rank in the World Bank's Business Report 2018, the country continues to lag on the indicator on enforcing contracts, which form the basis of any commercial relationship between two companies.¹

The present chapter will provide an overview of how long delays in our judicial system have a direct impact on companies in several ways. We will analyse possible approaches to risk assessment and risk mitigation and strategies employed when cases arise. We will also delve into whether strategy needs to be tailored differently depending on the size of the dispute, the size and importance of the counter-party, and whether the counter part is a government or a private player. Lastly, the article will focus on how engagement of cross functional stakeholders within a company along with the legal/ contracts team is essential to have a pro-active and pro-settlement approach to litigation management.

IMPACT OF LITIGATION AND JUDICIAL DELAYS ON CORPORATES

It is often assumed that multinational companies (MNCs) have deep pockets and risk appetite to withstand the time and cost of judicial delays as a

part of 'doing business in India'. However, long-drawn legal battles affect the smooth functioning of companies, even large multinationals, in numerous ways. At the epicentre lies the uncertainty of the time that it will take for a high stakes dispute to lead to a favourable order and/or a cash-in for a company. This could be especially crucial if the matter involves an outstanding payment from a customer that is owed to a company during difficult financial conditions or if it affects the working capital cycle or liquidity of a company or affects its ability to continue to do business.

While, on the one hand, there is a long lead cycle on recovery from litigation, on the other, running a high stakes litigation or arbitration disrupts and diverts a company's attention from its day-to-day business. Running a litigation or arbitration requires the time and attention of not just in-house counsel, but also core business executives, technical teams, finance teams, secretarial teams, amongst others. While the in-house legal team would be largely in charge of running the litigation on a daily basis, including hiring and instructing outside lawyers and solicitors, as many of the cases are fact-based, yet for drafting the pleadings and providing evidence for hearings, the business executives need to be heavily involved and participate. For example, in large EPC contracts (engineering, procurement, and construction contracts) there is a possibility of disputes arising out of performance guarantees, wherein lawyers will have to work in tandem with the technical/projects team, having specialised technical knowledge, to ascertain where the performance guarantees are met and where the faults have arisen. A sizeable effort will also be expended in managing communications and relationships with third parties. This could include the counterparty itself, if the counterparty is a strategic customer or vendor with whom the company has continuous dealings. Relationship management could also be required to resolve fallout with other customers, regulators, investors, and even the media, if the matter has a particularly high impact on

the financials or reputation of the company. In fact, there may also be disputes in certain sectors (particularly infrastructure) which may adversely impact the ability of a company to participate in future tenders. For example, in government tenders or tenders sought by public sector undertakings (PSUs) wherein the companies are required to make disclosures regarding any ongoing litigation/dispute with the ministry or the particular PSU or with any other PSU of that state.

Material disputes also require regular reporting and assessment of the stakes involved and possible liability entailed for the company, especially in case of a listed company, to controllers, auditors, board of directors, and regulators. Furthermore, MNCs have structural reporting to global stakeholders. All of this adds to the diversion of a company's resources from its core business.

The long pendency of commercial matters in Indian courts implies that there is a multi-fold increase in the time and energy consumption required to keep a close watch of cases on a periodic basis. It also blocks the ability of a company to make decisions when the counterparty is a customer or vendor with whom there is an existing relationship. Costs also multiply over the years, and include direct costs of outflow of legal fees, continuous accrual of interest over the claim (if the claim is against the company), and indirect costs, such as bank guarantee charges if the company is required to provide a bank guarantee to secure an interim award. It is in this landscape of delays and uncertainty that in-house legal teams need to devise the company's strategy towards dispute resolution. The work of an in-house counsel often starts at a pre-litigation stage. A legal notice received by the company, will more often than not, be directly sent to the in-house counsel or tax department for a reply. However, if an in-house counsel is well-integrated into the business, business executives may approach in-house counsel for advice just when things are beginning to sour in a relationship with a customer, a vendor, or a regulator. It is often at this

stage that the pros or cons of each communication from the company to the counter party need to be thought through. A commercial legal strategy can be of immense help in safeguarding the company's interests and the achievement of a company's goals.

LITIGATION MANAGEMENT AND APPROACH TAKEN BY CORPORATES

Once a legal notice for dispute is sent or received, the approach to be taken depends on various factors. The most important factor in devising the litigation strategy is whether a company is prosecuting or is being prosecuted; in other words, whether the company is a plaintiff/appellant or is it a defendant/respondent. In-house counsel should be the first point of contact in both the aforesaid scenarios. Prior to initiating a litigation/arbitration against an opposite party, companies must put in place a standard operating procedure to assess the following factors:

1. The financial and the reputational stakes involved/impacted;
2. Estimate of costs involved;
3. Estimated time to be spent;
4. Probability of winning or losing;
5. The effect of the liability ensued or impact of adverse findings against the company; and
6. Points of contact in the business.

Such a rigorous process of an early case assessment may also involve seeking legal opinions from external legal counsel depending on the criticality of the outcome and the subject matter of the dispute. At the heart of the early case assessment often lies a central question—is the time and expense of running a legal dispute offset by a tangible financial/legal/reputational advantage for the company? A good to high probability of winning a high-stake matter may lead the company to initiate or go ahead

with dispute resolution as per the provisions of the contract. On the flip side, if an objective assessment reveals low to medium probability of a win or a good chance of a liability accruing for the company, or that the benefits of a win may be offset by the time and cost involved in litigating or arbitrating a matter, a company may just decide to settle the matter through discussions with the counterparty. This is also the rationale of commercial contracts often providing for provisions to amicably settle matters through escalation to higher authorities of the parties or through an independent party, such as an independent engineer (a FIDIC² mechanism) or technical expert. These provisions provide a formal contractual window to parties to settle their disputes, before approaching a legal forum.

The company may also have an approval mechanism prior to either finalising a settlement or initiating a litigation or arbitration. Often, in MNCs, this could involve a multi-tiered approval process that is required to be followed. An important part of pre-litigation work in a company involves identifying the key business contacts which the in-house counsel will work with, both during the early assessment phase and through the litigation or arbitration. This becomes important, as often the experience is that once a litigation or arbitration comes to the in-house counsel, the counsel becomes the owner. However, in order to be effective, the counsel, whether in-house or outside, will need solid business partnerships to run the dispute effectively. The soundness of this multi-stakeholder partnership becomes critical to the success of a litigation or arbitration when dealing with complicated contracts which may involve technical or factual questions, as much as legal nuances. It also helps maintain the cost ownership of the litigation or arbitration.

A special segment of disputes facing companies is when the counterparty is a government entity, including a public-sector company. MNCs are usually averse to litigating or arbitrating with the government. Unless the stakes involved are critical,

companies usually prioritise maintaining their relationship with government entities over disputes on ongoing projects, especially if government entities are strategic customers. Government entities, on the other hand, do not appear to be amenable to settling, particularly if claims and counterclaims are involved, due to the inherent fear of allegations of corruption or an investigation by the Central Vigilance Commission. In such a scenario, a proactive approach to prevent situations or minor issues from escalating into full-fledged disputes becomes crucial to working smoothly with government customers. Equally important is maintaining flawless communication and management of documents/records for potentially contentious matters.

Once litigation or arbitration is initiated, a good litigation strategy often entails regular reviews and revaluation of pending cases of a company. Another aspect is ensuring the handover of matters in a seamless manner, not just if an in-house counsel is leaving employment but also if there is change of gear of any of the business executives involved in a matter. Frequent changes may impair the ability of a company to effectively fight a dispute and may significantly escalate the time involved in litigation as a new resource may have to comprehend and reassess a case from the scratch, breaking the flow and continuity in the litigation management.

ENGAGING WITH EXTERNAL COUNSEL

Another big aspect of litigation management is the appointment of outside legal counsel for matters. Once the case is instituted or the trial commences, the external lawyers/law firms play a very significant role in handling litigation/arbitration; all the phases of the case from drafting the pleadings, filing, appearances, evidences, and appeal processes have to be efficiently handled by them. Hence, while engaging an external lawyer,

a company begins to shortlist the lawyer/law firm keeping in view the nature of the dispute. External law firms or lawyers are shortlisted based on the expertise it/they have in a particular area of law, the volume of matters handled by them in the specific area of law, the expertise/strength of the firm/lawyer in representing his/her clients before the specific court, tribunal, or any judicial/quasi-judicial body, their understanding of the business and the commercial requirements of the litigant company, their reputation, and their track record in the market. Certainly, a long association of a law firm/lawyer with a company eases the chances of being re-associated and re-engaged for any new dispute that arises. Additionally, the cost of engaging the counsel over long periods of time vis-à-vis the significance of the matter for the company becomes an important factor which determines which outside counsel is appointed by a company. It is, therefore, important that a legal budget is identified upfront for a matter, both with business counterparts as well as outside counsel so that companies can effectively assess costs on a per hour/per hearing basis (also keeping in view the non-effective hearings).

CONCLUSION

The litigation management approach described in this chapter centres around the philosophy of proactive dispute prevention. It is a direct result of the long years and increasing costs that corporates are encountering when pushed to litigate or arbitrate and may somewhat appear to be antithetical to the interests of outside counsel who are naturally more interested in their legal fees. There are two central pillars of this approach. One, is that the legal/contracts team must be well integrated into the commercial business decisions and dealings of the company rather than being mere advisors or litigation managers. This will ensure that the legal/

contracts team can guide the company through potentially difficult situations with the view to prevent them from escalating into disputes. Second, litigation management must involve a cross-functional approach with decision making, interactions and inputs being obtained from the best qualified subject matter experts in the company.

With the changing face of the Indian corporate law regime and also with the tangible steps taken by the government in reforming the corporate judicial setup of India by influx of various legislations, the role and responsibilities of in-house counsel managing the company's litigation have intensified in terms of scope, pace and reporting requirements. To ensure a company's long-term sustainability in light of the long delays in our judicial system, an

effective and an efficient litigation management is a sine qua non.

Notes

- * Disclaimer: The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of any company and any of its branches or subsidiaries; further, they do not reflect the official policy or position of any entity the author has been or will be affiliated with.
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- 2. FIDIC - Fédération Internationale Des Ingénieurs-Conseils (International Federation of Consulting Engineers).



SECTION THREE

NATURE OF DISPUTES AND DELAYS



Litigation in Land Acquisition: Who Bears the Burden?*

Alok Prasanna Kumar

1

INTRODUCTION

The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends these who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the State is bound to make good the loss to those who lose their property.

Hugo Grotius¹

The concept of eminent domain is usually the starting point for discussions about land acquisition in India, whether in the specific context of private property rights² or larger questions of justice in the context of marginalisation.³ While discussions of eminent domain and land acquisition in India have largely focused on issues, such as the right way to deprive someone of their lands, what compensation they should be offered, and what use the acquired land should be put to, a far more important question does not get sufficiently addressed, which is that of judicial delays in land acquisition litigation.

Land acquisition in India can be legislated by both the states and the union government, thanks to entry 42 in the concurrent list of the Seventh Schedule of the Constitution. While there was a Land Acquisition Act, 1894 (LAA) which was replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCTLARRA) at the union level, other union as well as state laws also provide for land acquisition, for example, the Requisition and Acquisition of Immoveable Property, 1952 at the union level and the Bangalore Development Authority Act, 1976. Under Article 254 of the Constitution of India, a union law prevails over state law in case of any conflict (doctrine of

repugnancy), but as the Supreme Court has clarified in *Bondu Ramaswamy v. Bangalore Development Authority*,⁴ the LAA would not prevail over all state legislations providing for land acquisitions in case of conflict.⁵ Land acquisition can, therefore, take place under multiple laws which provide for different procedures, different bases, and different kinds of compensation for the property owner.

Litigation over land is one of the largest contributors to the ‘supply’ of cases in India’s civil courts. As per DAKSH’s *Access to Justice Survey, 2016*, nearly two-thirds of all civil cases are land and property disputes.⁶ Irrespective of the income of the survey respondent, more than half the cases they were involved in were land and property disputes.

As on 1 May 2019, the Land Reference cases (under the LAA and the RFCTLARRA) constitute about 2.38 per cent of all original civil cases in India, according to the National Judicial Data Grid. This may not necessarily reflect all the cases concerning land acquisition since the categorisation differs from court to court and there may be a provision to approach civil courts specifically for land acquisition cases under state and other laws.

Even assuming that land and property cases, and specifically land acquisition form a sizeable chunk of cases in the judicial system, in the normal scheme of things, this is not such a significant issue—after all, it is a hallmark of modern government that the citizen is entitled to approach a court of law against actions of the government she is dissatisfied with.

What sort of land acquisition disputes could potentially be litigated in court? There are two obvious categories:

1. **Type 1:** Challenge to the land acquisition itself as being illegal on procedural grounds (for example, non-issuing of notice, failure to give a hearing, etc.) or substantive grounds (for example, no public purpose being served, purpose being acquired for contrary to statute, etc.).

2. **Type 2:** Challenge to the compensation awarded.

This distinction is important because Type 1 cases are generally filed in the High Courts while Type 2 cases are generally filed in the trial courts, whether in the form of civil suits or in the form of land acquisition references. In the first of the two categories, the government has an interest in moving the case forward while the land owners do not and the reasons are obvious. In the latter, it is the converse for exactly the same reasons.

This situation is a classic example of the famous dictum that ‘possession is nine-tenths of the law’, which is that the person in factual possession of property or money has a much greater advantage than the person who does not. The question is does this also translate into the creation of perverse incentives for the parties to delay the proceedings in a given case?

To study this, this chapter examines data collected by DAKSH relating to trial courts in Karnataka and data collected by the Vidhi Centre for Legal Policy in relation to the Karnataka High Court to see if any obvious patterns emerge from the analysis. Given that each state in India has its own constraints and peculiarities in almost every respect, it would be somewhat hazardous to make a cross-state comparison without controlling strictly for all factors in question. To this end, this chapter limits the analysis of data from Karnataka that is available with DAKSH and Vidhi.

METHODOLOGY

As far as cases in the trial courts are concerned, both original petitions and appeals cases have been considered. As per the e-courts data available with DAKSH, these have been labelled ‘Land Acquisition Cases’, ‘LAC Miscellaneous’, and ‘LAC Appeal’. A total of 3,172 cases are present in the sample as shown in Table 3.1.1.

Table 3.1.1. Sample of Land Acquisition Cases in the Subordinate Courts

Case type	Number of cases
L.A.C. - Land Acquisition Cases	2,262
LAC Misc. - LAC Miscellaneous	4
LAC(APPL) - L.A.C.APPEAL	779
LAC.APPEAL - L.A.C.APPEAL	127
Grand total	3,172

Source: DAKSH database.

Given that there are very few LAC Miscellaneous cases, the original and appeals cases may be split into 2,262 original cases and 906 appeals cases. These cases come from across 12 districts in Karnataka. It may be pointed out here that Karnataka had amended Section 54 of the LAA to provide for a right of appeal to any court apart from a High Court notified for this purpose. A contrast between the two provisions is provided in Table 3.1.2.

Table 3.1.2. Comparison of the Land Acquisition Act Prior to and Post the Amendment

Land Acquisition Act, 1894	Land Acquisition Act, 1894 (as amended by Karnataka)
<p>54. Appeals in proceedings before Court:- Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from the original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, <i>an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid as appeal shall lie of the Supreme Court subject to the provisions contained in section 110 of the Code of Civil Procedure, 1908, and in Order XLV thereof</i></p>	<p>54. Appeals in proceedings before Court (1) Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, <i>an appeal shall lie from the award, or from any part of the award, of the Court in any proceedings under this Act to the Court authorised to hear appeals from the decision of that Court.</i></p> <ol style="list-style-type: none"> 1. From any decree of a Court, other than the High Court, passed on an appeal under sub-section. 2. An appeal shall lie to the High Court, if, but only if, the amount or value of the subject-matter in dispute in appeal exceeds two thousand rupees or the case involves any question of title to land.

Source: Author's compilation.

Note: Author's emphasis.

The status of these cases, as on the date on which the data was collected by DAKSH, is as shown in Table 3.1.3.

These cases will be analysed in the next section of this chapter.

Table 3.1.3. Status of Land Acquisition Cases in the Subordinate Courts

Row labels	Disposed	Pending	Grand total
L.A.C. - Land Acquisition Cases	122	2,140	2,262
LAC Misc - LAC Miscellaneous		4	4
LAC(APPL) - L.A.C.APPEAL	464	315	779
LAC.APPEAL - L.A.C.APPEAL	108	19	127
Grand total	694	2,478	3,172

Source: DAKSH database.

In the context of High Courts, only writ petitions filed between 2012 and 2016 in the High Court of Karnataka have been considered. The entire data was collected over a period of 20 days between 30 August 2017 and 20 September 2017 and reflects the position as of that date. This data formed the basis of Vidhi's report on the High Court of Karnataka.⁷

Among the case data collected from the Karnataka High Court, I identified the cases concerning land acquisition on the basis of the classification of the case by the High Court.

Cases were classified as one of the following:

1. LA
2. LA(KIADB)
3. LA(BDA)
4. LA(BMP)
5. LA(HS)
6. LA(KHB)
7. LA(KIADB)
8. LA(RES)
9. LA(UDA)

These cases were considered as ‘land acquisition cases’ for the purposes of the analysis. As mentioned earlier, land acquisition cases are not just in the context of the union land acquisition laws alone but happen at the state level also. However, in all these laws, the procedure in respect of the challenge to an award of land acquisition is the same as the one in the LAA. For example, in the Karnataka Industrial Areas Development Act, 1966, Section 30 declares that the LAA shall apply in so far as questions of enquiry and award by the Deputy Commissioner, the reference to Court, the apportionment of compensation and the payment of compensation, in respect of lands acquired under this law are concerned. In a similar manner, Section 33 of the Karnataka Housing Board Act, 1963 provides that the KHB may take steps to acquire land necessary for executing a housing or land development scheme in accordance with the RFCTLARRA.

Given the particular way in which case details are recorded in the Karnataka High Court, I have counted only individual cases and not petitions. As explained in Vidhi’s report,⁸ each case can consist of multiple petitions filed by the same person seeking the same relief but in respect of different parcels of land. Counting only the cases concerning land acquisition, I have found a total of 7,646 cases. The disposed and pending cases among these were as shown in Table 3.1.4.

Table 3.1.4. Status of Land Acquisition Cases in the High Court of Karnataka

Row labels	Number of cases
Case disposed	4,857
Case pending	2,789
Grand total	7,646

Source: Vidhi Centre for Legal Policy, ‘A Study of Karnataka High Court’s Writ Jurisdiction’.

The pending and disposed cases were broken up by year of filing as shown in Table 3.1.5.

Table 3.1.5. Status of Land Acquisition Cases in the High Court of Karnataka

Year of filing	Case disposed	Case pending	Grand total
2012	856	60	916
2013	980	194	1,174
2014	1,217	735	1,952
2015	999	636	1,635
2016	805	1,164	1,969
Grand total	4,857	2,789	7,646

Source: Vidhi Centre for Legal Policy, ‘A Study of Karnataka High Court’s Writ Jurisdiction’.

While there are several definitions of what constitutes ‘delay’, the most cogent one still happens to be the Law Commission of India’s definition of the same in its 245th Report titled *Arrears and Backlog*.⁹ Simply put, a ‘delayed case’ has been defined to mean ‘[a] case that has been in the Court/judicial system for longer than the normal time that it should take for a case of that type to be disposed of’.¹⁰ This is to distinguish it from the term ‘pending case’ which is applies to every case which is in the system and has not yet been disposed of.

This leaves open the question as to what is the ‘normal time’ within which a case should

be disposed of. The Law Commission does not prescribe a normal time within the report since it is dealing with a very wide variety of cases and no one inflexible time period can be prescribed for all cases. In a subsequent report, namely the 253rd Report on *Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015*, the Law Commission was of the view that a civil suit that is pending for less than two years would not be ‘delayed’.¹¹ While this assumption was made for the purposes of analysing which civil cases on the original side can be considered ‘delayed’, it is a safe criterion to apply in the context of land acquisition references also, which are original petitions.

Thus, for the purposes of this chapter, it is assumed that land acquisition reference cases which have been pending for more than two years are ‘delayed’ cases.

Likewise, in first appeals cases also, even though the facts are already established and no further evidence is required to be admitted, a two-year limit for disposal of cases can be applied. Cases which take more than two years to be disposed can, therefore, be considered ‘delayed’.

In the context of writ petitions, although the procedures are much less complicated, given the enormous jurisdiction of High Courts and the burden of cases, it might be prudent to take a similarly relaxed definition of delay, that is, about two years. Even though disputed questions of fact are not admitted in High Courts, given the circumstances, a two-year limit for cases to be disposed of may be prudent.

Applying these definitions to the data in question, we can see what proportion of land acquisition cases is delayed and to what extent.

ANALYSIS

Looking only at the disposed original land acquisition cases in the subordinate courts, of the 122 disposed cases, the average time taken to dispose a case is 723.86 days, that is, just short of two years. However, this does not necessarily give us a full picture since there are several more pending cases than disposed cases in the data collected by DAKSH.

Looking at pending cases, however, we find a very interesting pattern, as explained in Table 3.1.6.

Table 3.1.6. Average Pendency (in Days) for Land Acquisition Cases in the Subordinate Courts of Karnataka

Row labels	Pending	Average number of days for which a case is pending
Karnataka	2,478	396.14
L.A.C. - Land Acquisition Cases	2,144	315.50
LAC(APPL) - L.A.C.APPEAL	334	913.80
Grand total	2,478	396.14

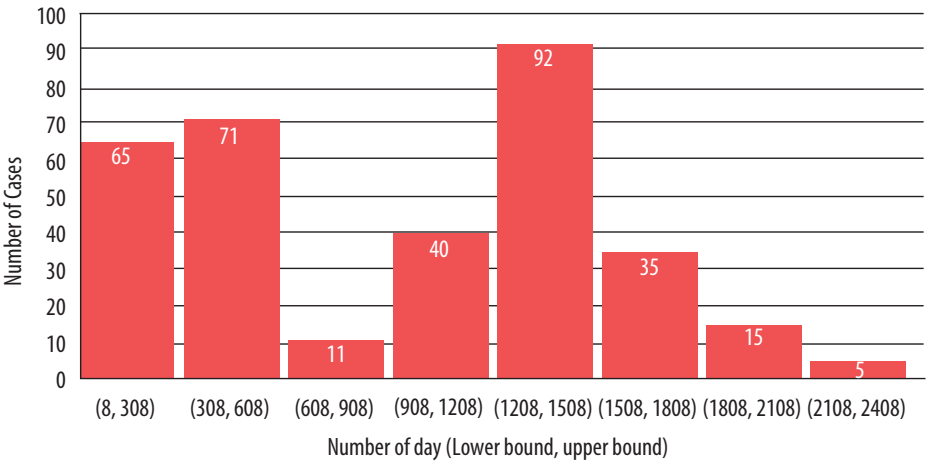
Source: DAKSH database.

We find an incongruous pattern in the data shown in Table 3.1.6—the average number of days for which an appeals case is pending (913.80) is greater than original petitions (315.50).

One potential reason could be because there are a few outliers when it comes to appeals cases that are skewing the smaller sample size as compared to the original petitions. One way to test for this is to see the median of the number of days the case is pending.

For pending appeals cases, the median value turns out to be 1,047 days or about three years. A distribution of the number of days a case is pending is shown in Figure 3.1.1.

Figure 3.1.1. Distribution of Pending Land Acquisition Appeal Cases

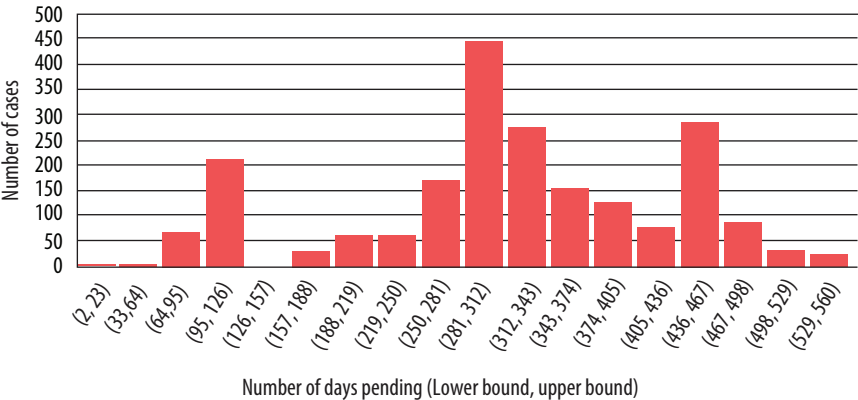


Source: DAKSH database.

The distribution of cases in Figure 3.1.1 suggests that there are no outliers but there is, in fact, a systemic problem in the manner in which appeals cases are moving through the system. Even though they are fewer in number than original petitions, they seem to be moving more slowly through the system.

Coming back to original petitions, are they likely to be disposed of in time? Keep in mind that we have a larger sample size in the ‘pending’ category than the disposed category and this might give us a better sense of the matter. A histogram of pendency for original petitions is shown in Figure 3.1.2.

Figure 3.1.2. Distribution of Pending Original Land Acquisition Petitions



Source: DAKSH database.

From the data in Figure 3.1.2, it does not seem as if there are many cases pending for more than two years and even the disposal data seems to suggest that delay is not a significant issue when it comes to original petitions.

What could explain the disproportionate delay problem in appeals cases? One answer could be that in the civil procedure system followed in India, given that parties still drive litigation forward, they may be disinclined to move the case forward when it is in their advantage to not do so. A party that has already received a favourable final order from a subordinate court in appeal may not be inclined to speed up the matter.

In the case of land acquisition appeals, the question decided in references is usually a

question of compensation or enhancement of it. If such compensation is granted and paid, it would not be in the interest of the land owner to move the case forward. However, if the original petition has been turned down, it would definitely be in the land owner's interests to move for swift conclusion of the appeal. Is this pattern borne out by the data?

For this purpose, the appellants in the appeals cases (all of which relate to amount of compensation) have been divided into government and non-government parties on the basis of the names of persons who have filed the appeal. This included the 'Land Acquisition Officer' or the 'State of Karnataka' and variants thereof, including their abbreviations.

Table 3.1.7. Break-up of Land Acquisition Appeal Cases Based on Parties

Appellant	Number of pending cases	Average time (days)	Number of disposed cases	Average time (days)
Government parties	26	1,085.65	142	1,376.29
Non-government parties	308	899.29	430	555.26
Grand total	334	913.8	572	759.08

Source: DAKSH database.

As per Table 3.1.7, while there are too few pending cases with government parties as appellants in the sample to draw any decisive conclusions, from the data on disposed of cases, it emerges that there is a vast disparity in the time taken to dispose of a case, depending on whether the appellant is a government party or not. While appeals filed by private parties are, on an average, disposed of within a two-year time period, the same cannot be said of appeals filed by the government parties. It cannot be a matter of chance or pure coincidence that while appeals filed by non-government parties take 555 days to be disposed of (about 18 months), appeals filed by the government take 1,376 days to be disposed of (about 46 months).

While these delays do not necessarily affect the land acquisition process itself (given that they are Type 2 cases since they are only appeals from references on

questions of adequacy of compensation), they are nonetheless a cause for concern as they tend to slow down the judicial system itself. While it is not clear who is responsible for how much delay, this is an area of concern that deserves much greater study.

But what about the Type 1 cases, where the acquisition is itself challenged? Here, the government is almost never the petitioner and it is usually the land owner challenging the process in question.

First, let us consider a break-up of the average time it takes to dispose a case, and the time for which a case has been pending. The total number of cases in Table 3.1.8 is slightly different from the total number of cases mentioned in Table 3.1.5 since some cases with erroneous date of filing have been excluded.

Table 3.1.8. Average Pendency (in Days) for Land Acquisition Cases in the High Court of Karnataka

Status	Number of cases	Average number of days taken to dispose/pending
Case disposed	4,852	257.96
Case pending	2,789	831.92
Grand total	7,641	468.82

Source: Vidhi Centre for Legal Policy, 'A Study of Karnataka High Court's Writ Jurisdiction'

On its own, Table 3.1.8 does not tell us too much. A more nuanced break-up of the numbers is needed to draw any meaningful conclusions. If we were to break up the disposed cases by the number of years taken to dispose them, the data would be as set out in Table 3.1.9.

Table 3.1.9. Land Acquisition Cases Disposed by the High Court of Karnataka as per Age of the Case

Category	Number of cases	Percentage of such cases
Less than one year	3,671	75.66
Between one and two years	839	17.29
Between two and three years	268	5.52
Between three and four years	55	1.13
Between four and five years	9	0.19
More than five years	10	0.21
Total	4,852	100

Source: Vidhi Centre for Legal Policy, 'A Study of Karnataka High Court's Writ Jurisdiction'

More than 90 per cent of the disposed cases in Table 3.1.9 have been disposed within a two-year period. Only a relatively small number of cases took longer than two years to be disposed, and were 'delayed' by the definition we have adopted.

What about pending cases though? Details are set out in Table 3.1.10.

Table 3.1.10. Age of Pending Land Acquisition Cases before the High Court of Karnataka

Category	Number of cases	Percentage of such cases
Less than one year	288	10.34
Between one and two years	1,060	38.06
Between two and three years	663	23.81
Between three and four years	588	21.11
Between four and five years	135	4.85
More than five years	51	1.83
Total	2,785	100

Source: Vidhi Centre for Legal Policy, 'A Study of Karnataka High Court's Writ Jurisdiction'

When we look at pending cases, we find that less than 50 per cent of these are actually pending for less than two years.

An overall picture emerges, which is set out in Table 3.1.11.

Table 3.1.11. Progress of Land Acquisition Cases at the High Court of Karnataka

Category	Number of cases pending	Number of cases disposed	Total	Percentage
Less than one year	288	3,671	3,959	51.84
Between one and two years	1,060	839	1,899	24.87
Between two and three years	663	268	931	12.19
Between three and four years	588	55	643	8.42
Between four and five years	135	9	144	1.89
More than five years	51	10	61	0.80
Total	2,785	4,852	7,637	100

Source: Vidhi Centre for Legal Policy, 'A Study of Karnataka High Court's Writ Jurisdiction'

It emerges, therefore, that a little less than 25 per cent of cases in the sample were delayed. This may not suggest a systemic problem per se, but one which requires the High Court to nonetheless identify and address the delays being caused in land acquisition.

At present, there is no data to suggest whether a case is delayed more owing to grant of a stay order, but this is an interesting area for further examination.

Given that the data sets from the trial courts and the High Court are not collected in the same manner, it is not possible to compare them directly. It is, however, better to address the problem of delay on its own terms for each level of the judiciary.

CONCLUSIONS

The analysis of data leads us to a few conclusions listed below.

1. Delays in Type 1 cases in Karnataka are significant, but the number of such cases do not form a large percentage of the overall number of land acquisition cases filed in court.
2. Delays in Type 2 cases seem far more prevalent in appeals cases, specifically appeals filed by the government against adverse orders in original cases.

Land acquisition is one of the leading causes of delays in the creation of transportation infrastructure in India.¹² This is with reference to not just the process of land acquisition itself, but also litigation over land acquisition as well.¹³ A McKinsey report suggests that there are three causes for delays, namely, under-valuation of land price, dependence on state governments for land acquisition, and the ambiguous definition of the term ‘unencumbered land’.¹⁴

Much more data is required to draw the direct link between the delays in court procedure with the

delays in land acquisition, specifically, what is the exact loss caused by delays in the judicial process. This is a complex calculation and requires a lot more data and analysis. However, future research may focus on the following paths to identify the exact scope of this problem. We can broadly split up these questions into two categories, costs incurred by delays due to litigation per se and costs incurred by litigation, increasing the compensation for property owners.

Delays Due to Litigation per se

1. How often do courts injunct land acquisition proceedings and for what reasons?
2. How long do cases take to be disposed by the courts, where such an injunction has been granted? Is there a difference if no injunction has been granted?
3. What is the increase in a project’s cost due to a stay granted in land acquisition?

Delays Due to Increased Compensation

1. How often do courts increase compensation for property owners? And on what bases?
2. How long do such cases take to be disposed?
3. What is the increase in the project’s cost due to increased payment of compensation (including interest and other costs)?
4. Why is it that appeals filed by the government are delayed more often?

With massive infrastructure projects being taken up across the country to facilitate economic growth, land acquisition issues will continue to slow down the process unless serious reforms are made. Even though land may be viewed purely as a factor for production in cold economic analysis, it is undeniable that in India, there is a strong emotional attachment to it on the part of the land owner. Negotiating the conflicting claims over land and how it ought to be

used is going to be a key flashpoint in the coming decades, and one which India's judicial institutions need to be better equipped to handle.

Notes

- * The author wishes to thank Anamika Kundu, Chandni Parekh, and Sapni G. Krishna for their assistance in preparing this chapter.
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2. Suhrith Parthasarathy, 'Thanks to Eminent Domain Defence, our Constitution has No Private Property Rights', My Law Blog, available online at <http://blog.mylaw.net/amendments-to-shield-eminent-domain-from-the-courts-have-left-the-constitution-without-private-property-rights/> (accessed on 1 May 2019).
3. Usha Ramanathan. 2003. 'A Word on Eminent Domain', in Lyla Mehta (ed.), *Displaced by Development: Confronting Marginalisation and Gender Injustice*, p. 133. New Delhi: SAGE.
4. (2010) 7 SCC 129.
5. This principle has also been extended to the RFCTLARRA by the Karnataka High Court in *Evershine Monuments v. State of Karnataka*, ILR 2018 Kar 731.
6. DAKSH, *Access to Justice Survey 2015–16*, available online at <http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf> (accessed on 30 November 2019).
7. Deepika Kinhal and Alok Prasanna Kumar. 2018. 'A Study of Karnataka High Court's Writ Jurisdiction', *Vidhi Centre for Legal Policy*, available online at <https://vidhilegalpolicy.in/reports/2018/2/21/a-study-of-karnataka-high-courts-writ-jurisdiction> (accessed on 7 May 2019).
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9. Law Commission of India. 2015. 'Arrears and Backlog', 245th Report, available online at <http://lawcommissionofindia.nic.in/reports/Report245.pdf> (accessed on 7 May 2019).
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2

Adjudication of Election Petitions: How Have Courts Fared?

Ritwika Sharma

Titiksha Mohanty

The dominant discourse around elections seems to focus on the smooth conduct of the process, the suitability and eligibility of candidates, and the limits of actions deemed acceptable during the crucial period of campaigning. This chapter focuses on judicial determination of disputes arising out of elections, an aspect that follows the culmination of the conduct of elections.

Transparency, along with appropriate judicial scrutiny, is a marker of free and fair elections.¹ Generally, judicial scrutiny of elections occurs when the validity of the election or the election of a particular candidate is challenged on certain grounds. While there are established statutory as well as judicial frameworks for trying election petitions, there are serious concerns as to their efficacy and expediency.

Part I of this chapter provides an introduction to the statutory position on election petitions. This is followed by some thoughts on how the judiciary plays an important role in the electoral process, and how securing the integrity of this process is as much a function of the courts as any other branch of the government. In a way, Part I places election disputes in the context of the judicial framework. Part II gives an overview of the performance of the courts (which form part of this analysis) in the disposal of election petitions. This part presents certain numbers around average time taken for disposal and compares this with the time limit provided under the Representation of People Act, 1951. Part III gives a bird's eye view of the problem by highlighting certain aspects of the judicial process which operate as roadblocks to the expeditious disposal of election petitions. This part encompasses an analysis of the data pertaining to trial of election petitions which was collected from official websites of five High Courts and the Supreme Court of India. This chapter closes with the thought that in view of the importance of election petitions for the electoral

process, as well as for the Indian democracy, it is imperative that existing reform recommendations be implemented suitably.

ELECTION DISPUTES AND JUDICIAL INTERVENTION

Article 329 of the Constitution of India prescribes that any election to one of the Houses of Parliament or to the state legislature can be called in question only by means of an election petition presented to an authority and in a manner prescribed by the relevant law. Much like the rights to elect and be elected, the right to dispute an election is also statutory and not fundamental. In *Jyoti Basu v. Debi Ghosal*,² the Supreme Court held categorically:

Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action in Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies.³

In this regard, the Representation of People Act, 1951 (hereafter, RP Act, 1951) provides for the procedural as well as substantive particulars for institution and trial of election petitions. Section 80A of the RP Act, 1951 mandates that the jurisdiction to try an election petition rests with the High Court, and shall be exercised by a single judge thereof. An election petition calling in question any election may be presented to the High Court on one or more of the following grounds.⁴

1. If a returned candidate⁵ was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution, or the RP Act, 1951, or the Government of Union Territories Act, 1963.

2. If the returned candidate or his election agent committed any corrupt practices.
3. Any nomination has been improperly rejected.
4. If the result of the election, so far as it concerns a returned candidate, has been materially affected
 - (a) by the improper acceptance of any nomination,
 - (b) by any corrupt practice committed in the interest of the returned candidate (by an agent other than his/her election agent),
 - (c) by the improper reception, refusal, or rejection of any vote, or the reception of any vote which is void,
 - (d) by any non-compliance with the provisions of the Constitution or the RP Act, 1951 (or the rules or regulations made under the Act).
5. If any person claims a declaration that he/she himself/herself or any other candidate has been duly elected.

The role played by the judiciary in the electoral process garners heightened significance in the aftermath of elections. By virtue of its constitutional function, the judiciary is rendered responsible for securing the integrity of elections through the process of resolving any disputes that may arise. Legal battles are fought concerning the minutiae of election procedures, ranging from the propriety of someone's candidature and campaign practices to the validity of election results. Keeping in mind the practical and symbolic ramifications that the trial of a returned candidate has for the democratic process, the relevance of the judiciary's role in hearing election petitions is elevated manifold. Tasked with easing social tensions between candidates and striking an appropriate balance between majoritarian sentiments of elections and the rule of law—while also exercising restraint from unduly interfering in the democratic process of elections—courts often find themselves in delicate yet critical positions.

As Ely opines, the court's power as a neutral arbiter of the democratic process to ensure its

integrity stems from the mandate that judicial review of elections through election petitions assists in ensuring that those who are in positions of power do not choke off channels of political change to ensure they remain ‘in’ while the ‘outs will stay out’.⁶ Courts then routinely assume a limited but reactive role of a rule-evaluating and rule-enforcing mechanism of ensuring fair play in the elections.⁷ As Gloppen notes, this role of the courts as referees of the electoral competition further enhances and facilitates democracy.

Given the paramount importance of election petitions, especially in terms of the consequences of the candidature of the returned candidate to the State Legislative Assembly or the Parliament, sensitivity of time is a recurrent theme. Operating within the constraints of a heavily burdened legal system, election petitions often face the predicament of being perennially prolonged due to systemic delays.⁸ The issue of the urgent need for expeditious disposal of election petitions has routinely found mention in numerous legislative, judicial, and administrative documents. Although the 170th Report of the Law Commission on the ‘Reform of the Electoral Laws’⁹ discarded the idea of instituting specialised tribunals for election petitions, the same was again proposed later by the National Commission to Review the Working of the Constitution (hereafter, the NCRWC). The NCRWC recommended that special election benches should be constituted in the High Courts earmarked exclusively for the disposal of election petitions.¹⁰ This recommendation was further emphasised by the Second Administrative Reforms Commission, which recommended the setting up of Special Tribunals as provided for under Article 323B of the Constitution.¹¹

Furthermore, the 1990 Dinesh Goswami Committee Report also proposed the appointment of ad hoc judges so as to relieve regular judges from their normal duty for the purpose of entrusting to them the trial of election petitions.¹² The issue was next discussed elaborately in the 255th Law

Commission Report on ‘Select Electoral Reforms’. This report noted that procedural delays in the disposal of election petitions could be attributed to various factors ranging from over-burdened judges, and lack of institutional support and resources, to legal tactics by parties’ counsels meant to intentionally impede quick resolution of petitions. This institutional inertia against timely disposal of election petitions renders the right to any relief illusory.

The differences in procedures across certain High Courts also adds a layer of complexity to the study of election petitions. The procedures differ as to the allocation of election petitions where a High Court has multiple benches. The Gauhati High Court, despite having benches in some of the states which are under its jurisdiction, entertains election petitions only at the Principal Bench in Guwahati.¹³ In case of High Courts exclusively meant for one state which have multiple benches across the state with jurisdiction over specified parts or areas of those states, election petitions can be filed either in the principal bench relating to all parts of the state or only before that bench which has exclusive jurisdiction over the area from which the election took place.¹⁴ As noted by the Law Commission, the combined effects of a procedure that is non-uniform across High Courts, excessively formalistic with regards to form instead of the content, inordinate delays in the trial, and exacerbated further by a system of automatic appeals to the Supreme Court on both law and fact, create a heavily unsustainable mechanism for the disposal of petitions.¹⁵

DISPOSAL OF ELECTION PETITIONS— HOW DO THE COURTS FARE?

In its 255th Report, the Law Commission of India rued the inadequacy of information available on the average time spent in concluding the trial and

hearing an election petition. Taking a cue from this observation, this chapter focuses on the issue of time spent on disposal of election petitions by courts in India. For the purpose of this chapter, we chose to study election petitions decided by the Supreme Court, and the High Courts of Gauhati, Himachal Pradesh, Karnataka,¹⁶ and Madhya Pradesh.¹⁷

While the selection of High Courts was aimed at ensuring adequate representation from all geographical regions in India, we had to work with the constraints around availability of data on High Courts' websites. An attempt to compensate for the absence of information from other regions/High Courts has been made by analysing data from the Supreme Court, which serves as an arbiter of election appeals from across the country. Our data set consisted of election petitions which were filed, in the courts chosen for this analysis, after 1 January 2008. The data set comprises both disposed as well as pending cases (cases which are currently pending before a certain High Court or the Supreme Court). We considered and analysed cases which were characterised using case types 'E.P.' (for the Gauhati, Karnataka, and Madhya Pradesh High Courts), 'EL.P.' (for the Himachal Pradesh High Court), and 'Election Petition (Civil)' (for the Supreme Court of India).

During the selected time period, two assembly elections took place in each of the states, corresponding to the High Courts chosen. To specify, the last two assembly elections (for states who are under the jurisdiction of the Gauhati High Court) were conducted in Arunachal Pradesh in 2014 and 2009, in Assam in 2016 and 2011, in Mizoram in 2018 and 2013, and in Nagaland in 2018 and 2013. Further, Assembly elections were conducted in Himachal Pradesh in 2017 and 2012, in Karnataka in 2018 and 2013, and in Madhya Pradesh in 2018 and 2013. General elections were last held in 2014, and in 2009 before that.

A total of 1,791 judicial orders were analysed for the purpose of this study, which included 303

orders from the Gauhati High Court (across 18 election petitions), 56 orders from the High Court of Himachal Pradesh (in eight election petitions), 145 orders from the High Court of Karnataka (in 20 election petitions), 1,038 from the Madhya Pradesh High Court (in 48 election petitions), and 249 from the Supreme Court (in 192 election petitions). The key elements noted were the date on which each election petition was filed, and the date on which the final order/judgment was passed. Where High Courts had not assigned a date of filing for cases instituted therein, the date of registration has been considered. This information was collected and analysed for two reasons—first, to ascertain the time elapsed between the date when the election petition is first presented to the High Court and the date of disposal of the election petition, and second, to understand what are the potential bottlenecks which obstruct the timely disposal of these election petitions.

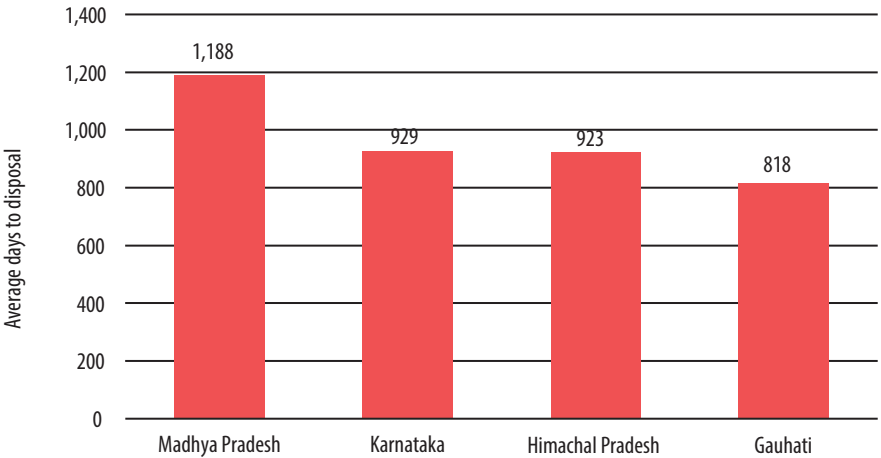
The RP Act, 1951 provides that every election petition shall be tried as expeditiously as possible and efforts shall be made to conclude the trial within six months from the date on which the petition is presented before the High Court.¹⁸ To enable expeditious disposal of election petitions, Section 86(6) of the RP Act, 1951 provides that the trial of an election petition shall, so far as is practicable, consistently with the interests of justice, be continued on a day-to-day basis until its conclusion. This sub-section also provides that where a judge finds it necessary to adjourn the trial of the petition to a date beyond the following day of its hearing, he is obliged by law to record his reasons for the same. Further, it is a settled position that all the proceedings commencing with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word 'trial'.¹⁹

Figure 3.2.1 represents the average days to disposal for the trial of election petitions in all the four High Courts. For the Gauhati, Himachal

Pradesh, and Karnataka High Courts, the average days to disposal have been arrived at by calculating the days spent by each of these High Courts between the date of filing till the date of final order/

judgment. For the Madhya Pradesh High Court, the points of reference are the date of registration of the election petition, and the date when the final order/judgment was delivered.

Figure 3.2.1. Average Days Taken for Disposal of Election Petitions



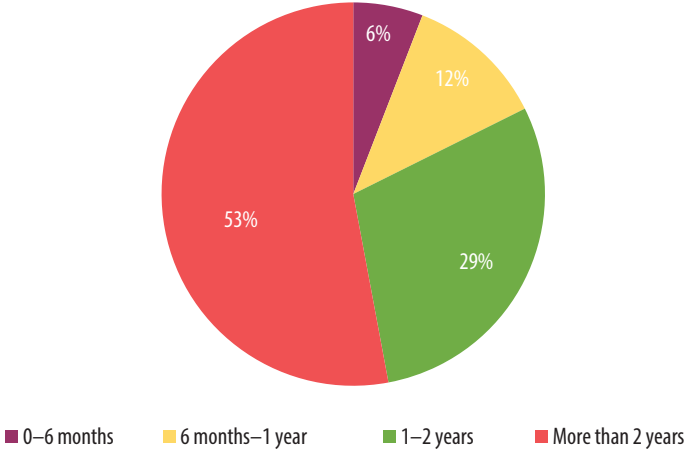
Source: Authors' calculations.

The Madhya Pradesh High Court took 1,188 days on an average, which translate approximately to 39 months. The Karnataka High Court and the Himachal Pradesh took 929 days and 923 days respectively (approximately 30 months), while the Gauhati High Court took 818 days (approximately 27 months).

None of these figures sit even remotely close to the time limit of six months that the RP Act, 1951 requires.

Figures 3.2.2 and 3.2.3 represent the average time taken in months by the Gauhati and Madhya Pradesh High Courts for the trial of election petitions.²⁰

Figure 3.2.2. Gauhati High Court—Time Taken for Trial of Election Petitions

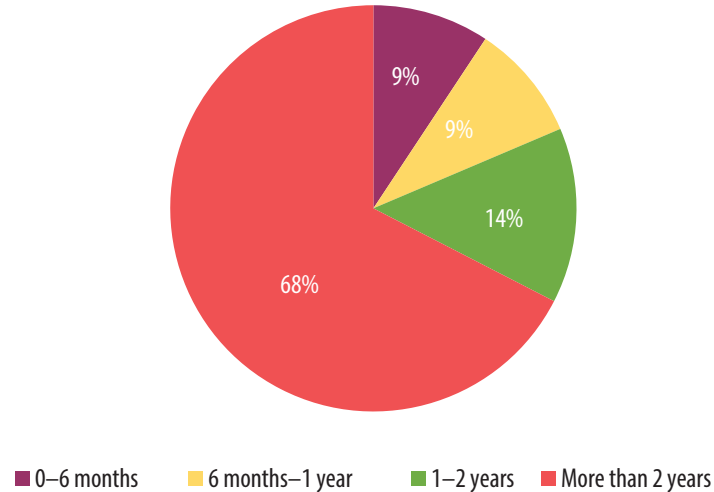


Source: Authors' calculations.

In the Gauhati High Court, more than half (53 per cent) of the election petitions analysed took more than two years to get disposed. Twenty-nine per cent took between one and two years

while 12 per cent took somewhere between six months and one year. The time limit of six months could be met only in 6 per cent of the election petitions.

Figure 3.2.3. Madhya Pradesh High Court—Time Taken for Trial of Election Petitions

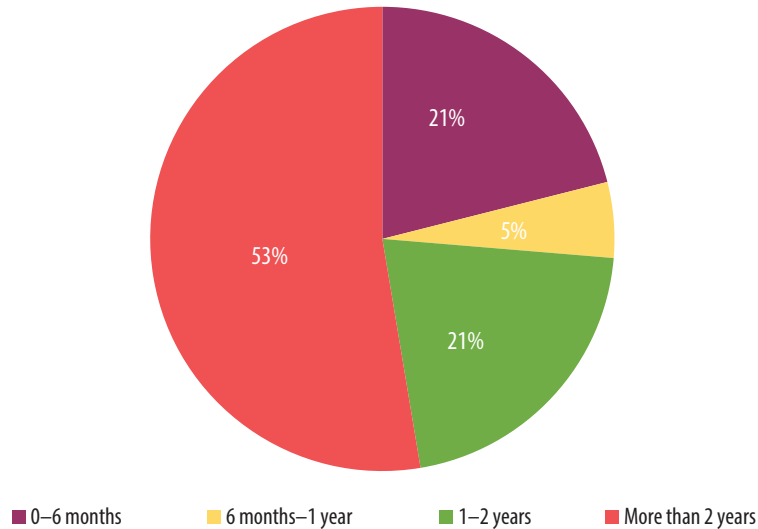


Source: Authors' calculations.

Trial of 68 per cent of the election petitions filed in the Madhya Pradesh High Court took more than two years. Fourteen per cent took between 1-2

years, 9 per cent were disposed within six months to a year while the remaining nine per cent took up to six months.

Figure 3.2.4. Karnataka High Court—Time Taken for Trial of Election Petitions



Source: Authors' calculations.

In the Karnataka High Court, 53 per cent of the election petitions took more than two years to get disposed. Twenty-one per cent took between 1–2 years, five per cent were disposed within six months to a year while the remaining 21 per cent took up to six months.

Based on an analysis of the orders passed during the trial of election petitions, it would be a platitude to say that the time limit of six months has been mostly rendered aspirational. In what follows, this chapter will discuss some of the recurring themes that are common to the trial of election petitions analysed across the chosen courts. The analysis of these themes will reveal how trials of election petitions have been unravelling in our courts, and the gaps that need to be plugged for addressing concerns regarding delays in disposal.

SOME RECURRING BOTTLENECKS

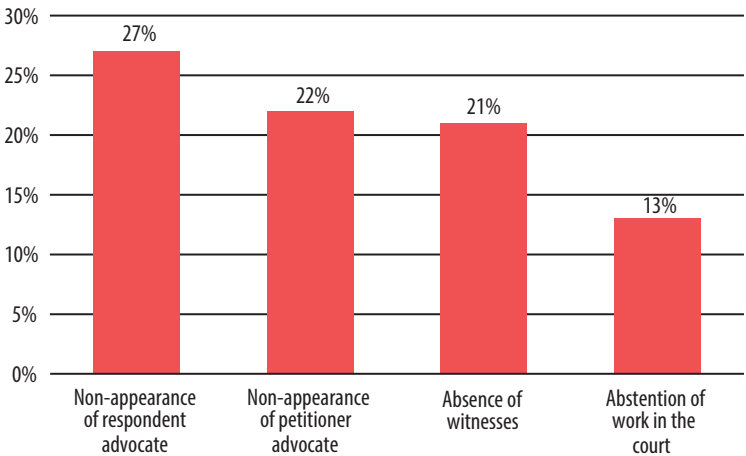
Frequent Adjournments/Adjournments on Insubstantial Grounds

In the Madhya Pradesh High Court, 1,038 orders that were analysed were borne out of 48 election

petitions filed and tried over the chosen period of 10 years. Similarly, the 303 orders analysed for the Gauhati High Court were made in a total of 18 election petitions. The manner in which trial in these election petitions proceeds is quite telling. The Madhya Pradesh High Court has been prone to granting adjournments to counsels of both sides and being extremely accommodating of reasons, such as inability of respondent counsel to read the election petition,²¹ confusion about date of appearance caused due to the court declaring a holiday,²² and absence of respondent counsel due to a ceremony at his house.²³ The Madhya Pradesh High Court also witnessed adjournments due to abstention of work in the court. Such abstention was attributable to a number of reasons, some of which included a call for strike by the State Bar Council and designation of certain work weeks for conduct of National Lok Adalat. Figure 3.2.5 represents the most frequently cited grounds for adjournments in the Madhya Pradesh High Court.

Out of the total number of adjournments, 27 per cent were due to the non-appearance of the advocate from the respondent’s side, while 22 per cent were caused by the absence of petitioners’ advocates, indicating that the absence of the parties’ advocates themselves significantly contributed to the delay in

Figure 3.2.5. Reasons for Adjournments—Madhya Pradesh High Court



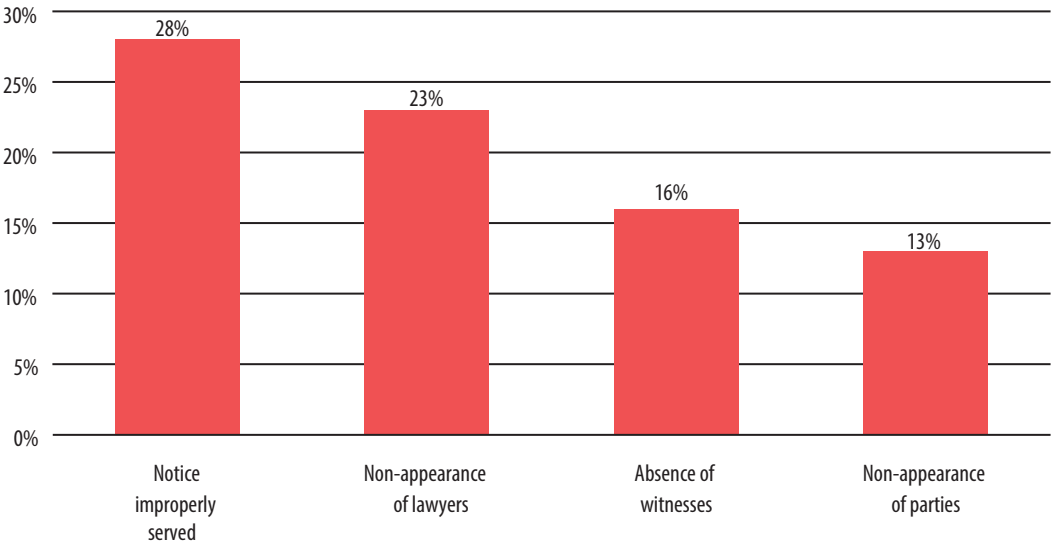
Source: Authors’ calculations.

trial. Absence of witnesses also caused significant delays in the Madhya Pradesh High Court. The court’s annoyance at the absence of witnesses was palpable in the case of *Kamal Patel v. Ram Kishore Dogne*²⁴, when it chided the petitioner for keeping the petition pending for four years by not appearing as a witness even once. Abstention of work in the court took up 13 per cent of the adjournments caused.

Similarly, the petitions filed in the Gauhati High Court faced routine adjournments on grounds ranging from absence of parties and counsels due to bad weather²⁵ and ill-health of counsel, parties or their family members.²⁶ Declaration of frequent *bandhs* also resulted in adjournments.²⁷ Delays were

also caused due to lack of access to translators and interpreters who could aid and assist the courts in conversing in the local language.²⁸ Additionally, for some cases where procuring physical evidence involved summoning officials to appear before court, the process was delayed further on account of unavailability of personnel.²⁹ Figure 3.2.6 represents the most frequently cited grounds for adjournments in the Gauhati High Court. Twenty-eight per cent of the adjournments were attributable to improper service of notice, mostly due to incorrect addresses on record.³⁰ Non-appearance of parties’ advocates, witnesses, and the parties themselves accounted for 23 per cent, 16 per cent, and 13 per cent adjournments respectively.

Figure 3.2.6. Reasons for Adjournments—Gauhati High Court



Source: Authors’ calculations.

The High Courts of Himachal Pradesh and Karnataka witnessed delays attributable to a variety of reasons. In Himachal Pradesh High Court, faulty issue of notice was a recurrent theme in certain petitions. Mostly due to incorrect name or address of the recipient, this factor caused delays in the initial stages of summoning the parties and the witnesses.³¹ Procedural delays were also attributable to the conduct of the parties

during trial. In Karnataka, a recurring theme was the lackadaisical attitude of the petitioners in rectifying office objections. In three of the 20 election petitions analysed in Karnataka,³² the High Court made orders for dismissal on the ground of the petitioners’ inability to rectify office objection in time (which the Court construed to be the petitioners’ disinterest in taking the election petition through its due course).

There were also instances of petitions being disposed in their entirety on account of complete absence of attendance of either of the parties.³³ This was also observed in the petitions filed in the Himachal Pradesh High Court. In the Supreme Court, there have been numerous instances where the case was adjourned due to absence of both parties as well as their counsels.³⁴ The most pertinent observation regarding the behaviour of errant parties was made in *Pukhrem Sharatchandra Singh v. Mairembam Prithviraj*.³⁵ The Supreme Court observed that voters entrust their faith in an elected candidate which makes it significant that when the candidate faces an assail to their election, they should be proactive in freeing themselves from the allegations, and not take shelter in seeking adjournments with the hope that they can be triumphant in the contest by the passage of time.³⁶

Delays Induced by Filing of Interim Applications (IAs) and Examination of Witnesses

One would assume that election petitions, by their very nature, are crucial cogs in the giant wheel of democracy and hence should not be subjected to the delays that otherwise plague the justice dispensation mechanism. It is then surprising to note that on several occasions, the trial of an election petition begins to resemble a private litigation between two parties, with numerous IAs being filed (and countered). While filing of IAs by itself may not be worrisome, the delay that they induce in the trial is. In the High Courts of Madhya Pradesh and Karnataka, the filing of IAs and replies thereto, followed by hearings on the same, added significantly to the time spent on trial of election petitions. For instance, in *Vivek Tiwari v. Divyaraj Singh*,³⁷ the Madhya Pradesh High Court heard as many as 20 IAs during the life cycle of the entire case. These IAs were filed by the parties on a range of matters including praying for rejection of the election petition, permission

to adduce secondary evidence, recalling of certain witnesses, striking off the names of some parties from the list of respondents, and application for grant of adjournment. This particular case took three years and 10 months to reach its conclusion (over a staggering 1,400 days, which is higher than the average 1,188 days election petitions took for disposal in the Madhya Pradesh High Court).³⁸

All parties to an election petition are free to lead documentary evidence as well as oral evidence for proving or disproving the averments made in the petition.³⁹ But, under Section 87 of the RP Act, 1951, a High Court has the discretion to refuse to examine any witness, or witnesses, if it is of the opinion that their evidence is not material for the decision of the election petition, or that the party tendering the witness or witnesses is doing the same on frivolous grounds. The position around examination of witnesses in election petitions was summarised in *Quamarul Islam v. S.K. Kanta*⁴⁰ where the Supreme Court held that High Courts must carefully scrutinise the list of witnesses before summoning them for evidence. Parties should be required to submit their lists of witnesses so as to put the opposite party on notice about the evidence sought to be adduced and also, to bind the summoning party to adduce relevant evidence as detailed in the list.

In the orders analysed, quite often, IAs were filed to bring on record additional documents as well as witnesses. The Supreme Court has observed that in the trial of election petitions, examination-in-chief as well as cross examination should be efficiently controlled and unnecessary leeway in delayed production of evidence should be avoided.⁴¹ Despite this direction, High Courts (particularly the Madhya Pradesh High Court) have been extremely liberal with regard to the time they allow parties on examination of witnesses. In *Mahaveer Prasad Manjhi v. Gyan Singh*,⁴² an election petition filed on 6 January 2017, the examination of witnesses and recording of evidence took a whopping 13 months and eight days,

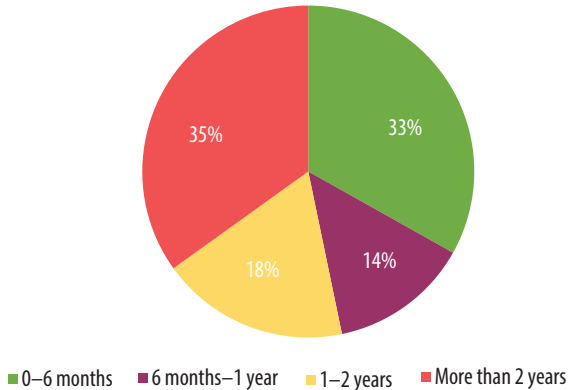
with the process commencing on 4 October 2017 and ending on 12 November 2018. This was hardly a one-off incident, with the Madhya Pradesh High Court having spent nearly two years (22 months and 30 days) in examining witnesses in the petition filed in *Radhe Shyam Dhakad v. Jaivardhan Singh*.⁴³ To put things in perspective, the court spent nearly 60 per cent of the total time it spent on this case in examining witnesses.⁴⁴ The irony was that in one particular order in this case, the High Court noted that while election petitions have to be disposed within six months, inordinate delays in examination of witnesses add to the time spent in disposal!⁴⁵ A similar situation was also seen in *Bharat Chandra Narah v. Naba Kumar Doley*,⁴⁶ an election petition filed in the Gauhati High Court. The case included 50 separate orders, spanning six years, with 64 per cent of its time spent in examining witnesses alone.

Petitions Rendered Infructuous in the Supreme Court Due to Efflux of Time

Section 116A of the RP Act, 1951 provides for a statutory right to appeal on questions of law and fact from orders of High Courts to the Supreme Court. It was observed that most election petitions filed in the Supreme Court were in the form of a Civil Appeal or a Special Leave Petition from a trial pending in a certain High Court that is filed against the High Court’s interlocutory order.⁴⁷ While a majority of these were disposed of in the first instance based on further instructions to the High Court, a considerable number of cases were ‘rendered infructuous’ by the Supreme Court due to the efflux of time, specifically due to the fact that the cause of action against the candidature of the elected candidate was redundant on account of fresh elections that had been held, or were to be held. Out of the 249 orders perused for the Supreme Court between 2008–2019, 5.6 per cent of the cases were categorically declared to be infructuous by the Court due to efflux of time.⁴⁸

In *Pukhrem Sharatchandra Singh v. Mairembam Prithviraj*,⁴⁹ the Supreme Court noted (per Justice Dipak Misra, as he then was) that expeditious disposal of an election petition sustains the purity of parliamentary democracy. In this case, the court further noted with displeasure that the elected candidate had taken time at his own pleasure and leisure, and filed numerous obstructing applications, emboldened by the Manipur High Court (where the case originated) that had granted adjournments in an extremely liberal manner. In *Navjot Singh Sidhu v. Om Prakash Soni*,⁵⁰ the court, while noting the futility of the petition due to the efflux of time, categorically mentioned that any deliberation of the issues posited in the petition would be merely academic at that point.

Figure 3.2.7. Supreme Court—Time Taken for Trial of Election Petitions



Source: Authors’ calculations.

Figure 3.2.7 represents the average time taken in months by the Supreme Court for the trial of election petitions. It is also pertinent to note that while only certain select cases were rendered infructuous, the majority of cases remained pending in the Supreme Court for more than two years. Specifically, for those cases that were appeals against interlocutory orders, by necessary implication, their parent cases in their respective High Courts were further delayed.

CONCLUSION

Judicial control over elections is exercised, most significantly, through election petitions. The responsibility for timely disposal of election petitions lies in the hands of not only courts, but also contesting parties. Unsuccessful candidates (in an election) may be prone to filing election petitions in courts without any real merit. Seeking of frequent adjournments adds to the life cycle of cases while also clogging the workload of the court itself. One of the ways in which election petitions can be expeditiously disposed, is if courts come down heavily on parties who protract the litigation. In the Karnataka High Court, a recurring theme was uninterested petitioners who did not actively pursue the petitions they filed, much to the displeasure of the Court. Frequent adjournments (on insubstantial, even flimsy, grounds) should be kept in check to speed up election petitions, and generally unlog the judicial process.

While this chapter is not an exhaustive study on the magnitude of the issues surrounding disposal of election petitions, it is meant to start a conversation about how these petitions, despite their immense significance for a healthy democracy, are being treated by courts just like other cases filed in the court. Election petitions are also a means to ensure accountability among the candidates for their actions. Timely disposal of election petitions signals to the candidates that they cannot flout the provisions of the RP Act, 1951, or other applicable laws, without facing repercussions. For a healthy democracy to flourish, it is necessary that citizens have faith in the judicial system to set right any electoral malpractices. Controversies around elections may arise due to the actions of the candidates or the election officers. Timely and expeditious disposal of election petitions will ensure that everyone involved in the electoral process is held accountable.

Keeping in view the time taken (on average) to dispose election petitions, perhaps it is also time that the statutory position (under the RP Act, 1951) catches up with the reality of the judicial process. As mentioned, numerous times in this chapter, the time limit of six months mentioned in the RP Act, 1951 is not being strictly adhered to. Given the fact that in the case of election petitions, High Courts are actually conducting a trial (as opposed to performing an appellate or review function), the possibility of amending the RP Act, 1951 to provide realistic timelines for disposal of election petitions should be mulled. Timelines that are calculated scientifically, within which various stages of the trial must be completed, might give the High Courts more strictly enforceable standards which the parties will have to abide by. These timelines might also act as a curb on the incessant filing of IAs as well as other delaying tactics which are routinely employed by parties themselves.

Election petitions are necessary to do justice within the electoral and democratic process. An eligible voter's vote may be rendered useless if the result of the election is challenged and a decisive pronouncement on such a challenge takes inordinately long to reach a decision. The irony is that the controversies surrounding election petitions have merited enough concerns amongst policymakers, which is probably the reason why the Law Commission, NCRWC as well as the Election Commission of India have made numerous recommendations on resolving delays and pendency arising during the trial of election petitions. The challenge now is to implement those reforms which can address the underlying issues most effectively. For that to happen, a systematic study of election petitions across all High Courts in India is the urgent need of the hour.

Notes

1. V.S. Ramadevi and S.K. Mendiratta. 2006. *How India Votes: Election Laws, Practice and Procedure*. New Delhi: Lexis Nexis Butterworths, p. 1006.
2. (1982) 1 SCC 691.
3. Jyoti Basu, para 8.
4. Sections 100(1) and 101, RP Act, 1951.
5. Section 79(f), RP Act, 1951 defines 'returned candidate' to mean a candidate whose name has been published as duly elected in the election results.
6. John Hart Ely. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Massachusetts: Harvard University Press, p. 87.
7. Siri Gloppen, Emmanuel Kazimbazi, and Alexander Kibandama. 2008. 'Elections in Court: The Judiciary and Uganda's 2006 Election Process', in Julius Kiiza, Sabiti Makara, and Lise Rakner (eds), *Electoral Democracy in Uganda: Understanding the Institutional Processes and Outcomes of the 2006 Multiparty Elections*, pp. 1–4. Kampala: Fountain Publishers.
8. Rakesh Bhatnagar. 2015. 'Perennially Pending: Election Cases that Stretch on Endlessly Taint our Democracy' *Scroll.in*, 10 October, available online at <https://scroll.in/article/760025/perennially-pending-election-cases-that-stretch-on-endlessly-taint-our-democracy> (accessed on 11 April 2019).
9. Law Commission of India. 1999. *Report No. 170: Reform of the Electoral Laws*. New Delhi: Government of India, para 1.3.6, available online at <http://lawcommissionofindia.nic.in/lc170.htm#LAW%20COMMISSION%20OF%20INDIA> (accessed on 11 April 2019).
10. National Commission to Review the Working of the Constitution. 2002. *Report of the National Commission to Review the Working of the Constitution*. New Delhi: Government of India, chapter 4, available online at <http://legallaffairs.gov.in/sites/default/files/chapter%204.pdf> (accessed on 11 April 2019).
11. Second Administrative Reforms Commission. 2007. *Fourth Report: Ethics in Governance*. New Delhi: Government of India, p. 17, available online at <https://darp.gov.in/sites/default/files/ethics4.pdf> (accessed on 11 April 2019).
12. Committee on Electoral Reforms. 1990. *Report of the Committee on Electoral Reforms*. New Delhi: Government of India, p. 51, available online at <https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf> (accessed on 11 April 2019).
13. Ramadevi and Mendiratta, *How India Votes*, p. 1021.
14. Ramadevi and Mendiratta, *How India Votes*, p. 1021.
15. Law Commission of India. 2015. *Report No. 255: Electoral Reforms*. New Delhi: Government of India, pp. 174–175, available online at <http://lawcommissionofindia.nic.in/reports/report255.pdf> (accessed on 11 April 2019).
16. Election petitions are considered by the Principal Seat of the Karnataka High Court (Bengaluru) as well as the other two benches (Dharwad and Kalaburgi).
17. Election petitions are considered by the Principal Seat of the Madhya Pradesh High Court (Jabalpur) as well as the other two benches (Gwalior and Indore).
18. Section 86(7), RP Act, 1951.
19. *Harish Chandra Bajpai v. Triloki Singh*, AIR 1957 SC 444, para 15(1); *Kailash v. Nankhu*, (2005) 4 SCC 480, para 13. For civil suits, the trial begins when the issues are framed and the case is set down for recording of evidence. This general rule is not applicable for election petitions.
20. For the Gauhati High Court, the dates of filing and the dates of final orders/judgments have been considered. For the Madhya Pradesh High Court, the date of registration of the election petition has been considered.
21. *Vivek Tiwari v. Divyaraj Singh* (EP 04/2014), order dated 29 November 2016.
22. *Radhe Shyam Dhakad v. Jaivardhan Singh* (EP 05/2014), order dated 8 July 2016. While this case was being heard, 7 July 2016 was declared holiday on occasion of Eid and the petitioner could not produce his witness on the actual date of hearing (8 July 2016) citing confusion regarding dates.
23. *Radhe Shyam Dhakad v. Jaivardhan Singh* (EP 05/2014), order dated 31 January 2017.
24. (EP 24/2014), order dated 5 April 2018.
25. *Atum Welly v. Kameng Dolo*, El. Pet. 2/2014, order dated 29 July 2015.
26. *Bharat Chandra Narah v. Naba Kumar Doley*, El. Pet. 2/2011, order dated 17 November 2015, 22 January 2015, 30 September 2015, and 17 November 2015. See also, *Matiur Rahman v. The Deputy Commissioner cum District Election Officer, Nagaon*, El. Pet. 5/2011, order dated 4 January 2012 and 14 March 2012; *Janak Lal Basumatary v. Naba Kumar Sarania Hira*, El. Pet. 3/2014, order dated 11 February 2015; *Zeneisiile Ate Loucii v. Neiphrezo Keditsu*, El. Pet. 1/2015, order dated 19 April 2016 and 19 July 2016. In the Himachal Pradesh High Court, see *Balbir Singh v. Secretary (Election) to the Govt. of Himachal Pradesh*, order dated 26 September 2018.
27. *Matiur Rahman v. The Deputy Commissioner cum District Election Officer, Nagaon*, El. Pet. 5/2011, order dated 20 April 2012.
28. *Zeneisiile Ate Loucii v. Neiphrezo Keditsu*, El. Pet. 1/2015, order dated 13 July 2017 and 17 August 2017.

29. *Smt. Duter Padu v. Gadam Ete*, El. Pet 3/2009, order dated 6 September 2011. See also, *Bharat Chandra Narah v. Naba Kumar Doley*, El. Pet 2/2011, order dated 12 September 2013.
30. Some of the cases in the Gauhati High Court where delays were caused due to improper service of notice are *Salma Jesmin v. Mazibur Rahman*, El. Pet. 3/2011 order dated 28 October 2011, 12 December 2012, and 14 May 2013. In the Supreme Court, delays were caused due to faulty service of notice in *Baldev Singh Mann v. Surjit Singh Dhiman*, Civil Appeal No. 3700 of 2007; and *P.A. Basbeer v. C. K. Sidhikhe*, SLP (Civil) No. 3116 of 2012.
31. *Ravi Thakur v. Ram Lal Markanda*, El. P 2/2018, orders dated 18 April 2018 and 3 May 2018 show that the High Court had to direct that notices initially served to incorrect addresses be sent to the correct addresses. The entire process consumed two months, 17 days (7 March 2018–24 May 2018). See also, *Balbir Singh v. Secretary (Election) to the Government of Himachal Pradesh*, El. P 3/2018, orders dated 13 April 2018, 3 May 2018, and 31 May 2018, which show that the proper service of notice (after service at incorrect addresses) took 3 months, 8 days (12 March 2018–29 June 2018).
32. *Sureshchandra S/o Shankarrao v. The State* (EP 200004/2018), order dated 8 February 2019; *Sri Mohauddin Bava v. Dr Bharath Shetty Y* (EP 10/2018), order dated 28 September 2018; *Sri Maranna Dhilip Kumar v. Sri Sunil Subramani* (EP 1/2014), order dated 8 March 2016.
33. *Kirren Rijju v. Takam Sanoy*, El. Pet 2/2009, order dated 8 June 2011. Here, the Election Petition collapsed since none of the parties came forward to pursue the Election Petition.
34. *Kameng Dolo v. Atum Welly*, SLP (Civil) Diary No. 16278/2015; *Rajendra Bhausaheb Deshmukh v. Collector, Jalna*, SLP (Civil) No. 29560/2010; *Balbir Singh v. Amrik Singh*, SLP (Civil) No. 32297/2013; and *Sopan Abaji Pol v. Jaykumar Bhagwanrao Gore*, Civil Appeal No. 8805 of 2013.
35. Civil Appeal No. 8063 of 2015.
36. Civil Appeal No. 8063 of 2015, order dated 1 October 2015.
37. EP 04/2014.
38. The case was registered on 12 September 2014 and the final order was pronounced on 12 July 2018.
39. Ramadevi and Mendiratta, *How India Votes*, 1081.
40. 1994 Supp (3) SCC 5, para 39.
41. *Makhan Lal Bangal v. Manas Bhunia*, (2001) 2 SCC 652.
42. EP 01/2017.
43. EP 05/2014.
44. The election petition was registered on 4 July 2014 and final order was delivered on 12 September 2017. Examination of witnesses began on 1 September 2015 and continued till 31 July 2017.
45. *Radhe Shyam Dhakad v. Jaivardhan Singh* (EP 05/2014), order dated 9 September 2015.
46. *Bharat Chandra Narah v. Naba Kumar Doley*, El. Pet 2/2011.
47. Ramadevi and Mendiratta, *How India Votes*, pp. 1149–1450.
48. *P.C. Thomas v. PM Ismail*, Civil Appeal No. 5033 of 2016; *Election Commission of India v. Yadavrao*, Civil Appeal No. 5879 of 2010; *Dharmendra Yadav v. Dharam Yadav*, SLP (Civil) No. 6866-6867/2010; *Dilip Kumar Jaiswal v. Aftab Azmi*, SLP (Civil) No. 26194/2010; *Vivek Raghunath Pandit v. Hitendra Vishnu Thakur*, Civil Appeal No. 1544 of 2010; *Ajaib Singh Mukhmailpura v. Madan Lal Thekedar*, Civil Appeal No. 4004 of 2010; *Balbir Singh v. Amrik Singh*, SLP (Civil) No. 17242/2010; *Vishwas Sarang v. Tarun Sharma*, SLP (Civil) No. 22189/2010; *Ashok Kheny v. Ambram TJ*, SLP (Civil) No. 19727/2014, order dated 27.10.2014; *SAK Mynoddin v. Anna Venkata Rama Babu*, Civil Appeal No. 7624 of 2012; *Sushma Swaraj v. Raj Kumar Patel*, SLP (Civil) No. 2951 of 2014; *VM Singh v. Feroze Varun Gandhi*, Civil Appeal No. 9942 of 2011; *Narottam Mishra v. Rajendra Bharti*, SLP (Civil) No. 14984/2010; and *Navjot Singh Sidhu v. Prakash Soni*, SLP (Civil) No. 14912/2011, order dated 18 January 2016.
49. Civil Appeal No. 8063 of 2015.
50. SLP (Civil) No. 14912/2011.



Labour Courts: Does Nature of Dispute Affect Extent of Delay?

Shruthi Naik

3

INTRODUCTION

Jobs play an integral role in society; they provide people with a means for sustenance and contribute to the socio-economic prosperity of society. The regulation of labour and employment, therefore, is an important function of the state as it has a direct bearing on the welfare of society. The Constitution of India provides the central government and the state governments the power, under List III of the Seventh Schedule, to enact laws regarding 'trade unions; industrial and labour disputes', 'social security and social insurance; employment and unemployment', and 'conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits'.¹ These legislations enacted by the government determine the functioning of industries in so far as they regulate the manner in which the industries can utilise labour, by stipulating minimum wages, conditions of work, employee benefits, etc.

Labour and employment, as with all aspects of life, is not free from conflict. Disputes often arise with respect to matters like the benefits that workers are entitled to, poor working conditions, unfair labour practices, strikes, layoffs, payment of compensation, etc. The timely resolution of such conflicts plays an important role in ensuring the smooth flow of work and continuity in the means of production without adversely affecting the workers, employers, society, or the economy.

This chapter seeks to understand the landscape of labour litigation through a focused study of labour litigation in the labour and industrial courts in the state of Maharashtra. Through the use of case-related data in these courts, the chapter

will analyse the nature of disputes that come before the courts for adjudication, the average amount of time a litigant can expect such cases to remain pending in court, the average life cycle of a case, and if the nature of the dispute has a bearing on the life cycle or the nature of disposal (whether the case was contested or uncontested) of the case. The chapter also analyses the time taken for adjudication of these disputes in the backdrop of statutorily prescribed time limits to understand if there is any delay in the resolution of such disputes. Further, the chapter examines the impact of labour and industrial litigation by highlighting the likely socio-economic impact of such litigation.

MAHARASHTRA INDUSTRIAL AND LABOUR COURTS

In order to understand the nature of labour litigation, this section of the chapter analyses data related to cases from the industrial and labour courts of Maharashtra as available in the DAKSH database.² As the nature of labour disputes and the legislation governing them could vary from state to state, this chapter focuses on analysing labour and industrial disputes in the state of Maharashtra alone. In Maharashtra, the Industrial and Labour Courts (ILC) have been set up under Sections 9 and 10 of the Bombay Industrial Relations Act, 1947 (BIR) which was enacted to regulate relations between employers and employees, as well as provide for a mechanism for the settlement of industrial disputes in Maharashtra. The jurisdiction of the ILC is as follows:

1. Labour courts: Section 78 of the BIR provides labour courts the power to decide matters

like the legality of an employer's order passed under a standing order, the interpretation of a standing order, whether a strike or lock-out is illegal, etc. The powers of the labour courts are, however, not limited to such matters, and other legislations provide courts with the jurisdiction to adjudicate matters such as deciding complaints relating to unfair labour practices, and offences punishable under the Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969.

2. Industrial courts: The industrial courts, under Section 87 of the BIR, have been given the jurisdiction to decide cases such as appeals on specific matters where an order has been passed by the Registrar under the BIR, decide appeals from decisions of the Commissioner of Labour, industrial disputes, questions relating to the interpretation of the BIR, any matter referred to it by a civil or criminal court, and appeals from the labour courts. Industrial courts are also given the power to decide a variety of matters under Section 5 of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971.

In order to understand the functioning of the ILC, a sample of 1,76,390 cases collected in the DAKSH database from across the various ILC in Maharashtra³ have been analysed. The sample consists of 49,621 pending cases⁴ and 1,26,769 disposed cases. Of both the pending and disposed data sets, 36–37 per cent of the cases is from the industrial courts, while 63–64 per cent is from the labour courts. Looking at the proportion of cases filed in the ILC (Table 3.3.1), it can be seen that the top seven regions with the highest proportion of cases that come before the ILC are regions with a high population density.

Table 3.3.1. Percentage of Cases Filed per Region

Cases filed	2014	2015	2016	2017	2018
Mumbai	17.98	14.51	14.41	15.20	15.38
Thane	10.10	9.03	10.25	10.14	10.60
Nagpur	8.11	8.23	7.21	7.63	6.91
Pune	8.02	7.38	8.34	11.48	10.69
Aurangabad	7.50	6.42	5.86	7.84	13.25
Nashik	4.42	3.51	5.42	4.14	4.27
Kolhapur	4.17	4.92	5.10	4.82	6.38
Solapur	3.70	2.98	3.75	5.05	2.69
Latur	3.46	2.91	2.28	2.46	5.03
Sangli	3.30	6.75	3.11	2.43	1.67
Akola	3.17	3.03	2.95	3.03	2.66
Ahmednagar	3.05	7.10	7.57	3.97	4.12
Nanded	2.62	2.42	2.30	2.51	2.21
Yavatmal	2.62	2.57	3.69	4.44	2.22
Chandrapur	2.43	1.53	1.90	1.45	0.42
Amravati	2.35	2.53	2.22	2.13	1.92
Dhule	2.11	2.28	1.56	3.16	2.00
Jalana	1.95	2.78	3.29	1.98	2.63
Satara	1.76	2.06	2.29	1.38	1.13
Jalgaon	1.45	1.44	1.50	1.61	0.88
Bhandara	1.31	1.08	0.65	0.72	0.21
Raigad	1.06	0.89	1.61	0.90	0.67
Buldhana	1.03	1.02	0.55	0.29	0.53
Gondia	0.88	1.16	0.82	0.31	0.19
Ratnagiri	0.83	0.63	0.69	0.29	0.21
Wardha	0.63	0.81	0.68	0.63	1.13

Source: Author's calculations.

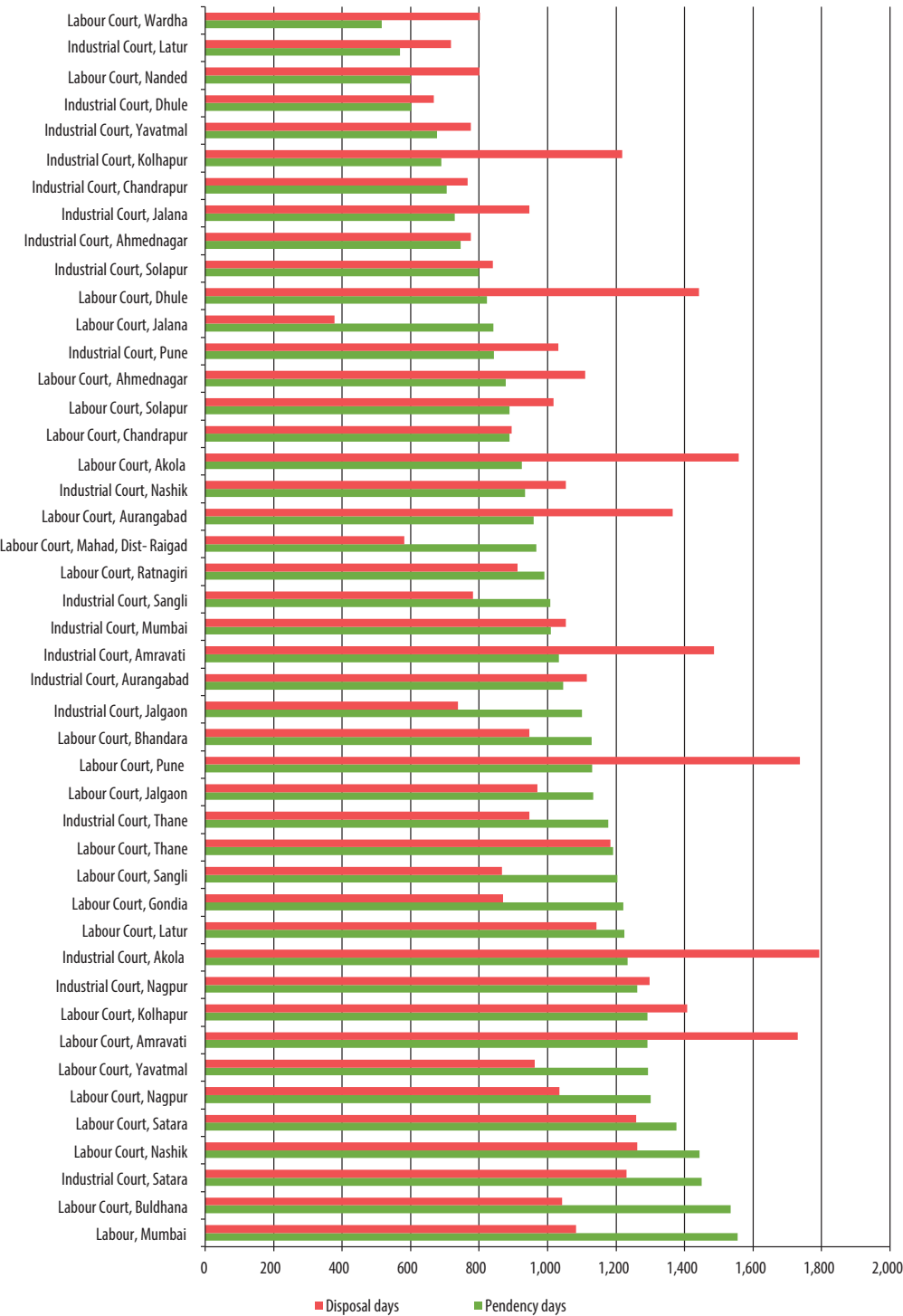
As seen in Table 3.3.1, cases filed before the ILC in Mumbai, Thane, Nagpur, Pune, Aurangabad, Nashik, and Kolhapur account for 60 per cent of the cases filed on average over the last five years. As per the Population Census of 2011, these regions also had the highest population density (that is, the number of persons per square meter).⁵ Further, as per statistics from the Ministry of Micro, Small, and Medium Enterprises (MSME), Government of

India, it was also found that the regions of Mumbai, Thane, and Pune have the highest number of MSMEs.⁶

A look at how long it takes for a case to be disposed and how long a case remains pending in the ILC throws light on how these cases progress through the ILC. From the data analysed, it was found that cases take 1,138 days (3.1 years) on average to be disposed, and similarly remain pending for 1,144 days on average. An often-noticed phenomenon in the Indian judicial system is that cases take fewer days to be disposed, while the average number of days that the cases remain pending is significantly higher.⁷ One of the possible reasons for this is that cases which fail to be disposed quickly, often end up remaining pending in the system for a long duration, and thereby increase the average pendency of a case. This phenomenon does not, however, appear to be the case with the ILC as the pendency time and time taken for disposal of a case are both around three years. However, a closer look at the pendency time and time taken for disposal shows that there is a difference in the amount of time taken in the various ILC, as shown in Figure 3.3.1.

As seen in Figure 3.3.1, 19 ILCs have a higher average number of pendency days as compared to the average number of days to disposal, while 26 ILCs have a higher average number of days to disposal than the average pendency days. It is interesting to note that a closer look shows that most labour courts (58 per cent), have a higher average of pendency days as compared to the days to disposal, whereas only 21 per cent of the industrial courts have a higher average of pendency days. This could mean that a litigant before the labour courts could expect their cases to remain pending for longer than the average time taken to dispose a case, as opposed to the industrial courts where most litigants could expect to see their cases disposed within the average disposal time for cases in that court.

Figure 3.3.1. Average Pendency Days and Average Disposal Days in the ILC



Source: Author's calculations.

Turning to an understanding of the age of labour and industrial disputes, a look at which age bracket has a higher proportion of cases shows that the industrial courts and labour courts are similarly situated in terms of the proportion of cases in each age bracket for disposed cases. However, it is seen that a higher proportion of cases have been pending for longer (more than five years) in the labour courts when compared with the industrial courts, as set out in Table 3.3.2.

Table 3.3.2. Age of Cases

	0–2 years	2–5 years	5–10 years	Above 10 years
Disposal age - Industrial Court	29%	50%	19%	2%
Disposal age - Labour Court	28%	47%	21%	4%
Pendency age - Industrial Court	45%	41%	13%	1%
Pendency age - Labour Court	44%	31%	22%	3%

Source: Author's calculations.

As per a report by the Ministry of Labour and Employment in 2007 that studied the disposal of 6,657 disputes by the ILC, the highest proportion of disposed cases (44 per cent), in ILC in Mumbai, took more than five years to be disposed.⁸ The reason attributed to such a delay was that the statements of claims by the workers or unions were not filed in a timely manner. However, looking at Table 3.3.2, it can be seen that a study of cases disposed by the ILC as of now shows that only 25 per cent of the disposed cases took over five years to be disposed; this is an encouraging sign showing, perhaps, that the average time taken to dispose cases in the ILC has been reducing over the years.

A closer look at the proportion of cases based on the year they were filed and the time period over

which they were disposed (Table 3.3.3) can help us further understand the manner in which cases are disposed.

Table 3.3.3. Proportion of Cases Disposed Based on the Year of Filing

		Industrial courts				
Year of filing	Year of disposal					
	2014	2015	2016	2017	2018	
	2014	14%	22%	15%	13%	11%
	2015		15%	22%	15%	10%
	2016			22%	20%	13%
	2017				13%	27%
	2018					18%

		Labour courts				
Year of filing	Year of disposal					
	2014	2015	2016	2017	2018	
	2014	20%	20%	17%	13%	9%
	2015		22%	19%	19%	11%
	2016			19%	24%	16%
	2017				17%	22%
	2018					17%

Source: Author's calculations.

Table 3.3.3 displays an interesting trend in the manner in which cases have been disposed over a five-year period. It shows that not more than 22 per cent of the cases filed in any given year were disposed in the same year; for example, of the cases filed in 2016 in the industrial courts, only 22 per cent of them had been disposed in the same year. Another point to note from Table 3.3.3 is that there is a slight rise in the proportion of cases disposed in the year after the filing year, before the proportion of cases belonging to that particular year then begin to drop; for example, 14 per cent of the cases filed in the industrial courts in 2014 were disposed in 2014, the proportion of cases

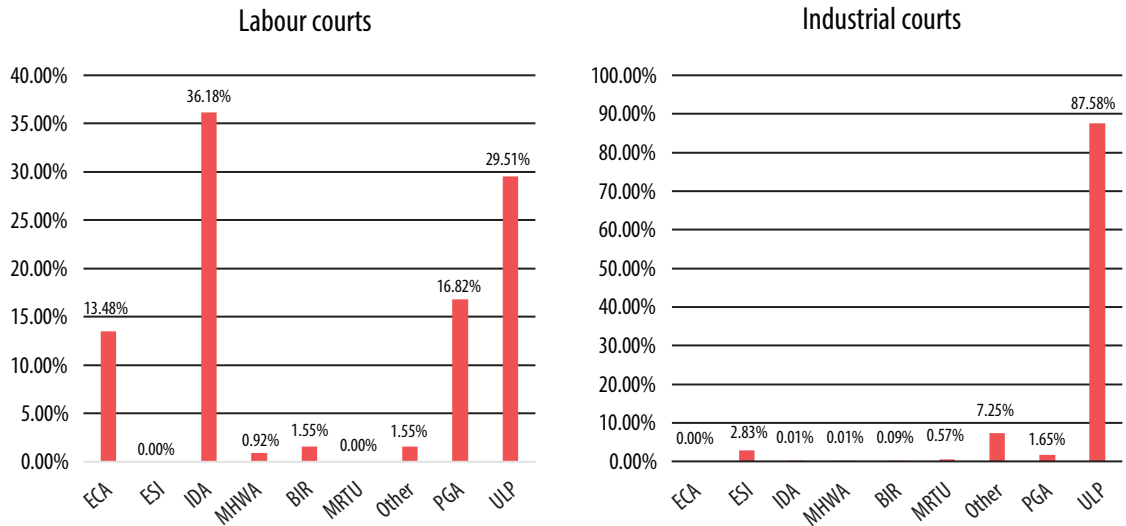
filed in 2014 and disposed in 2015 increased to 22 per cent, and then went on to gradually drop to 15 per cent, 13 per cent, and 11 per cent in the subsequent years. This shows that most often, the highest proportion of cases get disposed in the year after the filing year, and then the proportion gradually drops.

In order to understand the workload of the ILC to analyse their functioning, it is important to look at the nature of cases pending before the courts before we go on to analyse whether the age of a case varies based on the nature of the case, as in Figure 3.3.2.

As seen in Figure 3.3.2, a large majority of cases pending before the industrial courts pertain to cases of unfair labour practices, with other cases accounting for only 12.4 per cent of its workload. On the other hand, the labour courts have a significant proportion of cases regarding industrial disputes, unfair labour practices, gratuity payments, and employee compensation with cases of such nature accounting for 96 per cent of its workload.

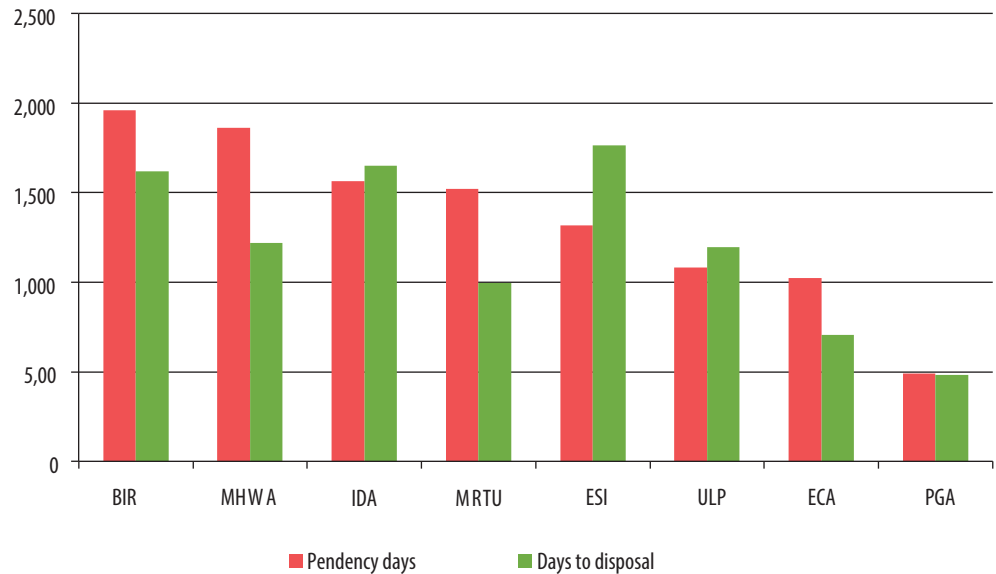
An analysis of the cases based on their case types (Figure 3.3.3) shows that there is significant variance in how long the cases remain pending, or how long they take to be disposed, depending on the nature of the case.

Figure 3.3.2. Proportion of Pending Cases as per Case Type⁹



Source: Author's calculations.

Figure 3.3.3. Pendency and Disposal Days as per Case Type¹⁰



Source: Author's calculations.

As per time periods shown in Figure 3.3.3, cases with respect to the ECA, MRTU, and MHW A take longer than the time prescribed by these statutes for the disposal of cases, as follows:

1. Cases regarding the ECA take 704 days (23.5 months) on average to be disposed, which is well above the time period of three months provided to dispose matters relating to employee compensation under Section 25A of the ECA.
2. Cases regarding the MRTU take 996 days (33.2 months) on average to be disposed, which is contrary to the time limits provided under the Act for disposing cases. Section 28(2) of the MRTU states that complaints relating to unfair labour practices must as far as possible be disposed by the court within a period of six months from the date of the complaint, and applications for the registration of a trade union under Section 11 or Section 14 of the MRTU

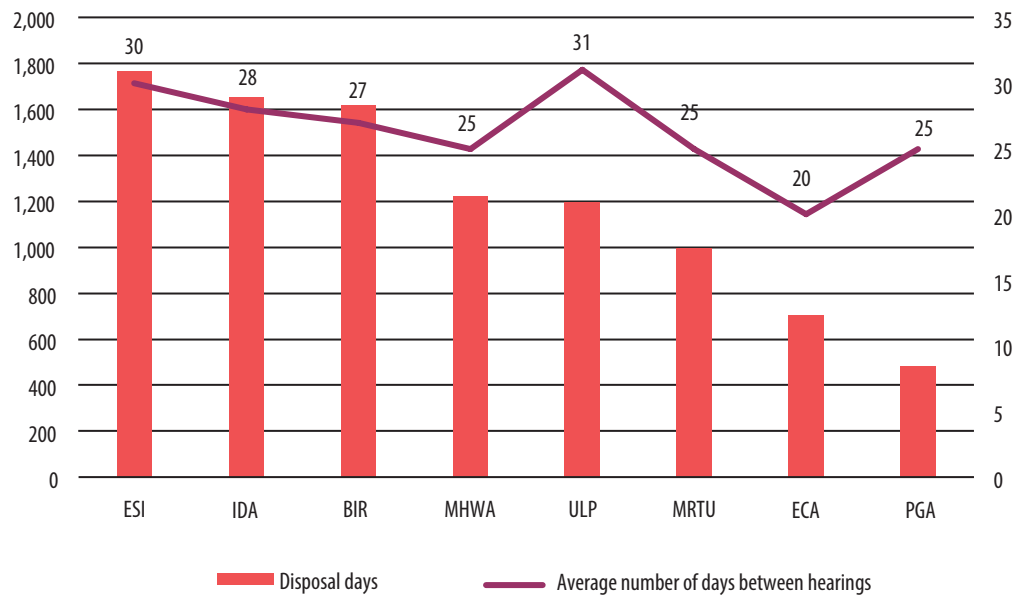
are to be disposed by the industrial courts within a period of four months from the date of the application.

3. Section 17F of the MHW A provides that the ILC must endeavour to dispose cases filed under the MHW A within a period of three months. However, the data shows that the MHW A cases take 1,221 days (40 months) to be disposed.

With cases taking longer than their prescribed time limits to be disposed, it would be interesting to note whether these cases are heard frequently, as explored in Figure 3.3.4.

As seen in Figure 3.3.4, for most types of cases (barring cases regarding ULP and PGA), the average number of days between hearings is higher when the overall days to disposal are higher. It is, therefore, possible that the courts take longer to resolve these cases as they are heard less frequently.

Figure 3.3.4. Average Number of Days between Hearings¹¹

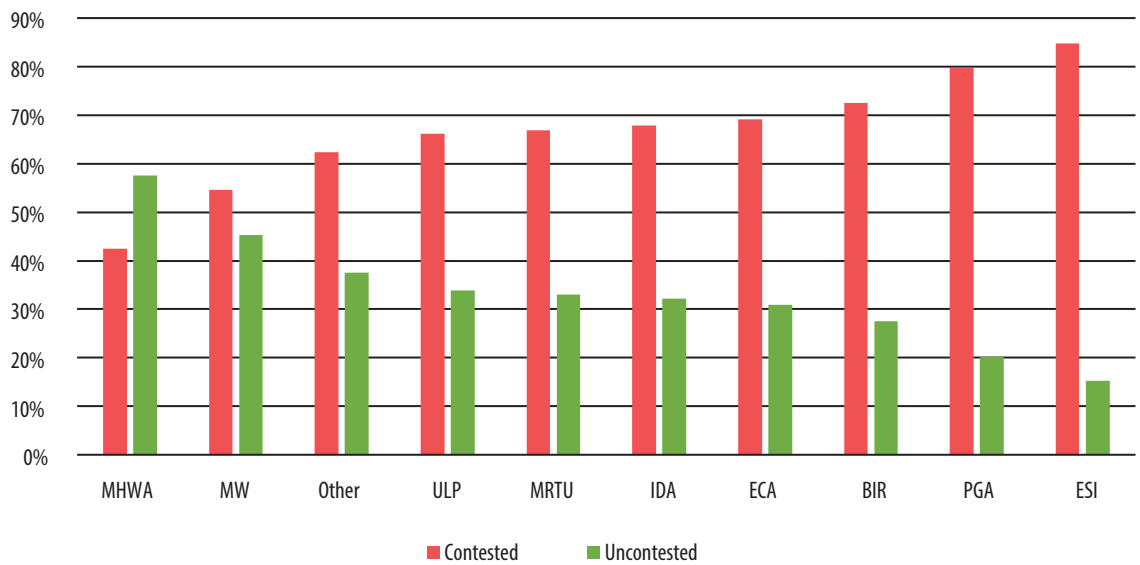


Source: Author's calculations.

In order to get a better understanding of the average number of days required to dispose cases, this must be seen in the backdrop of the proportion of cases that get disposed as 'contested' and 'uncontested' as provided on the e-courts website.

While the overall proportion of contested cases is 68 per cent and uncontested cases in 32 per cent, a look at the proportion of cases based on case types can provide a better understanding of how the court's time is distributed, as in Figure 3.3.5.

Figure 3.3.5. Proportion of Contested and Uncontested Cases as per Case Type

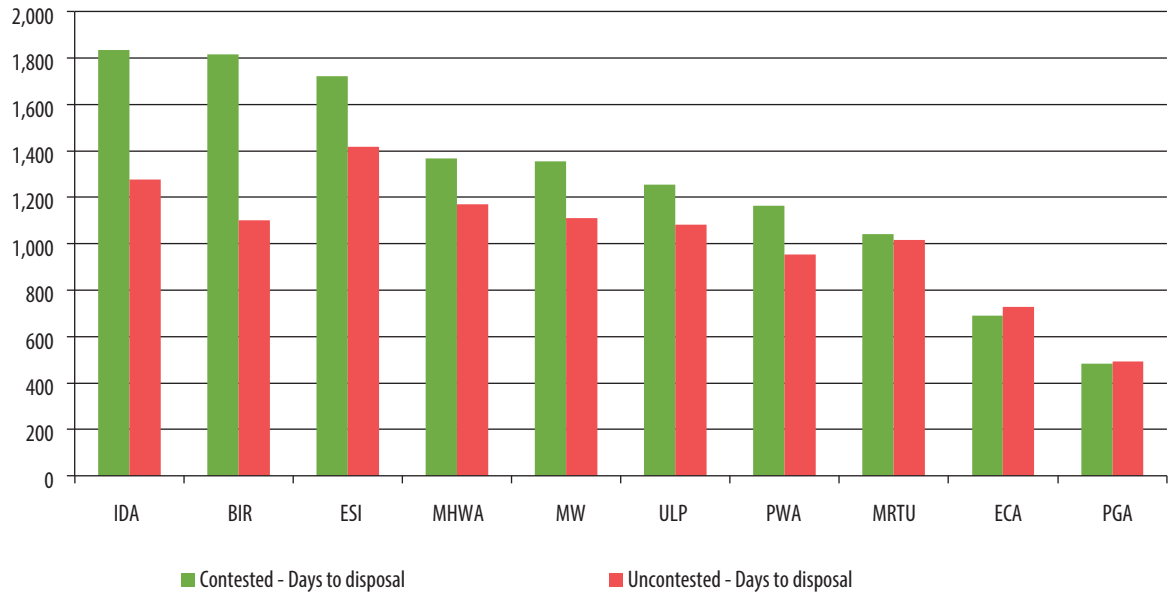


Source: Author's calculations.

As seen in Figure 3.3.5, a higher proportion of labour and industrial disputes are disposed and marked as contested cases, rather than uncontested cases. It must also be considered if the nature of

disposal of cases, that is, whether the cases disposed were contested or uncontested in court, plays in a role in the time taken for disposal. Figure 3.3.6 analyses this.

Figure 3.3.6. Disposal Days Based on the Nature of Disposal¹²



Source: Author's calculations.

It can be seen from Figure 3.3.6 that cases take over a year to be disposed, regardless of whether the cases were contested and uncontested. However, for most case types, the average number of days taken to dispose cases that were uncontested is lower than the average number of days taken to dispose contested cases.

A comparison of Figure 3.3.5 and Figure 3.3.6 shows that three out of the five case types that have a high proportion of contested cases (IDA, BIR, and ESI) also take the highest average number of days to dispose contested cases of that nature. However, when looked at from the perspective of the court's workload, it is only IDA cases that would take up a significant amount of time in the court's workload, as the proportion of ESI and BIR cases

are significantly low. IDA cases take 1,277 days (for uncontested cases) or 1,834 days (for contested cases) on average to be disposed; while the IDA does not stipulate a time period within which all cases filed under the IDA ought to be disposed, the proviso to Section 10(2A) prescribes that when the industrial disputes concerns an individual workman, the court must submit its award within three months. With the courts currently taking 42 or 61 months (for uncontested and contested cases respectively) on average to dispose IDA cases, this is well above the statutorily prescribed time limit. In order to understand the resulting effects of such delays in the adjudication of labour and industrial disputes, the following section of the chapter seeks to highlight the possible impact that judicial delay has on an employee, an employer, and the society.

IMPACT OF JUDICIAL DELAY

There are three primary groups of people who will be impacted by delays in the judicial process, that is, the employees, the employers, and the society at large. This section of the chapter seeks to highlight the likely socio-economic effects of judicial delays in the resolution of industrial and labour disputes.

Employees

From the perspective of an individual, it is the employee in a labour or industrial dispute who is likely to face the most hardship from judicial delays in the resolution of their dispute. The effect of delay in adjudication of a labour dispute can be felt by the employees concerned in the form of time lost and lost wages. The cost of litigation in India will further increase the hardship for the employees by increasing their spending, and in some cases, even increasing their debt. However, in cases where an interim stay on a dismissal is granted, or when an employee is provided subsistence allowance under the Industrial Employment (Standing Orders) Act, 1946 during the period of litigation, the employee could be protected from the economic impact of litigation.

The effect of delays in litigation against the employer can also bring adverse social effects such as pressures to compromise on their entitlements and settle matters out of court or be threatened of consequences for initiating such litigation.

Employers

The reference to adjudication of any industrial or labour dispute will foremost adversely impact relations between an employer and its employees; therefore, any prolongation of such disputes due to judicial delay is likely to further heighten any existing hostility between the disputants. Further, such litigation exacerbates the effects of judicial delay and

can even stall business operations, projects, and future growth plans of a company by requiring managerial personnel to work on ameliorating relationships between the management and labourers.

Society

As per the MOSPI, the number of workers in India affected due to industrial disputes (that result in stoppage of more for over 10 workers) in the year 2014 was 11,58,770 workers and the disputes resulted in a loss of 1,10,95,370 man-days.¹³ If any industry or a part of it has to remain idle on account of a strike or lockout for an extended period of time, the effect of it will be a loss of output in that industry. If the industry affected by the delay in dispute resolution is a supplier of raw materials, there can be a snowball effect felt on other industries that rely on the supply of such raw materials. Further, if industrial disputes fail to get resolved in a quick and efficient manner, the effect of such delays is also felt by consumers. In the event of a shortage of goods due to any on-going dispute, the resulting decrease in the supply of goods can lead to an increase in prices of the goods in the market and thereby affect consumers of products.¹⁴

CONCLUSION

A glimpse into the functioning of the ILC in Maharashtra shows that industrial and labour disputes that go through the process of adjudication in the ILC take a significant amount of time to be processed, and the disputes take longer than statutorily prescribed timelines to be disposed. This is the case with most disputes in the Indian judicial system as delays are no longer the exception but appear to be the norm. However, unlike other areas of the law, labour legislations provide for a multi-tier system of dispute resolution, as they advocate conciliation of disputes and adjudication by the ILC

as the last resort. In this regard, a study on labour disputes suggests that adopting a conciliation process for labour disputes took lesser time for dispute resolution and had the effect of reducing claims as well as final payments to workers and thereby increased settlements through bargaining.¹⁵

With around 50,000 cases pending before the ILC in Maharashtra, and the ILC exceeding prescribed timelines for disposal of cases, it would be desirable for the state to strengthen its conciliatory mechanisms so as to encourage their use and successfully resolve disputes out of court wherever possible. The adverse impact of the current judicial delays in resolving labour and industrial disputes is not only felt by the individuals involved but can also have a large-scale impact on industry and society. Therefore, until such time that existing conciliatory mechanisms are further strengthened to encourage more out of court resolution of disputes, efforts must be made within the ILC to dispose long pending cases, and make a targeted attempt to hear cases in an efficient manner so as to resolve disputes on a timely basis and minimise the effects of judicial delay.

Notes

1. Entries 22, 23, and 24, List III, Seventh Schedule, Constitution of India, 1950.
2. The DAKSH database collects case information from courts across the country in order to make possible large-scale analyses of court data to understand the problems of pendency and delay in the Indian judicial system.
3. As per the list of ILC in Maharashtra as available on e-courts.
4. Cases that were pending in the ILC as of 1 December 2018. Therefore, data regarding cases in the ILC in the month of December 2018 has not been considered in this chapter.
5. See Districtwise Area and Population Density. Directorate of Economics and Statistics, Government of Maharashtra. 2016. *Handbook of Basic Statistics of Maharashtra State*. Mumbai: The Director of Economics and Statistics, pp. 16, 17.
6. MSME Development Institute. 2017. *Industrial State Profile of Maharashtra*. Mumbai: Ministry of MSME, Government of India, p. 42, available online at http://dcmsme.gov.in/dips/state_wise_profile_16-17/Maharashtra%20Industrial%20State%20Profile%202016-17-Final.pdf (accessed on 12 April 2019).
7. Arunav Kaul. 2017. 'Performance Indicators: Working of Magistrates' Courts in India', in Shruti Vidyasagar, Harish Narasappa, and Ramya Tirumalai (eds), *Approaches to Justice in India: A Report by DAKSH*, p. 102. Lucknow: EBC Publishing Pvt. Ltd.
8. Ministry of Labour and Employment. 2007. 'Report No. 15 of 2007: Implementation of Industrial Disputes Act, 1947 and Contract Labour (Regulation and Abolition) Act, 1970', available online at https://cag.gov.in/sites/default/files/old_reports/union/union_performance/2006_2007/Civil_%20Performance_Audits/Report_no_15/introduction.pdf (accessed on 27 January 2019).
9. The case types shown in Figure 3.3.2 pertain to the nature of cases under various legislations. The abbreviations stand for cases with respect to the following legislations: 'BIR'—Bombay Industrial Relations Act, 1946; 'ECA'—Employee's Compensation Act, 1923; 'ESI'—Employees' State Insurance Act, 1948; 'IDA'—Industrial Disputes Act, 1947; 'MHWA'—Maharashtra Mathadi Hamal and other Manual Workers Regulation of Employment and Welfare Act, 1969; 'MRTU'—Maharashtra Recognition of Trade Union And Prevention of Unfair Labour Practices Act, 1971; 'PGA'—Payment of Gratuity Act, 1972; 'ULP'—Maharashtra Recognition of Trade Union And Prevention of Unfair Labour Practices Act, 1971.
10. Only case types with a data set of over 100 pending cases and 100 disposed cases have been considered for this analysis.
11. The average number of days between hearings has been calculated based on a sample set of 60,801 disposed cases and 8,86,983 hearings.
12. Only case types with a data set of over 100 contested cases and 100 uncontested cases have been considered for this analysis. MW stands for cases related to the Minimum Wages Act, 1948; and PWA stands for cases related to the Payment of Wages Act, 1936.
13. 32.17 – Industrial Disputes, Labour and Employment. Ministry of Statistics and Programme Implementation. 2018. *Statistical Year Book India 2018*. New Delhi: Government of India.
14. M.J. Arputharaj and R. Gayatri. 2014. 'A Critical Analysis on Efficacy of Mechanism to Industrial Disputes Resolution in India', *International Journal of Current Research and Academic Review*, 2(8): 332.
15. Rahul Sapkal. 2016. 'How Law and Law Enforcement Affect Labour Markets in Developing Countries: An empirical evidence on India'. Unpublished thesis, Erasmus University Rotterdam; Sadaf Modak. 2018. '8,142 Cases Pending in Mumbai Labour Courts', *The Indian Express*, 4 February.



Court Processes to Aid Arbitration: What Is the Impact of Recent Amendments?*

Poornima Hatti

4

INTRODUCTION

Indian courts and how long they take to adjudicate matters have now been the discussion of many studies, both within India and outside. Despite this continued attention, no immediate solution to an efficient judiciary is within reach.¹ The one recurring theme to avoid delay and the consequent social and economic impact has been to look to alternative dispute resolution (ADR) mechanisms. As far back as 1978, the Law Commission of India, in its 76th report, detailed the history of arbitration in India, including the historical trend towards this form of alternative dispute resolution.² Every ADR process of course has to gain legitimacy through the existing judicial system to ensure that there is acceptance of the ADR process.

The ADR process has to be efficacious to be accepted as an alternative to the mainstream dispute resolution system. For this to transpire, any support that the ADR process seeks from mainstream litigation also has to be efficacious. If this does not happen, the ADR process would become irrelevant as an alternate to litigation.

Arbitration has been put forth and continues to be an effective alternate remedy in many jurisdictions when compared to mainstream litigation for a number of reasons. Studies show that the businesses over the world prefer resolving disputes, overwhelmingly, through arbitration when compared to litigation.³ For an effective arbitration regime, court support is important. This chapter looks at empirical data collected from courts in the context of cases relating to arbitration and analyses the same in the context of the larger issues of socio-economic delay plaguing the Indian judiciary.

Role of Courts in Arbitration: Why and How Much?

The role of national courts and arbitration has been stated to be one of true partnership and forced co-habitation. Thus, if arbitration is to work as a truly short alternative to long-drawn litigation, there has to be excellent support from the litigation process. At every instance, persons who have opted for arbitration need judicial support. Such judicial support needs to be clear, steady, and swift. Unfortunately, the situation is that any support that Indian courts have lent to arbitration in itself has been long-drawn and slow, thus frustrating the arbitration process as an alternative. For instance, if parties disagree on the nominees to constitute a tribunal, the option available, particularly in the context of ad hoc arbitration, is to go to court and get help in constituting the tribunal. Unfortunately, this process of getting the tribunal constituted itself can take much longer than anticipated.

The Supreme Court has stated that:

...the primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties.⁴

In this chapter, I examine the issue of judicial delay within the specific context of matters pertaining to arbitration that come up before subordinate courts and whether amendments in the recent past have helped address this issue. I will analyse data from the DAKSH database by evaluating whether the Amendment Act of 2015 accomplishes its desired objective of remedying the delays caused by the Arbitration and Conciliation Act, therefore, rendering arbitration in India a more effective and economically feasible ADR method. The study is restricted to data collected from selected districts between May and September 2018.⁵

HISTORY OF ARBITRATION IN INDIA

In the Indian context, arbitration was introduced by the 1st Legislative Council by way of the Indian Arbitration Act, 1899, and was derived from the British Arbitration Act, 1889. This was superseded by the Arbitration Act, 1940, and eventually by the Arbitration and Conciliation Act, 1996 (Act), which ironed out defects that had been observed in the Arbitration Act, 1940. The Act incorporated the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Act consolidated and amended laws relating to domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards. The idea is that almost every nation across the world is trying to bring similar arbitration legislation to ensure that awards obtained in one country can be enforced in another along the lines of the New York Convention.⁶

The necessity to enact extensive amendments to the Act was acknowledged within half a decade of the Act coming into force, by way of Report No. 176 on the 'Arbitration and Conciliation (Amendment)

Bill, 2001' submitted by the Law Commission of India,⁷ which observed that arbitration proceedings were experiencing severe delay, and specifically quoted the observation of the Supreme Court that the arbitral process was subject to severe delays.⁸ The Act was subsequently amended in 2005 by the Arbitration and Conciliation (Amendment) Act, 2005, and further amended in 2015 by the Arbitration and Conciliation (Amendment) Act, 2015.

The Arbitration and Conciliation (Amendment) Act, 2015 (Amendment) was a consequence of deliberations and study that spanned over a decade comprising *inter alia* reports, bills, consultation papers, national conferences, and draft papers, submitted by eminent persons and various institutions. The Amendment incorporated the recommendations of Report No. 246 (Report) submitted by the Law Commission of India in August 2014. The Report observed that the Act had 'come to be afflicted with various problems including those of high costs and delays' and highlighted the failure of the Act to fulfil its objective—to serve as an efficient (in terms of time and expense) method of alternative dispute resolution. The Report stated that the Act was 'no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative'. Consequently, the Amendment incorporated changes to address inadequacies of the Act. Significant among these are the amendments that make the proceedings under the Act time-bound. Another recent set of amendments have come to be passed in 2019, which have seen, *inter alia*, the setting up of the Arbitration Council of India. The changes introduced by the amendment of 2019, however, will not be the focus of the present discussion.

This chapter examines arbitration-related matters before courts that include (among others) matters under (a) Section 9 for seeking interim measures and (b) Section 34 for setting aside

of arbitral award. Section 9 of the Act pertains to applications for interim measures, and is more commonly filed prior to commencement of arbitration proceedings. Section 9, after the Amendment was passed, prescribes a time limit of 90 days to commence arbitration proceedings after obtaining an interim order. The language of Section 9 is fairly widely worded, hence, bringing into its scope a wide range of interim reliefs that can be granted. These reliefs can be granted prior to the constitution of an arbitral tribunal, after the award has been made and prior to the enforcement of the award, and also when a tribunal has been constituted, but any interim relief by a tribunal may not be considered efficacious. Once relief is obtained via the Section 9 route, it is required that parties must approach the relevant arbitrators and constitute an arbitral tribunal within a period of 90 days, unless the court allows for an extension. If one views the various decisions in cases that have been brought to court under Section 9, they include the following types of cases:

1. Cases in which one of the parties would like to secure the financial amount in dispute, where courts can direct parties to furnish guarantees.
2. Cases wherein courts have directed parties to take symbolic possession of the properties involved.
3. Courts have also allowed receivers to be appointed over certain properties and have also allowed disclosure of property details in terms of what was owned by a specific party.

Section 34 of the Act relates to applications for setting aside of the order passed by an arbitral tribunal.

The procedure prescribed under Section 34 mandates issuance of notice by a party seeking the setting aside of such an award to the other party to the arbitration proceedings. Section 34 was amended by the Amendment to impose a time limit of one year from the date of issuance of such notice to the date of disposal of application.

METHODOLOGY

This chapter relies on data collated by DAKSH across several districts in India from the web-based platform of subordinate courts in India (ecourts.gov.in). The data was collected between May and September 2018. This chapter will compare the statistics of cases filed before December 2015 and from January 2016 onwards in order to assess the impact of the Amendment. For pending cases, the duration for which a particular matter has been pending will be computed between the date on which the matter was filed and the date on which data was collected. Data analysis excludes outliers in order to account for observational error and aberrant data, which would cause significant variance in the computation of averages.

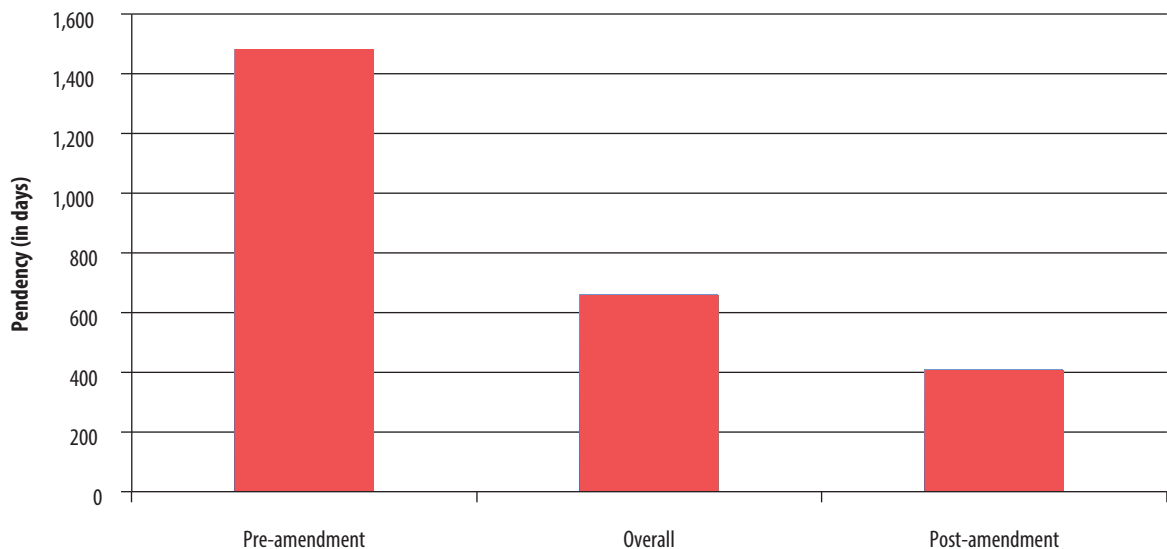
ANALYSIS

In this section, data pertaining to delay in cases that are pending has been analysed separately from that of cases that have been disposed.

Pending cases

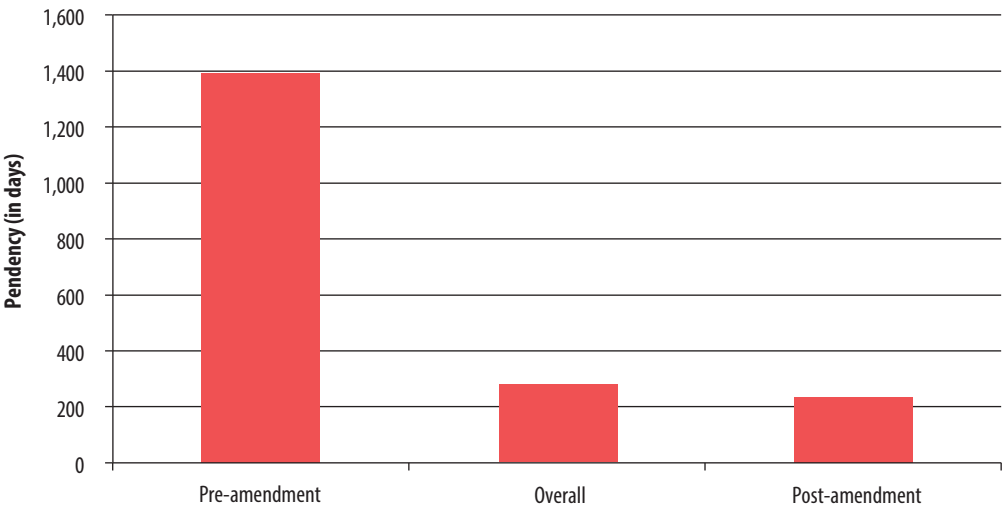
As seen in Figure 3.4.1, the average pendency of cases filed prior to the Amendment is visibly greater than the average pendency of cases filed post Amendment, by a significant margin. Prior to the Amendment, matters pertaining to arbitration remained pending for an average of 1,480.98 days. After the Amendment came into force, the average number of days that matters have remained pending has decreased to 408.3 days.

Figure 3.4.1. Average Pendency (in Days)



Source: Author's calculations.

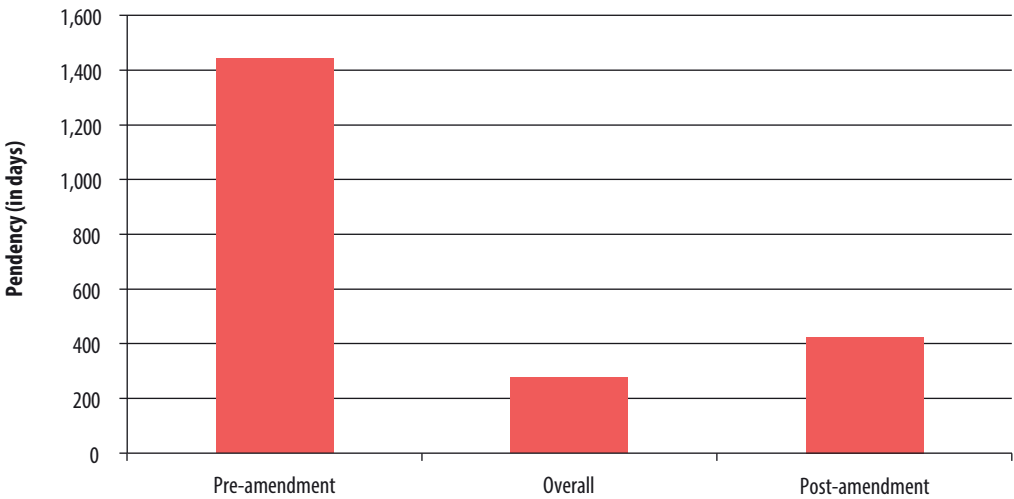
Figure 3.4.2. Average Pendency (in Days) of Section 9 Cases



Source: Author's calculations.

Figure 3.4.2 shows that the average pendency of cases filed prior to the Amendment for matters filed under Section 9 of the Act is greater than the average pendency of cases filed post Amendment by a significant margin. Prior to the Amendment, matters pertaining to Section 9 of the Act remained pending for an average of 1390.2 days. Upon the Amendment having come into force, the average number of days that matters have remained pending has decreased to 232.27 days.

Figure 3.4.3. Average Pendency (in Days) of Section 34 Cases



Source: Author's calculations.

Figure 3.4.3 shows that the average pendency of cases filed prior to the Amendment for matters filed under Section 34 of the Act is greater than that of matters filed post Amendment. Prior to the Amendment, matters pertaining to Section 34 of the Act remained pending for an average of 1,442.77 days. Upon the Amendment having come into force, the average number of days that matters have remained pending has decreased to 421.46 days.

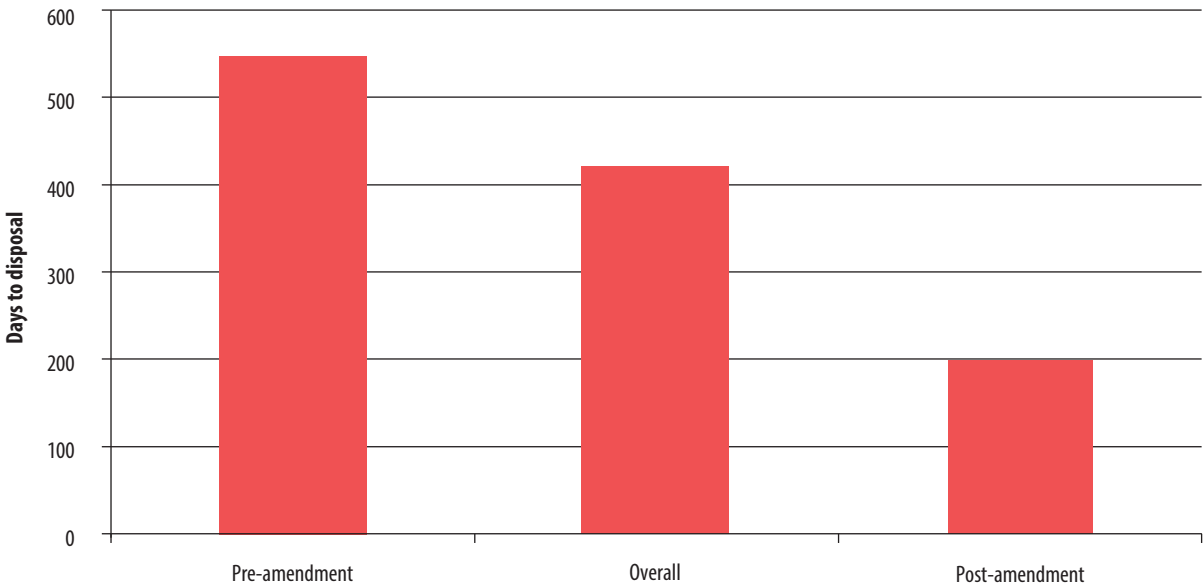
An analysis of the data pertaining to pending cases reveals that the Amendment might have played a role in boosting the efficiency of courts. As a lawyer, it is my opinion that the Amendment has been the primary driver of change in the pace of proceedings before the courts, as judges have often cited the statutorily prescribed limit as a strict deadline.

However, the success of the Amendment is severely limited by the fact that by and large, courts have not strictly adhered to the time limits prescribed in the Amendment. Delays are therefore prevalent, though to a lesser degree, and the average pendency of arbitration-related disputes in courts continues to be a vast and pervasive problem.

Disposed Cases

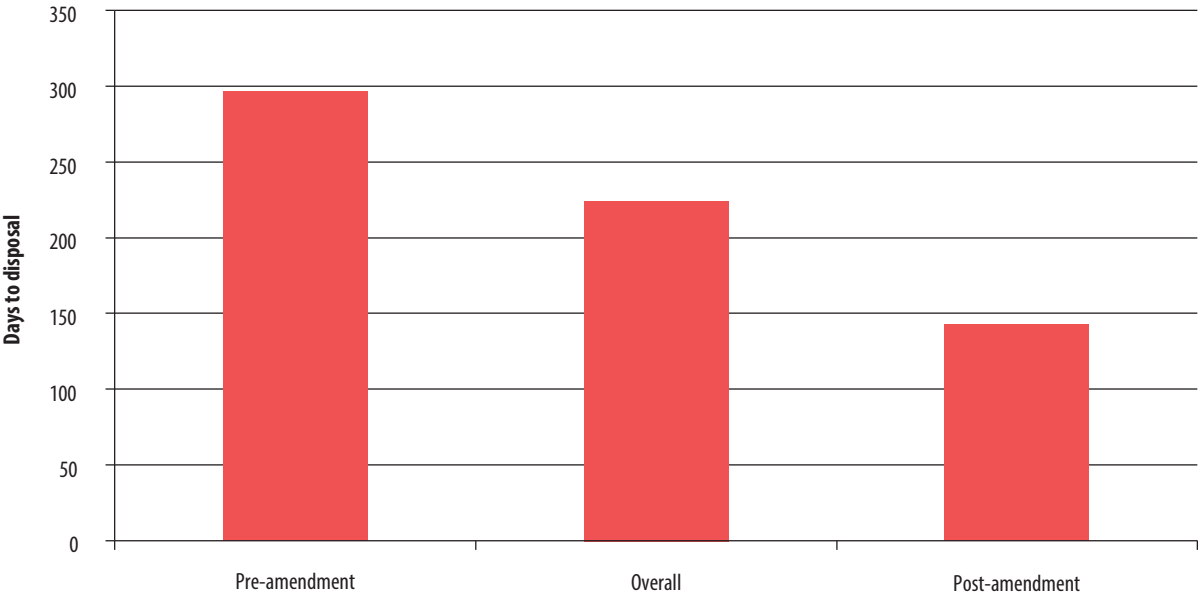
Prior to the Amendment, matters pertaining to arbitration were disposed within an average period of 548.85 days, as seen in Figure 3.4.4. Post the Amendment, arbitration matters have been disposed of significantly more expeditiously, at an average of 199.5 days.

Figure 3.4.4. Average Days to Disposal



Source: Author's calculations.

Figure 3.4.5. Average Days to Disposal of Section 9 Cases



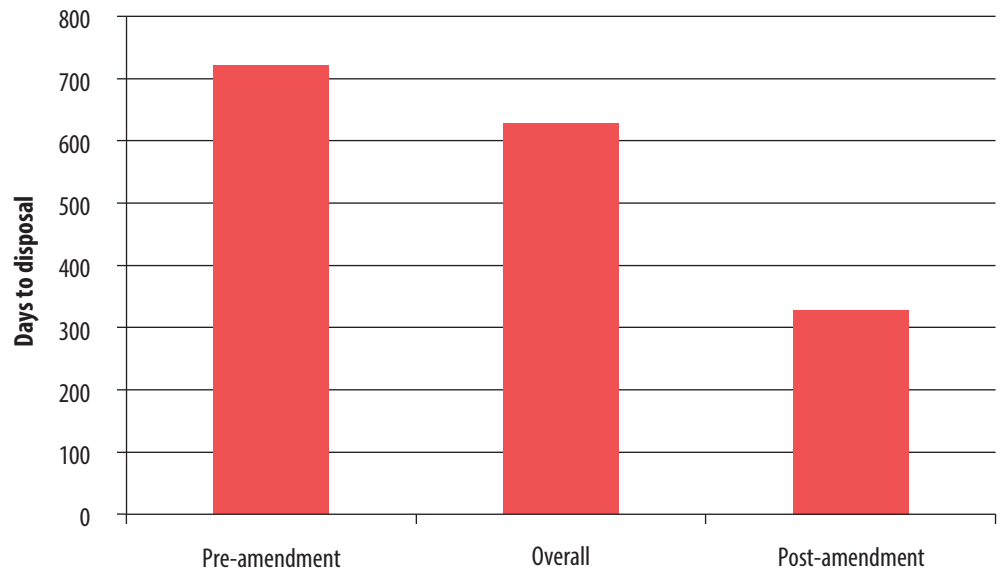
Source: Author’s calculations.

Similarly, as seen in Figure 3.4.5, applications filed under Section 9 of the Act were being disposed of within an average period 296.46 days prior to the Amendment. This has shown remarkable improvement post the Amendment, and the average period of disposal has shrunk to 143.43 days. The present data measures the duration between the date of filing and the date of disposal, as opposed to the date of passing of the interim order and the date of commencement of arbitration proceedings. However, based on my observation and experience as a lawyer, I surmise that the time taken between the date when the interim order is passed and date when arbitration commences has also reduced—the effect of the Amendment in speedier disposal of applications filed under Section 9 prompting parties to move forward to the next stage of resolution expeditiously. While this is not a comparative observation, it is significant in the context of the 90-day limit imposed by the Act.

As seen in Figure 3.4.6, the average duration has decreased from 721.67 days for matters filed prior to December 2015 to 328.48 days post December 2015.

I am of the considered opinion that since the statute, on account of the Amendment, prescribes a strict time limit of one year between date of issuance of notice to date of disposal of application, there has been a significant decrease in the average duration required to dispose of applications under Section 34 of the Act. From the data provided earlier, it is evident that there has been a decrease in the average duration of pendency as well as disposal. While there remain several possible extraneous factors that might have resulted in this decrease, from the standpoint of legal practitioners, having observed proceedings pertaining to arbitration over the course of over a decade, it is apparent that courts have been mindful of the Amendment. More often than not, the Act in its amended form serves as a tool to conclusively establish a strict deadline on the proceedings.

Figure 3.4.6. Average Days to Disposal of Section 34 Cases



Source: Author's calculations.

IMPACT

The preceding section highlights the marked difference in the duration of court proceedings for cases filed post the Amendment and prior to the Amendment. However, while the Amendment has been a positive driver of change, procedural delay is rampant and remains an institutional problem that negates the very purpose of arbitration as an ADR mechanism. In this context, it becomes necessary to set out the negative and wide-ranging socio-economic impact of such delay, especially in the context of arbitration being intended to circumvent such impact.

Judicial delay comes at great economic cost, especially in the corporate-commercial sphere. India is ranked 100 out of 189 countries in the World Bank rating or Ease of Doing Business 2017. India is ranked 178 among 189 countries on ease of enforcing contracts. Contract enforcement plays a significant role in the economy and has serious impact on cash flow. A strong contract enforcement regime would boost productivity. A survey

conducted by Boehm and Oberfield concluded that reducing court congestion would improve industrial productivity by around 5 per cent.⁹ The study further observed that weak enforcement often created situations wherein parties choose to purchase from trusted suppliers or altogether cease purchasing materials by 'vertically integrating and making the components themselves, or by switching to a different production process'.

The former Chief Justice of India, T.S. Thakur, stated that in relation to 'Make in India' foreign investment in India would require a judicial system capable of handling cases and disputes that may arise out of such investments. He stated, '[e]fficacy of the judicial system is so vitally connected with the development of this country.'¹⁰ According to the 2005 World Bank Enterprise Survey data, of the firms surveyed, 12.5 per cent were party to court cases during the period 2001–2004. Of these firms, about 22.5 per cent stated that poor contract enforcement was a constraint to doing business. Slow courts are more expensive for litigants. Contract enforcement can take years to be resolved, which could result in

parties avoiding making investments in India or participating in surplus-generating transactions.¹¹

To contextualise this data, both Section 9 and Section 34 of the Act can be examined. An application for grant of interim measures frequently results in the courts granting the interim measure sought. With respect to disputes involving contract enforcement, this could prevent certain portions of the contract from being enforced, which would have an impact on cash flow. This would have wide-ranging impact on the functioning of the affected party, from payment of salaries to employees, to not being able to pursue or fulfil other transactions. Once an interim order is passed, the order would be in effect for a maximum of 90 days before the court, unless the court grants an extension, and the interim measure would then be considered further by the arbitral tribunal. Failure of the court to dispose of applications filed under Section 9 increases the overall time taken to resolve the dispute.

Similarly, once arbitration is concluded, more often than not, an application is filed under Section 34 of the Act, seeking for the award to be set aside. When court proceedings under this Section get delayed—and often, such proceedings can span years—they completely vitiate expeditious arbitration proceedings. The affected party is denied timely relief due to judicial delay.

CONCLUSION

In the words of Lord Mustill:

Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators

take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can, in case of need, lend its coercive powers to the enforcement of the award.¹²

Courts play a crucial role with respect to arbitration, and the success of the arbitration regime in India is contingent upon courts acting expeditiously within the statutorily prescribed time frame. While this author is of the opinion that the Amendment has been successful in curbing judicial delay, this success is severely limited by the fact that the strict time frames prescribed by the Act are not being met. The data analysed in this chapter clearly indicates that the Act is not being enforced strictly, and this judicial delay has a negative socio-economic impact.

Notes

- * The author wishes to acknowledge the research and support of Pooja Kini, Associate, Samvād: Partners, in preparing this article. I would like to particularly acknowledge her for data analysis.
1. Ministry of Finance. 2019. 'Ending Matsyanyaya: How to Ramp up Capacity in the Lower Judiciary', in *Economic Survey 2018–2019*, pp. 109–114.
 2. Law Commission of India. 1978. *Seventy Sixth Report on Arbitration Act, 1940*. New Delhi: Government of India, pp. 2–8, available online at <http://lawcommissionofindia.nic.in/51-100/Report76.pdf> (last accessed on 30 August 2019).
 3. Adrian Hodis. 2018. '2018 International Arbitration Survey: The Evolution of International Arbitration', *Queen Mary University of London*, available online at <http://www.arbitration.qmul.ac.uk/research/2018/> (accessed on 30 August 2019).
 4. *Union of India v. Varindera Constructions Ltd.*, (2018) 7 SCC 794, para 12.
 5. Data has been compiled across the districts of Ambala, Amritsar, Balodabazar, Bathinda, Beed, Bengaluru, Bengaluru Rural, Bhiwani, Buldhana, Chikballapur,

- Coimbatore, Cuddalore, Dakshina Kannada, Darjeeling, Dharmapuri, Fatehbad, Ferozepur, Gadag, Ganjam, Gurdaspur, Gurugram, Hassan, Haveri, Hoshiarpur, Idukki, Jaipur, Jalandhar, Jalpaiguri, Jashpur, Jhajjar, Jharsuguda, Kalahandi, Kannur, Kapurthala, Karnal, Kolhapur, Kollam, Koraput, Kottayam, Kozhikode, Krishna, Kurukshetra, Latur, Ludhiana, Madhubani, Mallapuram, Mandya, Mansa, Mayurbanj, Moga, Muktsar, Mysuru, Nashik, Nellore, Nuapada, Pallakad, Panchkula, Panipat, Pathanamthitta, Pathankot, Patiala, Pune, Puri, Raichur, Rewari, Rohtak, Rupnagar, Sambalpur, Sangrur, South 24 Parganas, Theni, Thiruvananthapuram, Toothukudi, Tiruchirapalli, Thrissur, Thiruchirapalli, Tiruvallur, Vijayapura, Virudhanagar, Vishakapatnam, and Warangal.
6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
 7. Law Commission of India. 2001. *Report No.176 on Arbitration and Conciliation (Amendment) Bill, 2001*. New Delhi: Government of India, available online at <http://lawcommissionofindia.nic.in/arb.pdf> (last accessed on 30 August 2019).
 8. Law Commission of India. 2001. *Report No.176 on Arbitration and Conciliation (Amendment) Bill, 2001*. New Delhi: Government of India, paragraph 1.8, p. 16, available online at <http://lawcommissionofindia.nic.in/arb.pdf> (accessed on 30 August 2019).
 9. Johannes Boehm and Ezra Oberfield. 2019. '(Un)ease of doing business: How congested courts hinder firm productivity', *VoxDev*, 7 February, available online at <https://voxdev.org/topic/institutions-political-economy/unease-doing-business-how-congested-courts-hinder-firm-productivity> (accessed on 30 August 2019).
 10. *The Times of India*, 2016, 'An Overworked Chief Justice T.S. Thakur Breaks Down in front of PM Modi', *The Times of India*, 24 April.
 11. Amrit Amirapu. 2016. 'Justice Delayed is Development Denied: The Effect of Slow Courts on Economic Outcomes in India', *Ideas for India*, 22 August, available online at <https://www.ideasforindia.in/topics/governance/justice-delayed-is-development-denied-the-effect-of-slow-courts-on-economic-outcomes-in-india.html> (accessed on 30 August 2019).
 12. Lord Mustill. 1993. *Comments and Conclusions in Conservatory Provisional Measures in International Arbitration*, 9th Joint Colloquium. ICC Publication.

5

Enforcement of Timelines under IBC: Two Steps Forward and One Step Back?

Aparna Ravi

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC), a consolidated law that deals with the insolvency resolution and liquidation of companies, has now been in effect since December 2016. One of the core features of the IBC is its emphasis on timelines, a feature that is borne out in the preamble to the IBC as well as in the Report of the Bankruptcy Law Reform Committee (BLRC Report),¹ which sets out the design and framework for the legislation. The IBC prescribes timelines for different stages in the insolvency resolution process, such as the time within which an application is to be admitted, the time period for submission of claims by creditors, the time period within which a resolution professional is to form a committee of creditors, and so on. The most critical timeline prescribed by the IBC is the timeline for completion of the corporate insolvency resolution process (CIRP). This time period was, until recently (and with respect to the data set covered in this chapter), 270 days and has been extended to 330 days with the passage of the IBC Amendment Act 2019 (IBC Third Amendment), which was notified on 16 August 2019. If a resolution plan is not approved by the committee of creditors within 270 days (now 330 days), the debtor company goes into liquidation.

But have these timelines been followed in practice? The insolvency of Essar Steel Limited, which had been on-going for over 600 days when the National Company Law Appellate Tribunal approved the resolution plan, is a high profile example of the tendency of the CIRP to extend well past the statutorily prescribed period.² Based on quantitative and qualitative data, this chapter considers the IBC's track record in adhering to the statutorily prescribed timelines since the law came into effect.³ It also considers the principal reasons for these delays in the context of the evolving jurisprudence around the IBC and what delays mean for the effectiveness of the law and the sanctity of the process it lays down.

Part I provides a brief overview of the IBC and why timelines are particularly important for insolvency laws. This part also analyses data made available by the Insolvency and Bankruptcy Board of India (IBBI) on the extent to which the timelines prescribed by the IBC are being complied with. Part II considers some of the contributing factors for these delays and their implications for the effectiveness of the IBC. In the conclusion, I look forward into the road ahead to explore what these principal causes of delays might mean for the sanctity of the IBC's process and timelines.

THE IBC AND TIMELINES

The principle behind the IBC as articulated in the BLRC Report was straightforward. The law was intended to provide a linear and time-bound process for a company that is unable to pay its debts when due, to either reach an agreement with its creditors (termed broadly as a resolution) or, if such an agreement could not be reached, to efficiently liquidate its assets, which could be put to better use elsewhere. The IBC details the steps to facilitate such a process, a simplified version of which is set out below.

First, either the debtor company or a creditor can initiate an insolvency resolution process under the IBC by filing an application with the relevant bench of the National Company Law Tribunal (NCLT) where the debtor company is located. Once such an application is admitted by the NCLT, a moratorium or 'calm period' comes into effect to enable the creditors of the debtor company to arrive at a resolution plan that is intended to allow the debtor company to continue its operations in some form. During the 'calm period', no litigation proceedings can be initiated against the debtor company and all existing proceedings are suspended, the idea being that the creditors and debtor company need such

a calm period to arrive at a resolution. The IBC gives the creditors a fixed time period (which was initially 270 days and has, as of 16 August 2019, been extended to 330 days) to arrive at a resolution plan, which needs to be approved by 66 per cent of the financial creditors and subsequently by the NCLT. Once a resolution plan has been approved, the debtor company comes out of the IBC process. If the creditors do not approve a resolution plan within the stipulated time period, the NCLT is required to pass an order for liquidation. The IBC also sets out the process for the appointment of a liquidator and the liquidation and distribution of the debtor company's assets to its creditors, employees, and other stakeholders.

Time Is of the Essence

The BLRC Report, points out that speed is of the essence for insolvency resolution for two reasons:

First, while the 'calm period' can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.⁴

In other words, the value of an insolvent company's assets depletes rapidly with time. Thus, in order to preserve as much economic value in the debtor

company as possible, both to maximise recovery for creditors and to increase the chances of the debtor company continuing in business, time is of the essence. This sense of urgency expressed in the BLRC Report has found its way into the IBC where timelines are prescribed for most steps in the process. Further, the law provides for a very clear consequence if a resolution plan cannot be arrived at within the stipulated timeline: the debtor company must go into liquidation.⁵

What Does the Data Say?

Based on data made available by the IBBI, as of 31 March 2019, there were 1,800 companies with respect to which applications for commencement of the CIRP had been admitted since the IBC came into effect.⁶ Of these 1,800 cases, the process has been closed in 715 cases in the manner set out in Table 3.5.1. It should be noted that as the data considered in this chapter relates to the period prior to the IBC Third Amendment when the CIRP was to be completed within 270 days, the data has been analysed with reference to compliance with the 270-day timeline.

Table 3.5.1. Outcome of Cases Where CIRP are Closed

Settled or closed on appeal	152
Withdrawn	91
Resolution Plan approved	94
Ended in Liquidation	378

Source: IBBI's Quarterly Newsletter, January–March 2019.

As discussed previously, barring cases that are closed prematurely on appeal, settled or withdrawn, the IBC essentially provides for two possible outcomes at the end of the CIRP: approval of a resolution plan or a liquidation order being passed. In both situations, the data available to date suggests that the 270-day time period has not been complied with in a large number of cases. Of the 94 cases where resolution plans have been approved, 62

cases took longer than 270 days, with a few cases nearing 600 days. Companies that have ended up in liquidation have in general taken less time, with 152 of the 378 companies where liquidation orders have been passed taking over 270 days.⁷ However, these numbers in themselves do not give the entire picture as there are still 1,085 companies which are currently undergoing the CIRP process. Data is not readily available as to how long these cases have been on-going, but given that they are yet to be completed, it is likely that a significant number might have already crossed the 270-day deadline.⁸

An interesting pattern that the data demonstrates is that the 270-day timeline appears to have been taken more seriously when the IBC first came into effect. For example, of the first 10 resolution plans that were approved prior to 31 December 2017, only 3 went over the 270-day deadline and none over 290 days.⁹ On the other hand, 26 of the 35 resolution plans that were approved between July and September 2018¹⁰ and 8 of the 13 resolution plans that were approved between October and December 2018¹¹ took over 270 days. There could, of course, be a number of different explanations for why a particular resolution takes longer than 270 days, but the broad trend appears to suggest that crossing 270 days is becoming more of the norm than the exception, particularly where resolution plans are concerned.

Another source of delay that is not captured in the data is the time taken between filing of an application for commencement of the CIRP and the admission of the application. (It should be noted that the time periods discussed earlier relate to the period from admission until approval of a resolution plan or passing of a liquidation order.) The IBC states that the NCLT is required to admit or reject an application within 14 days of filing. However, in my experience and in the experience of other commentators,¹² this has not happened in practice, with some benches of the NCLT being particularly slow to admit matters. In fact, in one of the early

IBC cases, the National Company Law Appellate Tribunal (NCLAT) held that the 14-day timeline prescribed by the IBC for admission of applications was directive and not mandatory.¹³ (Incidentally, the NCLAT in that same judgment clarified that the 270-day timeline was mandatory.) Interestingly, the IBC Third Amendment seeks to address delays in admitting cases by requiring the NCLT to provide a reason for delay in any case where it fails to ascertain the existence of a default within 14 days.¹⁴ It remains to be seen whether this requirement would put greater pressure on the NCLT benches to admit cases more quickly.

It is still early days to arrive at strong conclusions as the IBC has been in operation only since December 2016. While timelines are not being followed to the letter, it appears to be better than prior regimes and the fact that the IBBI is tracking the time periods closely in its quarterly newsletters is a step in the right direction. However, based on the data available so far, it is clear that the timelines are not being adhered to as strictly as it was hoped when the law was enacted. In the following section, I explore some possible explanations for these delays and, more generally, what they mean for the sanctity of timelines under the IBC.

UNDERSTANDING THE DELAYS

Lack of Judicial Capacity

Lack of judicial capacity and over-burdened courts and tribunals are often cited as one of the factors contributing to delays in litigation. In the case of the IBC too, this reason appears to have some merit with many NCLT benches being overburdened with cases and taking several months for admitting applications to commence a CIRP. When the IBC came into effect, the newly constituted NCLTs were saddled with hearing both company law

matters as well as IBC cases. This new mandate was not accompanied by an increase in the bench strength of NCLTs, though the Report of the Joint Parliamentary Committee that considered the draft bill¹⁵ and other reports speak of the need to increase the capacity of the NCLTs.

Of late, there have been some attempts to increase the capacity of the NCLT with the central government constituting two new benches of the NCLT in Amaravati and Indore in March 2019.¹⁶ The Supreme Court, in a recent judgment¹⁷ that considered the constitutional validity of the IBC, also directed the central government to constitute additional benches of the NCLAT. It remains to be seen if these measures would reduce the burden on the NCLTs and NCLAT and enable them to dispose of applications more expeditiously.

The capacity of the NCLT benches to hear and dispose insolvency cases in a timely manner requires a detailed empirical analysis which is beyond the scope of this chapter. However, apart from judicial capacity, there are a few IBC specific factors that have contributed to delays and are worth exploring further.

Excluding Litigation Periods

There is a question of how the 270-day timeline was extended in a large number of cases despite the statute providing for liquidation where the 270-day period has been crossed. To date, the tribunals and courts have not technically granted extensions to parties beyond the 270-day deadline. However, the NCLAT, in its order in the case of *Quantum Limited v. Indus Finance Corporation Limited*¹⁸, stated that any period during which litigation was pending must be excluded when calculating the 270-day period, which has then been followed by various NCLT benches. In most cases, decisions that are made during the CIRP as well as the conduct or outcome of the process have been challenged

by various stakeholders: unsuccessful bidders, creditors, employees, erstwhile promoters, to name a few. The NCLAT pointed out that delays caused because of such litigation were outside the control of the parties and it would be unfair to penalise the resolution applicant, the corporate debtor, and creditors for them. The various benches of the NCLT further justified their decision to exclude the period for litigation on the grounds that: (a) under the Limitation Act, 1963, the period of litigation is excluded from determining whether the limitation period has run out; and (b) the rules of the NCLT give the tribunal discretion to consider timelines in the greater interest.

The decision to exclude litigation periods presents an interesting conundrum. On the one hand, it appears to be justified given that, practically, the stakeholders cannot move towards a resolution plan, while litigation regarding the CIRP is pending. However, the approach of excluding litigation periods threatens to dislodge one of the core features of the IBC. Insolvency resolution and restructuring in most jurisdictions tend to be contentious and competitive processes, with challenges to resolution plans being all too common. If such litigation in itself is a reason to not enforce the 270-day time period strictly, the majority of resolution plans would extend well over 270 days. It is also not possible to stop stakeholders from litigating and there is, in the worst-case scenario, a possibility of misuse if parties were to file frivolous claims in order to buy more time.

The central government now appears to have identified the practice of excluding litigation periods as one of the sources for delay as this is explicitly addressed in the IBC Third Amendment. As discussed before, the recent amendment extends the time period for completing the CIRP from 270 days to 330 days.¹⁹ However, in addition to doing so, it makes clear that the 330-day period is inclusive of any litigation period. In other words, under the recent amendments, a debtor company

would go into liquidation after 330 days regardless of whether the delay is a result of pending litigation against the corporate debtor or other stakeholders in the CIRP. One will have to wait to see if this amendment is strictly enforced by courts and tribunals going forward. Yet, the issue does not end here. In its November 2019 judgment in the Essar Steel insolvency,²⁰ the Supreme Court struck down the word ‘mandatorily’ from this amendment, stating that while the CIRP should ordinarily be completed in 330 days, including the time taken for legal proceedings, there should be room for the adjudicating authority to extend the CIRP beyond 330 days in exceptional cases. One will have to wait to see if this amendment is strictly enforced by courts and tribunals going forward. The court stated:

However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days.

At one level, not making the 330-day period mandatory has been welcomed by stakeholders as a recognition that delays are often beyond the control of the parties involved and there may be reasons to extend the period beyond 330 days if such an extension could save the debtor company from liquidation. At the same time, this aspect of the judgment again provides room for catering to delays

despite the attempt by the IBC Third Amendment to rein in and strictly enforce timelines.

Policy Bias Favouring Resolution over Liquidation

The policy of favouring resolution over liquidation is also relevant to understanding the reasons for delays. While the BLRC Report and the IBC as initially enacted did not express a preference over the outcome of the CIRP, over time, there has been a clear shift in favour of resolution over liquidation that has been articulated by the central government, the Supreme Court²¹ and the NCLT on several occasions. Two examples of this bias are an amendment to the threshold for approval of resolution plans from 75 per cent of the financial creditors to 66 per cent of the financial creditors²² (making it easier for resolution plans to be approved) and an amendment to the liquidation regulations allowing for businesses to be sold as a going concern during liquidation.²³ These types of amendments reflect efforts by policymakers to make changes aimed at avoiding liquidation at all costs. The NCLT have also regularly articulated the bias in favour of resolution over liquidation in their orders.²⁴

This policy articulation is understandable given that, all things considered, it would be preferable for the business of the debtor company to continue in some form rather than for its assets to be sold on a piecemeal basis (as would typically happen in liquidation). Apart from the economic losses associated with liquidation and winding up of companies, there are social costs as well, including the likelihood of a large number of employees losing their jobs. However, it is important to remember that a balance needs to be struck and resolution may not be possible in all situations. Attempting to force a resolution when it is not economically viable to do so might only be delaying an inevitable liquidation.

A by-product of this strong bias in favour of resolution has been delays in completing the CIRP.

In a situation where creditors have not been able to arrive at a resolution plan, the policy favouring resolution over liquidation has meant that NCLT benches across the country tend to give several more opportunities to creditors and resolution applicants before passing a liquidation order. An extreme example of this practice was seen in the CIRP of the real estate developer Jaypee Infratech Limited,²⁵ where the Supreme Court ordered the entire resolution process to be restarted. This tendency on the part of tribunals in turn, causes the participants of the CIRP, including resolution professionals, creditors, and resolution applicants, to be less concerned about meeting timelines which they know will not be enforced.

CONCLUSION

The fact that resolution processes have taken over 270 days should not come as a surprise as merely putting in timeline in a legislation does not guarantee that they will be followed. Events outside a party's control as well lack of sufficient capacity at the NCLT and NCLAT would mean that it may not always be possible to adhere to the timelines as prescribed. Further, the CIRP may speed up as the law matures and the stakeholders and professionals involved become more familiar with the process.

However, habitual delays as well as a perceived weakening of the resolve of the NCLT to enforce timelines strictly are causes for concern. The practice of excluding the time periods for litigation as well as the strong bias in favour of resolution over liquidation have contributed to timelines being broken on a regular basis.

The IBC Third Amendment appears to address at least one of these sources of delay, though this amendment has, to an extent, been diluted by the Supreme Court's ruling in Essar Steel. However, the

open question remains whether the tribunals would be willing to strictly enforce the 330-day deadline or if their bias in favour of resolution over liquidation would allow them to find wiggle room here as well.

Delays could have an economic impact both at the level of individual cases as well as more systemically for the success of the IBC generally. For individual cases, delays are likely to result in lower recoveries for all parties concerned. Further, it is questionable whether allowing delays would actually serve to favour resolution over liquidation. The longer a debtor company remains in CIRP, the greater the value erosion and the lower the likelihood that bidders would be interested in the resolution of the company, making liquidation the more probable outcome.

At a systemic level, frequent delays raise the question of what this trend might mean for a law that places particular emphasis on the time-bound process it provides for. There may, on occasion, be a good reason to allow for an exception to the deadline, but if this is done too often, would all stakeholders lose confidence in the sanctity of the process itself? Policymakers, courts, and tribunals would do well to consider the long-term effects on the law if timelines are regularly broken.

Notes

1. Report of the Bankruptcy Law Reform Committee, Vol. 1 – Rationale and Design (November 2015), available online at https://ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf (accessed on 4 May 2019).
2. In the case of Essar Steel Limited, the National Company Law Tribunal approved the resolution plan submitted by Arcelor Mittal on 8 March 2019, 587 days after the CIRP was commenced. However, in light of appeals made by dissenting creditors, the Supreme Court has stayed implementation of the plan by Arcelor Mittal. The Supreme Court's judgment, dated 15 November 2019, finally paved the way for implementation of the resolution plan.
3. It is important to note that while the IBC includes chapters on both the insolvency or bankruptcy of companies and individuals, the chapter on individuals is yet to come into effect. Accordingly, the scope of this chapter is limited to the insolvency of companies.
4. BLRC Report, Vol. 1, Chapter 2, 'Speed is of Essence'.
5. Section 33 of the IBC states:
Initiation of liquidation. - (1) Where the Adjudicating Authority, - (a) before the expiry of the insolvency resolution process period *or the maximum period permitted for completion of the corporate insolvency resolution process under section 12* or the fast track corporate insolvency resolution process under section 56, as the case may be, *does not receive a resolution plan under sub-section (6) of section 30*; or (b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, *it shall - (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter.* (Author's emphasis)
6. IBBI Quarterly Newsletter, January–March 2019, p. 13, available online at <https://www.ibbi.gov.in/uploads/publication/NewsLeter%20Jan-%20March.,%202019.pdf> (accessed on 1 May 2019).
7. These numbers have been arrived at based on the information in IBBI's quarterly newsletters between December 2017 and March 2019, which provide the insolvency commencement date and the date on which the resolution plan was approved, or a liquidation order was passed for all companies. The author has calculated the time periods based on this information.
8. Data with respect to the length of a particular insolvency proceeding is only available once the CIRP process has been completed. Data is not available for on-going CIRPs. It should be noted, however, that the IBC Third Amendment has a retrospective aspect to it. The amendments require any CIRP that has been ongoing for over 330 days at the time the amendment came into effect to be completed within an additional 90 days. It, of course, remains to be seen whether the numerous pending cases will, in reality, be completed within this period.
9. IBBI Quarterly Newsletter, October–December 2017, p. 11, available online at https://ibbi.gov.in/uploads/publication/news_letter_Oct-Dec17.pdf (accessed on 4 May 2019).
10. IBBI Quarterly Newsletter, July–September 2018, pp. 12–14, available at https://ibbi.gov.in/uploads/publication/QUARTERLY_NEWSLETTER_FOR_JUL_SEP_2018.pdf (accessed on 5 May 2019).
11. IBBI Quarterly Newsletter, October–December 2018, pp. 14–15, available online at <https://ibbi.gov.in/uploads/>

publication/QUARTERLY_NEWSLETTER_FOR_OCT_DEC_2019.pdf (accessed on 5 May 2019).

12. See, for example, 'Overwhelmed,' available online at <https://www.businesstoday.in/magazine/the-hub/overwhelmed/story/345985.html> (accessed on 24 May 2019), which states: 'As per the Code, if an application filed (with the NCLT) is in order, it should be admitted within 14 days. In reality, it could take at least four-five months to get the matter in,' says Chawla. Punit Tyagi, Executive Partner at New Delhi-based law firm Lakshmikumaran & Sridharan, concurs. According to him, even fresh matters are not heard for two to three months.' See also, 'For NCLT, it is a Race Against Time for Resolution of NPAs,' *The Economic Times*, 13 December 2018, available online at <https://economictimes.indiatimes.com/news/economy/policy/for-nclt-it-is-a-race-against-time-for-resolution-of-nps/articleshow/67069865.cms> (accessed on 24 May 2019).
13. *Juke Mills v. Surendra Trading Company* (AT 9 of 2017), dated 1 May 2017.
14. Amendment to Section 7 of IBC.
15. Page 78 of Report of the Joint Parliamentary Committee states: 'The Committee observe that implementation of provisions of the Code, 2015 would be a great challenge with the existing status of setting up of NCLT and NCLAT as well as functioning of DRTs and DRATs. Not only that handling the workload of pending proceedings before the Board of Company Law Administration which with the operationalization of the Code would stand referred to the NCLTs would further add to this challenge. Thus, there is an urgent need to work in the mission mode and expedite setting up adequate Benches of these adjudicating authorities/appellate authorities.'
16. Ministry of Corporate Affairs Notification, dated 9 March 2017.
17. *Swiss Ribbons Pvt. Limited and Anr. v. Union of India and Ors.* (Writ Petition No. 99 of 2018), dated January 25, 2019, para 16.
18. NCLAT, Company Appeal (AT) (Insolvency No. 35 of 2018), dated 20 February 2018.
19. Amendment to Section 12 of IBC.
20. *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.*, MANU/SC/1577/2019.
21. In *Swiss Ribbons*, the Supreme Court articulated that 'The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors.'
22. Insolvency and Bankruptcy (Second) Amendment Act, 2018.
23. IBBI (Liquidation Process) Regulations, 2016, Regulation 32.
24. For example, the NCLT Ahmedabad Bench, in the case of insolvency resolution of Alok Industries stated '...in the interest of the company as well as its employees in view of main object of the IBC as also the very intent of legislature is for the revival of the company and its welfare.' (*IDBI Bank v. Shri Ajay Joshi and Anr.*, dated 4 January 2019).
25. *Chitra Sharma and Ors. v. Union of India and Ors.* Writ Petition No. 744 of 2017, Supreme Court of India, order dated 9 August 2018.

Government Litigation: How Can Technology Help Legal Information Management?

Ajay Gupta

6

INTRODUCTION

The Indian judiciary's path-breaking judgments and fearlessness are appreciated by one and all. However, the judiciary also faces criticism about the long pendency of cases before it. Statistics on the National Judicial Data Grid (NJDG), as of 31 January 2019, show that subordinate courts across India are reeling under an exhausting case load of around 2.97 crores of pending cases.¹ The NJDG for High Courts shows that more than 42 lakh cases are pending in the High Courts,² and there are approximately 57,346 cases pending in the Supreme Court.³ Of all the pending cases in the subordinate courts, 15 per cent of cases have been pending for 3–5 years, 16 per cent of cases have been pending for 5–10 years, and 9 per cent of cases have been pending for over 10 years.⁴

The long pendency of cases has a variety of socio-economic impact. The dilution of the right to access timely justice may lead to erosion of the rule of law; it may shake the faith of the people in the judicial system. Dealing with court cases also lays an economic burden on the government exchequer. Further, assuming a conservative estimate of 10 persons per case, 33 crores of Indian citizens would be involved in legal disputes. Therefore, it is a major concern for the government to deal with the rising number of court cases and pendency in a more proficient, transparent, and effective manner. One of the major steps taken by the government to tackle the increasing pendency of cases is the introduction of the Legal Information Management and Briefing System (LIMBS). The next section of this chapter explains the thought behind the development of LIMBS and how it is assisting the government in handling its own litigation.

LIMBS

Technology has proven its role in enhancing efficiency, improving access, as well as encouraging transparency, accountability, and adherence to timelines in dealing with legal matters. The World Economic Forum 2018 emphasised the role of IT in various fields, including the legal profession, stating that ‘computing has become much cheaper and digital equipment and devices has become widely available, faster and more cheaply available’.⁵ Data is the oxygen for machine learning and artificial intelligence. The World Economic Forum 2018 emphasised the need for increased investment in artificial intelligence, research, and cross-border collaboration.

India has taken a variety of measures to automate processes within the judiciary with an aim to improve efficiency and eliminate the time lost in unproductive work. Some of the initiatives are: easy accessibility to online case records and previous judicial pronouncements, reducing dependency on stenographers by utilising voice recognition software, usage of video conferencing facilities to increase the reach of courts, case management systems, e-registry of court, automated preparation of cause-lists, phasing out physical records through e-filing and e-submission of documents, etc.

The initiatives mentioned are proactively implemented to automate processes on the judicial side. However, as the government is considered to be the biggest litigant in India, it is equally important to digitise, automate, and monitor cases from the ministry/department’s side for cases where the government is a litigant. It is for this purpose that the LIMBS was put in place.

LIMBS is a web-based application for monitoring cases involving the central government of India, in a more effective and transparent manner. It is an initiative of the Department of Legal Affairs (DoLA),

Ministry of Law and Justice, and aims to digitise the legal process and monitor the entire life cycle of a case. Through a Gazette Notification issued on 8 February 2016 by DoLA, all ministries of the Government of India and their departments, sub-departments, and attached offices were brought under the ambit of LIMBS. It is an innovative and easy-to-access online tool which is available 24x7 to all stakeholders—government officials, department users, nodal officers, higher officials of ministries, advocates, arbitrators, and claimants of 62 ministries. Users can upload latest information regarding a case, and that will be available on a real time basis on a single unified platform to avoid confusion, delay, and financial burden on public exchequer. In a short span of 3.5 years, LIMBS has created a centralised database of 4.07 lakh court cases in which the Union of India is a party, as well as 2,500 arbitration cases.⁶

LIMBS provides a standard GUI screen to capture basic information about court cases and provides an elaborate set of user-friendly reports which allow the higher administration as well as clerks to concurrently monitor the progress of cases. Through its system generated SMS alerts, the higher administration is informed regarding upcoming important cases, contempt cases, Special Leave Petitions, appeals, etc. The system also sends SMSs to users, concerned officers, and advocates regarding forthcoming cases, seven days prior to the hearing in court; this helps the administration remain aware of upcoming case hearings, and ensures that no case remains unnoticed or unprepared for. LIMBS also has a Unique Digital Locker (UDL) and e-document vault which allows users to upload documents that can act as institutional memories. LIMBS also provides a one-page summary report and graphs that have resulted in a perceptible improvement in the working of legal processes in ministries. Thus, through LIMBS, pending court cases are being closely monitored by higher administration of the concerned ministries, the NITI Aayog, DoLA, etc. Further, more than 16,000 advocates are registered

with LIMBS, this helps in uploading first-hand information on the system as well as facilitates the timely processing of advocate bills.

LIMBS has a structured database where all relevant information about a case, since its inception, can be found. This includes information regarding the drafting of pleadings, preparation of internal notes and advice by the legal department, filing of a case in court, capturing each proceeding in the court, the final judgment copy, etc. A compilation of over 60 attributes regarding each case facilitates the analysis of cases. LIMBS assists the administration in having a data-driven approach to decision making based on trustworthy, meaningful, authoritative, and precise data.

The following features of LIMBS illustrate the focused approach it has in trying to reduce pendency.

1. Clubbing of cases: It has often been suggested that cases of a similar nature be clubbed so that they can be dealt with as a combined case. If cases were being monitored manually, information regarding the cases would be scattered and it would, therefore, be time consuming and difficult to combine cases of a similar nature. However, with the implementation of LIMBS, these adversities have been blown-away electronically; as LIMBS is a structured database, the utilisation of artificial intelligence and standard algorithms can help with clubbing cases of a similar nature. This will allow ministries to prepare a combined reply to these cases, and they can be contested in the court as a single/clubbed case. Such clubbing of cases will help decrease the amount of time and effort that the court, as well as the administration, would have to put in. Thus, LIMBS can play an influential role in reducing at least 20 per cent of central government related litigation by enabling the clubbing of similar cases.
2. Harmonisation of policy: LIMBS has a structured database which can prompt policymakers and researchers to ascertain strained areas where there is a high volume of litigation arising due to ambiguity in policies. It can become a catalyst to improving policies by simplifying, streamlining, and harmonising them with an aim to eliminate unnecessary litigation. The elimination of ambiguities with the help of LIMBS can further the cause of ease of doing business, and therefore become instrumental for good governance.
3. Use of real-time analytics: Prior to LIMBS, information regarding cases of the central government was dispersed, and it was hence difficult to assimilate the right information at the right time. Through the use of LIMBS, this situation has been dealt with and analytical tools are able to provide precise information when required. LIMBS provides dashboards, graphs, summarised reports, and detailed data sheets which cater to the needs of government officials. Cognitive technologies, artificial intelligence, and machine learning can also help the administration take action effectively. LIMBS allows stakeholders to monitor cases on real time basis and is a promising step to check the increasing pendency.
4. Predictive and perspective analysis: Dashboards and graphical representations are in-built in the LIMBS application for in-depth analysis of cases. However, the higher administration contemplates more use of the data. The idea of 'smart data discovery' is being preferred, wherein smart analytical tools help identify trends in the data. The benefit of this approach is that it is less subjective or biased to human interpretation, when compared with traditional analytics. LIMBS at a self-actualisation stage, can help with predictive analyses. For example, while filing a case in court, when a

user selects the name of the court, the system will be able to provide information regarding the approximate time it will take the court to dispose the case, based on past trends. While selecting the advocate, the system can provide information regarding the percentage of cases that the advocate won, as per past records.

Further, through machine learning, the system can provide a list of previous judgments and replies submitted in similar cases that were dealt with in the past. Bibek Debroy had once said ‘on all civil cases, not just Union government ones, the moment issues are framed, one more or less (in 90 per cent of cases) knows the eventual outcome, within a band, not precisely. Litigation merely prolongs the journey towards a certain outcome’.⁷ As LIMBS provides all the required relevant information, it can help users predict the chances of winning a case. It can, therefore, act as a catalyst in helping the administration avoid unnecessary litigation and become a tool to reduce the burden of the judiciary.

5. Mining of text: Text mining based on deep learning algorithms is a method to categorise text from unstructured data into structured data. Text mining allows the computer to read documents which are spread over several pages and accessible in .pdf, .doc, and excel formats. It helps categorise the text with dynamic indexes, allows users to retrieve the same at a faster pace, and can prepare a synopsis by analysing the text. LIMBS is a rich source of information as it contains uploaded documents such as replies, counter replies, affidavits, contempt notices, judgments, etc. Text mining of these documents will allow the users to access relevant information in the shortest possible time with a high accuracy. Machine learning may further refine accessible data and assist the administration in making a faster reply. The introduction of objectivity

in the system will help the administration quickly identify the next steps to be taken to curb pendency.

CONCLUSION

Dealing with the menace of large arrears and pendency is one of the top priorities of the government. Several measures are being undertaken, such as an emphasis on alternate dispute resolution (arbitration, mediation,⁸ and online dispute resolution), extensive use of IT, capacity building of stakeholders, avoiding unnecessary litigation, etc. LIMBS can play an important role in reducing the pendency of cases in court through clubbing cases of a similar nature, streamlining strained policies having a high volume of litigation, predicting the outcome of court cases in advance, and monitoring of court cases in a transparent, efficient, and proactive manner.

Notes

1. National Judicial Data Grid, available online at <http://njdg.ecourts.gov.in/njdgnew/index.php> (accessed on 31 January 2019).
2. National Judicial Data Grid, available online at http://njdg.ecourts.gov.in/hcnjdg_public/main.php (accessed on 31 January 2019).
3. Supreme Court of India. ‘Monthly Pending Cases - as on 01 January 2019’, available online at <https://www.sci.gov.in/statistics> (accessed on 31 January 2019).
4. National Judicial Data Grid. ‘Age Wise Pie Chart’, available online at http://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard (accessed on 31 January 2019).
5. World Economic Forum, AMNC 2018, available online at <https://www.weforum.org/events/annual-meeting-of-the-new-champions/stream/day-1-83b8ec05-ddc8-46ed-af52-25a3cf1796bf> (accessed on 31 January 2019).
6. As of 31 January 2019.
7. Bibek Debroy. 2018. ‘It is important to make the Union government litigation efficient’, *Hindustan*

Times, 11 December, available online at <https://www.hindustantimes.com/analysis/it-is-important-to-make-the-union-government-litigation-efficient/story-3PaannODvmrBndbLQLdIOI.html> (accessed on 31 January 2019).

8. A need is felt for concerted efforts between the government and judiciary to decrease the pendency of commercial

disputes. To this end, the Commercial Court (Amendment) Act, 2018 was enacted to set up commercial courts at the district level and below. The most prominent feature of this legislation is compulsory pre-institution mediation and settlement, an alternate dispute resolution mechanism that will help reduce the burden on the judiciary and assist in speedy dispute resolution at a lower cost.



7 Education Departments: Is Excessive Litigation Detracting from Their Primary Focus?*

Malini Mallikarjun

INTRODUCTION

Education departments across India are excessively preoccupied with dealing with the large number of cases pending resolution at the courts. In most states, the education department is divided across the Primary Directorate, Secondary Directorate, and a separate office for Samagra Shiksha Abhiyan (earlier known as Sarva Shiksha Abhiyan). On an average, the number of cases pending against the Primary and Secondary Education Department of a single state is in the staggeringly high range of 15,000–40,000, and includes cases pending resolution at the district courts, tribunals, High Courts, and the Supreme Court.¹ The cases filed can be Public Interest Litigation petitions, Writ Petitions under Article 226 of the Constitution of India, Contempt Proceedings due to lack of timely action by education departments, Special Leave Petitions filed in the Supreme Court, cases filed under the Right to Education Act 2009, etc., and a large number of them pertain to service matters.² In one of the states where Piramal Foundation works, the number of cases related to irregular appointment of teachers alone constitutes 90 per cent of the approximate 6,000 cases involving the primary education department of the state. In fact, the majority of litigation involving education departments are cases that are filed against the department. There is also a relatively low number of civil suits in the district courts on property or other such matters, as compared to the matters filed in High Court and Supreme Court.

One unique feature of education departments in all states is the high number of employees. An average-sized state like Jharkhand with 24 districts has approximately 3.3 lakh employees on its payrolls (within the primary and secondary education departments alone) including teachers, principals, and cluster/block officials. It would be worthwhile to dig deeper and analyse if having a large number

of employees in a department increases the amount of litigation concerning the department, especially since government-related litigation constitutes a significantly high percentage of the cases pending resolution at the courts. Any resolution of excessive pending government-related litigation will have a wider effect of impacting the entire justice delivery system by unclogging it.

UNDERSTANDING EDUCATION LITIGATION

Piramal Foundation is working extensively with the education department in three states (Haryana, Jharkhand, and Madhya Pradesh), catering to their legal needs of litigation support, litigation advice, policy advice, and legal capacity building of concerned officers. Currently, the major work undertaken in all the three states is fixing the process gaps. There are delays in filing replies to the court in the absence of robust tracking and monitoring mechanisms, the in-house functioning follows a lengthy procedure, and the file-movement procedure within a department also leads to delays in receiving information from the court regarding the last date for filing counter-affidavits, show-cause replies, or compliance reports. Due to the excessive work load and limitation of a manual system, non-filing of timely replies to the court and non-compliance of the court orders leads to imposition of costs (fines) on the department, thereby increasing the financial burden or eventually leading to the filing of contempt cases against the department and increasing the pendency in cases. None of the three states have an in-house legal department to tackle the large amount of litigation. The replies in cases are prepared by the officers in the department who do not have technical legal knowledge. Many times, strong facts supporting the government are not produced before the court due to lack of proper coordination and collaboration within the department and in-house functioning/ file movement process.

This chapter attempts to outline some of the reasons for excessive litigation being faced by the ‘education departments’ (for this chapter, the term refers to the primary education department, secondary education department, and Samagra Shiksha Abhiyan), the challenges with handling such litigation, and seeks to explore ways of potentially addressing this problem.

REASONS FOR HIGH VOLUME OF LITIGATION

For the purposes of careful and nuanced analysis, the reasons for a high volume of litigation could be categorised into primary and secondary factors. Primary factors, on the one hand, are those that trigger the onset of litigation, such as the ever-changing, and at times inconsistent, norms on recruitment, service conditions, transfers, and promotions which result in contentious claims and counter claims. At times, the situation is compounded on account of multiple rulings by High Courts and the Supreme Court which enhance the confusion about the purpose, import, and interpretation of these regulations.

Another factor which contributes to the volume of litigation is the absence of robust and empowered grievance *redressal fora* where employees can seek appropriate clarifications or receive meaningful redressal in response to their grievances on any of the service matters. Currently, the lack of such grievance *redressal fora* necessitates approaching the courts through litigation.

Secondary factors, on the other hand, are those that contribute to the education departments’ inability to effectively deal with existing litigation and thereby increase the amount of pending litigation over the years. These are mostly systemic in nature and are a function of the lack of appropriate systems, processes, and skillset needed to deal with a technical

problem such as service matter litigation. Examples of such secondary factors are:

1. Elaborate decision-making processes within the department: An elaborate decision-making process between officers at the state headquarters and officials at the districts results in delay in taking action. This is made worse by the levels of communication and inter-dependence between other institutions like the concerned High Court and the office of the Advocate General. We have seen in many pending cases that the action is pending at the department level itself; such action would be of filing counter affidavits, supplementary affidavits, or complying with court decisions.³
2. Lack of necessary manpower and specialised legal skills: Adequate skilled manpower is needed for managing litigation-related workload. In a large state like Madhya Pradesh which has three benches of the High Court and a correspondingly high number of cases (close to 10,000 cases related to education departments⁴), there are no more than 4–5 dedicated officers at the state headquarters of the education department to deal with the litigation-related workload.
3. Archaic documentation and filing methods: This results in relevant documentation and data not being available with all the key stakeholders, leading to low-quality decisions and actions.

In addition to these direct contributory factors, it is important to consider other potential indirect causes, such as the lack of incentives for good governance or clear outcomes within government departments, which leads to a high volume of litigation.

IMPACT

The most obvious and direct impact of the high volume of litigation in education departments is

that it distracts the administration from focusing on educational outcomes. Learning levels in government schools is below all expected norms⁵ and one of the oft-quoted reasons by the administration is that the mid-level and senior officials are tied up in dealing with legal cases, instead of ensuring good governance and leadership to improve educational outcomes.

District-level officials are spending a reasonable part of their time in managing back-end processes relating to litigation, such as data collection for filings, ensuring compliance with various dictates from courts such as hearing notices, submission deadlines, and personal attendance, which reduces the time invested by the officers in capacitating their subordinate functionaries. On an average, the time spent by an official of the education department on litigation related chores is two to three days in a week. However, on paper, the role of the district officials is to run a robust machinery focused on enabling staff to deliver better education outcomes. With officials spending a large part of their week focusing on litigation, what get compromised are the school visits they are supposed to carry out, field support that they have to render to the blocks, studying MIS for qualitative data-based decision making, etc.

Given this mismatch between expected roles versus what the officials are compelled to do on a daily basis, there is a systemic failure. All aspects pertaining to people, processes, and policies are outdated and not in accordance with the expected needs of such a large public system. Hence, the impact of low learning levels in a public education system which caters to approximately 250 million children⁶ in the country is a current reality. Unless addressed, there would be little hope of turning this situation around in the foreseeable future. Systemic and administrative failures have a tendency to aggregate to disastrous effect.

Another understandable impact of high level of litigation is the over-burdening of an already burdened justice delivery system. Courts,

government advocates, and the administration are all sucked into tackling this situation.

Hence, thoughtless litigation which could be prevented is sucking up state capacity which should otherwise be focused on more positive education outcomes, and is also utilising a reasonable capacity of the judicial delivery system; all in a country where the average citizen sometimes waits for more than a decade for any justice delivery.

FIELD EXPERIENCES ON BETTER MANAGEMENT OF LITIGATION

Education departments in various states are acutely aware of how excessive case backlog is draining their resources and demotivating their forces. It is not uncommon for senior officials in education departments to lament their inability to attract good talent from within the state machinery, on account of the widespread fear of having to attend multiple hearings and being hauled up in contempt proceedings.

Given these realities, in the recent past, education departments are experimenting with a range of initiatives that are aimed at streamlining their internal systems and processes to better handle the litigation backlog. For example, states like Rajasthan, Haryana, Odisha, and Andhra Pradesh have all introduced technology-enabled platforms to track litigation and underlying documentation to streamline some of the back-end processes.

Some states have also expanded their legal teams; Odisha has a 17-member team managing litigation at the state headquarters alone with one legal retainer in each district, while Haryana has engaged young law graduates on a contractual basis as 'legal associates' to augment existing manpower.

States are also taking the lead in launching administrative measures to ease departmental processes. An example of such measures is the streamlining of responsibilities for handling cases based on the level of complexity, impact, and experience of people involved (the Principal Secretary in Jharkhand himself leading the charge for this change initiative). In Madhya Pradesh, an in-house call centre has been leveraged to improve internal communication channels on new cases being generated and the allocation of people to tackle them.

In addition to these interventions, other measures which are noteworthy are the efforts being made to institute the culture of undertaking research on past matters and decisions of High Courts and the Supreme Court while handling critical matters. For instance, the spate of PILs against the proposed merger of schools in Jharkhand were all dismissed by relying on (among other things) decisions of other High Courts on similar matters and by extensively referencing guidelines issued by the Ministry of Human Resource Development to demonstrate that such merger schemes were, in fact, in the public interest.

Another commendable effort has been in sheer governance and utilisation of existing data with the administration in states like Haryana and Odisha. In Haryana, fortnightly review meetings on court cases are conducted where case of different branches are prioritised based on personal appearances, fines, and cases with immediate next dates of hearing. These meetings also help the department take decisions such as filing petitions for clubbing cases of similar nature or filing replies on priority in contempt cases.

While all the measures mentioned have yielded some results, they have not proved to be a comprehensive solution since senior and mid-level officials in education departments in all of the abovementioned states are still spending a substantial amount of their time in resolving legal

matters. Hence, the next phase of the journey in tackling litigation in the education department would be to identify the existing gaps which may be procedural or policy-level and to think of innovative solutions. Another part of this journey would also be to document these best practices and enable their deployment in other states and departments.

WAY FORWARD

Essentially, in the recent past, education departments have tended to launch a combination of one or more measures to resolve the issue of excessive litigation but have not conceptualised holistic solutions for full resolution of the issues litigated.

A challenge of this nature, that is, high litigation within an archaic public system, is a classic ‘wicked problem’, which is loosely defined as a problem that has technical, social, and cultural facets that is difficult to solve for many reasons: incomplete or contradictory knowledge, the number of people and opinions involved, the large economic burden, and the interconnected nature of these problems with other problems.⁷ For example, as government departments deal with a backlog of cases, it is essential to also ask the question as to what makes people litigious. Is it a sense of not having a voice and therefore seeking litigation as a last resort, or is it in fact, a sign of an overly empowered workforce who resort to litigation at the slightest grievance? Equally, are good processes and systems the only solution or is a more experienced administrative machinery, including officials, a necessary ingredient to evolve and manage a large public system in an ever-changing world?

Therefore, it is apparent that solutions to such complex public system problems can be neither linear nor technical alone. Any solution needs an understanding of multiple disciplines, such as legal

issues, technology aspects, process management skills, cultural aspects on what makes people litigious, behavioural science understanding to determine most effective ways of addressing employee’s grievances, and so on.

Even by very conservative estimates, any solution set to solve the case backlog involving education departments should consist of all of the following elements:

1. Robust processes for managing communication, appropriate documentation, and effective governance;
2. Technology-enabled platforms and digital offerings to support the processes;
3. Enhanced people skillset within the department through recruitment and capacity-building measures;
4. Alternate redressal and grievance *redressal fora* to address peoples’ concerns; and
5. Cogent and coherent policy frameworks on key service matters.

Designing and deploying the above measures will necessitate forging deep partnerships between government systems and non-state actors, since education departments and governments in general are not equipped with all the required expertise and skillsets. Effective management of the litigation backlog within education departments may well lead to significantly reducing the burden on Indian courts.

Notes

- * The author would like to thank members of the COE Legal Team of Piramal Foundation for Education Leadership for their inputs.
- 1. The state of Odisha has reported reducing the number of pending cases against primary and secondary divisions to 40,000 cases in April 2018, as part of its update on best practices to the NITI Aayog. Information on their cases is

- available on *Integrated Legal Monitoring System*, available online at <http://ilms.csmpil.in/> (accessed on 11 July 2019).
2. In the states of Jharkhand, Madhya Pradesh, and Haryana, where we are working extensively with the state governments, employee related litigation constitutes more than 85 per cent of the cases pending resolution.
 3. For example, in Haryana, in the month of January 2019, the number of cases on which action was pending was as high as 50–60 per cent in many of the branches. The branches are divided according to different legal issues, for example, one branch deals with cases regarding the appointment of post graduate teachers, while another branch deals with cases regarding the promotion of post graduate teachers, etc.
 4. See Website of High Court of Madhya Pradesh, available online at <https://mphc.gov.in/user/login?current=node/20> (accessed on 11 July 2019).
 5. ASER reports contain detailed data on learning levels, available online at <http://img.asercentre.org/docs/ASER%202018/Release%20Material/aserreport2018.pdf> (accessed on 11 July 2019).
 6. According to District Information System for Education (DISE) and education ministry data, available online at <http://udiseplus.gov.in/home> (accessed on 11 July 2019).
 7. Horst Rittel and Melvin M. Webber. 1973. 'Dilemmas in a General Theory of Planning', *Policy Sciences*, 4(2): 155–169.



SECTION FOUR

SYSTEMIC INFLUENCES





Increasing Judge Strength: Impact on Reducing Pendency of Cases*

Surya Prakash B.S.

Siddharth Mandrekar Rao

The 114th Law Commission Report on ‘Gram Nyayalayas’ by Justice (Retd.) D.A. Desai in 1986 contains this experience of a litigant, which was brought to its notice.

A litigant in search of justice since 1972 enriched his tale of woes at the workshop held in Benares University at Varanasi. According to him, on an average, there is a floating population of 50,000 litigants, including witnesses, who visit Varanasi District Court Compound daily. According to him, the average cost of transport, plus snacks works out to Rs.10 per day per individual. The longest distance one has to travel to reach court at Varanasi measures about 58 kms. Most of the places in the hinterland within the jurisdiction of District Court at Varanasi are not connected by rail with Varanasi. Bus transport apart from being hazardous is very uncomfortable and tedious. One is required to travel on an average 2 ½ to 3 hours one way. It does not require a genius to calculate this wasteful expenditure on what is euphemistically called search for justice...¹

The words could well be written in 2019, and they would still ring true about the plight of litigating citizens.

The Access to Justice Survey, 2017 by DAKSH investigated the paths to justice chosen by citizens who chose not to go to court. Of those who did not approach the courts, 26.8 per cent did not file a case in court because of the high costs of litigation, 21.5 per cent did not understand how to do so or found the legal system too complex, and 17.3 per cent said that they were deterred by how long courts take to resolve cases.² These responses show that a significant proportion of citizens have been obstructed from accessing the formal justice system because of problems inherent in the structure of the judiciary, and the processes of litigation and administration of

the judiciary. None of the proposed or attempted solutions to these problems have evolved sufficiently to keep pace with the rapid increase in workload brought about by the significant growth of litigation in India in recent years.

The shortcomings of the formal justice system in making justice accessible led to the formation of Nyaya Panchayats (first conceptualised in the pre-independence era) and Gram Nyayalayas (set up by an Act of the Parliament in 2009). One can safely say that both of these ideas have failed to take off from the ground. However, the continuing attraction of such and other ideas is because courts continue to fail the access to justice mandate on many counts—whether in terms of the distance that the citizen has to travel; procedural and process-related inflexibilities; or ultimately in rendering timely justice.

At the same time, courts have consistently demanded that more judges need to be appointed so as to render timely justice.³ The 120th Law Commission Report titled *Manpower Planning in Judiciary: A Blueprint*, published in 1987, and the 245th Report titled *Arrears and Backlog: Creating Additional Judicial (Wo)manpower*, published in 2014, spoke of how additional judges are needed in the judiciary. The reports did not consider how much of an impact more judges would have on the pendency and backlog numbers.

In this chapter, we evaluate whether setting up new courts benefits the litigant in terms of faster disposal of cases.

By new courts, we do not mean a new type of courts, for example, fast track courts or special courts. Here, we use the term ‘new court’ to refer to a new judicial post created in a specific judicial cadre. New courts selected for our purpose have been set up in the same court complex where other courts function. One can safely say that these new courts were not set up to alleviate hardships due to distance, and they also make use of the existing

facilities and infrastructure belonging to existing courts. Therefore, we quantify the impact on time taken for disposal of cases on account of setting up new courts.

FACTORS CONSIDERED IN SETTING UP NEW COURTS

To answer the question we set for ourselves, we first sought to understand the factors that are considered when deciding to set up a new court. We did not find any document that lists the criteria used by the judiciary for such a process. During the course of informal discussions with a few judicial officers, we understand that no policy document for this purpose is in place. We were informed that the following factors are usually considered during this process.

1. New talukas: When new talukas are set up, it is generally expected that new courts catering to that jurisdiction will also be set up. However, we do not find court complexes in each taluka in the country and can only conjecture reasons for this.
2. Docket size per judge: The High Court generally monitors the docket size of each judge (the average number of cases that form the workload of the judge). Where it is felt that the docket size has become unmanageable (there is no specified number), new courts are set up.
3. Requests from the bar or litigants: In some cases, new courts are set up based on requests from litigants and members of the bar who are inconvenienced by the distance they have to travel to court complexes.
4. Other considerations: As with any other large institution that wields significant socio-economic power, when faced with such choices, the dynamics of individuals in power, be it within the judiciary or without, affect the final decision. Therefore, as with public services, such

as railway stations, bus stations, post offices, etc., the choice of whether, and where to, open a new court is a mix of rational and political considerations.

PROCESS OF SETTING UP NEW COURTS IN AN EXISTING COURT COMPLEX

The following steps are involved in setting up new courts.

1. The High Court recommends the setting up of a new court. Recommendations of the High Court are in most cases those of the full court based on findings from a committee that has been set up for this purpose.
2. The committee considers submissions of the bar and litigants and other material relevant to the matter in coming to its conclusion.
3. The state government then follows the recommendation of the High Court.

The foregoing points have been corroborated by the High Court of Karnataka in its response to the RTI application we filed. The response stated that:

1. The Committee for Establishment, Abolition, and Alteration of Jurisdiction of Courts is responsible for this process. This is a permanent committee.
2. The following factors are considered in setting up new courts: “The overall pendency of cases according to criteria,⁴ accessibility-transportation facility, that is, conveyance from one place to another, jurisdiction, geographical condition, representations from concerned Bar Associations, opinion furnished by the concerned Principal District and Sessions Judge.”⁵
3. These factors have not been codified in any rules, regulations, or handbook.

The process for the transfer of cases to the new courts varies based on the cadre of the judicial post created. The response to the RTI stated:

[I]f the new Courts are Civil Judge or Senior Civil Judge & JMFC and Addl. CJM Courts, the Principal District Judge will transfer the cases to the new courts from pre-existing courts considering the pendency and jurisdiction. If the new Courts are Addl. District Courts on the basis of the recommendation made by the Principal District and Sessions Judge, the High Court will permit the Principal District and Sessions Judge to transfer the cases from pre-existing Courts to the new courts.⁶

EVALUATION: THE IMPACT OF NEW COURTS

In this chapter, we evaluate the impact of three new courts set up in the Mysuru and Chamarajanagar districts of Karnataka. These districts have historically been administered as one unit and were bifurcated only in 1998. They have many socio-economic and geographical similarities. These districts are predominantly rural in nature and have only one urban centre (Mysuru city). There is no special distinguishing feature in either of these districts that make the judiciary in these districts stand out either positively or negatively. These districts can, therefore, be considered to be representative of subordinate courts in India and suitable for our analysis without requiring adjustments for data.

The two districts had 56 judicial posts between 1 January 2000 and 18 August 2014, when three new courts were then notified.⁷ The three new courts were:

1. Additional Civil Judge and Judicial Magistrate First Class at Krishna Raja Nagar;

- 2. Additional Civil Judge and Judicial Magistrate First Class at Heggada Devana Kote; and
- 3. II Additional Civil Judge and Judicial Magistrate First Class at Nanjanagud.

These three new courts are located in the existing court complexes at these locations. Therefore, no additional advantage of bringing the courts closer to the citizens has been created.

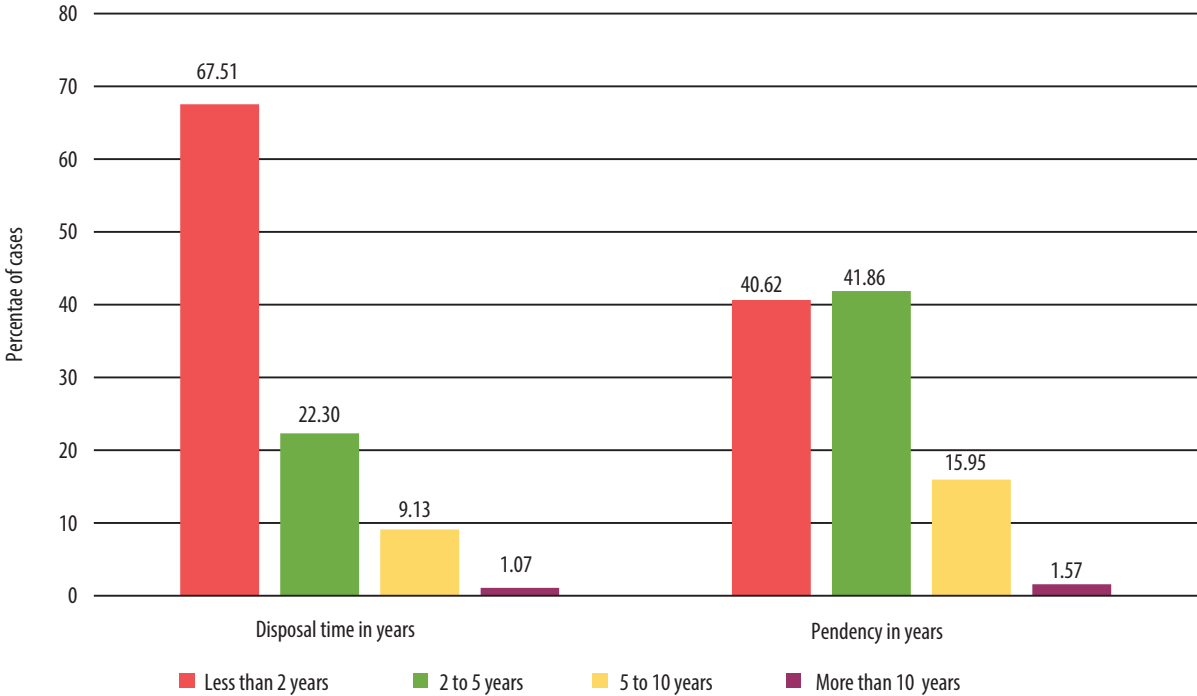
We consider a sample of data relating to cases filed between the years 2000 and mid-2018 for courts in these districts. The data set consists of 3,72,144 cases filed in these districts in this period, of which 3,10,303 were disposed as of 1 July 2018. There were also 61,896 cases that were pending as of 1 July 2018.

In Part A of this section, we provide an overview of how courts in Mysuru and Chamarajanagar are functioning; while in Part B, we discuss our hypotheses and analyse whether new courts help improve the functioning of courts in these two districts.

Part A: Overview of the Functioning of Courts in Mysuru and Chamarajanagar

In order to assess the impact of new courts, it is necessary to have a brief overview of the composition of cases in the dataset and understand how long cases take to progress through the system. The following data points will help in getting an overview of the functioning of the courts during this period.

Figure 4.1.1. Distribution of Pendency and Disposal Times in the Dataset



Source: Authors' calculations.

From Figure 4.1.1, we note that most of the disposed cases were disposed within the 0–2 years’ bracket, and of the cases that were pending, the majority of them were pending for more than two years.

Before proceeding with our analysis in this chapter, it is important to set out the definitions of key terms used in our analysis:

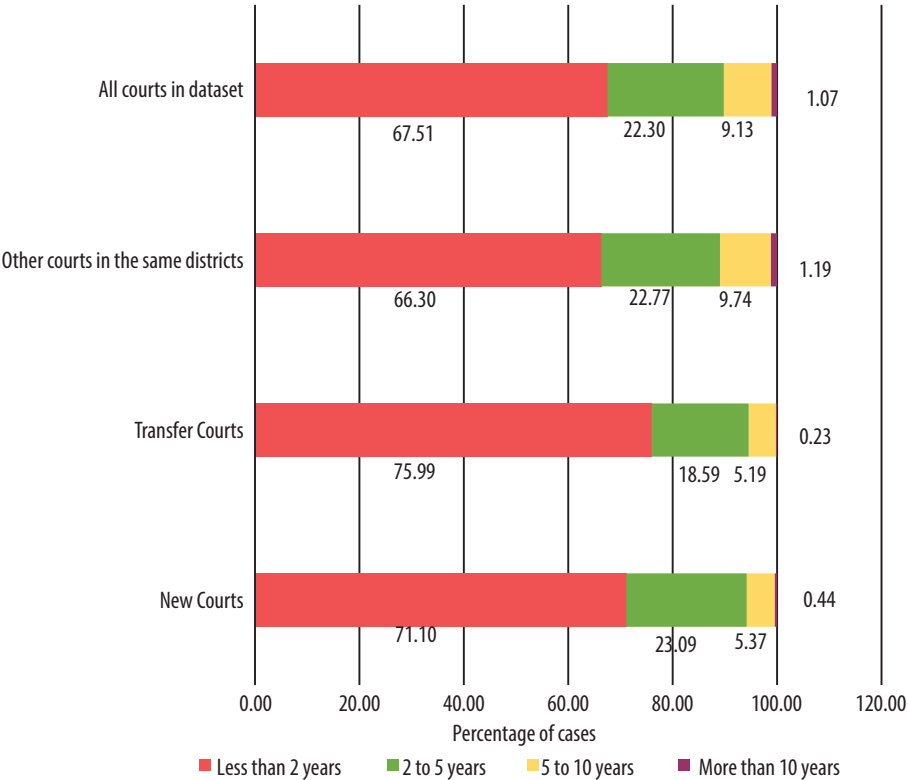
1. Court versus Court Complex. In this chapter, ‘court’ refers to an individual judicial post, and ‘court complex’ refers to the physical location of one or more courts.
2. New Courts versus Transfer Courts versus Control Courts. The ‘New Courts’ analysed in this chapter are the three new courts established in the districts of Mysuru and Chamarajanagar in 2014, to which cases were transferred on 18 August 2014. The ‘Transfer Courts’ analysed

in this chapter are the courts from which cases were transferred to the New Courts, and which are located in the same court complexes as the corresponding New Courts. The ‘Control Courts’ are those courts which are not New Courts and did not have cases transferred to Transfer Courts.

The terms ‘treatment’ and ‘control’ belong to terminology from experiment-based research. In an experiment, some subjects undergo a ‘treatment’ of some nature and are compared to other subjects that did not, which is the ‘control’ group.

A summary of the functioning of the New Courts since the date on which they were set up, and similar courts situated in the same complexes, has been provided.

Figure 4.1.2. Comparison of Disposal Times in Years



Source: Authors’ calculations.

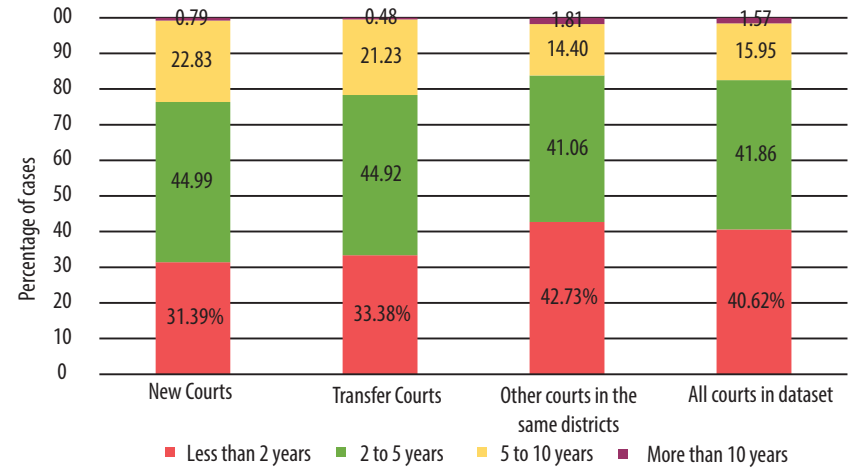
As seen in Figure 4.1.2, the proportion of cases that have taken over two years to be disposed is higher in the New Courts (28.9 per cent) when compared with the Transfer Courts (24.01 per cent).

Figure 4.1.3 shows that cases that are pending for more than two years form about 69 per cent of the pending cases in New Courts while they constitute about 66 per cent in the Transfer Courts. The

corresponding number for all courts in these districts is about 60 per cent.

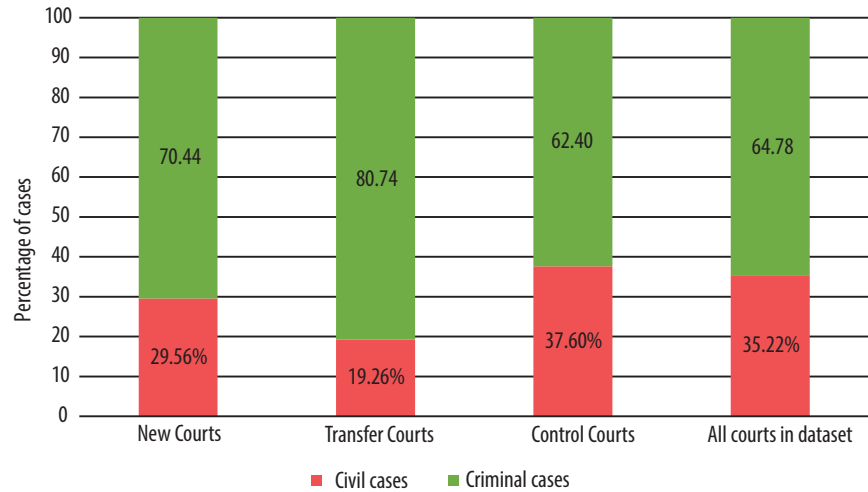
From Figures 4.1.2 and 4.1.3, we may say that New Courts have not increased disposal timelines. On the contrary, the situation has worsened—the proportion of cases with a disposal time of more than two years is greater for New Courts and Transfer Courts, and pendency in the lowest age bracket (0–2 years) is actually smaller for New Courts and Transfer Courts.

Figure 4.1.3. Comparison of Pendency, in Years



Source: Authors' calculations.

Figure 4.1.4. Comparison of Proportion of Civil and Criminal Cases



Source: Authors' calculations.

Figure 4.1.4 shows that the balance of criminal cases and civil cases varies between New Courts, Transfer Courts, and Control Courts. For example, Control Courts have a much lower proportion of criminal cases than Transfer

Courts—62.4 per cent, in comparison to 80.7 per cent. This could potentially bias comparisons between these groups, because criminal cases typically have lower disposal time and pendency than civil cases.⁸

Figure 4.1.5. Comparison of Average Disposal Time across Six Years



Source: Authors' calculations.

Further, Figure 4.1.5 shows that in the immediate one year (2014 to 2015) following the creation of New Courts, graphs representing the disposal times of New Courts, Transfer Courts, and Control Courts are roughly parallel, implying that the New Courts had little impact on the amount of disposal time the courts were already taking.

Based on the foregoing analyses, it may be tempting to quickly conclude that New Courts have not helped in rendering timely justice. However, it must be noted that the metrics described previously do not give a complete picture to make a comparison between the New Courts, Transfer Courts, and Control Courts. One reason for this is that they do not enable us to estimate the extent of the relationship between which courts the cases are from and how this

affects rates of case disposal. Another reason is that they do not account for factors like the nature of cases, duration for which they were pending, and changes (in workload, resources, and working style) at the courts over the period of analysis. The analysis shown above also does not account for gaps in the performance of Transfer Courts and other courts in the district that existed before the New Courts were set up. For example, variation in the types of cases and the complexity of their subject matter means that some types of cases may need more time for disposal than others. If the concentration of more demanding cases is higher in one region than another, the courts in that region will have higher average disposal time. Since both are necessary in order to make a valid comparison, we conducted further analyses as described in Part B of this section.

Part B: Hypotheses and Analyses

Given the limitations of the metrics used in Part A of this section in analysing the effect of New Courts, this part of seeks to go beyond those metrics in understanding how the life cycles of cases change once New Courts are introduced.

The court complexes chosen for the introduction of New Courts were chosen due to high demand, a relatively high volume of pending cases, and high average pendency, according to the Chief Administrative Officer of the Principal District Court, Mysuru.⁹ Therefore, in order to analyse the effect of establishing New Courts, we use methods that enable estimation of the difference in case disposal rates between New Courts, Transfer Courts, and Control Courts. These methods allow this comparison to be made while accounting for the influence of other factors.

Intuitively, cases should be disposed faster¹⁰ in New Courts than in Control Courts. This is because they have a lower workload and can thus, allocate more time to cases in each hearing or hear each case more frequently. Similarly, cases in Transfer Courts should also be disposed faster after the transfer since they too have a lower workload. The hypotheses that follow from these intuitions, and which we would like to test in this chapter, are given further.

1. For cases of age x , where all else is equal, cases in New Courts would have a higher chance of being disposed of at age x than cases in Control Courts;
2. Cases in Transfer Courts would also have a higher chance of being disposed of at age x than cases in Control Courts; and
3. From the previous two hypotheses, we derive a third hypothesis, which is that the chance of disposal will be higher for cases from a wider pool, consisting of both New Courts and Transfer Courts, than for cases in the Control Courts, conditional on their being of the same age. This comparison enables estimation of the

overall effect of the introduction of New Courts, in comparison to Control Courts.

The approach we use to test the hypotheses is ‘survival analysis’ or ‘duration analysis’, or the analysis of the duration of a state, and the probability¹¹ of transitioning (or not transitioning) to another state, commonly referred to as ‘failure’. It is typically used to estimate the probability of the occurrence of that transition, given the duration of the state. For example, in medicine, it has been used to estimate the probability of the death of a patient given the duration of an illness. In studying industrial reliability, it has been used to predict the probability of failure of mechanical components. In the context of legal cases, we use survival analysis to predict the probability that a case will be disposed or survive beyond a certain amount of time. Survival analysis can also be used to analyse the factors which influence these probabilities.

Survival analysis has been applied to court cases only relatively recently. We follow Datta, Prakash, and Sane¹² in using survival models for this purpose. They are especially appropriate for court cases for two reasons. The first is that survival models can be used to predict the *instantaneous probability* of disposal of a case, given its duration.¹³ The second reason is that survival models are specifically designed to utilise data in which some units of observation have not yet experienced a transition event.

In the context of this chapter, this means that the probability of a case’s disposal (or survival) given its age can still be estimated using a dataset containing pending cases. This is not the case for other methods and approaches, which would require omission of pending cases from the dataset.¹⁴ This is because survival analysis has been specifically designed to estimate the probabilities of both occurrence and non-occurrence of an event.

Key concepts in survival analysis are the survival function and the hazard function. In our context, for court cases, the survival function tells

us the probability of a case remaining pending past any chosen point in time. For example, the survival function tells us the probability that a case would remain pending for two years or more. The two-year cut off is an important one because it is the longest permissible disposal time as per the Case Flow Management rules (CFM rules) developed by the Justice M. Jagannadha Rao Commission.¹⁵

The hazard function is a related concept. In our context, for court cases, it gives the risk of a case getting disposed at any point of time.¹⁶ For example, we are interested in the two-year cut off for case disposal because of the CFM rules. We can then look at the hazard function to know the risk of a case being disposed at two years.

We also use the cumulative hazard function in this analysis. The cumulative hazard function is a more complex concept and is a little less intuitive to grasp; however, since one of the methods of analysis depends on it, it needs to be explained. The cumulative hazard function represents the ‘accumulation’ of hazard over time—if the hazard function captures the risk of occurrence of an event after a given amount of time, the cumulative hazard function captures the total *amount* of risk that a subject would have been exposed to in the time that has passed. This is difficult to interpret as it is rarely the case that an individual can experience multiple ‘failure’ events, and for court cases this would be equivalent to a case being disposed multiple times.¹⁷ However, estimating the cumulative hazard function is necessary as a step to estimating the hazard function.¹⁸ Modelling the hazard function directly when time is treated as a continuous variable is difficult,¹⁹ but the cumulative hazard function, from which we can infer the shape of the hazard function,²⁰ is much easier.

In this chapter, we use two models to compare the survival and hazard functions between New Courts, Transfer Courts, and Control Courts.

These are the Kaplan-Meier estimator and the Royston-Parmar parametric model. These models and the motivations for choosing them are explained below. For greater clarification of the components and concepts, which are at the core of survival analysis, see Annexure I.²¹

THE KAPLAN-MEIER ESTIMATOR

The Kaplan-Meier estimator is a method of estimating survival functions. We use it to estimate the probability that a case will be pending for longer than a specified amount of time. To interpret Kaplan-Meier statistics, it is most useful to plot them as graphs, where a higher curve indicates a higher probability of cases lasting longer than a given amount of time. The formula for the Kaplan-Meier estimator is given in Annexure II. We plot these curves separately for New Courts, Transfer Courts, and Control Courts. Based on the intuition that increasing the number of courts would help dispose of cases faster, we predict that the curves for New Courts and Transfer Courts will be *lower* than the curve for Control Courts.

THE ROYSTON-PARMAR PARAMETRIC SURVIVAL MODEL

The Royston-Parmar Parametric Survival model (RP model)²² is a method of estimating cumulative hazard functions (and by extension, survival functions). In this instance, we use this model to estimate hazard curves for cases while adjusting for the variation in disposal times that can occur because of other characteristics, such as case types, or other factors, such as the number of cases pending in a court at a given point of time in a case’s life.

The RP model also enables the prediction of:

1. The direction of the difference in probability of case disposal—meaning whether one group has higher or lower probability than another—and
2. The degree of the difference in probability of case disposal. For example, whether one group has 1.5 times the probability of case disposal than another group.

The model can be used to estimate how the variation in the probability of case disposal is correlated with variables, such as whether a case is from a New Court, a Transfer Court, or a Control Court. In other words, this means we can see how much lower (or higher) the probability of disposal is at any point of time for New Courts or Transfer Courts in relation to Control Courts. This difference is quantified in the form of a number known as a ‘hazard ratio’. For court cases, the hazard ratio expresses the ratio of the probabilities of disposal between two groups. For our investigation, it will be the ratio between the probabilities of disposal for a treatment group consisting of either New Courts or Transfer Courts, and Control Courts. For example, for cases of a given age, a hazard ratio of 2 for cases in New Courts against a baseline of cases in Control Courts would mean that New Courts have twice the estimated probability of disposal for cases of a given age in both types of court.²³ If the rate of filings is the same for both groups, then in this example, New Courts would have twice the rate of disposal of Control Courts. In this chapter, we also use this model to account for the effects of other variables, which are the type of case and the year of filing, and to see if variation in courts’ workload is the cause for the results, we fit one model controlling for the number of filings in a given year.

Using case-level data, we fit two separate models for three different treatment groups: one model which compares cases from New Courts and Transfer Courts separately to cases from Control Courts, and a second model grouping cases from both New Courts and Transfer Courts together,

comparing these with cases from Control Courts. Our prediction is that if New Courts are effective in helping reduce disposal times and dealing with the workload of cases, the probability of disposal of a case in the group consisting of cases from New Courts and Transfer Courts will be higher than for a case in Control Courts at any given point of time.

FINDINGS

Kaplan-Meier Estimator

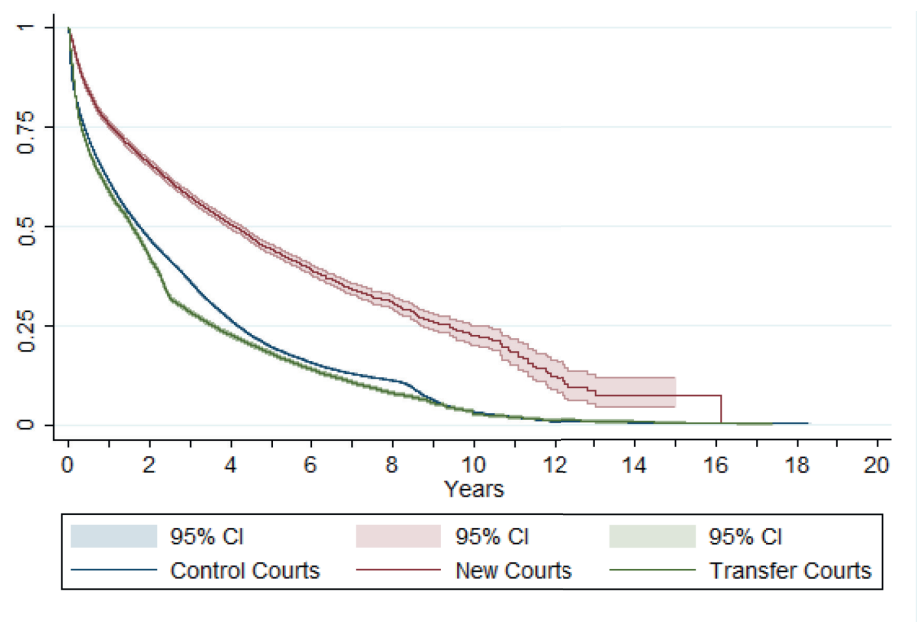
Figure 4.1.6 gives estimated survival functions for New Courts, Transfer Courts, and Control Courts. From the survival curve shown, it is apparent that the probability of a case continuing to remain pending beyond each point in time is, in fact, *higher* for New Courts. This difference is significant at the 95 per cent level of confidence.²⁴ This is evidence against the first hypothesis, which stated that cases in New Courts would have a lower chance of surviving past any given age as compared to Control Courts.

However, the opposite is true for Transfer Courts in comparison to the Control Courts. It shows that Transfer Courts perform slightly better than Control Courts for cases up to two years old, and this difference is statistically significant at the 95 per cent level of confidence. This is evidence in favour of the second hypothesis—that cases in Transfer Courts have a higher chance of disposal.

As per these estimates, the creation of New Courts has had only a minor impact on the disposal time of a case, and only in Transfer Courts, for cases pending for longer than the two-year cut off.

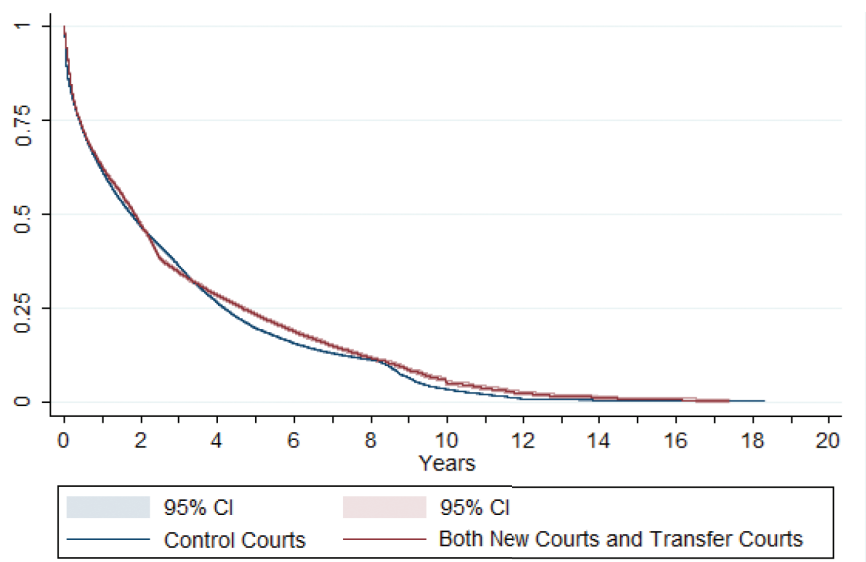
Figure 4.1.7 shows a separate estimate of the survival function for all cases in Treatment Courts against Control Courts. Survival curves in both graphs have a 95 per cent confidence interval (CI), meaning that the ‘true’ value is believed to fall within

Figure 4.1.6. Kaplan-Meier Survival Estimates Comparing New Courts and Transfer Courts with Control Courts



Source: Authors' calculations.

Figure 4.1.7. Kaplan-Meier Survival Curves Comparing Survival Times for Cases from Control Courts with Cases from both New Courts and Transfer Courts



Source: Authors' calculations.

this interval with 95 per cent probability. There is no statistically significant difference between cases from the pooled group of both New Courts and Transfer Courts and those from Control Courts for the critical first two years of a case's life, and the curves are very close for all survival times. Apart from a brief dip for cases between two and three years old, the curve for the pooled group is higher for most of the age range. This is evidence against the third hypothesis that the overall effect of the New Courts would be to increase the chances of case disposal in the group consisting of cases from both New Courts and Transfer Courts.

ROYSTON-PARMAR PARAMETRIC SURVIVAL MODEL

The cumulative hazard ratios for New Courts and Transfer Courts are, in fact, associated with a lower probability of disposal at any given point of time, even when other factors are controlled for, such as the number of cases filed and the types of cases. These effects are statistically significant. The predicted hazard for New Courts is between 44.2 per cent and 40.4 per cent of that of Control Courts. Transfer Courts fare much better, but still perform poorly in comparison to Control Courts, at between 79.6 per cent and 92.6 per cent of Control Courts. This shows that New Courts and Transfer Courts are associated with a lower probability of disposal of cases as compared to Control Courts. This is evidence against the first and second hypotheses, which are that cases in New Courts and Transfer Courts have a higher chance of disposal, with all else being equal, relative to Control Courts.

LIMITATIONS

The court complexes where New Courts were introduced were chosen based on the fact that

the older courts in their talukas (Transfer Courts) had a higher volume of pending cases than others in the district, and cases in Transfer Courts were pending for longer in comparison to cases in other courts in the district. This ruled out our ability to utilise research design where we would have been able to design an appropriate method to study the causal relationship between the introduction of New Courts and the course and outcome of a case in those jurisdictions. If more court complexes had been selected, and if they had been randomly (or 'as-good-as-randomly') designated to be sites where New Courts were introduced (and therefore, where Transfer Courts are), we could have treated the cases in Transfer Courts as being generally equivalent to those in Control Courts *before* the transfer. This would have brought us closer to the process of an experiment—called a 'natural experiment'—and we could have made a causal claim regarding the effect of transferring cases on the chances of case disposal.

Therefore, the fact that there was little overall improvement after the transfer implies that some factor other than just the volume of cases causes judicial delay, perhaps some feature of the court locations in which the New Courts were introduced, such as administrative practices or infrastructure.

It would have also been preferable to use a random sample of court locations from across India in which new courts were introduced. This would have helped in generalising from the observations made in this chapter, as the results would have been less sensitive to local conditions and more representative of the 'population' of cases that we want to generalise to.²⁵

The metrics used provide only a limited picture of how cases are processed in the courts studied, as there are numerous factors, such as the subject matter of cases, the number of witnesses examined, among others, that influence the progress of cases

through courts. The stages of cases at the time of transfer, for example, would influence their progress through New Courts, in case any stages would need to be heard again. This would explain why Transfer Courts improved post-transfer, but New Courts performed poorly in comparison. Analysing these factors as well might reveal that volume of cases alone is not the only factor influencing rates of disposal.

CONCLUSION

Discussion on backlog in Indian courts tends to focus on the numerical strength of courts, and approaches the problem as a question of human resource allocation. Indian courts do suffer from a large number of vacancies in sanctioned judicial postings. However, the results provide evidence that inadequate judge strength may not be the only contributing factor for pendency and backlog, and perhaps there are other causes which must be explored. Administrative practices and procedures and their effect on performance, as well as deficiencies in other areas, such as infrastructure, availability or performance of personnel other than judges, and technological assistance, for example, should also be considered.

Since the results show that the New Courts and Transfer Courts are associated with worse performance overall, in terms of rates of disposal of cases, it may be revealing to explore patterns and trends in the purpose of hearings after cases have been transferred, and how these change as a result of the transfer.

There are many potential reasons why they did not have the desired effect of increasing the chances of case disposal, as described above. This topic would benefit from research into what causes delays in the life cycle of cases.

Further, research could also be conducted in the form of randomised controlled trials (RCTs) to evaluate the impact of changes in court strength on rates of disposal. There is great scope for exploration of the potential legal, procedural, administrative, and technical causes of delay by comparing courts along these factors and measuring their impact on rates of disposal. A more detailed examination may also be done of how much time is dedicated to hearing and disposing of cases, using methods such as those in the Zero Pendency Courts Pilot Project of Delhi High Court.²⁶

ANNEXURE I—METHODOLOGY: SURVIVAL ANALYSIS CONCEPTS

1. Time— T . This is a random non-negative variable denoting the duration of a state. For our purpose, this will be the amount of time for which a case has been in courts. This will refer to disposal time for disposed cases, and the amount of time cases have spent in courts at the time of data collection for pending cases. The distribution of T is given by cumulative distribution function $F(t)$ and density function $f(t)$, where

$$F(t) = \Pr(T \leq t)$$

and

$$f(t) = \frac{dF(t)}{dt}$$

2. Censoring—units which have not reached the event of interest are referred to as ‘right-censored’. In our case, this refers to pending cases as they have not yet been disposed of.

3. Survival function— $S(t)$. This represents the probability that T is greater than or equal to some time t . $S(t)$ can be expressed as

$$S(t) = 1 - F(t) = Pr(T > t)$$

4. Hazard function— $h(t)$. This represents the *instantaneous* probability of leaving a state at time t , conditional on having reached time t before the event. In our case, it is the probability of disposal at. $h(t)$ is defined by

$$h(t) = \lim_{\Delta t \rightarrow 0} \frac{Pr(t \leq T < t + \Delta t | T \geq t)}{\Delta t}$$

ANNEXURE II—METHODOLOGY: KAPLAN-MEIER SURVIVAL FUNCTION ESTIMATOR

The Kaplan-Meier estimator is used to estimate the survival function described in Annexure III. It depicts the estimated probability of survival at each recorded time of failure in the data. It is calculated²⁷ as

$$\prod_{t_i \leq t} \frac{r_i - d_i}{r_i}$$

Where in event time t_i ,

1. r_i is the number of units at risk of failure, which are cases pending at t_i , and
2. d_i is the number units which are subject to failure in the interval $[t_i, t_{i+1}]$, meaning the number of cases that have been disposed of.

This estimator is calculated and plotted for each time period in the data, as an estimate of the survival curve, and typically shows a decline in probability of survival over time. We estimate the Kaplan-Meier statistics with 95 per cent confidence intervals.

ANNEXURE III—METHODOLOGY AND RESULTS: ROYSTON-PARMAR MODEL²⁸

The class of models developed by Patrick Royston and Mahesh K.B. Parmar semi-parametric model which models the variation in the cumulative hazard function (probability that a case will be disposed at or later than a given point of time) that is associated with variation in a group of variables.²⁹ It is a more appropriate choice for our dataset than the more conventional parametric models, such as the Weibull Model or the exponential model, and the popular Cox Proportional Hazards model, which is semi parametric, because the effect of variables on probability of case disposal varies with the age of a case, violating the assumptions of that model, but the Royston-Parmar model performs better when accounting for non-proportional hazards.³⁰ The model can be used to fit both proportional hazards and proportional odds models, but the former are more applicable to the study of legal cases, given that the probability of a case's disposal can vary with its age, and especially given that any dataset on court cases is bound to contain right-censored data.

The key feature of this model is that the 'baseline' hazard function, meaning the hazard function independent of the effect of the variables in the chapter, is estimated as a 'restricted cubic spline', where different subdomains within the domain of the function are parameterised as a cubic function, meeting at specified points called knots. In a restricted cubic spline, the function is constrained to be linear beyond the highest and lowest knots, called the boundary knots.

A restricted cubic spline function with k knots in positions k_1, k_2, \dots, k_k can be written as

$$s(x) = \gamma_0 + \gamma_1 v_1 + \gamma_2 v_2 + \dots + \gamma_{k-1} v_{k-1}$$

Where the γ_j are the coefficients of the derived functions. The derived functions, also called basis functions, $v_j(x)$ for $j = 2, 3, \dots, k-1$ are calculated as

$$v_1 = x$$

$$v_j = (x - v_j)_+^3 - \phi_j(x - v_1)_+^3 - (1 - \phi_j)(x - k_K)_+^3$$

where $\phi_j = (k_K - k_j)/(k_K - k_1)$

In keeping with the advice of Royston and Parmar (2002), we fit models with four internal knots³¹ meaning that the models have five degrees of freedom. They advise against models with fewer knots on the grounds that they are potentially unstable, and they also comment that increasing the number of knots does little to improve model fit.

The model, with time-dependent covariates, can be written as follows:³²

$$\ln\{H_i(t|x_i)\} = s\{\ln(t) | \gamma, \mathbf{k}_0\} + \sum_{j=1}^D s\{\ln(t) | \delta_k, \mathbf{k}_j\} x_{ij} + \mathbf{x}_i \beta$$

in which

1. $\ln\{H_i(t|x_i)\}$ is the restricted baseline cumulative hazard function, conditional on the variables in the model
 1. $H_i(t|x_i)$ is the cumulative hazard function t is time
 - \mathbf{x}_i represents a vector of the covariates
2. $s\{\ln(t) | \gamma, \mathbf{k}_0\}$ is the restricted cubic spline function, which models the baseline log cumulative hazard, a function of
 1. γ , the coefficients of the derived variables
 2. \mathbf{k}_0 , the number of knots
3. $\mathbf{x}_i \beta$ represents a vector of the variables we are interested in, weighted by coefficients β .
4. $(\sum_{j=1}^D s\{\ln(t) | \delta_k, \mathbf{k}_j\} x_{ij})$ captures the time-dependent effects of the variables, which would include our primary (indicator) variables of which court a case is from, as well as others such as the stage of a case and the number of cases filed in that court in a year.
 1. There are D time-dependent effects
 2. δ_k the coefficients of the derived variables for these effects, and
 3. \mathbf{k}_j is the number of knots

The RP model enables us to estimate hazard ratios for multiple variables independent from the

effect that the others will have on the probability of disposal, which is the main advantage it offers above simply estimating survival functions using the Kaplan-Meier estimator. This means that we can quantify the overall difference in the hazard functions and measure difference between the hazard functions of two groups, and can account for the confounding factors mentioned earlier, including the types of cases and the location of a given court. However, the Kaplan-Meier estimator remains very useful because it does not make any distributional assumptions, being a non-parametric model—which the RP model does.

For a detailed but technical explanation of the model, see Royston and Parmar³³ and see Lambert and Royston³⁴ for the user-written Stata commands used.

ANNEXURE IV—ROYSTON-PARMAR MODEL RESULTS

	(1)	(2)	(3)
New Courts	0.442*** (-57.73)	0.447*** (-56.54)	0.404*** (-58.74)
Transfer Courts	0.926*** (-11.18)	0.869*** (-20.68)	0.796*** (-31.53)
Case type dummies		Yes	
Number of cases filed			0.000185*** (72.47)
_cons	-0.665*** (-179.10)	0.671 (-0.80)	
N	4288927	4288927	

Notes: Exponentiated hazard ratios are given, t statistics in parentheses,

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Notes

- * The authors would like to thank Renuka Sane, Anarghya K. Chandar, Manjula, Nitin Bakshi, and Ramandeep Randhawa for their advice and assistance.
1. Law Commission of India. 1986. *One Hundred and Fourteenth Report on Gram Nyayalaya*, p. 14. Available online at <http://lawcommissionofindia.nic.in/101-169/Report114.pdf> (accessed on 13 March 2019).
 2. Padmini Baruah, Shruthi Naik, Surya Prakash B.S., and Kishore Mandyam. 2018. 'Paths to Justice: Surveying Judicial and Non-judicial Dispute Resolution in India', in Harish Narasappa, Shruti Vidyasagar, and Ramya Sridhar Tirumalai (eds), *Approaches to Justice in India: A Report by DAKSH*, p. 28, available online at http://dakshindia.org/Daksh_Justice_in_India/12_chapter_02.xhtml#_idTextAnchor011 (accessed on 27 August 2019).
 3. Justice (Retd) T.S. Thakur (then Chief Justice of India). 2016. 'Country Needs over 70,000 Judges to Clear Pending Backlog of Cases: CJI', *First Post*, 9 May, available online at <https://www.firstpost.com/india/cji-judgesgovernment-modi-thakur-hc-2771338.html> (accessed on 25 June 2019).
 4. While this is unclear, we understand this to mean that there are thresholds for both volume and duration of pending cases, based on which the Principal District and Sessions Judge decides whether to or not to recommend the creation of a new court. This is based on our conversation with officials, including the Chief Administrative Officer at Mysuru District Court Complex.
 5. SPIO No. 50/2019 dated 23 March 2019 from Office of the State Public Information Officer and Joint Registrar, High Court of Karnataka.
 6. SPIO No. 50/2019 dated 23 March 2019 from Office of the State Public Information Officer and Joint Registrar, High Court of Karnataka.
 7. District and Sessions Judge, Mysuru. (2014) Order No. ADMN/A/11626/2014, Mysore, dated 16 August 2014, available online at https://districts.ecourts.gov.in/sites/default/files/Case%20Transfer%20List_Nanjangud.pdf; District and Sessions Judge, Mysuru. (2014) Order No. ADMN/A/11654/2014, Mysore, dated 16 August 2014, available online at https://districts.ecourts.gov.in/sites/default/files/CaseTransferList_HDKote.pdf; District and Sessions Judge, Mysuru. (2014) Order No. ADMN/A/11656/2014, dated 16 August 2014, available online at https://districts.ecourts.gov.in/sites/default/files/CaseTransferList_KRNagar.pdf (accessed on 25 June 2019).
 8. On the National Judicial Data Grid (NJDG) which is a source of aggregate statistics on court cases logged in the e-courts system, the 74.84 per cent of civil cases in subordinate courts in India have a disposal time under one year, as compared to 87.25 of criminal cases, as of 27 August 2019.
 9. Interviewed by the authors in person.
 10. We define disposal time to be the time between the date of filing and the date of disposal.
 11. In broad terms, a probability is a quantification of the chance that an event will occur. It may take any value between 0 and 1. The closer to 1, the higher the chance that the event will occur, while the closer 0, the lower the chance it will occur, with a probability of 1 meaning that the occurrence is certain, and the probability of 0 meaning that its non-occurrence is certain.
 12. Pratik Datta, B.S. Surya Prakash, and Renuka Sane. 2017. *Understanding Judicial Delay at the Income Tax Appellate Tribunal in India*. No. 17/208, available online at https://macrofinance.nipfp.org.in/PDF/DattaPrakashSane_WP_2017_208.pdf (accessed on 18 December 2019).
 13. Datta, Prakash and Sane, *Understanding Judicial Delay*.
 14. See Janet M. Box-Steffensmeier and Bradford S. Jones. 2004. *Event History Modeling: A Guide For Social Scientists*. New York: Cambridge University Press.
 15. The rules were drafted by the commission upon order of the Supreme Court in *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344. The rules prescribe time limits for case disposal for different 'tracks' of case, with each case's track being classified is based on its subject matter. While endorsed by the Supreme Court in the ruling, the rules have not been enacted for all jurisdictions, which must be done separately for High Courts and subordinate courts.
 16. This is the *conditional* risk of disposal, being conditional on the case not having been disposed of before the time considered. It cannot be considered a probability because the estimated probability of an event when time is treated as a continuous variable tends to zero. See J.D. Singer, J.B. Willett, and J.B. Willett. 2003. *Applied Longitudinal Data Analysis: Modeling Change and Event Occurrence*. New York: Oxford University Press, pp. 472–475.
 17. T.G. Clark, M.J. Bradburn, S.B. Love, and D.G. Altman. 2003. 'Survival Analysis Part I: Basic concepts and first analyses', *British Journal of Cancer*, 89(2): 232–238
 18. Clark, Bradburn, Love, and Altman, 'Survival Analysis Part I: Basic concepts and first analyses', 232–238; Singer, Willett, and Willett. *Applied Longitudinal Data Analysis*.
 19. Singer, Willett, and Willett, *Applied Longitudinal Data Analysis*.
 20. See Annexure I.
 21. See John D. Kalbfleisch and Ross L. Prentice. 2002. *The Statistical Analysis of Failure Time Data (Wiley Series in Probability and Statistics)*, available at <https://onlinelibrary.wiley.com/doi/book/10.1002/9781118032985>.

22. Patrick Royston and Mahesh K. B. Parmar. 2002. 'Flexible Parametric Proportional-hazards and Proportional-Odds Models for Censored Survival Data, with Application to Prognostic Modelling and Estimation of Treatment Effects', *Statistics in Medicine*, 21(15): 2175–2197.
23. This is with the assumption of proportional hazards—for a more detailed explanation, see Royston and Parmar, 'Flexible Parametric Proportional-Hazards'.
24. Whenever the data used in an analysis is a sample from a 'population' which it is intended to represent (all cases in Indian subordinate courts, in this context), we want to be sure that the difference between two groups in the sample in any metric, such as disposal time, is not simply due to chance. We would want to ensure that our estimates of the metric for the sample are representative, we can quantify the extent of the certainty that the outcome that we see is not due to chance—this is known as 'statistical significance'. Survival curves in both graphs have a 95 per cent confidence interval (CI), meaning that the population value is believed to fall within this interval with 95 per cent probability.
25. This is sometimes referred to as 'external validity'.
26. The High Court of Delhi. 2019. *Zero Pendency Courts Project*. New Delhi, available online at http://dakshindia.org/wp-content/uploads/2019/05/PublicNotice_3MRRIN3QTHN.pdf (accessed on 30 November 2019).
27. Edward L. Kapla and Paul Meier. 1958. 'Nonparametric Estimation from Incomplete Observations', *Journal of the American Statistical Association*, 53(282): 457–481.
28. Royston and Parmar, 'Flexible Parametric Proportional-Hazards', pp. 2175–2197.
29. Royston and Parmar, 'Flexible Parametric Proportional-Hazards', pp. 2175–2197.
30. Box-Steffensmeier and Jones, *Event History Modeling*.
31. Royston and Parmar, 'Flexible Parametric Proportional-Hazards', pp. 2175–2197.
32. Paul C. Lambert and Patrick Royston. 2009. 'Further Development of Flexible Parametric Models for Survival Analysis', *The Stata Journal*, 9(2): 265–290.
33. Royston and Parmar, 'Flexible Parametric Proportional-Hazards', pp. 2175–2197.
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Forecasting and Predictive Modelling: Innovative Statistical Analyses of Judicial Data

Arunav Kaul

Gaurav Banerjee

INTRODUCTION

A few months ago, several media outlets reported that a group of students from IIT-Madras had developed a software tool that can predict crowd behaviour and could be used by the Indian Army to deal with stone pelters in Jammu and Kashmir.¹ Using crowd density maps and live images, the tool predicts abnormal events, such as stone pelting. The utility of such predictive models is indeed immense. In today's world, predictive modelling and forecasting has become the norm. From banks to credit card companies, nearly every institution uses one form of prediction model or other to take better-informed decisions. Discovering patterns in large data sets and analysing trends are important for any institution to sustain itself and progress. In such a scenario, why should judicial data be left out of such analyses?

The Indian judiciary is a large institution which processes lakhs of cases across the country each year. With tons of case-related data being generated online on a daily basis, can it not be used to help predict case life, which, in turn, can be used by the judges to make better decisions? Unfortunately, judicial delays are on the rise. While justice, equality, and good conscience are three sacrosanct terms that one associates with the judiciary, there are also three other words with which our judiciary is being associated. These are pendency, delay, and backlog. It is no surprise that one affects the other and certainly in an adverse manner. Until the issue of chronic delay and mounting backlog are not adequately addressed from the Indian judicial system, principles like justice and equality will always be affected.

The objective of this chapter is to showcase the manner in which judicial data can be used to forecast and deconstruct the working of the court. While analysing the working of the courts, the chapter attempts to study the different variables that play an

important part in the life cycle of a case. With the help of the variables identified, this chapter focuses on:

1. Time series model that forecasts the number of cases that will be filed in the coming years;
2. Survival analysis that helps in providing the probability of cases pending at different time periods; and
3. Understanding the relationship of various stages with case life and highlighting their impact through correlations.

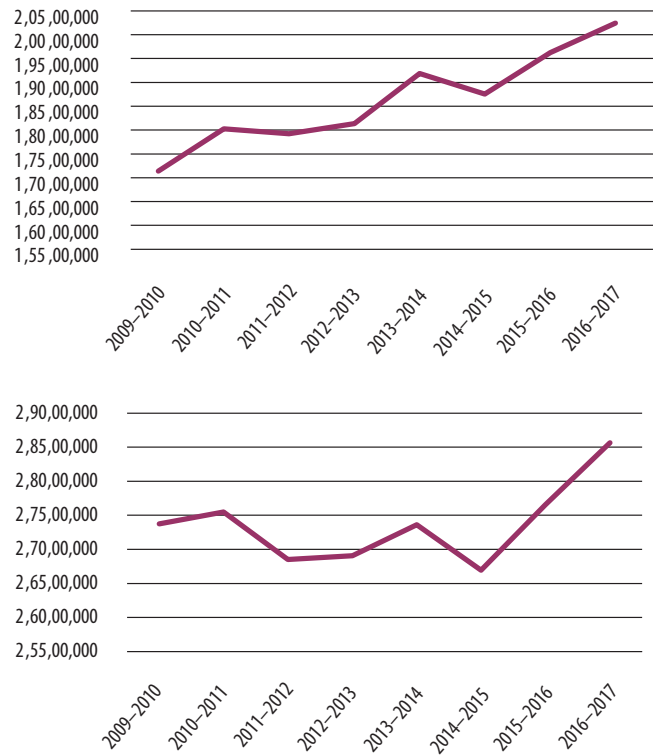
Current Scenario

Numerous reports on the problems of judicial delay by the Law Commission of India and various other

committees from the 1950s to the current times is a testimony to the fact that judicial delay is not a new topic of concern. Increasing pendency was a concern then and remains a concern even now, as the number of cases being filed and pending every year seem to be on the rise. To illustrate this, Figure 4.2.1 provides the total number of cases filed and pending in subordinate courts across the country. This data gathered pertains to the years between 2009 and 2017.

As one may clearly note, the number of cases filed over the years have been increasing with years 2015–2016 and 2016–2017 witnessing a sudden escalation in the number of filings. In 2017 alone, nearly two crore cases were filed across the country. The trend for pending cases too seems to

Figure 4.2.1. Number of Cases Filed (Above) and Pending (Below) in Subordinate Courts 2009–2017



Source: Data from the Supreme Court's *Court News*.

Note: The number of cases pending are as of 31 March of every year starting from 2010.

be similar, as the number is found to increase in 2016 and 2017. Numbers noted as of 22 January 2019 are no different as per National Judicial Data Grid (NJDG)—2.85 crore cases were pending in subordinate courts across the country.

Rapid Change Due to Technology

On 7 August 2013, a watershed event occurred for the Indian judiciary when the Chief Justice of India inaugurated the national e-courts website for subordinate courts. Perhaps, one of the most important steps towards better court and case management was the launch of the e-courts website. The website provides details of cases registered in courts in different parts of the country. Information related to cases listed in the court, stages, and even copies of daily order sheets are fed into the e-courts system by court staff in different parts of the country. Not only do these details keep the litigants and advocates better informed, the data entered can be ‘regularly analysed for meaningful assistance in policy formation and decision making’.²

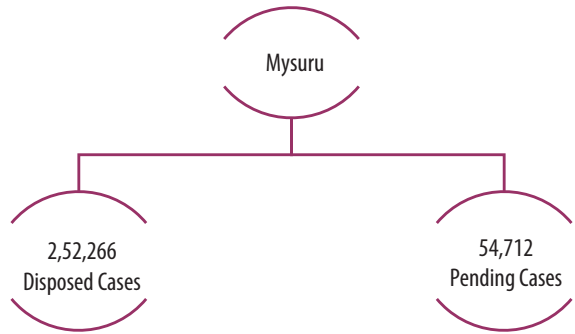
This chapter utilises the variables provided on the e-courts website to carry out a variety of analyses. In order to analyse the data in depth, it was important to select a particular district from where the cases could be examined. Given the availability of a large sample size and better data quality, we chose the courts in Mysuru district.

DATA DESCRIPTION

The data for Mysuru district was extracted from the e-courts website between 28 June 2018 and 1 July

2018. Out of a total of 21 court establishments³ in Mysuru, data from 19 court establishments was extracted for analysis in this chapter.⁴ Figure 4.2.2 below provides a snapshot of the sample size.

Figure 4.2.2. Sample Size

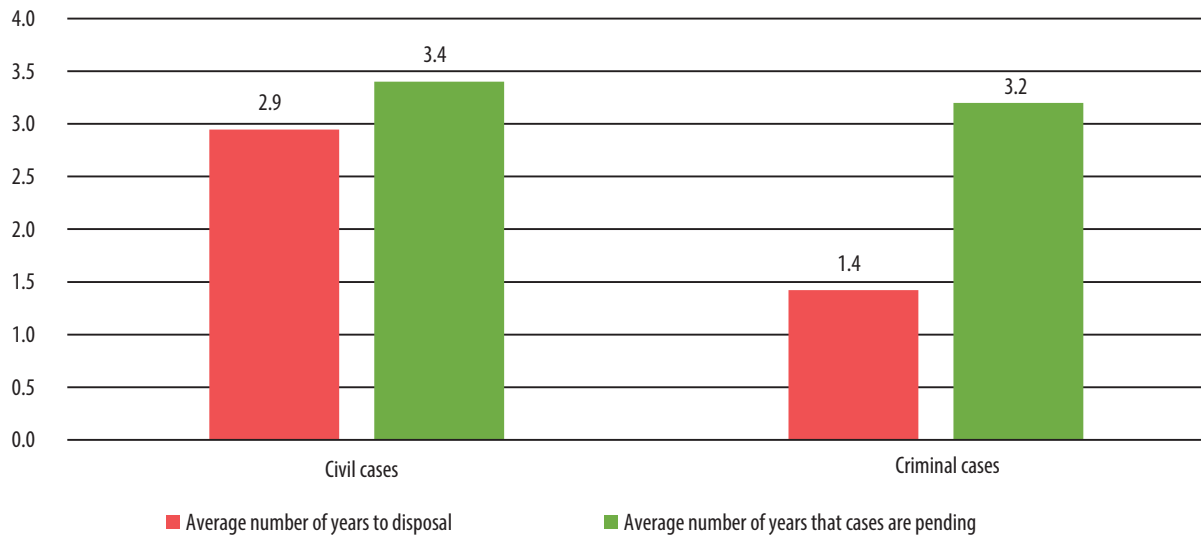


Source: Authors' calculations.

Before proceeding with an in-depth analysis of cases in Mysuru, it is important to provide an overall trend of how cases progress and highlight the courts' performance. Accordingly, Figure 4.2.3 shows the average number of days to disposal and average number of days for which cases have been pending in Mysuru.

Overall, the average days to disposal of civil cases is higher than that of criminal cases in Mysuru. However, in civil cases, the average pendency is higher than average days to disposal. A similar trend is observed even for criminal cases. This may be due to the fact that cases tend to get disposed quickly, failing which they tend to remain pending for longer periods of time. This particular trend has also been observed in other courts, as noted in DAKSH's previous reports.⁵ While Figure 4.2.3 focuses on the average days, Table 4.2.1 depicts the percentage of cases that have been getting accumulated over the years.

Figure 4.2.3. Average Disposal and Pendency (in Years) of Civil and Criminal Cases



Source: Authors' calculations.

Table 4.2.1. Percentage of Cases Pending as of 1 July 2018

Year of filing	Percentage of cases still pending (as of 1 July 2018)
2013	16
2014	21
2015	31
2016	27
2017	41

Source: Authors' calculations.

The figures in Table 4.2.1 indicate that 16 per cent of cases filed in 2013 were still pending as of 1 July 2018 and 21 per cent of cases filed in 2014 were still pending as of 1 July 2018. It is, therefore, important to focus on long-pending cases and ensure that cases do not get lost in judicial limbo.

IDENTIFYING CASES FILED THROUGH A TIME SERIES MODEL

One often sees news channels and environmental agencies predicting rainfall or determining future air quality readings.⁶ While most of us would only pay attention to the forecast, if we were to take a step back and consider how one comes up with these kinds of projections, the answer would be a time series model. In simple terms, a time series model is a collection of observations recorded sequentially in time.⁷ These observations are used as data points to study trends across different time periods. The use of a time series is not merely limited to studies regarding the environment. They are used in several other fields, such as in economics to assess unemployment trends, in finance for forecasting exchange rates or

predicting share prices in the market, etc.⁸ One of the advantages of a time series model is that it helps in forecasting trends and patterns that can help in taking informed steps.

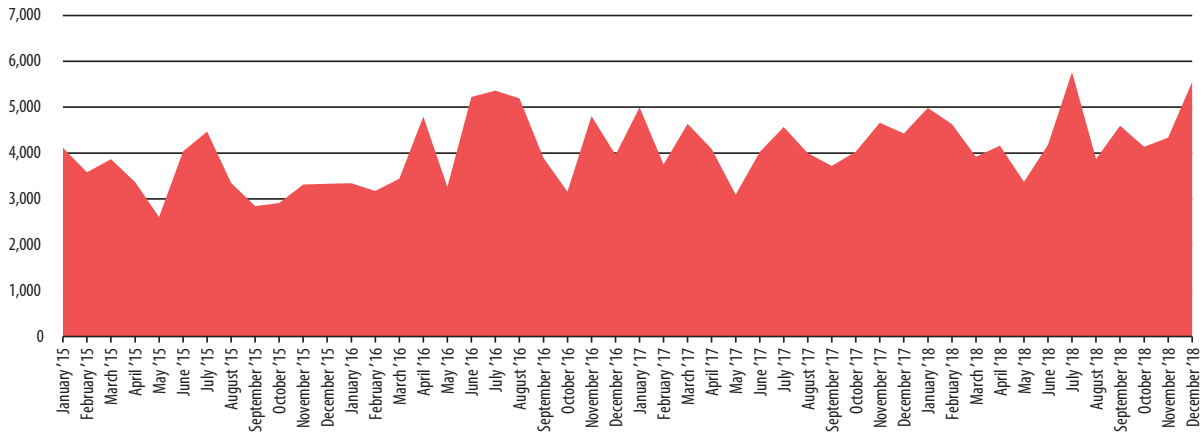
Can a time series model be built using judicial data to project future institution of cases? A study carried out on the US Federal District Courts using cases filed from 1904 to 1998 studies the growth rate of cases filed across the years and projects the number of filings between 2000 and 2020.⁹ Although it would be extremely difficult to gather

such historical data in the Indian context, recent data available in the public domain can be studied to provide a forecast for the coming years.

Projections of Case Filings in Mysuru

Before proceeding with the forecast, let us take a look at the historical trend of cases filed in Mysuru. Figure 4.2.4 depicts the total number of cases filed in each of the months in Mysuru district, starting from January 2015 until December 2018.¹⁰

Figure 4.2.4. Total Number of Cases Filed between 2015 and 2018

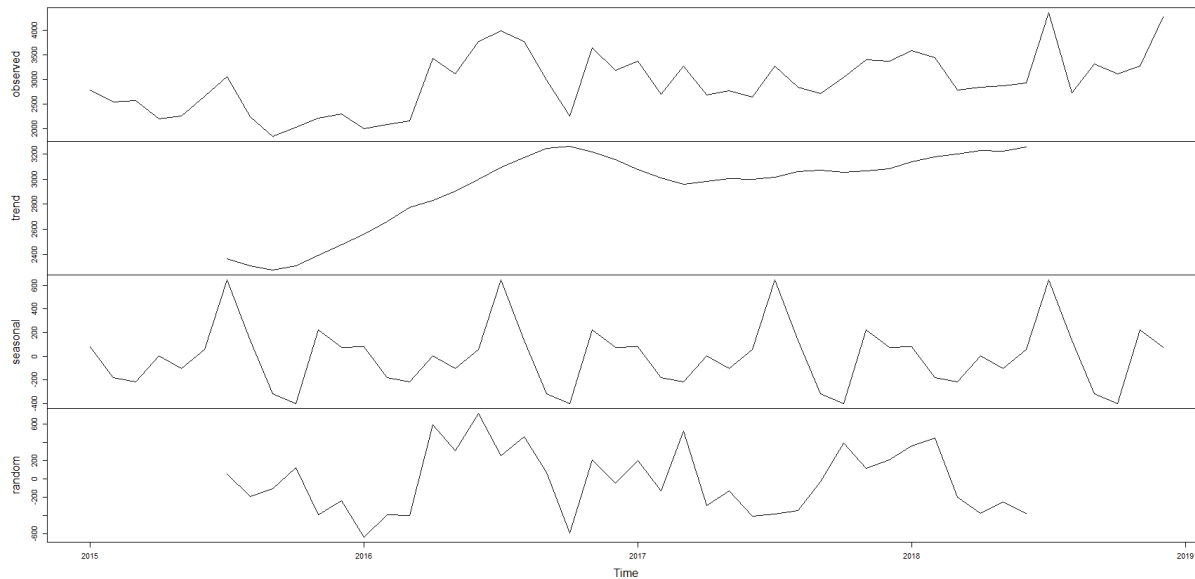


Source: National Judicial Data Grid as of 28 January 2019.

There is a gradual increment in the number of cases filed over the years in Mysuru, with July and December 2018 experiencing the most number of filings. Interestingly, there is a spike in filings in the months of June and July in every year, while there is a dip in case filings in April and May every year. This sudden spike can be attributed to court

vacations. Subordinate courts in Mysuru remain closed on account of vacations from end of April to May. Once courts reopen, the next two months witness a marked increase in case filings. To get an in-depth view of the historical filings, Figure 4.2.5 further analyses the data from different perspectives.

Figure 4.2.5. Categories of Patterns of the Historical Data



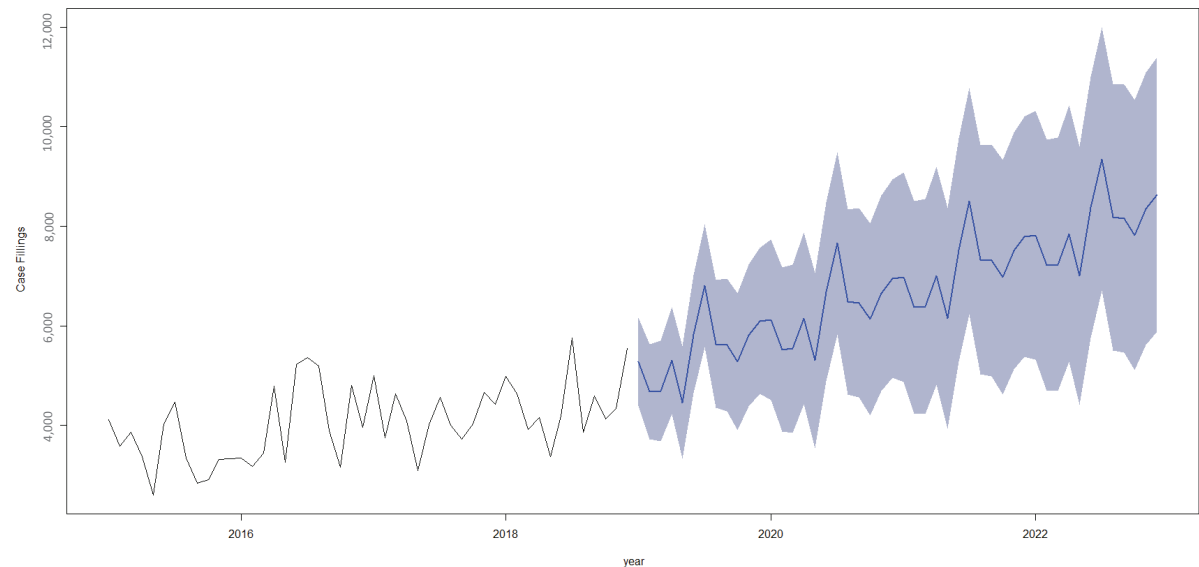
Source: Authors' calculations.

Figure 4.2.5 highlights the various components of a time series model. The figure examines the historical data through three important components, namely, trend, seasonality, and randomness. This is known as decomposition of the time series data. The first graph—the observation—is the raw data as shown previously in Figure 4.2.4. The second graph—the observation—is an increase and decrease of values in the data set.¹¹ One may note a gradual increase in the filings over the years in Mysuru. The third graph—seasonal—highlights the repeating cycles in the data set.¹² For instance, case filings dipping in the months

of April and May and spiking in June and July due to court vacations can be easily captured through the seasonality chart. Lastly, randomness, as the name suggests, shows the random variations in the data set—for instance, there would be certain months in which case filings would randomly increase or decrease with no particular trend.¹³

Using the Holt-Winters filtering model (explanation with equation is in Annexure A),¹⁴ we forecast the number of cases that will be instituted in the coming years in Mysuru.

Figure 4.2.6. Forecast of Number of Case Filings in Mysuru for the Period between 2019–2022



Source: Authors' calculations.

Figure 4.2.6 projects the cases that will be filed in Mysuru from 2019–2022. The blue line indicates the actual projected filings (also known as point forecast) over the next four years, while the outer grey lines are the higher and lower range of filings. Case filings in the time series model have been projected with a confidence interval of 80 per cent. This means that that the model can predict future filings with an accuracy of 80 per cent. One may note that over the years, there is a gradual increase in case filings with certain months seeing as many as

8,000 cases filed. Table 4.2.2 shows the predicted filings along with the higher and lower ranges between which cases will be filed.

To test the accuracy of the model, we fed the number of cases filed between 2015–2017 and forecasted the number of cases that would be filed in 2018. These forecasted numbers were compared with the actual number of cases filed in different quarters in 2018. Table 4.2.3 shows the comparison.

Table 4.2.2. Forecasted Case Filings

Year	Forecasted case filings (point forecast)	Forecasted lower range (minimum)	Forecasted higher range (maximum)
2019	65,496	51,158	79,829
2020	75,664	53,977	97,353
2021	85,836	58,755	1,12,916
2022	96,004	64,448	1,27,559

Source: Authors' calculations.

Table 4.2.3. Testing the Predicted Values

Quarters, 2018	Cases filed	Case filings forecasted (point forecast)	Forecasted lower range (minimum)	Forecasted higher range (maximum)
January to March, Quarter 1	13,536	13,326	10,596	16,055
April to June, Quarter 2	11,716	15,973	12,520	19,426
July to September, Quarter 3	14,231	16,438	12,390	20,486
October to December, Quarter 4	14,025	15,535	10,969	20,100

Source: Authors' calculations.

Table 4.2.3 tests the accuracy of the time series model used in the chapter. All the cases filed in 2018 fall within the forecasted ranges (upper and lower) barring Quarter 2. In terms of forecasted number, all the different quarters are close to the point forecast, barring Quarter 2 where the difference is comparatively high. The forecasted numbers can help in giving the judge as well as the registry an assessment of the total cases that the court may expect to be filed. Requirements for adequate infrastructure, staff, and processes can be accordingly kept in place in view the incoming case load.

STUDYING LIFE CYCLE OF CASES

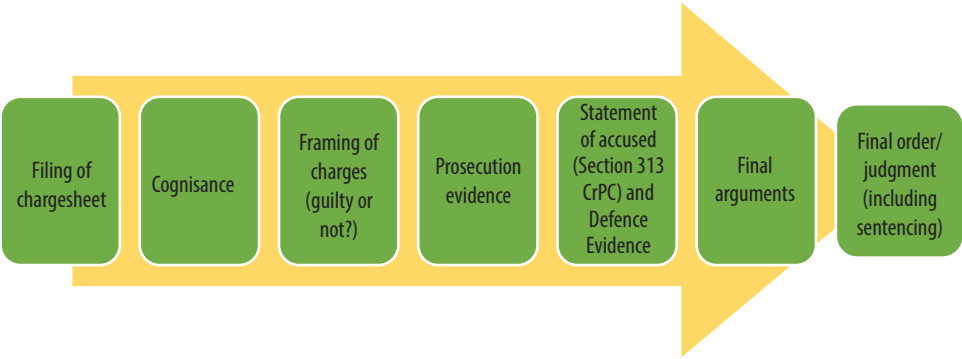
Studying the life cycle of cases and understanding the manner in which they proceed through different

stages is essential to identify bottlenecks in the system. To effectively study the life cycle of cases and their various attributes, cases have been divided into civil and criminal categories. Due to difference in procedures, stages, and subject matter, it was considered necessary to analyse them separately.

It must be noted that a typical criminal case emanating from a police station and being tried in the court would go through certain stages, starting from cognisance of the chargesheet to framing of charges, evidence, arguments, and then the final judgment. Figure 4.2.7 depicts the broad stages that constitute the progress of criminal cases.

While the stages provided in Figure 4.2.7 may be true for certain cases, there are some cases that do not pass through the evidence stage at all. This may be due to several reasons, for instance,

Figure 4.2.7. Stages in Criminal Cases



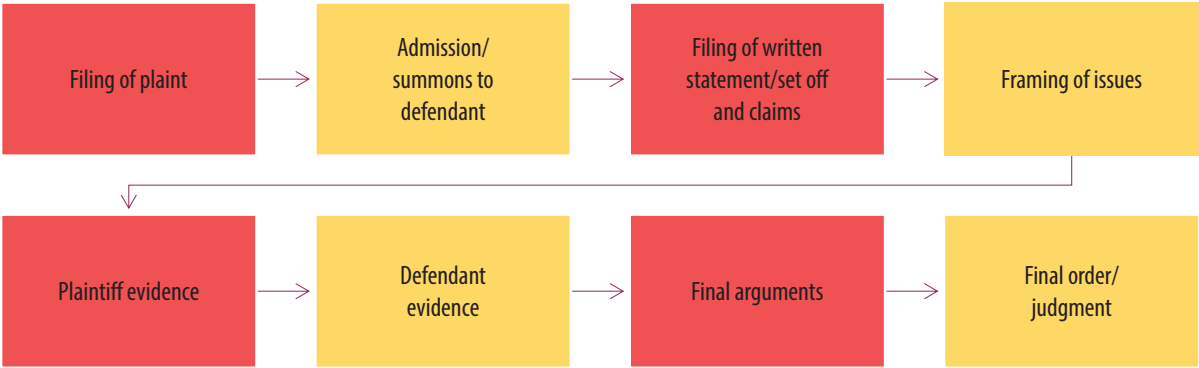
Source: Authors' compilation.

if the accused pleads guilty to the charges or confesses to the crime, the evidence stage is dispensed with. Further, in certain types, such as criminal appeals or miscellaneous criminal appeals, there is no evidence stage. As a general practice, once the case goes on appeal, the court focuses primarily on the question of law and does not revisit the evidence, as the entire evidence stage would have already been completed during proceedings in the trial court. Hence, barring certain exceptional cases, appeals do not go through the evidence stage.

The evidence stage forms an important part of the life cycle of a criminal case. Not only does the entire case rest on the outcome of the evidence stage, but the courts also spend a considerable amount of time in cross-examining witnesses. Summoning the investigating officer and witnesses, carrying out examination in chief and cross-examination, recording the statement of accused under Section 313 of the CrPC, and so on occupy a significant amount of time of the court.

Figure 4.2.8 broadly shows the different stages in a civil case.

Figure 4.2.8. Stages in Civil Cases



Source: Authors' compilation.

Apart from the stages provided in Figure 4.2.8, there are few other stages, such as alternate dispute resolution (ADR), which can be sought by the parties in case they are interested in out-of-court settlements. Even in civil cases, not all the cases go through the evidence stage. Cases relating to execution or appeals do not have an evidence stage. Also, where the suit is dismissed for want of cause of action or where parties settle the dispute through ADR, the case does not go through the evidence stage.

Hence, for the purpose of carrying out a comprehensive analysis, cases may be bifurcated into those that go through the evidence stage and those that do not.

Assessing the Life cycle of Cases through Survival Analysis

While forecasting the number of cases filed would help judges and the registry in taking strategic decisions, a model that can help in assessing the life of a case and providing estimations for disposal of cases would be helpful in gaining a deeper understanding of the court's workload. To provide estimations regarding the disposal of cases, the chapter uses survival analysis to assess the life cycle of cases in Mysuru. A similar study aimed at deconstructing the duration of cases through survivor analysis was carried out for civil cases filed in certain courts in Argentina.¹⁵

Survival analysis is a set of statistical techniques used to study the data where ‘the outcome variable is the time until the occurrence of an event of interest’.¹⁶ Such an event can be death, marriage, or occurrence of a disease. The time it takes to the event, or in other words the survival time, can be determined in years, months, weeks, etc.¹⁷ For example, if the event of interest is a heart attack, then survival analysis can help in providing information about the time taken for the person to develop the heart attack.¹⁸ Hence, the subject is observed over a certain period of time until the event of interest occurs.

Survival analysis is widely used in biology or health-related areas where researchers face the issue of incomplete observations.¹⁹ For instance, imagine a study is being undertaken for 10 weeks to understand the survival time of individuals developing a heart attack.²⁰ During the study period, let us say that some patients develop a heart attack, while certain other patients drop out of the study, and some do not develop a heart attack at all. To avoid discarding incomplete or partial data, survival analysis can be used to provide an estimate of when the event may occur.²¹ The completed observations, that is patients who developed a heart attack, are called ‘non-censored’, while observations that remained incomplete, that is patients who either dropped out or never developed the heart attack, are called ‘censored’.²²

Similarly, cases filed in the court can also be bifurcated into non-censored, that is disposed cases which have been concluded in the court, and censored, that is cases that are still pending in the court and are yet to be concluded. Based on the data, the survivor model techniques can be used to determine case duration or survival time.

In this chapter, we use survival analysis (Kaplan-Meier Product Limit Method; see Annexure B for details) to estimate the probability of case disposals.

Applying Survivor Analysis to Criminal Cases (CC)

Criminal cases differ from each other in nature and complexity; hence, analysing all criminal cases together may not provide accurate results. In addition, carrying out separate analyses for each different type of case would result in numerous methods and insights, which would be difficult to understand and present. Hence, drilling down to a particular case type would be a good start to showcase the results. Accordingly, the case type Criminal Cases (CC) that forms the majority in the sample study has been considered for survivor analysis in this chapter.

Criminal Cases are those that originate from the police station where police officials file a chargesheet upon registration of a First Information Report. Criminal Cases pertain to offences in the Indian Penal Code, protection of women from domestic violence, mines and minerals, etc. Criminal Cases are primarily adjudicated by judicial magistrates. To carry out the survival analysis, cases were divided into those that undergo the evidence stage, and those that do not, as explained earlier.

In our study, amongst the cases that did not go through the evidence stage, the nature of disposal in 32 per cent of the cases was ‘closed’. In 17 per cent of cases, the nature of disposal was ‘uncontested-conviction or conviction by pleading guilty’. Table 4.2.4 shows the probability of cases surviving or pending over different points in time after being filed.

Table 4.2.4 compares the probability score of cases that will remain pending at the end of each year over a 10-year timeframe for cases that go through evidence and the ones that do not. Out of 83,284 Criminal Cases in the sample, 48,124 cases did not have an evidence stage at all. As per Table 4.2.4, one may note that the probability of cases remaining pending is higher for different time periods that go through the evidence stage,

Table 4.2.4. Probability Score of Cases Pending for Criminal Cases (CC)

Case type	1 year	2 years	3 years	4 years	5 years	6 years	7 years	8 years	9 years	10 years
Evidence	0.83	0.67	0.52	0.30	0.31	0.26	0.22	0.19	0.13	0.09
Non-evidence	0.64	0.40	0.34	0.22	0.14	0.10	0.09	0.07	0.03	0.01

Source: Authors' calculations.

as opposed to cases that do not go through the evidence stage. Hence, if a case does not go through the evidence stage, then its probability of getting disposed quickly is higher, if all else is equal. Cases that do not go through the evidence stage have a 64 per cent probability of remaining pending for one year or more. That means the probability of cases getting disposed in the same year as they were filed in is 36 per cent. However, for cases that do go through the evidence stage, the probability of them pending for one year or more is 83 per cent. Thus, there is a 17 per cent probability that such cases would be disposed within the same year as that of filing. The trend is similar across different time periods, showing that the probability of a case getting disposed faster is high when it does not go through the evidence stage.

Applying Survivor Analysis to Civil Cases

The nature of civil cases filed in Mysuru district differs widely. To carry out survival analysis, it was important to target certain case types. Hence, based on the number of cases in the sample study, survival analysis was carried out for Original Suit (OS), Execution Cases (EX), Motor Vehicle Cases (MVC), Small Cause Case (SC), Regular Appeals (RA), and Land Acquisition Cases (LAC). These case types form a considerable load of cases in Mysuru district. In our study, amongst the cases that do not go through the evidence stage, 38 per cent of them indicated nature of disposal as 'closed', followed by 24 per cent of cases which were 'compromised'. Table 4.2.5 shows the probability of cases that remain pending for different case types across various points in time.

Table 4.2.5. Probability Score of Civil Cases that Go through the Evidence Stage

Case type	1 year	2 years	3 years	4 years	5 years	6 years	7 years	8 years	9 years	10 years
LAC	0.62	0.47	0.37	0.29	0.23	0.19	0.16	0.14	0.09	0.05
MVC	0.70	0.49	0.26	0.20	0.16	0.13	0.13	0.10	0.04	0.02
OS	0.86	0.73	0.61	0.52	0.43	0.36	0.31	0.26	0.19	0.16
SC	0.50	0.41	0.37	0.35	0.33	0.33	0.33	0.33	0.09	0.03

Source: Authors' calculations.

Table 4.2.6. Probability Score of Civil Cases that Do Not Go through the Evidence Stage

Case type	1 year	2 years	3 years	4 years	5 years	6 years	7 years	8 years	9 years	10 years
LAC	0.39	0.33	0.24	0.23	0.21	0.20	0.15	0.11	0.05	0.03
MVC	0.71	0.62	0.40	0.28	0.23	0.19	0.18	0.15	0.04	0.01
OS	0.65	0.57	0.49	0.41	0.33	0.25	0.20	0.16	0.06	0.04
SC	0.58	0.51	0.46	0.45	0.44	0.43	0.00	0.43	0.06	0.02
RA	0.64	0.46	0.33	0.21	0.15	0.10	0.08	0.04	0.01	0.01
EX	0.68	0.52	0.41	0.33	0.26	0.22	0.19	0.16	0.09	0.05

Source: Authors' calculations.

Tables 4.2.5 and 4.2.6 compare the probability scores of cases that go through evidence and the ones that do not. Cases categorised as EX and RA that do not go through the evidence stage at all have been included only in Table 4.2.6. Similar to CC, LAC have a higher probability score for cases that go through the evidence stage, indicating the fact that the probability of cases remaining pending is higher when compared to the cases that do not go through evidence, if all else is equal. Amongst LACs, which do not go through the evidence stage, the probability of cases pending for one year or more is 39 per cent, as more than half of the cases would probably be disposed in the same year as they were filed.

A problematic case type is MVC, where the probability of cases remaining pending even after two or three years is higher for cases that do not go through the evidence, when compared to ones that do. The evidence stage occupies a considerable amount of time and effort of the court. If despite not going through the evidence stage, cases take longer to be disposed, then there are certain other stages that may be causing delay in a case. A similar pattern can also be seen for SC cases, where the probability of cases pending at different time intervals is higher for cases that do not go through the evidence stage.

The probability of EX cases pending for one year or more is 68 per cent, with the probability of EX cases pending for six years or more is 22 per cent. This is problematic too. EX cases relate to the execution of the decree passed by the court which means litigants have to approach the court yet again for the same case and wait for several years till the execution order is passed.

CORRELATION FOR CRIMINAL CASES

There are various stages through which criminal cases progress. Each stage has its own significance

in a criminal case. To get a better and in-depth understanding of the life cycle of a case, it becomes essential to assess the effects of different stages on a case. For this purpose, each of the stages of a criminal case has been correlated with the days taken to dispose a case. In a nutshell, correlation helps in understanding the strength of a relationship between two variables. The closer the value is to 1, the stronger the relationship between the two variables. To better understand case life, each of the stages have been correlated with the days taken to dispose a case. This would help in highlighting the relationship between stages of cases and the disposal timeframe of cases.

To carry out this correlation, several stage attributes are chosen as different variables. Table 4.2.7 depicts the variables with the most amount of correlation with disposal time.

Table 4.2.7 focuses on two attributes of stages, that is days spent on a stage in the life cycle of a case and the number of hearings at each of the stages.²³ These attributes are compared with cases that go through the evidence stage and ones that do not. These stage attributes are then correlated with the case life to see which attribute has the highest correlation. As per Table 4.2.7, the number of hearings in a case has a positive (directly proportional) and strong correlation with case life for both categories of cases, which means an increase in the number of hearings in a case would increase the number of days to dispose a case and vice versa. This is certainly obvious since greater number of hearings mean that the case is prolonged and unable to get disposed. Adjournments can play a detrimental role in unnecessarily extending the number of hearings, and thus prolonging case life. Due to absence of the parties/witnesses or even the judge, hearings are pushed to succeeding dates, thus causing delay.

Days spent on the evidence stage has a high correlation with case life, which indicates that the speed with which cases get decided at the evidence

Table 4.2.7. Correlation of Different Case-Related Variables (Cases with Evidence and No Evidence Stage)

Variables	Correlation with disposal time (cases with evidence stage)	Correlation with disposal time (cases with no evidence stage)
Number of hearings	0.772	0.741
Days spent on evidence stage	0.701	Not applicable
Days spent on notice/summons/warrants	0.544	0.650
Days spent on appearance stage	0.514	0.649
Number of hearings for evidence stage	0.508	Not applicable
Number of hearings for notice/summons/warrants	0.479	0.546
Number of hearings for appearance stage	0.453	0.598
Days spent on each hearing	0.375	0.450
Days spent on framing of charges	0.350	0.230

Source: Authors' calculations.

Note: The stages provided in the table have been taken directly from the e-courts website and hence differ from the stages provided in Figure 4.2.7.

stage has a strong impact on the disposal of cases. The faster a case goes through the evidence stage, the sooner the case can be completed, provided there is no other obstacle faced at any other stage.

Further, days spent on the stage of issuing notices/summons/warrants and the appearance stage have a moderately high correlation with case life for both the categories of cases. However, cases not going through the evidence stage have a slightly stronger correlation. In certain cases, a great amount of time is spent on issuing summons to witnesses or issuing warrants to the accused. This can further hamper the day-to-day proceedings of the case. Despite consistent issue of summons and warrants, the accused or the witnesses fail to appear that results in delay. The correlation between days spent on the appearance stage and disposal time is 0.649 for cases that do not go through the evidence stage, which shows that court may be spending several days on the appearance stage, waiting for the accused/parties to appear.

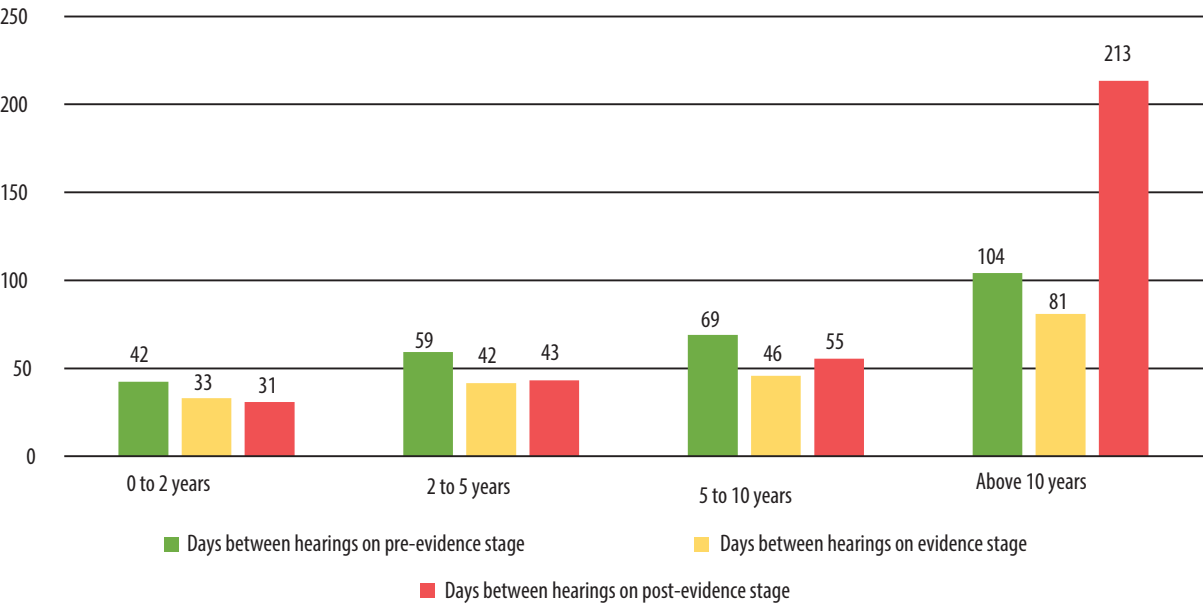
Certain other stages, such as framing of charges and hearing stage, also feature in Table 4.2.7;

however, they have a very weak correlation with case life.

To obtain a deeper understanding, it is important to go a step further in analysing this aspect. Since there are different types of cases which have been disposed at different times, a bifurcation between them would further help in giving a proper picture. In this context, Figure 4.2.9 focuses on the case type CC, as it forms a majority amongst the case types in Mysuru. Further, Figure 4.2.9 considers the evidence stage as a landmark and divides the cases into three phases, that is pre-evidence stage, evidence stage, and post-evidence stage. The pace at which cases move from these phases is worth analysing.

Figure 4.2.9 splits up cases into different disposal time brackets, that is 0–2 years, 2–5 years, 5–10 years, and more than 10 years. The average days between hearings in the pre-evidence, evidence, and post-evidence stages are compared across the different time brackets. It may be noted that the days between hearings increase in three phases as the case starts getting older. For cases in the 2–5 years and 5–10 years bracket, the days between hearings

Figure 4.2.9. Average Days between Hearings in Different Phases for Criminal Cases (CC) in Various Disposal Time Brackets



Source: Authors' calculations.

at the pre-evidence phase is higher when compared to those in the other phases. It is, therefore, required that judges complete the pre-evidence phase, comprising cognisance, framing of charges, etc. in a timely manner and proceed with the evidence stage to ensure that cases get disposed in a timely manner.

Further, it can be seen that cases that take more than 10 years to be disposed have a much higher average of days between hearings in the post-evidence phase. Hence, even after the entire evidence phase is completed, there is delay at the final stages of the case, thus preventing the case from getting disposed.

CORRELATION FOR CIVIL CASES

Table 4.2.8 highlights the correlation of various stages with the disposal time of cases that go through the evidence stage and the ones that do not.²⁴

Table 4.2.8. Correlation of Different Case-Related Variables (Evidence and No Evidence Stage)

Variables	Correlation with disposal time (cases with evidence stage)	Correlation with disposal time (cases with no evidence stage)
Days spent on evidence stage	0.998	Not applicable
Days between hearings	0.949	0.700
Days spent on notice/summons/LCR	0.040	0.832
Days spent on final order/judgment	0.012	0.394

Source: Authors' calculations.

Note: The stages provided in the table have been taken directly from the e-courts website and hence differ from the stages provided in Figure 4.2.8.

The measure of days spent on the evidence stage has a very high correlation to disposal time. A higher positive correlation indicates that with an increase in the days spent on the evidence stage, there is an increase in the days taken to dispose the case, and vice versa. Hence, the evidence stage plays a crucial role in the life cycle of civil cases. However, cases that do not go through the evidence stage have a high correlation with days spent on notice and summons stage. A similar trend was observed even for criminal cases; however, the correlation for civil cases is found to be much stronger. Therefore, the notice and summons stage plays an important role for cases that do not go through the evidence stage. Often parties, especially the defendant, do not appear in the court despite repeated summons. Due to their absence during the hearings, cases continue to get adjourned and result in unnecessary delays.

Days between hearings and the days taken to dispose cases have a strong correlation to each other. The correlation is strong for both categories of cases—those that go through evidence and those that do not. Listing cases at regular intervals of time is crucial so that cases can progress through different stages quickly. The correlation highlights that days between hearings is all the more important for civil cases, as increase in the number of days would lead to increase in the time taken to dispose that case and vice versa.

CONCLUSION

The various analyses, insights, and statistical models provided in this chapter have been devised with the intention of helping judges at the ground level. One of the highlights of the chapter is that it predicts the number of cases that will be filed in the next few years in Mysuru. The forecasting model can be used by the principal district judge and the registry members to strategise and adopt certain measures

that can be used to deal with the incoming case load. Based on the projected filings, the administration can take steps to ensure that there is adequate staff strength during months when the greatest number of filings is expected. One of the most important uses of the model can be at the national level, wherein number of expected filings in different states and districts in the country can be projected. The model can be used nationally by absorbing it into the new version of the NJDG that was released recently and provides several interactive charts and figures in relation to cases pending/disposed in courts. While the projection provided in this chapter focuses only on cases filed, the same can be expanded to even project the number of cases pending in a particular court over the next few years. Hence, the forecasting model can play an important role in managing the workload of judges in different courts.

The chapter also takes a deeper look into the life cycle of a case and studies the extent to which various variables affect the disposal of cases. While carrying out the analysis, cases that went through the evidence stage and the ones that did not go through the evidence stage were analysed separately. Overall it was observed that cases that do not go through the evidence stage tend to get disposed faster. In civil cases, it was observed that the average days spent on evidence stage, the average days between hearings, and the average days spent on notice/summons/LCR have a high correlation with disposal of cases. Judges need to ensure that minimum adjournments are granted, and cases be listed in quick intervals wherever possible so that all the stages get completed quickly. Further, there is a strong need to bifurcate cases on procedural and substantive stages in courts. Judges need to focus on substantive stages while the procedural stages should be taken care of by the registrar of the court, thus freeing up judges' time. The practice is mandated under the case flow management rules passed in several states; however, it is seldom being followed.

On the other hand, in criminal cases, the average number of hearings in a case and the average days spent on notice/summons/warrants stage have a strong correlation with disposal of cases. Hence, judges should ensure that minimum adjournments are granted to ensure maximum number of effective hearings in a case. Summoning of accused, witnesses, or investigation officers should take place quickly so that proceedings continue smoothly.

It has been close to seven years since the inauguration of the e-courts online portal. Significant amounts of data have been gathered that can be used to suggest systemic changes in court processes. With increasing growth and enhancement of the e-courts system, more case-related data is made available which can be used to carry out various types of analyses. However, not all judges use data and technology at the optimal level. Bringing more awareness towards effective use of data and encouraging judges to bring changes based on data insights is important. It is high time that data becomes an integral part of the judiciary, as it can go a long way in bringing concrete changes in the system.

ANNEXURE A: HOLT-WINTERS METHOD

Holt-Winters model is used to forecast and predict the behaviour of a sequence of values over different periods of time, also known as a time series model. Holt-Winters model is one of the most popular and widely used forecasting technique for carrying out time series. The model is decades old; however, it is still used in various fields and in many applications.²⁵

Forecasting always requires a model and through Holt-Winters three aspects of time series can be modelled. These are a typical value (average), a slope (trend) over time, and a cyclical repeating pattern (seasonality).²⁶ Holt-Winters uses an exponential smoothing to encode several values from the past

and use them to predict 'typical' values for the present and future. Before proceeding further, it is important to explain exponential smoothing. The terms refer to the use of exponentially weighted moving average (EWMA) to 'smooth' a time series. If you have a time series, x_t , you can define a new time series s_t that is a smoothed version of x_t .²⁷

$$s_t = \alpha x_t + (1-\alpha)s_{t-1}$$

There are three aspects to the time series model, that is value, trend, and seasonality. These three aspects are expressed as three types of exponential smoothing; hence, the Holt-Winters model is called as the triple exponential smoothing. The model uses the combined effect of these three influences and computes the prediction for a current or future value. The model requires several parameters: one for each smoothing (α , β , γ), the length of a season, and the number of periods in a season.²⁸

Suppose you have a time series, x_t , along with a smoothed version s_t . You would like to forecast the next value for x_t , which is x_{t+1} . To do this, you could use the last value you calculated for the EWMA, s_t . It works out this way because our smoothed time series is the EWMA of our original series, and because of the way averages (and expectations) work, s_t turns out to be a really good prediction. Predicting the next value is called the one-step-ahead forecast.

Further, in this chapter, we have used the Holt-Winters additive model to forecast the future case filings.

The component form for the additive method is:²⁹

$$\begin{aligned} y_{t+h|t} &= \ell_t + hb_t + s_{t+h-m(k+1)} \\ \ell_t &= \alpha(y_t - s_{t-m}) + (1-\alpha)(\ell_{t-1} + b_{t-1}) \\ b_t &= \beta(\ell_t - \ell_{t-1}) + (1-\beta)b_{t-1} \\ s_t &= \gamma(y_t - \ell_{t-1} - b_{t-1}) + (1-\gamma)s_{t-m} \end{aligned}$$

where, k is the integer part of $(h-1)/m$, which ensures that the estimates of the seasonal indices used for forecasting come from the final year of the

sample. The level equation shows a weighted average between the seasonally adjusted observation ($y_t - s_{t-m}$) and the non-seasonal forecast ($\ell_{t-1} + b_{t-1}$) for time t . The trend equation is identical to Holt's linear method. The seasonal equation shows a weighted average between the current seasonal index, ($y_t - \ell_{t-1} - b_{t-1}$), and the seasonal index of the same season last year (that is, m time periods ago).³⁰

The equation for the seasonal component is expressed as:

$$s_t = \gamma^*(y_t - \ell_t) + (1 - \gamma^*)s_{t-m}$$

If we substitute ℓ_t from the smoothing equation for the level of the component form above, we get:

$$s_t = \gamma^*(1 - \alpha)(y_t - \ell_{t-1} - bt - 1) + [1 - \gamma^*(1 - \alpha)]s_{t-m}$$

which is identical to the smoothing equation for the seasonal component we specify here, with $\gamma = \gamma^*(1 - \alpha)$. The usual parameter restriction is $0 \leq \gamma^* \leq 1$, which translates to $0 \leq \gamma \leq 1 - \alpha$.³¹

ANNEXURE B: SURVIVAL ANALYSIS

Survival analysis is an important branch of statistics that is used to study the data where 'the outcome variable is the time until the occurrence of an event of interest'.³² Such an event can be death, marriage, or occurrence of a disease. The time it takes to the event, or in other words survival time, can be determined in years, months, weeks etc.³³ For example, if the event of interest is a heart attack, then the survival analysis can help in providing the time up to which the person develops the heart attack.³⁴ In this chapter we have extended the same analysis to the cases in the court to analyse the percentage of cases that will be pending or disposed after certain point of time.

While using the survival analysis in the chapter we have used the Kaplan-Meier estimator which is used to estimate the survival function. It helps

in depicting the estimated probability of survival at each recorded time of failure in the data. The equation for Kaplan-Meier estimator is³⁵

$$\hat{S}_t = \prod_{ti \leq t} \left[1 - \frac{di}{ni} \right]$$

where ti is duration of study at point i , di is number of cases disposed up to point i and ni is the number of cases pending just prior to ti . S is based upon the probability that a case will remain pending at the end of a time interval, on the condition that the case was filed at the start of the time interval. S is the product (P) of these conditional probabilities.

Notes

1. *Hindustan Times*. 2019. 'IIT-Madras Offers AI-based Tech to Help Army Predict Stone Pelting in Jammu and Kashmir', *Hindustan Times*, 23 January, available online at <https://www.hindustantimes.com/india-news/iit-madras-offers-ai-based-tech-to-help-army-predict-stone-pelting-in-jammu-and-kashmir/story-nFpvW68m42WNLXmu2AnIBN.html> (accessed on 1 February 2019).
2. E-courts services, available online at http://www.ecourts.gov.in/ecourts_home/static/about-us.php (accessed on 28 January 2019).
3. As per e-courts, judges belonging to the same cadre are grouped together as court establishments.
4. Due to certain technical problems in extracting data for two court establishments, data from all 21 court establishments could not be extracted.
5. Arunav Kaul, Ahmed Pathan, and Harish Narasappa. 2017. 'Deconstructing Delay: Analyses of Data from High Courts and Subordinate Courts', *Approaches to Justice in India: A Report by DAKSH*, 2: 94-95.
6. Martin Zarcek. 2017. *Introduction to Time Series*. Czech Republic: University of Ostrava, p. 1.
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Effective Hearings in PILs: A Transaction Costs-based Approach

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3

INTRODUCTION

In the book *The Remembered Village* by anthropologist-turned-novelist M.N. Srinivas, published by University of California Press in 1980, the author elaborates on the oft-used Kannada adage about the judiciary—‘the victor in a law suit suffered defeat while the defeated suffered death (*geddavanu sota, sotavanu satta*)’.¹ When this statement is analysed in the context of the Indian judiciary, it evokes the sentiment that the time taken for cases to be resolved in the judiciary means that for the winner of a case, victory is often Pyrrhic, while for the loser, it is worse.

In contemporary times, it is important that we begin to evaluate the state of our judiciary from certain interdisciplinary perspectives, such as those pertaining to data management and information technology. To analyse the socio-economic impact of judicial delay, we need to rethink how we measure the efficiency and effectiveness of our judicial processes. A lot has been said and written about the challenges around judicial processes from the perspectives of judges. To develop a more nuanced understanding of the effects of delay, we need to also keep in mind the affected parties. When we flip the discussion from the perspective of judges and judicial administration and keep the affected parties at the centre of our analysis, our treatment of the cost of litigation and loss of time can be seen from a new viewpoint. In this chapter, we use the age-old management tool of transaction costs to take a fresh look at a few cases in the Karnataka High Court.

For the purpose of this chapter, we begin with a simple transaction costs-based study of the judicial process as it unfolds in the adjudication of public

interest litigation cases (PILs). One of the authors of this chapter, Sridhar Pabbisetty, has been a litigant in several of these PILs in his capacity as the Chief Executive Officer of the Namma Bengaluru Foundation. Analysis of transaction costs is limited to the information and data available on the website of the Karnataka High Court. While the study in this chapter is modelled on a small sample of eight PILs, taking this approach forward, it can be extended to all kinds of cases. Our understanding of transaction costs, for this chapter, is informed by three variables—(a) preparation time of both litigants and counsels, (b) attendance time of both litigants and counsels, and (c) the time spent on on-boarding of benches hearing a case. We begin by looking at the number of litigants at the time of filing the petition and attribute a nominal amount of time spent by them on the case, based on the information available on the Karnataka High Court website. As mentioned, this includes both the case preparation time and case attendance time based on our observations. Needless to say, the accuracy of each of these variables can be further improved if and when more granular data becomes available on websites of courts or through private entities.

In this chapter, we argue that transaction costs can be used to measure and analyse judicial delay. The time and effort spent towards the three variables mentioned previously, which we consider to calculate transaction costs, can have important implications on studying the time taken for disposal of cases. Considering PILs are crucial for bringing to light issues of governance, it is important to analyse the time spent in specific stages and acts which occur as these cases progress. However, this analysis will remain incomplete (and unsatisfactory) unless our case management systems are re-engineered and data on certain specific parameters of judicial hearings are collected and presented. To that end, this chapter gives certain indicative parameters around which data management systems should work for better study and analysis of judicial delays.

OUR DATA SET—SAMPLE STUDY OF CASES

Transactions generally occur when goods or services are transferred from a provider to a user. In economics, transaction costs are understood as depending on how the transaction is organised.² Within an organisation, costs forming part of a transaction can include aspects of managing and monitoring personnel as well as procuring inputs. Where external providers are involved, transaction costs include source selection, contract management, and performance monitoring. In this chapter, we make an attempt to use this concept, which is generally used in management studies, for studying judicial delays and efficiency.

Transaction costs may be affected by a number of factors. However, we have only considered the factors mentioned in this part of the chapter. Our selection of these factors is informed by the availability of relevant data on the website of the Karnataka High Court. In addition to that, some assumptions have been made where accurate data is not available. These will be explained under the relevant factors which have been considered to measure transaction costs.

Our sample comprises eight PILs belonging to diverse subject areas which have the potential of wide-ranging impact on the public. This sample of cases pertains to matters of improving governance in Bengaluru, India.

We have considered the following factors in arriving at the transaction costs for each case.

Time Available for Each Hearing

We calculated the time available for each hearing by considering the number of cases listed in Court Hall 1 of the Karnataka High Court on 1 April 2019.

Table 4.3.1. Cases Listed for Hearing in Court Hall 1 of the High Court of Karnataka on 1 April 2019

Hearing type	Number of cases
Stage: Hearing - Interlocutory application	2
Stage: Preliminary hearing	6
Stage: Admission	1
Stage: Preliminary hearing - B group	21
Stage: Final hearing	1
Stage: Orders	2
Stage: Preliminary hearing	50
Stage: Preliminary hearing - B group	1
Stage: Preliminary hearing	1
Total	85

As seen in Table 4.3.1, 85 cases were listed on 1 April 2019 to be heard in approximately five hours of court time (the Karnataka High Court starts its day at 10:30 am and benches rise at 4:30 pm, with an hour for lunch at 1:30 pm). This can be quite arduous when litigants, their lawyers, and the judges have to make meaningful progress from the last hearing to the present one. Even when we did not account for the time taken by lawyers and clients of one case to make way for the next one, we end up with a mere 3.53 minutes per case.³

Bench On-boarding

In the Indian judicial process, an ongoing case might also have to bear the effects of changes in bench composition. This could be necessitated either by change of the roster according to the schedule of the High Court, or due to factors like retirement, elevation, or transfer of the member judge. Across the eight PILs that formed part of our sample (out of which some are disposed while others are currently pending before the High Court), we found that each case was presided over by a Division Bench at all times, and the benches changed from a minimum of three times to a maximum (as on 10 June 2019) of 13 times.

Every time the composition of a bench changes, the incoming judges have to be apprised of the case right from its origin to key developments that have occurred over time. The transaction cost in this case is the amount of time taken to make judges familiar with all developments in the case.

Case Preparation Time (CPT)

In the context of PILs, the initial case preparation time includes time spent on preparing background information in the case, legal research, and following up with relevant authorities (who might be parties to the case) in an attempt to resolve the dispute out of court, if possible. When out-of-court discussion does not meet its desired end, a litigant is forced to approach the court of law. After making a decision to file a case, the litigant also has to work with the counsel to ensure that the facts of the case are presented as per the counsel's legal strategy and research.

Keeping aside this initial time for each hearing, the case preparation time has two components—Preparation Time of Litigant⁴ (PTL) and Preparation Time of Legal Counsel (PTC). In explaining and calculating these, we have made certain assumptions⁵ as to the time spent by litigants and legal counsel for preparation of the case. The figures we use here are being considered as a model and more accurate numbers can be used if and when official data is made available as to the time spent in preparation of a case.

1. **Preparation Time for Litigant (PTL):** On an average, every litigant spends about a week going through the orders from previous hearings, organising any response to be provided, gathering evidence to counter arguments of the opposing counsel, briefing their counsel, and resolving any feedback from the counsel prior to the next hearing.
2. **Preparation Time for Legal Counsel (PTC):** The legal counsel, on the other hand, should

process the information given by a client who may or may not be aware of how the court system works. Hence, he/she will have to process the information from the client into a format acceptable to the court, get essential signatures from the client, assist in notarising any relevant submissions, organise their arguments, and research relevant case law.

Case Attendance Time (CAT)

The Case Attendance Time (CAT) for each hearing has two components—Attendance Time for Litigant (ATL) and Attendance Time for Legal Counsel (ATC). Since only the date of hearing is confirmed for any case but not the time of hearing, this is a hugely suboptimal process. As with preparation time, we have made assumptions with regard to attendance times as well.

- 1. **Attendance Time for Litigant (ATL):** Each litigant will have to travel to the court complex and wait for the case to be called. Often, each litigant ends up spending anywhere between half a day to an entire day on each date of hearing. Since the time of hearing is at best a guess, he/she will end up arriving either too early or too late for the hearing. Litigants tend to err on the side of caution so as not to miss the hearing and arrive at least an hour earlier than the anticipated hearing time. Though the actual time of hearing may be anywhere from 0 to 3.53 minutes (on an average) to 60 minutes or more, the waiting time itself is longer than the productive time spent in court.
- 2. **Attendance Time for Legal Counsel (ATC):** Counsels usually have more than one matter being heard in the court on a particular day. They, however, have a different challenge in case they have more than one matter being heard on the same day. One can often see lawyers rushing

from one court hall to another. In any case, a counsel will end up allocating an hour (at the least) to one particular case to ensure effective appearance.

Modelling Assumptions

Since many of the above defined times are not captured (on either the Karnataka High Court website or any other information portal nor are they otherwise available for research and analysis), for the sake of modelling, we have considered the following starting values:

Table 4.3.2. Starting Values for Determining Essential Transaction Costs (on per Hearing Basis)

Metric	Time (in Days)
Preparation Time for Litigant (PTL)	8
Preparation Time for Legal Counsel (PTC)	3
Attendance Time for Litigant (ATL)	1
Attendance Time for Legal Counsel (ATC)	0.25
Bench On-boarding ⁶	3

Source: Authors’ compilation.

As mentioned earlier in this chapter, these numbers have been arrived at based on prior experiences of one of the authors (Sridhar Pabbisetty) in past cases where he has been involved as a litigant.⁷ Once we can capture real data for each of the above described data elements, the model can use the real data. As will be evident from later sections of this chapter, these values have been used to determine the time spent (in days) for each of the following—preparation time (of litigants and counsels), attendance time (of litigants and counsels), and bench on-boarding. For instance, for calculating preparation time of litigant, the starting number of eight days (based on our assumption) is multiplied by the number of litigants involved in the case (this information is available on the High Court website). While this

may not present the most accurate calculation (or depiction) of the preparation time of litigants, we have assumed that this is the closest possible (or the least incorrect) figure that can be arrived at based on available information.

Time Taken for Disposal of Cases

An important metric for us to keep in mind as we begin looking at cases is the duration that each case takes from its inception to culmination. In our sample of eight PILs, we find the range to be from 359 days to 2,442 days. This is a very important metric to keep in mind, particularly because these are matters of immense importance to the citizenry at large; while on the one hand, speedy disposal is always preferable, on the other hand, these cases require judges as well as counsel to spend an appropriate amount of time in meaningful discussion of issues and adjudication of disputes.

Maximum Delay Between Hearings

As we began examining the selected cases, an important aspect that came up for consideration was the gap between case hearings. This metric shows a very random nature of occurrence. For the purpose of this chapter, we have highlighted the maximum delay between hearings in each of the cases. Any hearings delayed by more than 30 days need to be urgently prioritised and should be calendared automatically.

STUDY OF SPECIFIC PILS

As mentioned, each of these PILs concern issues of far-reaching importance for governance in Bengaluru. This section will describe each of these PILs in some detail and consider the transaction costs involved in them.

Climate Change and Environment Protection (PIL No. 1)

While it would be reasonable to assume that containing the effects of climate change necessitates suitable policy measures from the government's side, courts across India have been frequently invoked by public-spirited persons to intervene in causes of environment protection. *Dattatraya T. Devare v. State of Karnataka*⁸ is one such instance where the petitioner, who belongs to the Domlur and Bangalore Environment Trust, argued that the Bangalore Metro Rail Corporation Limited (BMRCL) did not conduct a consultation process before felling trees for the purpose of preparing the required metro rail routes.⁹ The case was filed on 23 April 2018, and as per the order dated 23 April 2019, the High Court directed the State of Karnataka to constitute a committee consisting of experts from the field of environment, science, and technology (as well as connected fields) to examine whether trees proposed to be felled could be saved by adopting any method. The High Court categorically stated that trees must be felled only when, after exhausting all other methods, it is found impossible to save any tree.

This case went through a change in bench four times, and the number of days spent in on-boarding the new bench was estimated to be 12 days (according to our model). The longest gap between two hearings was 68 days, between 28 November 2018 and 6 February 2019, which can be attributed to the fact that the bench was changed between these two hearings and a new Division Bench was constituted to hear this case. As on 10 June 2019, this case was pending before the High Court.

The case involves questions of environmental law and climate change. This requires some technical knowledge of the subject area (environmental studies) as well as the relevant law for taking approvals for felling of trees. All of this adds to the preparation time of the counsel as well as the parties. The figures concerning the variables which determine transaction costs as per our model are given in Table 4.3.3.

Table 4.3.3. Transaction Costs for *Dattatraya T. Devare v. State of Karnataka*

Case Number		W.P. 17841/2018
Description		Protecting the trees of Bengaluru- <i>Dattatraya T Devare v. State of Karnataka</i>
Date of filing of case		23 April 2018
Last date of action		23 April 2019
Elapsed time (in days)		359
Longest gap between two consecutive hearings (in days)		68
No. of bench changes		4
Total hearings		7
Litigants involved (petitioners and respondents)		8
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	64
	Preparation Time of Legal Counsel (PTC) (in days)	24
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	8
	Attendance Time Legal Counsel (ATC) (in days)	2
Bench On-boarding (in days)		12
Total transaction costs (in days)		110
Status		Pending

Source: Authors’ calculations.

Addressing Bengaluru’s Garbage Management Woes (PIL No. 2)

Another PIL which closely concerns issues of governance in Bengaluru is the one on garbage management. Even to a casual visitor, Bengaluru’s garbage management woes are hard to miss. Increase in urban population, which was not accompanied with simultaneous urban planning, has led to large swathes of waste dotting several parts of Bengaluru.¹⁰ In *Kavita Shankar v. State of Karnataka*,¹¹ the petitioner urged that the right to life, under Article 21 of the Constitution of India, includes the right to life of the future generation also, which makes it incumbent on the state to protect the natural environment.¹² It was in the second recorded hearing of this case where the

High Court passed the following directions to the Bruhat Bengaluru Mahanagara Palike (BBMP) for segregation of waste at source:

- Appoint Executive Magistrates who are vested with the powers to impose fines on households which are failing to segregate garbage into dry and wet;
- After collection from each household, further collect the segregated waste at three places in every ward and make the particulars of such collection available;
- Remove the garbage/waste presently to the landfills, which have been identified for this purpose; and
- Award contracts to commercial entities desirous of converting the garbage/waste into energy, so

that the requirement of landfills will eventually be made superfluous. Details of contracts awarded to be disclosed in writing.

This order was made by the High Court on 10 September 2012. In its subsequent order, the High Court noted how despite the proceedings before it, the Government (of Karnataka) had not looked into the problem of shortage of dumping sites for waste generated in the metropolis. The litigation is currently pending before the High Court as of 10 June 2019, and several directions have been made to agencies of the state government.

It must be mentioned that in PILs, one of the respondents is generally one or more concerned government department. In several cases, before parties approach the court, they make an attempt to have a grievance redressed by approaching the

department first. It is reasonable to assume that only when departments fail to discharge their duties do litigants approach the judiciary. Following up with such relevant authorities urging them to discharge their duties also adds to the time spent in preparation by both the litigants as well as the counsels. Further, this is the kind of case in which preparation and research is on the part of the litigants primarily because it involves certain specialised areas of legal research—environmental law and garbage management.

The presiding bench in this matter was changed after the first hearing itself, and six times thereafter. The longest gap between two hearings was 289 days—between 23 June 2016 and 12 April 2017. The figures concerning the variables which determine transaction costs as per our model are given in Table 4.3.4.

Table 4.3.4. Transaction Costs for *Kavita Shankar v. State of Karnataka*

Case Number		W.P. 24739-740/2012 [connected matter- W.P. 46523/2012]
Description		Garbage Management-Kavita Shankar v. State of Karnataka
Date of filing of case		19 July 2012
Last date of action		29 June 2018
Elapsed time (in days)		2,140
Longest gap between two consecutive hearings (in days)		289
No. of bench changes		7
Total hearings		57
Litigants involved (petitioners and respondents)		21
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	168
	Preparation Time of Legal Counsel (PTC) (in days)	63
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	21
	Attendance Time Legal Counsel (ATC) (in days)	5.25
Bench On-boarding (in days)		21
Total transaction costs (in days)		278.25
Status		Pending

Source: Authors' calculations.

As mentioned, both the above PILs (on felling of trees and garbage management) require specific knowledge of environmental law and climate change—both on the part of the counsels as well as the bench. While we have estimated the time spent by counsels for preparation of the case, it is still difficult to determine the knowledge on the part of the judges. In the absence of specialised knowledge of climate change or environmental studies, the bench may require time to familiarise themselves with the technical specifics of the case, adding to the time spent in adjudication.

Land Use Concerns in Bengaluru (PIL No. 3)

The third PIL we analysed concerns the issue of land use in Bengaluru. In March 2008, a PIL was filed by the Citizens’ Action Forum and certain other civil society groups (in Bengaluru) who challenged the Draft Revised Master Plan (RMP) of 2015, which allowed commercial use of residential areas by routing it through a land use category called ‘mixed land use building’.¹³ A bench comprising of the then Chief Justice D.H. Waghela and Justice B.V. Nagarathna directed the state government to amend the land use change rules of BDA’s revised Master

Plan to allow only the ancillary use of residential properties, instead of allowing land use change for commercial use.

The case was disposed on 28 November 2014. The High Court held that a notice under the Contempt of Courts Act, 1971 would be issued against the state government if previous orders passed by the High Court were not complied with. While this case should have been effectively disposed with the initial reproach by the High Court of the state government, the court was compelled to pass further directions in 2014 threatening the government with contempt. This talks about another dimension to the issue of transaction costs which was addressed in our discussion of the PIL on garbage management as well, which is non-compliance of executive bodies of the directions passed by the court. Ideally, this matter should have been disposed with the order of the High Court dated 28 November 2014; however, a contempt petition was required to ensure that the government complies with the order of the High Court.

The figures concerning the variables which determine transaction costs in this case are given in Table 4.3.5.

Table 4.3.5. Transaction Costs for Citizens’ Action Forum v. State of Karnataka

Case Number		W.P. 3676/2008
Description		Reckless commercialisation in Bengaluru- <i>Citizens Action Forum v. State of Karnataka</i>
Date of filing of case		03 March 2008
Last date of action		15 December 2014
Elapsed time (in days)		2,442
Longest gap between two consecutive hearings (in days)		190
No. of bench changes		8
Total hearings		25
Litigants involved (petitioners and respondents)		21
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	168
	Preparation Time of Legal Counsel (PTC) (in days)	63

Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	21
	Attendance Time Legal Counsel (ATC) (in days)	5.25
Bench On-boarding (in days)		24
Total transaction costs (in days)		281.25
Status		Disposed

Source: Authors' calculations.

Affixing Accountability for the Open Drains of Bengaluru (PIL No. 4)

On 9 October 2014, a PIL was filed by Namma Bengaluru Foundation, an NGO based out of Bengaluru, for initiating criminal proceedings against officials of the BBMP responsible for leaving a drain open in Bilekanahalli. The filing of the PIL was triggered by the death of two children who fell into open drains in Bengaluru. The PIL sought for directions to be issued to the state to conduct an inquiry to identify the administrators and officers who were derelict in the conduct of their statutory duties and criminally negligent for leaving drains open and not maintaining the upkeep of public infrastructure in the city. The petition also sought a direction from the High Court to the BBMP to take immediate steps to close all open drains and manholes in the city while also providing adequate signage to warn people of the hazards.¹⁴ The High Court took cognisance of the matter and in an order dated 21 October 2014, ordered the personal presence of the Commissioner of the BBMP in court, with necessary explanation on how the petitions were being dealt with by the BBMP.¹⁵

The matter was filed in 2014, and five years on, it is still pending before the High Court (as of 10 June 2019). Even though the crux of this matter was

affixing criminal responsibility on BBMP officials, till June 2017, the High Court was issuing directions to the BBMP to submit further reports as to whether they had taken action against the erring persons and fixed their personal responsibilities.¹⁶ After this order was passed, the next hearing in this case was four months later, on 25 October 2018, where the Court held that this as well as all cognate matters be listed in the special sitting of the High Court on Saturdays. The High Court connected this PIL with two other matters which deal with similar issues¹⁷—*Citizens Action Group v. State of Karnataka*¹⁸ and the *JP Nagar 4th Phase Dollars v. State of Karnataka*.¹⁹ Hearing of these matters are underway as of 10 June 2019.

While the immediate purpose of this PIL was to have criminal proceedings initiated against the concerned BBMP officials, it turned out to be beneficial for the greater purpose of health and sanitation as well. The imminent issue of ushering in better practices for management of drains was brought to the attention of the judiciary as well as the concerned authorities by the concerted efforts of the citizens. In terms of transaction costs, the ambit of this case expanded from a particular incident of loss of life to a wider issue of management of drains. Details of the case are set out in Table 4.3.6.

Table 4.3.6. Transaction Costs for *Namma Bengaluru Foundation v. State of Karnataka*

Case Number		WP 47875-76/2014
Description		Criminal negligence/accountability [petition seeking to inter alia, prosecute errant and deviant officials in the context of failure to fix potholes, open drains, etc.]- <i>Namma Bengaluru Foundation v. State of Karnataka</i>
Date of filing of case		09 October 2014
Last date of action		30 January 2019
Elapsed time (in days)		1,551
Longest gap between two consecutive hearings (in days)		490
No. of bench changes		5
Total hearings		13
Litigants involved (petitioners and respondents)		6
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	48
	Preparation Time of Legal Counsel (PTC) (in days)	18
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	6
	Attendance Time Legal Counsel (ATC) (in days)	1.5
Bench On-boarding (in days)		15
Total transaction costs (in days)		88.5
Status		Pending

Source: Authors' calculations.

Manning of Metropolitan Planning Committees (PIL No. 5)

The next PIL analysed by us pertains to the constitution of Metropolitan Planning Committees (MPCs) in Bengaluru. The Bengaluru Metropolitan Planning Committee was formed in February 2015 after a directive was passed by the Karnataka High Court making the MPCs and ward committees mandatory for governing local bodies.

The challenge to the MPC arose with regard to the inclusion of elected representatives; Section 503B of the Karnataka Municipal Corporations Act, 1976

envisaged the presence of members of Parliament and State Legislature as permanent invitees on the MPC.²⁰ The primary challenge in this PIL centred on the issue of decentralisation of functions of different levels of government and how it works with the Constitution (Seventy-third) Amendment Act, 1992 and Constitution (Seventy-fourth) Amendment Act, 1992.

The longest gap between two successive hearings was 437 days, while the number of bench changes stood at 13. The case is pending as of 10 June 2019. The figures concerning the variables which determine transaction costs as per our model are given in Table 4.3.7.

Table 4.3.7. Transaction Costs for *Namma Bengaluru Foundation and Citizens' Action Forum v. State of Karnataka*

Case Number		W.P. 48720/2014
Description		Metropolitan Planning Committee Case- <i>Namma Bengaluru Foundation and Citizens' Action Forum v. State of Karnataka</i>
Date of filing of case		16 October 2014
Last date of action		26 April 2019
Elapsed time (in days)		1,630
Longest gap between two consecutive hearings (in days)		437
No. of bench changes		13
Total hearings		31
Litigants involved (petitioners and respondents)		3
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	24
	Preparation Time of Legal Counsel (PTC) (in days)	9
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	3
	Attendance Time Legal Counsel (ATC) (in days)	0.75
Bench On-boarding (in days)		39
Total transaction costs (in days)		75.75
Status		Pending

Source: Authors' calculations.

Saying No to the Steel Flyover (PIL No. 6)

In a bid to resolve Bengaluru's traffic woes, the Government of Karnataka had set out on the task of building a six-lane elevated road (in the form of a steel flyover) between Basaveshwara Circle and Hebbal. The flyover would have covered a distance of approximately seven kilometres, costing nearly ₹ 1,800 crores to the Government and 800 trees to the city of Bengaluru.²¹ The next PIL we analysed was filed by the Namma Bengaluru Foundation to compel the government to scrap this project.

It is interesting to note that in its first order in this case (dated 7 October 2016), the High Court said that public projects of big magnitude should not be stalled by an interim order of the court. Further, the court clarified that the concerned authorities may continue with the implementation of the project but subject to the result of the writ petition. While this matter was pending before the High Court, an application was made against the building of the flyover in the National Green Tribunal, Chennai (Southern bench), in which an injunction was passed restraining the authorities from constructing the steel flyover. Again, while this issue pertained

specifically to the steel flyover, it presented the problem of Bengaluru’s traffic in front of the court. Details pertinent for calculating transaction costs as per our model are set out in Table 4.3.8.

Table 4.3.8. Transaction Costs for *Namma Bengaluru Foundation v. State of Karnataka*

Case Number		W.P. 53613/2016
Description		#SteelFlyoverBeda Case [petition challenging the six lane steel flyover between Basaveshwara Circle and Hebbal Flyover]- <i>Namma Bengaluru Foundation v. State of Karnataka</i>
Date of filing of case		06 October 2016
Last date of action		09 January 2019
Elapsed time (in days)		813
Longest gap between two consecutive hearings (in days)		745
No. of bench changes		3
Total hearings		5
Litigants involved (petitioners and respondents)		7
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	56
	Preparation Time of Legal Counsel (PTC) (in days)	21
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	7
	Attendance Time Legal Counsel (ATC) (in days)	1.75
Bench On-boarding (in days)		9
Total transaction costs (in days)		94.75
Status		Disposed

Source: Authors’ calculations.

PROSECUTION OF GOVERNMENT OFFICIALS (PIL NO. 7)

The last two PILs discussed hereafter relate to issues of the prosecution of a BBMP official and land grabbing in Bengaluru respectively. The PIL *Namma Bengaluru Foundation v. State of Karnataka*²² arose out to challenge the decision of the Additional Chief Secretary of the

Urban Development Authority (ACS, UDD), Government of Karnataka, rejecting Namma Bengaluru Foundation’s representation in regard to the prosecution of the then BBMP Commissioner who was alleged to have misused his office to grant a trade licence to an eatery.²³ This PIL yielded commendable results—the High Court, on 30 May 2019, quashed the clean chit given to the Commissioner by the ACS, UDD in this case. A bench presided by Chief Justice Abhay Shreeniwasi

Oka and Justice P.S. Dinesh Kumar gave liberty to the petitioners to submit a representation to the Department of Personnel and Administrative Reforms seeking sanction for prosecution.

The figures concerning the variables which determine transaction costs in the PIL relating to order of prosecution against the Commissioner is set out in Table 4.3.9.

Table 4.3.9. Transaction Costs for *Namma Bengaluru Foundation v. State of Karnataka*

Case Number		W.P. 57920/2016
Description		Prosecution of Former BBMP Commissioner [petition challenging the order of the Additional Chief Secretary, Urban Development Department rejecting the representation which sought to issue sanction to prosecute former BBMP Commissioner]- <i>Namma Bengaluru Foundation v. State of Karnataka</i>
Date of filing of case		08 November 2016
Last date of action		09 April 2019
Elapsed time (in days)		871
Longest gap between two consecutive hearings (in days)		357
No. of bench changes		6
Total hearings		10
Litigants involved (petitioners and respondents)		5
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	40
	Preparation Time of Legal Counsel (PTC) (in days)	15
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	5
	Attendance Time Legal Counsel (ATC) (in days)	1.25
Bench On-boarding (in days)		18
Total transaction costs (in days)		79.25
Status		Disposed

Source: Authors' calculations.

LAND GRABBING IN BENGALURU (PIL NO. 8)

The last PIL we analysed was filed in 2013 by the Namma Bengaluru Foundation which brought the attention of the High Court to the rampant issue

of land grabbing. This PIL sought the recovery of land encroached upon in Bengaluru as well as the prosecution of government officials and private parties responsible for grabbing public land. The litigation involved the Karnataka Public Lands Corporation Limited with the High Court urging them to

come up with an action plan for removal of forest encroachment.²⁴ The High Court, in its subsequent hearings, had to continuously follow up with the Corporation as to the preparation of this action plan.

The figures concerning the variables which determine transaction costs in the PIL regarding the issue of land grabbing are given in Table 4.3.10.

Table 4.3.10. Transaction Costs for *Namma Bengaluru Foundation v. State of Karnataka*

Case Number		W.P. No 15500/2013
Description		Land Grab Case [petition seeking to inter alia, direct the State of Karnataka to recover the land illegally grabbed by private persons/institutions/trusts/societies/ nongovernmental associations and organisations]- <i>Namma Bengaluru Foundation v. State of Karnataka</i>
Date of filing of case		28 March 2013
Last date of action		07 August 2017
Elapsed time (in days)		1,569
Longest gap between two consecutive hearings (in days)		363
No. of bench changes		10
Total hearings		18
Litigants involved (petitioners and respondents)		3
Case Preparation Time (CPT) (in days)	Preparation Time of Litigant (PTL) (in days)	24
	Preparation Time of Legal Counsel (PTC) (in days)	9
Case Attendance Time (CAT) (in days)	Attendance Time Litigant (ATL) (in days)	3
	Attendance Time Legal Counsel (ATC) (in days)	0.75
Bench On-boarding (in days)		30
Total transaction costs (in days)		66.75
Status		Disposed

Source: Authors' calculations.

LEARNING FROM THIS ANALYSIS: THE COMPELLING NEED FOR RE-ENGINEERING A CASE MANAGEMENT SYSTEM

One feature that stands out about PILs (in general) is that they can be immensely impactful in their contribution to issues of governance. In all the PILs we studied, while the case may be pending or might have been disposed, the High Court passed several orders which had a direct impact on governance in Bengaluru. PILs are imperative to governance, which makes it important to improve transaction costs pertaining to these cases. To that end, in this part, we make suggestions on what data/information should be recorded about cases being heard in the High Court, for better study of how cases progress. While the National Judicial Data Grid (NJDG) captures important information at the case and hearing levels, some granular level details will facilitate deeper evidence-based analysis. We recommend recording of such information by the NJDG which will help in case management informed by relevant evidence. We must mention that while in this chapter we have only studied PILs to make suggestions for better mapping of data, improving case management systems will help with analysis of all kinds of cases before our courts.

In PILs which concern crucial issues of governance, impactful developments can take place during varying stages in the life of a case, and no two cases may have witnessed the same kind of progress. Considering the variations that may exist between any two cases, re-engineering the case management system to capture relevant information about the progress of the life cycle of cases becomes important.

A few starting points for re-engineering case management systems can encompass questions of how many cases a bench (or a judge) can effectively hear. This will also have an impact on the quality of adjudication in terms of the time allocated to

particular advocates and the nature of exchange between the bench and the counsels. The number of hearings required (under ideal circumstances) to adjudicate a case is also worth contemplating. This is, however, not an easy figure to arrive at considering how concerned parties keep getting added to high-impact PILs, adding to the complexity of such cases. While we have considered the number of litigants at the time of filing of the petition, additional litigants are added during the course of the petition due to the evolving nature of the hearing. This is particularly true in matters involving questions of environmental protection and climate change, where concerned organisations get tagged in litigation. Addition of some parties could be due to their own insistence while others may be added based on the discretion of the judge hearing the case. Hence, this computation should capture the costs as the litigants are added to the case.

While many attempts have been made to implement Case Flow Management Rules across courts in India,²⁵ they have yielded only limited results. Karnataka also has not passed Case Flow Management Rules for High Courts. Draft rules in subordinate courts have either not been adopted or are not implemented in the right context. However, implementation of these rules can positively impact the flow of cases considering they concern key issues of governance. For instance, in a matter like the land-grabbing PIL, it is essential that the court abide by certain timelines so as not to allow parties with vested interests to illegally encroach public land before the High Court passes any order to stop such an act.

More layers get added to the computation of transaction costs when matters are connected together to be heard. It is essential to measure the transaction costs for each litigation—while mathematically, it is a simple addition of time periods spent and costs, it can be tedious to get information from lower courts for the matters connected to the

main case; particularly, it may be hard to obtain, the details of the case, when it is before the lower authority. Related case numbers in the lower court/ authority can, generally, be found only in the text of the High Court's order upon reading it. Ideally, this should be a database field which is easily identifiable without the user having to go into the text of the High Court's order.

Programmatically mapping lower-court case numbers, all the way up to the Supreme Court is an arduous task. Given how long certain cases take in their journey from lower courts to the apex court, such mapping of cases will enable easier analysis. Hence, looking at an end-to-end integrated case management system is essential. Even if not a monolithic system, there have to be interoperable standards in naming and tracking of cases once it is appealed in a higher court.

Also worth contemplating is how lenient a court can be for adjournment requests where a party makes no progress from previous hearing but seeks additional time. Often the cause for such adjournments or urgent mentions made is not recorded adequately in an analysable fashion. This needs to be incorporated in future case management systems. In case any of the litigants are no longer interested in pursuing the case, this may be the right metric to guide dismissal of cases by the bench itself. A decision by the Chief Justice of India giving two weeks to over 729 petitioners to file an update or withdraw their case can be made a standard operating procedure with this data being available periodically.²⁶

In addition to all of these, changes to the case listing process also need to be considered. We believe that the process for listing cases for hearing should be rule-based with parameters, such as age of the case and disclosed priority informing the process, rather than the bias of judges or the practice of senior advocates mentioning urgent matters.

CONCLUSION

PILs are filed in matters that have a wide impact on issues of governance and matters that touch upon the lives of all citizens. The litigation in PILs tend to continue for long lengths of time, and the transaction costs for such cases can significantly vary depending upon the number of days lost due to litigation. In our study of the eight PILs mentioned above, we witnessed that the time and resources spent on the litigation hinged on several factors—while in some cases, the state government's willingness (or sometimes, lack of it) to comply with court's orders determined how the litigation shaped up; in others, the High Court's decision to tag along matters of similar nature together added to the time spent in litigation. Availability of granular details (specifically numbers) of the nature specified in Part IV of this chapter will assist us in a more broad-based analysis of the transaction costs of litigation. Even though we have discussed only a sample of eight PILs, the time is ripe to extend the suggestions made by us to other cases also, subject to some modifications. PILs have become an important tool to compel inert governments into taking actions on issues of governance. Re-engineering of our case management systems can go a long way in studying the life cycle of PILs.

Notes

1. M.N. Srinivas. 1980. *The Remembered Village*. Berkeley: University of California Press, p. 115. He elaborates—the victor lost financially, while the loser lost financially as well as morally.
2. Ellen M. Pint and Laura H. Baldwin. 1997. *Strategic Sourcing: Theory and Evidence from Economics and Business Management*. California: RAND Corporation, p. 3.
3. This number has been arrived at by dividing 300 minutes (five hours) across 85 cases.

4. Our use of the term 'litigant' encompasses both petitioners as well as respondents.
6. This depicts the effort required (in days) to bring the new bench up to speed with the past history of the case.
5. These assumptions have been made based on the experiences of one of the authors of this chapter, Sridhar Pabbisetty, who has been a litigant in several PILs filed before the Karnataka High Court.
7. As CEO of Namma Bengaluru Foundation (NBF), Sridhar Pabbisetty was involved in the following PILs—*Namma Bengaluru Foundation v. State of Karnataka*, WP 47875-76/2014; *Namma Bengaluru Foundation and Citizens' Action Forum v. State of Karnataka*, WP 48720/2014; *Namma Bengaluru Foundation v. State of Karnataka*, WP 53613/2016; *Namma Bengaluru Foundation v. State of Karnataka*, WP 57920/2016; and *Namma Bengaluru Foundation v. State of Karnataka*, WP 15500/2013.
8. WP 17841/2018.
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15. *Namma Bengaluru Foundation v. State of Karnataka*, Order dated 21 October 2014.
16. *Namma Bengaluru Foundation v. State of Karnataka*, Order dated 21 June 2017.
17. Order dated 27 October 2018.
18. WP 38401/2014.
19. WP 11044/2018.
20. *The Times of India*. 2017. 'HC to Govt: Don't OK Masterplan without Nod', *The Times of India*, 17 October, available online at <https://timesofindia.indiatimes.com/city/bengaluru/hc-to-govt-dont-ok-masterplan-without-nod/articleshow/61111622.cms> (accessed on 24 July 2019).
21. *The Hindu*. 2019. 'HC Closes Plea Against Steel Flyover to Hebbal' *The Hindu*, 18 June, available online at <https://www.thehindu.com/news/cities/bangalore/hc-closes-plea-against-steel-flyover-to-hebbal/article28066915.ece> (accessed on 24 July 2019).
22. WP 57920/2016.
23. *The Hindu*. 2019. 'HC quashes "clean chit" to ex-BBMP Commissioner', *The Hindu*, 30 May, available online at <https://www.thehindu.com/news/national/karnataka/hc-quashes-clean-chit-to-ex-bbmp-commissioner/article27298410.ece> (accessed on 24 July 2019).
24. Order dated 9 December 2014.
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26. Kanu Sarda. 2019. 'CJI Ranjan Gogoi Cracks Whip over Pending Cases, Gives Two Weeks' Time to 729 Petitioners', *The New Indian Express*, 27 March, available online at <http://www.newindianexpress.com/nation/2019/mat/27/cji-ranjan-gogoi-cracks-whip-over-pending-cases-gives-two-weeks-time-to-729-petitioners-1956490.html> (accessed on 24 July 2019).



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Note: The letter ‘n’ ‘t’ ‘f’ following locators refers to notes, tables and figures respectively.

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About DAKSH

DAKSH is a Bengaluru-based civil society organisation working at the intersection of public policy, data science, and operations research. Our work focuses on solving the problem of pendency of cases in the Indian legal system. We approach court delays and case pendency from the perspectives of data, efficiency, process, technology, and administration, and have undertaken several initiatives over the past six years.

In 2014, we embarked on the pioneering *Rule of Law Project* to evaluate judicial performance, study the problem of pendency of cases, and conduct quantitative research on mapping the administration of justice in India. To keep the judicial reforms discourse centred on data, we maintain India's largest and only public database that enables an in-depth study of courts' day-to-day functioning.

As part of the *Rule of Law Project*, we have published the *State of the Indian Judiciary* (2016) and *Approaches to Justice in India* (2017), which are widely regarded as ground-breaking in the discourse on judicial reforms. The reports highlight not only our findings, but also contain meticulous analyses by judges, lawyers, data analysts, and public policy experts on various aspects of the judiciary.

In addition, we have worked with the judiciary on numerous projects. Most prominently, we assisted the High Court of Delhi in its pioneering pilot project on 'Zero Pendency Courts' (http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_3MRRIN3QTHN.PDF) by creating an application called the Court Log App which provided valuable insights to understand the time spent per hearing, reasons for adjournments and hearing outcomes, among other data points. We also analysed the data from the app and co-authored the report published by the High Court of Delhi on the findings.

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