

# STATE OF THE INDIAN JUDICIARY

*A Report by*

DAKSH





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# Foreword

**T**he *State of the Indian Judiciary: A Report by DAKSH* is a path-breaking endeavour with the high purpose of attracting attention to an important area of national concern. The Report holds a mirror to the soul of the judicial system and tells us that the disillusionment and cynicism the system has engendered is a strong negative social critical mass. It conveys the message that judicial reforms are too serious a matter to be left to the judges alone. It is only trained experts in professional management, with full cooperation from the members of the local Bar, that can extricate the trial system from the morass it has descended into. To be clear, this Report emphasises the inefficiency in procedures. It does not deal with the philosophy of substantive justice and changes, if any, to the concept of justice itself.

Justice, it is said, is the greatest interest of humans on earth. The history of institutional mechanisms to resolve conflicts between citizens and the state, and citizens *inter se*, is in itself a reflection of civilisational values and the state of evolution of any society. Indian independence and the ushering in of a new Constitution was an event of global significance and was in itself a spiritual movement not only for the people of India, but for the whole world, which at the close of the World War was groping for a new world order to save humanity from the culture of wars and armed conflicts.

The realisation of our constitutional aspirations will, as Sir Alladi has observed, depend upon organic laws giving effect to constitutional provisions; the adoption of principles of English common law as a matter of justice, equity, and good conscience; the acceptance of convention in the working of other constitutions; and above all, the law-abiding spirit of average citizens in India, which is the greatest asset for the proper working of the Constitution. In his book, *Making Our Democracy Work*, Justice Stephen Breyer describes a meeting with the Chief Justice of an African country who asked him why Americans do what the court says. Justice Breyer's answer was that there are no magic words on paper; following the law is a matter of custom, of habit, and of widely shared understanding as to how those in government and members of the public should, and will, act when faced with a court decision they strongly dislike. The answer lies not in doctrine but in history.<sup>1</sup>

A long time ago, an English judge lamented that if Britain's business methods were as antiquated as its legal methods, Britain would have been a bankrupt country. Law, it is said, is a notorious laggard. It does not reach out as science does. It follows social consensus which is itself behind the need of the times. The mantle of omniscience and infallibility that is supposed to descend on a judicial personality by reason of his appointment alone is a worn-out cliché. This is amply proven by the state of the judiciary today. Litigations linger on for generations. It is the result of unscientific, non-productive, petrified procedures and a history of wasted judicial time over routine non-judicial repetitive motions in courts without any value addition to the decision-making process. We are committing unthinking unilateral disarmament against injustice. Each court has its own peculiar problems and cultural limitations and needs specially tailored case-flow management techniques. One size does not fit all. The serious problem is that superior courts, which do not have the expertise to effectively monitor the work of the trial courts, have adopted a top-down remote-control model. A case-flow management system which does not utilise the expertise of computer systems or men who can design an assembly line for case flow, and a system which does not have an auxiliary adjudicative support system enlisting the cooperation of the local Bar for pre-trial planning and consultations for the elimination of exaggerated claims and time-consuming motions, can only perpetuate the problem and not solve it. On and after a fixed date all future filings must go on an assembly line with time-bound monitored progress. The backlog should be addressed by a self-liquidating mechanism.

The Report throws up some interesting facts. For instance, while the national average of percentage of cases in relation to population is 1.77 per cent, some 139 districts (out of 700 and odd districts) have half of that ratio at 0.88 per cent. Some 41 districts have only a fourth of the national average at 0.44 per cent. Even in these 180 districts, a desired time limit on pendency is not achieved.

These are not matters pertaining to the High Courts and the Supreme Court, which are in a league of their own. The creative contribution of the Supreme Court of India in dealing with the leaving stream of our national life, steering between the extremes of rigidity and formlessness, and unravelling and mastering the secret of application of the eternal principles of law to our ever-changing conditions is truly remarkable. But the response of the trial system to the needs of society is disappointing.

Only about 10 per cent of cases from trial courts go to the High Courts; from High Courts to the Supreme Court it is less than 1.5 per cent. The place where things really happen is the trial court and within the trial system. The problems of the superior courts in their correctional jurisdiction arise from

the failure of the trial system. The result is loss of man hours, wages, and productivity on account of non-productive, idle listing of cases, estimated at ₹50,387 crores a year, apart from the actual wasted expenses, estimated at nearly ₹30,000 crores a year!

The stereotyped, top-down system has really suffered banality, which has foreclosed any fresh look at the problem. Any light from outside is not only not welcome but, indeed, is seen as an intrusion into judicial independence.

What is urgently needed is an open-minded exposure to scientific methods. Through this Report, DAKSH has more than established the demand for a fresh look. All this has been said before: but it has to be said again and again since nobody seems to listen! Those who hold sway over our judicial destiny must have the good sense to listen at least now.



M.N. VENKATACHALIAH

Former Chief Justice of India

Bengaluru  
30 April 2016

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# Introduction

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*Harish Narasappa*

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India has a dichotomous relationship with its judiciary. The judiciary continues to remain the most respected of state institutions, primarily due to its activist approach to many social and environmental matters that has brought a semblance of order and logic to the state's action on those issues. In addition, the technocratic character of the judiciary and the inherent procedural fairness associated with judicial proceedings give the judiciary a cloak of intellectual superiority that is difficult to challenge. On the other hand, the severe delays in deciding cases has not only led to frustration among citizens, but to a real fear that the judiciary has become dysfunctional. The continued secrecy associated with the appointment of judges to the higher judiciary has added to the fears of citizens. Further, there is near unanimity on the fact that marginalised sections in the country have difficulty in accessing the justice system for a variety of reasons, such as lack of proper articulation of their rights, massive costs, technical challenges, and legal illiteracy.

This report focuses on two primary aspects—delays in the judicial system and access to justice. While it contains a chapter on the appointment of judges to the higher judiciary, it does not address the many questions that have arisen following the Supreme Court's 2015 judgment in the *National Judicial Appointments Commission (NJAC) case*. Raju Ramachandran's 'A Case of Self-Selection: Judicial Accountability and Appointment of Judges' brilliantly analyses the *NJAC* judgment and its implications on the judiciary, its independence, and relationship with society and other state institutions. Ramachandran also explains the evolved scope and use, worrying in his view, of the basic structure doctrine.

## DELAY

Delay is the biggest and most visible problem facing the judiciary. There is a large body of discourse on judicial delays in the country. While the discussion has helped in increasing awareness of the problem, it has lacked the substantive depth and persistence necessary to transform itself into a momentum for change. Importantly, it has largely been dependent on anecdotal evidence, due to the absence of data. This is despite a decade-old effort to computerise the judicial system. In 'Bringing the "E" to Judicial Efficiency: Implementing the e-Courts System in India' Atul Kaushik describes the painful but exhilarating process of kick-starting the computerisation of courts and, in particular, the journey and plans for the e-Courts Project that aims to bring all the subordinate courts in the country onto a single platform. However, even after these efforts, no scientific maintenance and analysis of court-level data is available for anyone to meaningfully understand, discuss, and analyse the problem of delay, let alone propose sustainable solutions as pointed out by the Law Commission of India in its 245th report.

Two simple examples illustrate the seriousness of this problem. According to the National Court Management Systems Committee (NCMSC), established by the Supreme Court of India, as on 31 December 2011, there were 14,924 sitting judges in India across all the tiers of the judiciary. In addition, there were 3,947 vacancies, taking the sanctioned strength of judges to 18,871. This number appears to have increased in 2015, according to *Court News* (brought out by the Supreme Court), which indicates a total of 21,543 as the number of sanctioned judges, with a vacancy of about 30 per cent. However, the National Judicial Data Grid (NJDG) puts the figure of subordinate judges at 15,894 (as on 25 March 2016). If we add the numbers of judges in the High Court and Supreme Court, based on information from their respective

websites, the number comes to just under 17,000. Thus, there is no unanimity even on the actual number of judges in the country!

Similarly, there is no clarity on the exact number of cases pending in the system. Even accounting for the daily filing of new and disposal of old cases, different reports give different numbers. A Press Information Bureau release on 3 March 2016 declares that the total number of cases pending across all courts is approximately 3.06 crores. However, as on 25 March 2016, the NJDG pegs the number of cases pending in the lower judiciary at 2,12,19,848. If we add the cases pending before various High Courts and the Supreme Court, the number increases by approximately another 42,00,000, bringing the total number to approximately 2.54 crores, a figure well below 3 crores.

Perhaps the differences can be explained. The point to note however is the lack of uniformity in available data.

There is also very little information on what the total number of cases really means for the judicial system and the litigants, and the real reasons for such a large number of pending cases. For example, there are no details available on the types of cases that are taking longer than others and clogging the system, nor is there any analysis of the reasons that could explain the delays. It is only when such data is collected and rigorously analysed will solutions for addressing the delays emerge.

DAKSH's Rule of Law project seeks to fill this vacuum. Using publicly available data from daily cause lists, the e-courts portal, and the websites of the Supreme Court and various High Courts, DAKSH has, over the last 16 months, built a data portal with various analytical tools that makes it possible to meaningfully understand and analyse pendency and the reasons for pendency. As on 1 April 2016, the database contains more than

40 lakh cases pending in the Supreme Court, 21 High Courts, and about 475 subordinate courts. The portal contains information, *inter alia*, on pendency in different courts, average number of hearings in each court, frequency of hearings, and pendency for different types of cases. It is now possible, for example, to compare, quantitatively, the efficiency of different courts in a state or across states. Even within a court, we can identify the categories of cases that are clogging the system and reorganise work allocation and priorities. As my colleague, Kishore Mandyam, insightfully points out in his chapter titled ‘Reaping the Benefits of the e-Courts System’, it is important to not only gather data but ensure that such data becomes information in the hands of policymakers. The DAKSH portal makes it possible for the leadership in the judiciary and executive to better understand and analyse the problem of delay and discuss possible solutions.

The DAKSH team has prepared a number of graphs and charts identifying and analysing patterns in cases currently before the judiciary, which bring out different facets of the functioning of the judiciary. These graphs and charts are included in the chapter titled ‘Decoding Delay: Analysis of Court Data’. The DAKSH team has also explained the various gaps in the availability of data on various courts’ websites, and the difficulties in comparing data across courts due to the diversity of nomenclature used even for similar cases. Suggestions for change in data generation and management are also included.

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## JUDICIAL ADMINISTRATION

The questions on delays reveal a more fundamental problem at the heart of the judicial system—the

lack of a dedicated group of people dealing with judicial administration. By judicial administration, I mean all activities of the judiciary other than the actual hearing and deciding of cases. It includes, *inter alia*, the management of cases and workload within the system, supervising the administration of courts, preparing budgets, evaluating infrastructure, and managing human resources. Constitutionally speaking, judicial administration is a collaborative effort between the judiciary (mainly High Courts) and the executive (primarily state governments). However, due to the fierce assertion of independence by the judiciary even in matters of administration, the executive has more or less abdicated its responsibility, resulting in a complicated situation where the structures of power and accountability are different. The executive’s abdication has meant that, in practice, the judiciary is exclusively responsible for the administration of the judicial system in the country. This effectively means that the Chief Justice of each High Court has the primary responsibility for the superintendence of all the courts in a state, although he shares this burden with other judges in that High Court. But judges have no administrative experience whatsoever. They are lawyers appointed primarily because of their knowledge of the law. Even more critically, judges do not have the time for administration, given that they spend their working days in court, hearing and deciding cases. Outside court hours, they prepare for the next day’s hearings and write orders. So when can they focus on the administrative duties they are entrusted with? The unfortunate reality is that administrative functions are treated as an adjunct evil and dealt with when judges manage to get some free time from their judicial functions. Furthermore, the characteristics of any good administration, such as transparency and reasoning, which the judiciary prescribes as essential for other institutions of the state, are not always visible in judicial administration.

In 'Accountability in Judicial Administration', Arun Sri Kumar explores several of these issues by examining the constitutional vision for judicial administration, the current reality, and the need for change. In particular Sri Kumar points out that while the Chief Justice of each High Court has all the powers in respect of judicial administration, since he is not answerable to anyone for the exercise of such powers, there is no accountability. Sri Kumar argues that the need of the hour is to create and develop a cadre that focuses only on administering the judiciary—not only from a day-to-day operational perspective, but also from an overall policy and system perspective. Sri Kumar also notes that the judiciary continues to be dependent on the executive for financial needs, since the latter controls the purse strings.

Following on from Arun Sri Kumar's observations on the financial relationship between the judiciary and the executive, Surya Prakash B.S., in his brief but insightful chapter titled 'Budgeting for the Judiciary', brings to fore the lack of a methodical approach in preparing budgets for the judiciary. Budget making has become a mechanical process—providing for inflation and additional manpower—rather than an opportunity to fund new priorities and tackle old problems. There is no financial expertise available within the judiciary to manage this process. In fact, there is no one taking leadership to utilise the funds made available for major reforms. For example, while the 13th Finance Commission created a separate budget (₹5,000 crores) for major reforms in the judiciary, just about 20 per cent of that money has actually been spent until now, demonstrating the lack of vision and skills needed to implement programmes effectively.

Sandeep Suresh, in his chapter, 'International Experiences in Judicial Administration', reviews the experiences of other countries such as United Kingdom, Ireland, and South Africa, who felt the

need to create new institutions to be exclusively in charge of judicial administration. Suresh points out the marked difference in judicial performance in those countries following the establishment of a cadre that focused on improving the administration of the judicial system, which worked in tandem with the executive and the judiciary.

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## JUDICIAL EFFICIENCY

The severity of pendency implies that the judiciary is not functioning efficiently or effectively. In his chapter called 'Judicial Efficiency and Causes for Delay', Alok Prasanna Kumar makes an effort to identify the reasons for delay in the functioning of the High Courts based on DAKSH data on disposed cases. In particular, Prasanna examines why certain types of cases appear to take longer than others to be decided, even though the processes they follow are similar to others in the system. This leads to the question, which Prasanna does not answer, on whether judges are uncomfortable about deciding certain types of cases, and that could lead to severe delays.

M.V. Sundararaman and Varuni Mohan focus on the day-to-day functioning of a single High Court, both in the court halls and the Registry, in their chapter 'Karnataka High Court: People, Processes, Pendency'. They examine the process by which a case moves through the Registry and into the court hall from the time of filing until disposal in the High Court of Karnataka. They raise questions about some accepted practices regarding change of roster, allocation of work, part-heard matters, and their impact on the principles of fairness and certainty, both fundamental characteristics of the judicial process. They also point out the problem of unfilled vacancies and note that the High Court of Karnataka is functioning at less than half its sanctioned strength.

In ‘Evaluating Judicial Performance: A Comparative Perspective’, Vasujith Ram studies international experiences of evaluating judicial performance, in terms of both judicial and administrative aspects. Ram examines the quantitative and qualitative measures adopted by different countries and evaluates their advantages and disadvantages. Ram’s chapter provides food for thought in the backdrop of the *NJAC case* and the new memorandum of procedure for appointment of judges to the higher judiciary.

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## PERSONNEL

Focusing on pendency can mask the extremely long work hours and stressful lives of judges, lawyers, and court staff. In a brilliant chapter, ‘Wielding the Gavel: View from the Other Side’, Justice Gautam Patel explains the everyday life of a High Court judge. Patel makes two extremely insightful points—first, the relentlessness of the daily schedule, and second, that judges are human beings and not machines that can produce immediate output. Justice Patel’s chapter underlines the fact that judges work extremely hard to deliver justice, something that critics of the system forget because of the focus on enormous pendency.

Complementing Justice Patel’s chapter are accounts by two lawyers, one with more than two decades of experience, and the other, a relatively recent entrant into the profession. Both Arun Kumar K. (‘Never a Restful Moment: A View from the Bar’) and Anupama Hebbar (‘Playing the Waiting Game: A Lawyer’s Day in Court’) talk about the day-to-day life of a litigating lawyer, the highs and lows, the stresses, the delays, and the expectations and frustrations, not only of their clients, but also their own.

Shiva Hatti, in his chapter ‘Behind the Bench: Perspectives of Court Clerks’, reports on his conversations with clerks in the Bengaluru courts. Court clerks or officers are mostly silent spectators, who are witness to every proceeding, but whose efficiency can have a determinative influence on the overall efficiency of the judge. While Hatti highlights various facets of the daily routine of a court clerk, one message comes through clearly—the utter lack of formal, mandatory, institutional training. Trial courts, in particular, depend a great deal on court clerks to implement processes correctly. Yet, they are left to learn on the job, which is viewed as a low-skill one, and no training is provided to introduce clerks to their duties or help perform them efficiently.

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## ACCESS TO JUSTICE

Whether every person in the country has access to justice is a question that has agitated the minds of political and judicial leaders since independence. Several efforts, such as establishment of special courts, gram nyayalayas, tribunals, legal aid services, Lok Adalats, and so on, have been made over the last 50 years to ensure that everyone in the country gets access to the judiciary. Despite such efforts, many believe that the majority of the people in India do not have meaningful access to justice. As in the case of delays, there is very little data available to support any significant debate on access to justice. Except for a few isolated studies by academics in discrete areas, there has been no data-driven study to evaluate the effectiveness of the diverse efforts made to improve access to justice.

Any access to justice study has to address three broad issues: (a) What is the meaning of justice and access and how can they be measured? (b) What kind of disputes arise in society and how are they being resolved? What are the barriers, if any, to



approaching the judiciary for resolution of such disputes? Which alternate body or system resolves disputes that are not brought to the judiciary? (c) Who are the people that approach the judiciary? How does the system treat them and what socio-economic costs do they incur? Further, what is the cost to society as a whole in the course of resolution of these disputes?

Chandan Gowda discusses the meaning of ‘access’ and ‘justice’ in access to justice in his chapter ‘Institutional Dimensions of “Access” and “Justice”’. He explores the political and societal understanding of justice, the institutional infrastructure and ecology required to render justice, and the potential sources of conflict between justice of the state and other forms of justice in a heterogeneous society. Gowda also stresses upon the need to bring about institutional and infrastructural changes in light of the findings from DAKSH’s Access to Justice Survey. In ‘Indian Judiciary and Access to Justice: An Appraisal of Approaches’, Aparna Chandra makes a powerful argument for the need to delink access to courts and access to justice. Access to justice is a more substantive concept and should be recognised as such, to ensure that the judiciary moves beyond viewing judicial delays and access to justice as a resource problem, and give meaning to the real need of the hour, which is to recognise rights of various groups, particularly at the margins of society, to the several forms of justice guaranteed by the Constitution. Ashwini Obulesh, in her chapter called ‘Institutionalising Justice: Gram Nyayalayas and Consumer Courts’, describes the contrasting journeys of implementation of the statutes that established the gram nyayalayas and consumer fora. Although the consumer fora have been around for much longer than gram nyayalayas, Obulesh argues that the absence of a clear vision about how gram nyayalayas are to function and their relationship with the regular courts has impaired their effectiveness.

To gain insight into the identities and needs of litigants, DAKSH conducted a survey amongst more than 9,000 of them, across 300 subordinate courts in 24 states, who are seeking resolution of their disputes in the judicial system. The findings of the survey are set out in detail in this report. While the survey provides many fascinating insights, the blockbuster findings relate to the economic cost of judicial delays. Even on a conservative basis, the cost of delays is about 0.5 per cent of India’s gross domestic product (GDP). In addition, litigants across the country spend more than ₹30,000 crores a year, only to attend court proceedings in their cases.

Ramya Sridhar Tirumalai explains the story beyond the numbers in her piece, ‘In the Temple of Justice: Survey Experiences’. Tirumalai describes the ebb and flow of life in a magistrate’s court in a small town in Kerala, as well as her experiences (and that of two surveyors) during the survey process, when they spoke to several accused facing trial in that court. In ‘Paths to Justice: Impact of Access to Justice Surveys on Judicial Reform’, Krithika Gururaj describes the experience of the United Kingdom where path-breaking research was conducted to measure the citizens’ expectations of the judiciary, together with some systemic changes that resulted. Gururaj expresses the hope that DAKSH’s Access to Justice Survey will also lead to changes in the system.

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## CITIZEN-CENTRED REFORMS

It is critical to draw away from the institutional standpoint in order to address issues of judicial delay and access to justice. Delay and access have to be measured not from a judge’s perspective but from a citizen’s perspective. A simple illustration will suffice to highlight the difference in approach:



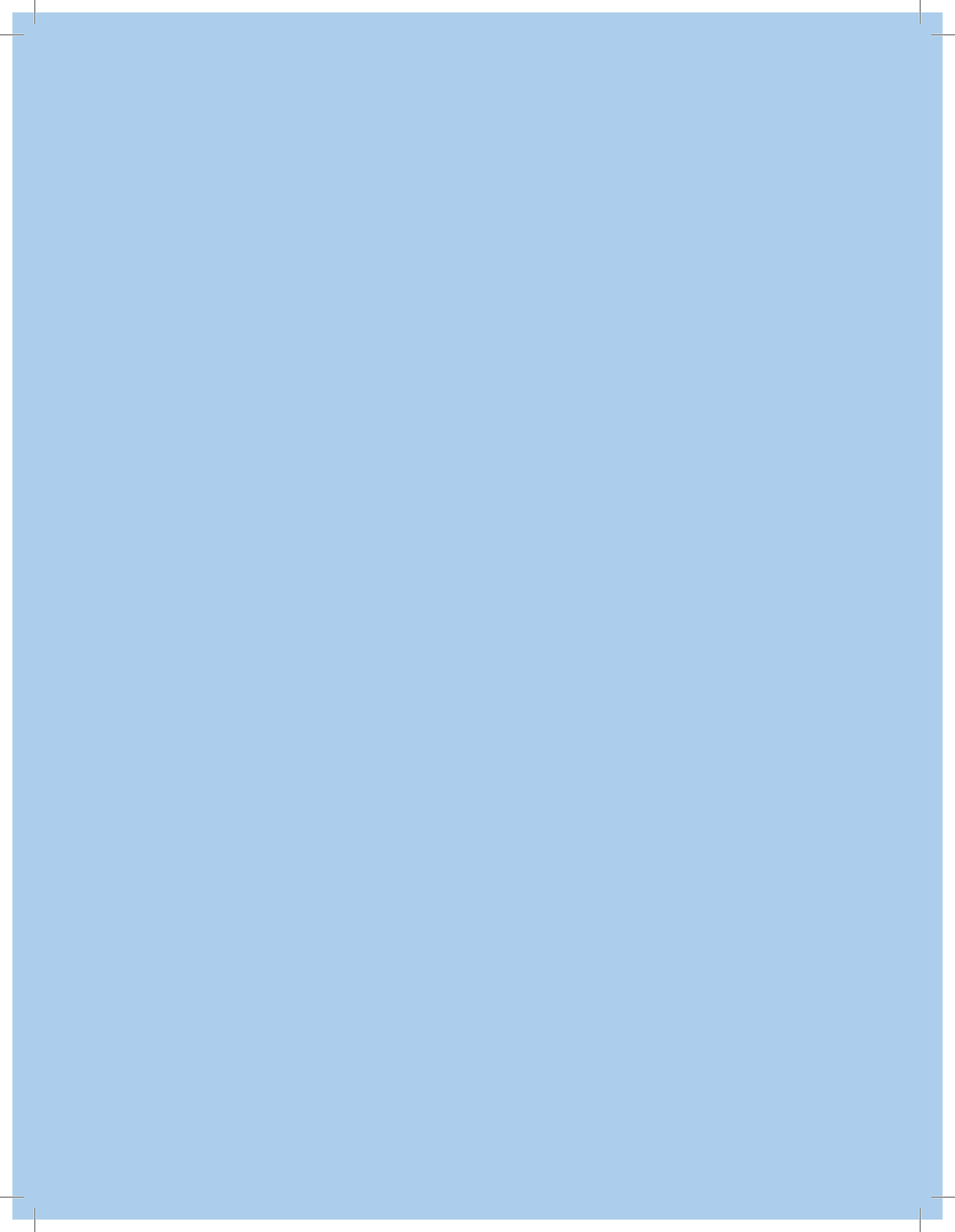
A judge who is slated to hear 100 cases a day cannot be faulted if he is unable to hear all of them. In fact, he may have an extremely satisfactory day even if he deals with 80 out of the 100 matters listed. But that is not acceptable for those litigants whose matters are not heard. The system has failed them and it is this failure that needs to be addressed. Unless and until such a citizen-centric approach is adopted,

tackling the two issues of judicial delay and access to justice will be difficult. This report is a small step towards bringing the citizen into focus. We hope that both the judiciary and executive take the initiative and work together to restore the judiciary to its rightful place—as the conscience keeper of the nation and a home for justice.



SECTION ONE

RULE OF  
LAW PROJECT



# Decoding Delay: Analysis of Court Data

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*Kishore Mandyam*

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*Harish Narasappa*

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*Ramya Sridhar Tirumalai*

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*Kavya Murthy*

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AKSH's Rule of Law Project is working to investigate the problem of pendency of cases within the Indian judicial system through a data-driven analysis of its processes. The goal of the project is to lay the groundwork for informed discussion, leading to the identification of sustainable solutions that will enable the judiciary to function efficiently, dispose of cases in a timely fashion, and safeguard the rule of law. Additionally, the project hopes to bring the litigant's interests to the heart of the discussion on pendency, which is necessary for any meaningful solution to emerge.

As with all data-driven exercises, the first step was to access the data. In the case of the Rule of Law Project, accessing data proved to be a stumbling block in itself. As of September 2014, when the project started, there was no official data on the cases pending before the Indian judiciary available in a single, analysable platform. (The situation has now changed in terms of district court data with the national judicial data grid coming into existence.) Data pertaining to the number of pending cases is also difficult to ascertain accurately. The Supreme Court of India releases a court news update every quarter, where the number of cases pending in each state (before the High Court and lower judiciary of the state) is published. Some High Courts also publish annual reports which contain pendency-related statistics. However, the data from these sources are updated erratically—the most recent edition of the Supreme Court news available on its website dates September 2015<sup>1</sup> which is more than six months old.

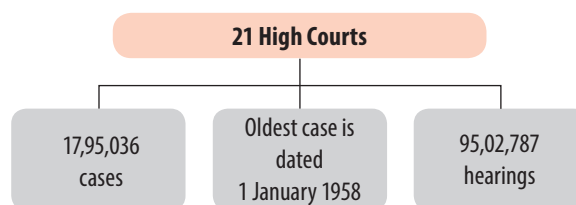
## PORTAL

DAKSH set about creating a database with details of cases pending before various tiers of the Indian judiciary using data available in the public domain, *inter alia*, from cause lists, websites of courts, and the e-courts website. This data is then analysed to meaningfully understand the functioning of the judiciary and identify the various reasons that contribute to the pendency crisis. Data collection commenced in December 2014, and as of 1 April 2016, DAKSH has data from 21 High Courts (Fig. 1) and 475 district courts (Fig. 2) with more than 40 lakh case records on its database, which is available for free public use on the DAKSH portal.<sup>2</sup> The portal contains analytical tools to create reports at an overall policy level or in granular detail at a single court to facilitate better understanding of the data. In addition, indicative dashboards and analytics are on display on the portal for quick glimpses into aggregate figures and the results of specific analysis of the data. The portal also contains the Census 2011 dataset to allow for regional and specific appraisals of the judiciary across social and economic parameters.

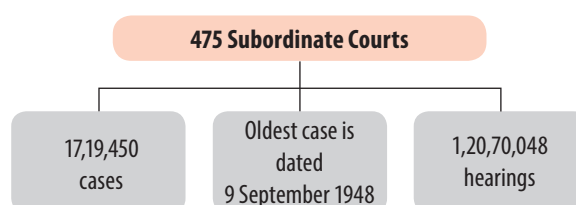
## VERIFICATION

To analyse data collected from the High Courts, we created a process of verification of all the available material and identified the discrete data objects that were available against each case record. The cause list of every High Court is the basic repository upon which our High Court database is built. A cause list is a list of all cases that are to be heard by

**FIGURE 1.** DAKSH Data: High Courts



**FIGURE 2.** DAKSH Data: Subordinate Courts



judges on each working day in a court. It contains information pertaining to which case is heard by which judge and in which court hall. Additionally, the cause list contains the case number that indicates the case type, and the year in which a case is instituted.

The first stage of our work was to collate this data in a single, analysable platform. Our software programmes used the cause list to create a data platform that included numerous columns of information as listed by a court against a case number. The case number also contains a backstory; looking up its status on the ‘Case Status’ page, one is able to get hold of the exact date in which it entered the registry, the names of lawyers representing the plaintiffs and respondents, and if we are lucky, a record of what legal stage the case was at and the number of times it has appeared in a court. The programme was able to attach this information to the record of every case.

The verification for High Court data involved three stages. The first step was to look at each High Court website and note down the data elements available against each case record. Against this knowledge, we checked the data parsed by our software for accuracy. In cases where we knew there was *more* information than our data parsers were collecting from the court websites, we were able to fine-tune the programmes to ensure that we covered the whole ground. For example, we checked to see if under the column for ‘Judge Name’, there is in fact only the judge’s name and not the name of a party in the case. The second part of verification involved the comparison of data *between* High Courts. We looked at whether the data maintained by each High Court was a standard set of information. To illustrate, we checked to see if each High Court listed the same set of details against a case number, such as date of filing, petitioners and respondents, orders passed, and the stage of the case. Finally, the verification involved an analysis of the completeness of information maintained by each court.

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## ANALYSIS

Currently, most debate and discussion on pendency revolves around the total number of cases pending—somewhere around the three crore mark—across all courts in the country. Other than this monstrous figure, very little is known about the problem of delay. Our database provides more details. With our data and tools, it is possible to sort the pending cases according to case types, duration, court, court hall, and many other parameters. In the section that follows, we present various charts containing analysis of the different facets of the delay problem.<sup>3</sup>

Figure 3 shows the average number of days a case has been pending by comparing data from the 21 High Courts represented on our database. The highest average pendency is seen in the High Court of Allahabad, with a case pending for an average for a little more than three years and nine months, whereas the High Court of Sikkim has the lowest average pendency of 10 months.

**FIGURE 3.** Average Pendency

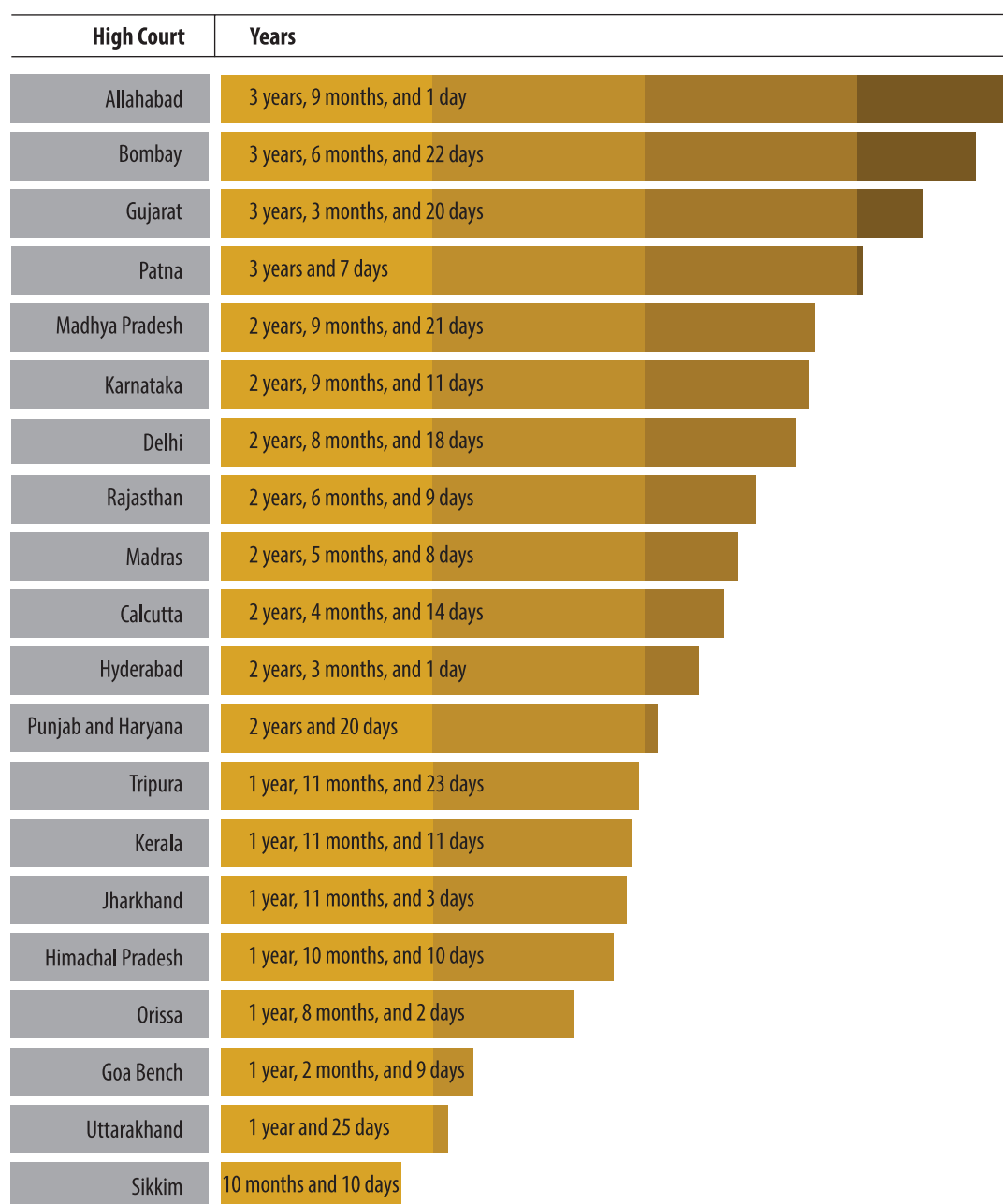


Figure 4 shows the same statistic for the five subordinate courts with the highest average pendency in our database.<sup>4</sup> The length of pendency is its most basic measure. Identifying the average length of time for which a case is pending will allow us to understand what exactly delay means in our

country and set benchmarks accordingly. It is important to remember though that we have just taken a simple average, meaning that there are at least 50 per cent of the total number of cases pending for longer than the average pendency!



**FIGURE 4.** Highest Pendency in Subordinate Courts

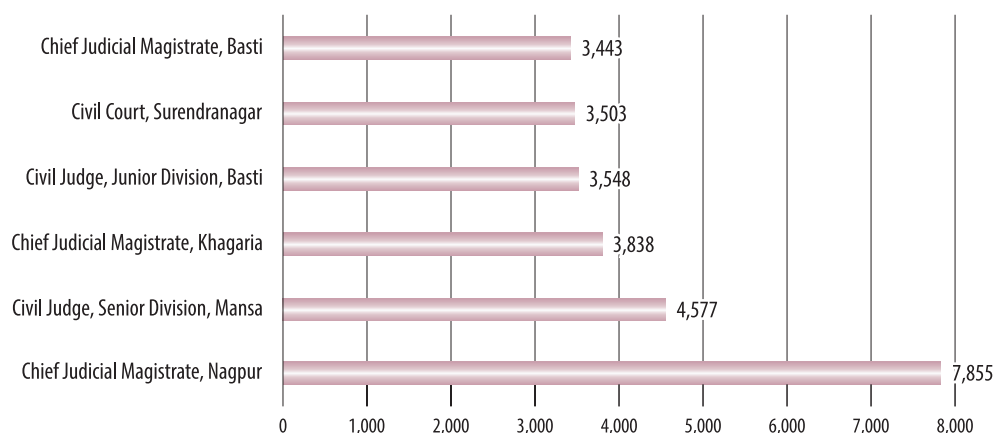
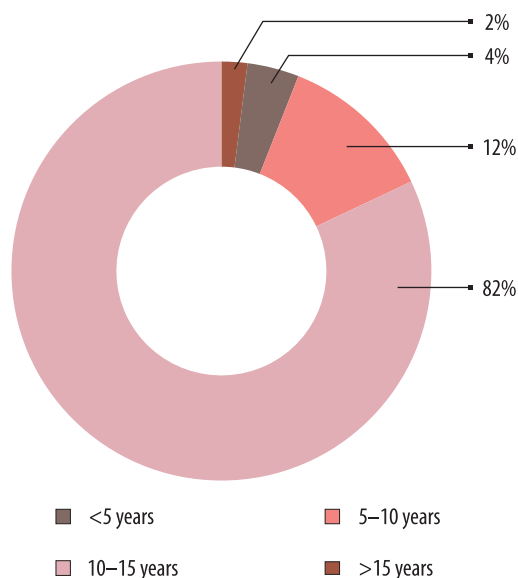


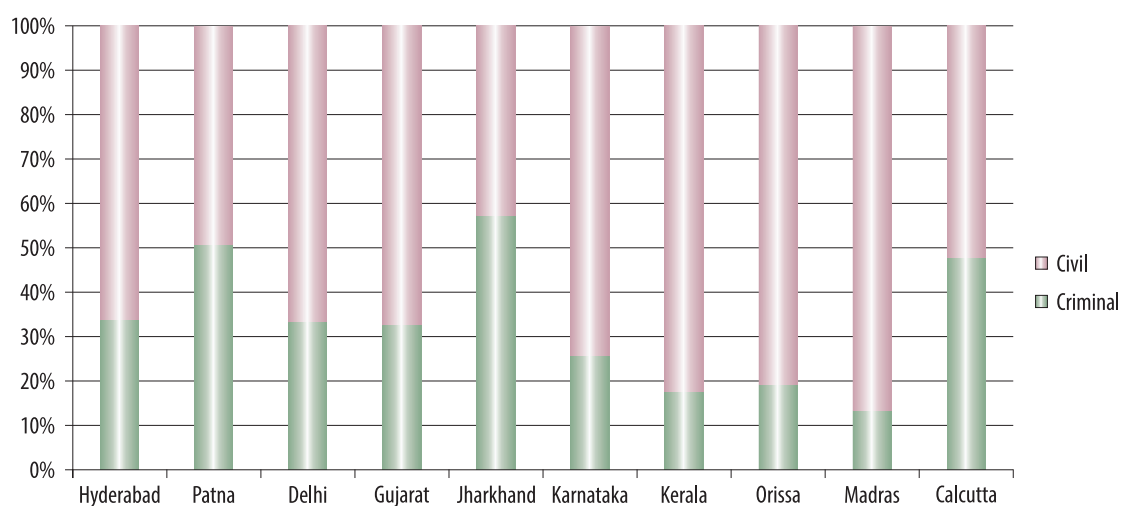
Figure 5 offers a different view of pendency: here, cases pending in the High Courts have been categorised into five-year brackets based on the duration of pendency. This allows us to understand the ageing of the cases and can form the basis for prioritising hearings accordingly.

**FIGURE 5.** Pendency in Five-year Brackets in High Courts



Apart from numbers of pending cases and length, a far lesser discussed and equally pressing aspect is the subject matter of the pending cases. As part of our analysis, we have categorised and divided cases pending in High Courts on the basis of their most basic distinction—civil and criminal. Figure 6 shows the proportion of civil and criminal cases in certain High Courts. Figure 7 provides an even more granular analysis in this regard, showing the types of cases in a single court, the High Court of Karnataka. The data is presented on the basis of specific case categories. For instance we can see that just two case types, Writ Petition and Miscellaneous First Appeals, constitute 60 per cent of the total workload of the court.

**FIGURE 6.** Proportion of Civil and Criminal Cases in High Courts



**FIGURE 7.** Workload at the High Court of Karnataka

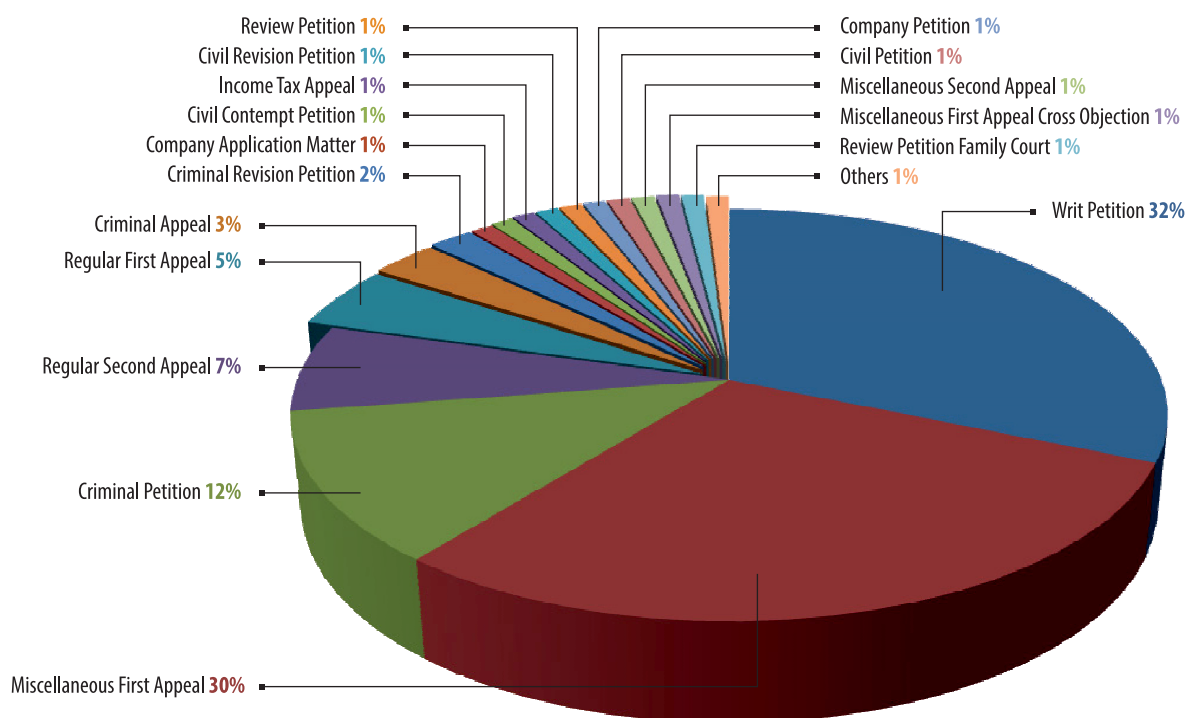


Figure 8 measures the duration of pendency of a specific case type. For example, Company Petitions, although constituting a mere 1 per cent of the total

cases in the High Court of Karnataka are pending, on average for 2,179 days, nearly six years.

**FIGURE 8.** Average Pendency in the High Court of Karnataka

Case type	Pendency in days
Company Petition	2,179
Regular First Appeal	1,553
Regular Second Appeal	1,514
Income Tax Appeal	1,408
Criminal Appeal	1,270
Miscellaneous First Appeal	1,168
Others	1,043
Criminal Revision Petition	1,025
Miscellaneous Second Appeal	1,015
Miscellaneous First Appeal Cross Objection	1,007
Writ Appeal	991
Civil Revision Petition	935
Company Application	926
Review Petition	902
Writ Petition	866
Civil Miscellaneous Petition	806
Civil Petition	782
Criminal Petition	775
Review Petition Family Court	745
Civil Contempt Petition	633

These charts clearly illustrate that understanding the composition of judicial workload and overlaying it with pendency figures is a much-needed step towards building sustainable solutions to pendency. Breaking down the workload allows us to highlight what kinds of cases need to be focused on as well

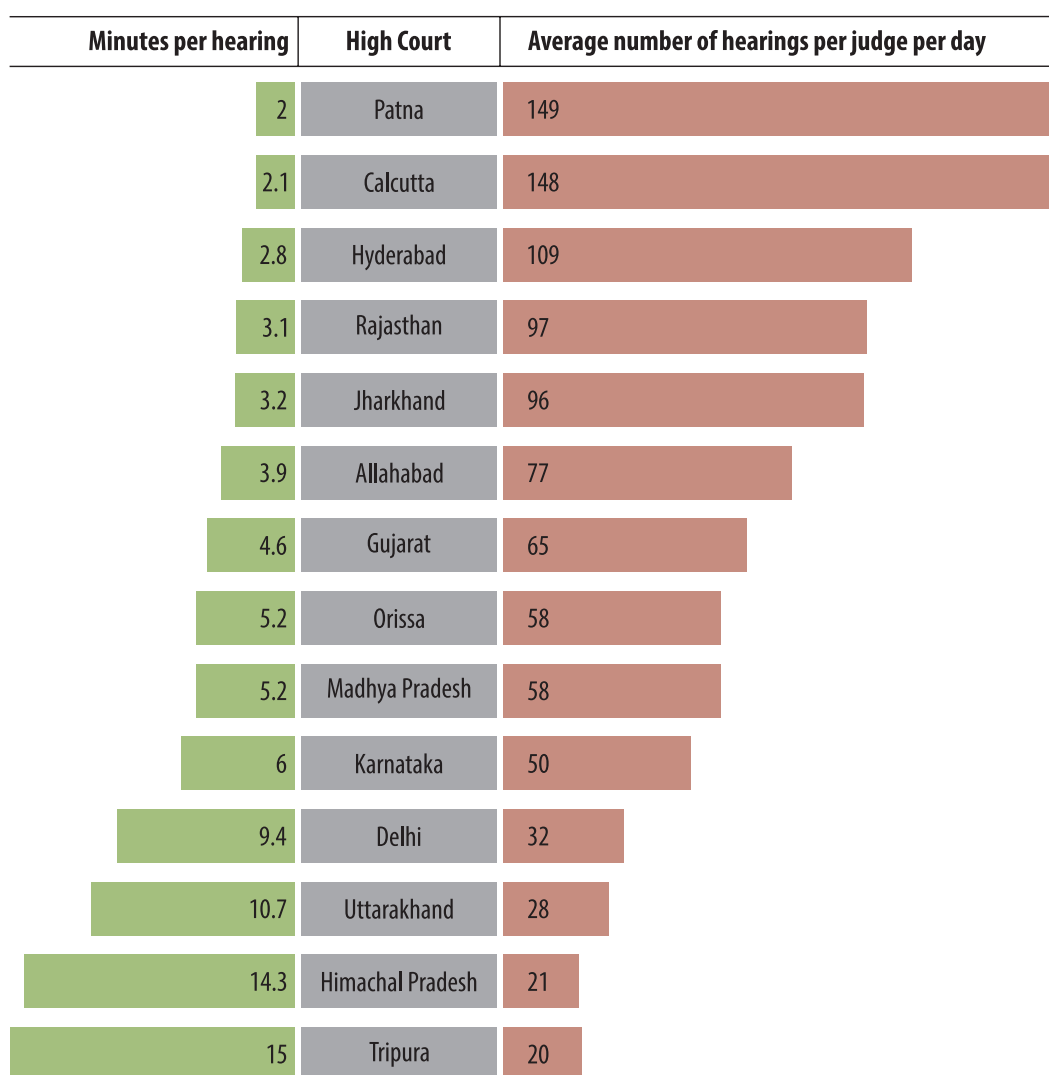
as investigate why some kinds of cases are taking much longer than others.

On the matter of judicial workload, a crucial point is the question of time that each judge has during a working day. Figure 9 tells us that in the

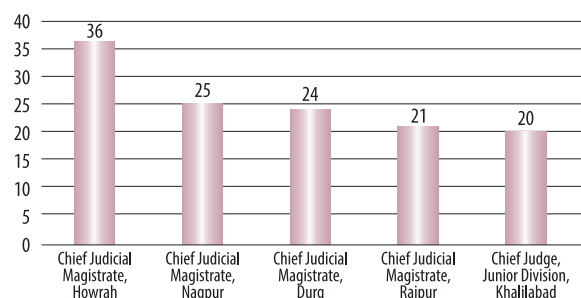
High Courts, judges hear anywhere between 20 and 150 cases a day, averaging 70 hearings. Another dimension that this chart shows is the time judges have for each hearing, which is computed based on their working hours. This kind of analysis is key to judicial reform, as it illustrates the severe stress that judges face each day, and shows that they need more tools to manage their time efficiently and effectively.

Judges are not the only actors in the system who have to deal with problem of multiple hearings. Litigants and lawyers are also plagued by this difficulty. Figure 10 shows the five subordinate courts in our database with the highest number of hearings per case. The question of numerous hearings is one that needs to be dealt with swiftly, as it is a significant contributor to delay. Putting a cap on the number of hearings will allow reduction in judicial workload and may improve efficiency and also reduce the number of times litigants have to visit courts.

**FIGURE 9.** Judges' Workload



**FIGURE 10.** Number of Hearings per Case in Subordinate Courts



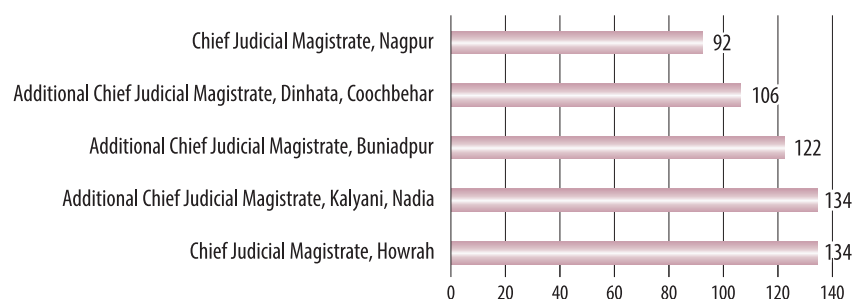
Frequency of hearings is closely linked to efficiency. Figure 11 measures the number of days between

hearings in each High Court. The High Court of Calcutta holds the most frequent hearings with 16 days between hearings, whereas hearings are most far apart in the High Court of Delhi with 80 days between hearings. Figure 12 shows the same measure for the five district courts that have the highest number of days between hearings. Figure 13 also measures the frequency of hearings, but for different kinds of cases. Time spent on a case, the frequency/infrequency of hearings, and change in judicial personnel not only impact understanding of pendency, but also adversely affects the concept of fair hearing, which is a fundamental promise that the judiciary makes to the litigants.

**FIGURE 11.** Frequency of Hearings in High Courts

High Court	Days
Delhi	80
Karnataka	79
Punjab and Haryana	75
Himachal Pradesh	68
Tripura	50
Sikkim	50
Bombay	43
Jharkhand	37
Kerala	36
Gujarat	30
Madhya Pradesh	30
Orissa	30
Patna	28
Madras	28
Hyderabad	28
Uttarakhand	27
Goa Bench	25
Rajasthan	23
Allahabad	22
Calcutta	16

**FIGURE 12.** Frequency of Hearings in Subordinate Courts



**FIGURE 13.** Frequency of Hearings per Case Category across 21 High Courts

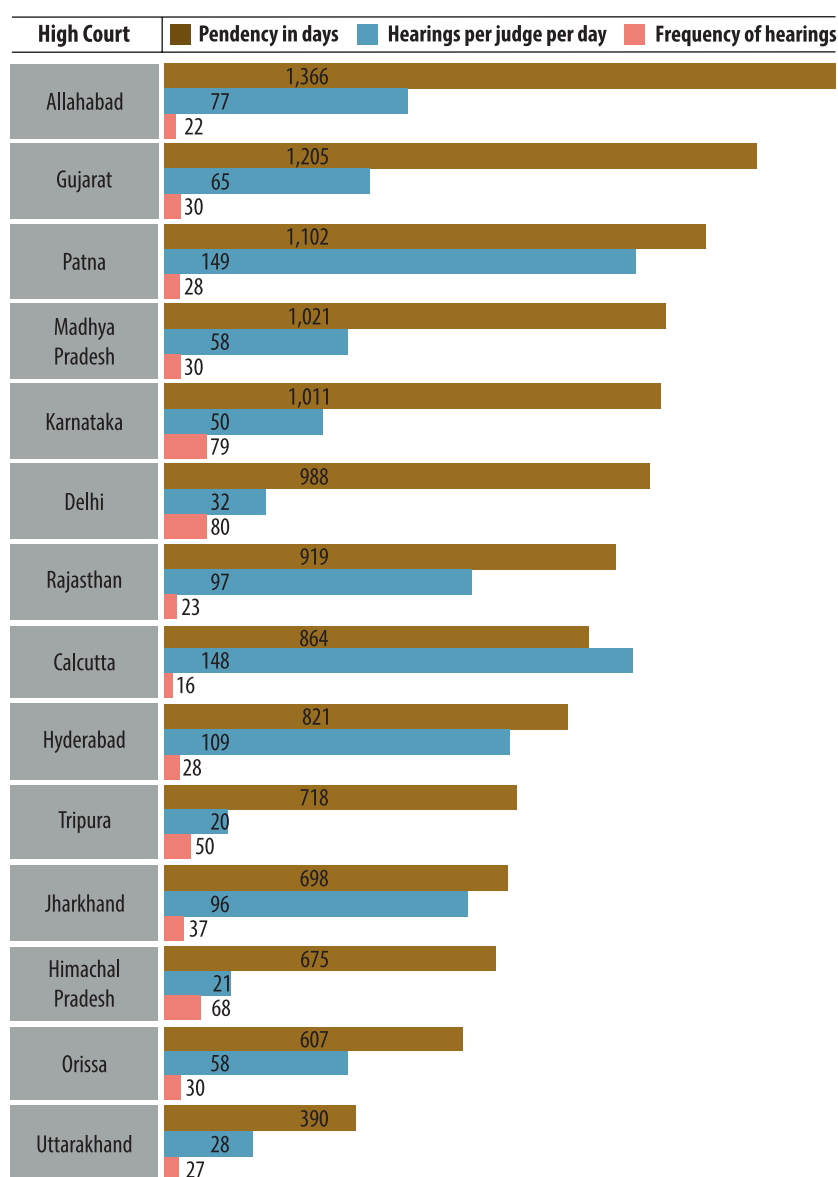
Case type	Days between hearing
Tax Case	63
Tax Reference	60
Cross Objections	57
Criminal Petition	54
Probate	54
Civil Appeal	49
Civil Suit	44
First Appeal	42
Civil Revision	41
Tax Appeal	40
Civil Petition	38
Criminal Appeal	36
Civil Contempt	35
Arbitration	35
Civil Application	31
Contempt—either	31
Criminal Case	29
Civil Case	26
Criminal Application	26
Criminal Contempt	25
Writ Civil	25
Criminal Reference	24
Criminal Revision	24
Letters Patent	24
Civil Report	22
Tax Revision	20
Writ Criminal	18
Civil Reference	18

Note: Case categories are classifications created by DAKSH based on case types encountered across High Courts, in order to narrow down all case types to approximately 30 categories to enable easier understanding and analysis.

Figure 14 shows a combination of pendency, judicial workload, and hearing-related statistics.

Through this correlation, we can begin to identify causal factors of pendency. For example, we measure the relationship between a high number of hearings per judge per day and length of pendency. In addition, we can study the courts that have lower average pendency and look to implement those practices in other courts.

**FIGURE 14.** Pendency and Judges' Workload



## CHALLENGES

We faced several challenges in collection, consolidation, and analysis of data from the High Courts and subordinate courts. They are set out in the following paragraphs. It is important to note that the problems highlighted here are essentially from the perspective of data analysis, which will vary significantly from that of an end-user or litigant. The data published by the courts is in all likelihood adequate for litigants and lawyers. However, as this section will illustrate, it is not sufficient for an understanding of pendency of cases in the system or delay in judicial processes.

### Non-availability of Basic Data

The non-availability of a large set of scientific data hampers wide-ranging and meaningful analysis of pendency. This is an observation that has been noted and stressed upon multiple times by the Law Commission of India in its 245th report, 'Arrears and Backlog: Creating Additional Judicial (wo)manpower'.<sup>5</sup>

That available data is highly varied and difficult to use is compounded by the fact that multiple pieces of basic data are not made available by High Court websites. For instance, in the first 10 High Court websites that we analysed, only five of them presented data for the field 'Date Filed'. This field as the name suggests, contains the date on which the said case was registered in the court. Of the five courts that do not make this data available, one limits access with a captcha and the other four courts do not even have this information available. This data element is perhaps the most crucial piece of information about a case, and there is no explanation as to why it is absent in many websites. Without information on the date a case filed, pendency cannot be calculated.

Another data point that very few High Courts provide is the name of the legislation that a case is registered under, even though this information is mandatory to file a case. Without information on the legislation under which a case was filed, detailed subject-wise analysis becomes an impossibility.

One more irregular data point is the ability to track down the details of past hearings against each case, which only some courts provide. Very few courts make available a feature to see a case's full history from the date of filing. A few courts also offer the ability to see data about disposed cases, however most do not.

Additionally, a case that originated in a subordinate court will have additional case record details—for example, a separate case number that is reclassified on entry into the High Court, and names of the court and district. These details are often unavailable.

All cases that appear in a High Court originate from a particular location within its jurisdiction. It is therefore important that the district from which the case originates is available for analysis, especially in order to create a spatial distribution of cases.

The figure in the Appendix amply demonstrates the gaps identified above. There are 64 data elements that the High Courts make available on cases, and of these less than a third is found in all courts. Along with current case information, there are only a few courts that provide lower court information and links to orders. Data verification demonstrated that for each case record there was a case type and case number, and the detail of at least one hearing (the cause list date). The cause list gives only as much information as needed to attend a court hearing: the court hall, and the judge hearing the matter. All other records against the case were filed away within the court registries, and their



availability was subject to the vagaries of clerical or administrative decisions on part of each individual High Court.

The prevention of automatic access to some case data by placing it behind a captcha is also problematic. Captchas are generally used when the system wants to verify whether the user is a human or not. As all of this case data is public it needs to be made available without preventing automated access.

The full date of filing (including the day, month, and year) is crucial to build and analyse the life cycle of cases. Availability of details of each hearing is key to understand the manner in which cases progress in the system, as well as for the identification of reasons for delay through their life cycle. Finally, the order sheets of disposed cases will provide information on what happens at each hearing, such as reasons for which an adjournment was sought. Providing access to this information would help create and understand the life cycle of a case, from the date of institution to the date of disposal, which would go a long way in benchmarking pendency. This would provide a more robust understanding of the functioning of the judicial system. However, with all the gaps in data, none of this is possible.

## Quality of Information

A major challenge with using with the available High Court data is its quality. High Court data is riddled with errors that render large parts of it unusable in the current form. In order to analyse this data, it has to be thoroughly checked and cleaned up—a process that is hindered by the huge volume of data and the number of mistakes it contains. Errors contained in the data can be roughly divided into the following categories:

1. *Incorrect spellings*: There are an enormous number of incorrect spellings in the data.

This is particularly visible in data fields such as district name, judge name, and stage name. The number of spelling mistakes is most likely due to the fact that the data is manually entered.

2. *Wrongly entered information*: Often we have come across data that should be under one field, mistakenly entered under another. For example, many courts have a data field known as 'Stage'. This field indicates the current procedural status of a case. Several times we have found this information in the field reserved for information about the legislation under which a case is filed. In addition, that the information is in a wrong column is not always apparent, especially in the case of data fields that are not clearly defined such as stage name and case categories.
3. *Incomplete information*: In several instances the name of the judge or the statute will not be complete, thus making the case record in question irrelevant for analysis.
4. *Abbreviations*: Much of the data on High Court websites is expressed in abbreviated form. These abbreviations vary widely from court to court. There is no centralised key available to navigate through the data, which makes the data undecipherable for users without a legal background. In addition, even those users equipped with legal knowledge have no way of knowing whether they are interpreting data correctly. For instance, each court uses case types to categorise and label cases. Most of these case types are in the form of abbreviations and there is no key provided for understanding the case type list on each website. In the absence of a key, it is unfeasible for anyone other than a local lawyer to understand the data. Without tools such as data dictionaries and keys to

abbreviations, amalgamation and correlation of data become impossible.

5. *Specific problems:* Certain data fields have problems specific to themselves. For example, many courts have a data field called 'Case Category' assigned to each case. In some courts, this category is used to indicate name of the statute that the case is filed under, whereas in other courts, it makes no reference to the statute and carries information on subject matter. Since this is not standard, it cannot be relied on for analysis.

## Lack of Standardisation

One of the biggest challenges is the complete lack of data standardisation in High Court data available online. Very simply, in terms of data, every High Court is an island. Each High Court website has its own site layout, data formats, and varying extents of data availability. This lack of data standardisation is puzzling and troublesome, as logically case-related information should be uniform. To add to the problem, the variations in data are by no means minor (as exemplified by the 'Data Availability in High Courts' chart in the Appendix).

Further, even within each High Court's website, the same data is at times displayed differently in different places. A good illustration of this is case type lists. Case types are categories created by High Courts to classify cases. Two different lists of case types are available on High Court websites. One can be found on the case status page of the High Court, where the pending status of current cases can be looked up. The other list of case types can be found in the cause list, which lists daily all the cases that will be heard in the High Court. The case type lists on the case status pages and the case types used in the daily cause lists are not the

same. This is a perplexing difference, as we assume that at least within a court, case types would be the same.

While most websites have case status pages and cause lists, four courts, namely High Courts of Jammu and Kashmir, Manipur, Meghalaya, and Sikkim do not have case status pages. This means obtaining any current case information in these states is not possible.

While High Courts make available the type of order issued by a judge after a hearing when the case last appeared in a court hall ('Order Type'), they are a hodgepodge of text fields that are not standardised.

The lack of standardisation in High Court data does not affect most users of the system, since their concern is focused on their own case. However, it does affect the ability to aggregate and analyse data for each High Court and across High Courts. Due to the lack of standardisation, even simple analyses of cases pending in the courts cannot be carried out, and in the absence of comparable elements, comparative analysis cannot be carried out. It also critically impedes an overall analysis of the judicial system.

Amongst the information that DAKSH collects for High Courts, 'case type' as a data element is key to categorising cases. This section describes the importance of case types as a piece of judicial data, the process used to categorise them, the problems of categorisation, and the need for a systemic standardisation of case types.

## Understanding Case Types

In a system with millions of cases, each case needs a unique identity or 'fingerprint' of sorts. To create these unique identities, cases receive a special

nomenclature from the courts known as a combined case number. Combined case numbers are one of a kind within their High Court of origin. Combined case numbers are made up of three parts—a case type indicated by an abbreviation, a serial number and the year of filing.

The first component of the nomenclature of cases is a case type. In order to classify and identify cases, the courts themselves have created categories known as case types. These categories are based on varied factors, such as the subject matter of the case or the legislation a case falls under. Case types are relevant right from the first stage of the judicial process, namely, filing. When a case is brought before the registrar of the court to be filed as a case, a case type has to be chosen for it.

Given that many case types specified by the courts are long and complicated, each case type is also given an abbreviation, which is usually made up of the first letters of each of its constituent words.

Case types are created based on a number of factors, the important among which are listed as follows with examples:

1. *On the basis of subject matter:* Writ petitions are cases that are filed in the Supreme Court and High Courts seeking the enforcement of fundamental rights as well as other legal rights. They make up a majority of High Courts' work and are usually filed under the case type 'Writ Petition – W.P.' Subject matter can be additionally combined with the stage of proceedings to create further case types. For instance a criminal appeal (usually found with the abbreviation CRL.A) is a case whose subject matter and stage of proceedings have decided its case type. As the name suggests, it is criminal in nature and is at the appeal stage.

2. *On the basis of stage or nature of proceedings:* An ideal example for this factor of creation are case types dealing with interlocutory applications found under case type 'IA', which are applications to the court for any incidental proceedings in a case that is already instituted in the court.
3. *On the basis of legislation that the case falls under:* Several High Courts list a case type 'HMA'. This deals with cases under the Hindu Marriage Act, 1955. Usually, these cases involve divorce proceedings. As they are governed by a single legislation and are numerous, they have been classified as a case type of their own.

Case types are crucial pieces of data as they form the basis for most kinds of comparative analyses, both amongst and within High Courts. Once case types are categorised, they can be compared within a High Court, as well as between High Courts. Case types are essential pieces of data to benchmark delay.

A good example of case type-based analysis is Figure 8, in which the average pendency in the High Court of Karnataka is compared across case types. This kind of analysis is only possible when case data contains case type information.

### *Process of Categorisation*

It was evident that for a nation-wide analysis of pendency to be carried out across High Courts and to facilitate even rudimentary comparisons, a normalisation table for case types across High Courts would have to be created, and case types would have to be categorised. The process of categorisation that we undertook, can be broken down to four main phases.

1. *Collection of case type lists from High Court websites:* There was no readily available official compilation of case types from all the High Courts in India, hence this was data that had to be collected and collated. To complicate the process, no High Court had an official list of case types available as a ready to use document. Due to the paucity of resources and time, physically visiting each High Court to collect the case type list was unfeasible. Thus, the case type lists were collected from the case status page of the website of each High Court. The case status page allows a person to see details about cases that have been instituted in that particular court. It has varied fields for searching—including party name, judge name, and combined case number. While searching by combined case number, to fill in the correct case number, a user has the option to choose from a drop-down menu containing all the case types that can be filed in that court. Each High Court has such a drop-down menu, which was copied to obtain the list of case types.
2. *Choosing a base list:* After the case type lists from 24 High Courts were assembled, in order to normalise them, a base list had to be chosen, to which case types could then be matched. At this juncture, the most extraordinary aspect of the categorisation exercise came to light. The sum total of all case types across the 24 High Courts amounted to an astonishing 2,553 case types. Given this huge number, it was decided that the base list should be as comprehensive as possible and it was for this reason that the list of case types from the High Court of Bombay was chosen. This was by far the longest list of case types amongst the 24 High Courts, containing 289 case types.
3. *Method of case type comparison:* After choosing the base list, the case type list of all other High Courts was matched to it. At this stage, the endeavour was to render as much existing variance invariant as was possible. For each High Court, all the case types that corresponded to a case type on the base list were grouped together. For example, in the High Courts of Karnataka and Delhi, case type ‘RSA’ stands for Regular Second Appeal, which corresponds to case type ‘SA’ or Second Appeal in the High Court of Bombay. Case types that could not be matched to the base list were highlighted. Once every case type list had finished a preliminary matching with the base list, a list of unmatched and unique case types was created and added to the base list.
4. *Creation of final case categorisation index:* The updated base list had over 380 distinct case types. The index was created as a chart, and next to each case type from base list the corresponding case type from each High Court was listed. We added two levels of filters, termed ‘category’ and ‘super category’. This was essentially a grouping of case types to enable various levels of analysis.

### *Further Categorisation and Super Categorisation*

To create depth and add robustness to the categorisation process, we added additional levels of classification. Of the final list of 380 case types, each was placed under one of two basic classifications—civil or criminal—12 super categories and 100 categories.

To simplify the case categorisation as much as possible, we attempted to add a ‘civil’ or ‘criminal’ classification to every single case type. This classification looks to partition cases on the basis

of their most fundamental divide—the ‘male’/‘female’ equivalent for cases. In addition to the civil or criminal classification, to add complexity, we created categories and super categories for which we grouped case types together on the basis of subject matter and stage of proceedings.

## Variance

As mentioned above, case types varied from each other in numerous ways. There was some variance that was expected; however a majority of the inconsistencies could not be explained. This section details the variance that manifested through the course of this exercise.

1. *Variance in type*: This is the most common variance due to the huge volume of case types. There were numerous case types that featured on a particular High Court’s list but were not found on the case type lists of other High Courts. This means there are case types that are unique to one or a few High Courts. However, realistically, these case types should be present on all lists. A good example for this type of variance would be the case type ‘Criminal Anticipatory Bail Application’, available only in the High Courts of Bombay, Guwahati, Jharkhand, and Tripura. Anticipatory bail can be granted by all High Courts, and thus the question arises as to why only four of 24 High Courts list it as a distinct case type. This is only one of many case types, which should logically be on every case type list, but in practice are missing.
2. *Variance in form and description*: This is the most problematic and illogical variance. Identical case types are given completely different names and abbreviations across High

Courts. These case types deal with the same subject matter and there is no apparent reason as to why they have been named differently. The most striking illustration of this form of variance is the case types that identify writ petitions. Across all the High Courts there are upwards of a hundred case types with variant nomenclature and abbreviations, all pertaining to writ petitions. Table 1 shows the variance in description of criminal writs across nine High Courts.

**TABLE 1.** Criminal Writ Case Types in Nine High Courts

High Court	Short Form
Allahabad	CRLP
Bombay	CRPIL
Punjab and Haryana	CRWP
Himachal Pradesh	CRWP
Patna	CWJC
Jharkhand	W.P.(Cr.)
Delhi	W.P.(CRL)
Tripura	W.P.(CRL)
Kerala	WPCR

3. *Variance in level of classification*: The case type lists across High Courts differ hugely in their degrees of stratification. To provide an example, the High Courts of Bombay and Jharkhand both had a very comprehensive classification; however, the former list had 289 case types whereas the latter had just 59 case types. Where Bombay chose to go into great levels of granularity, Jharkhand was broader in its grouping. To illustrate, Table 2 contains a list of tax-related case types from both these High Courts.

**TABLE 2.** Comparison of Tax-related Case Types between the High Courts of Bombay and Jharkhand

High Court of Bombay	High Court of Jharkhand
1. Agricultural Income Tax Reference	1. Tax Application
2. Estate Duty Tax Application	2. Tax Appeal
3. Estate Duty Tax Reference	3. Tax Cases
4. Excess Profit Tax Reference	
5. Expenditure Tax Reference	
6. Gift Tax Appeal	
7. Gift Tax Application	
8. Gift Tax Reference	
9. Income Tax Appeal	
10. Income Tax Application	
11. Income Tax Reference	
12. Interest Tax Appeal	
13. Maharashtra Value Added Tax Appeal	
14. Sales Tax Appeal	
15. Sales Tax Applications	
16. Sales Tax Reference	
17. Super Profit Tax Applications	
18. Super Profit Tax Reference	
19. Sur Tax Appeal	
20. Sur Tax Application	
21. Sur Tax Reference	
22. Tax Appeal Civil	
23. Wealth Tax Appeal	
24. Wealth Tax Application	
25. Wealth Tax Reference	

While neither showing great detail nor having a more generic grouping is a clear indicator of good classification, the variance in the level of detail thwarts the possibility of methodical comparison of courts.

4. *Duality*: When a case is instituted and is being filed in the High Court Registry, a case type has to be chosen for it. However, this is challenging, as there are cases that could fit easily into either of two separate case types within a single High Court's case type list. For example, in the High Court of Andhra Pradesh, contempt appeals could fit under First Appeals as well as Contempt Cases. Which then is chosen? In essence, case types are sometimes nebulous and often overlap. There are no guidelines on choosing case types in cases of duality.
5. *Variance in local flavour*: This was the expected variance that was seen across High Courts. There is a clear local flavour to each list, where case types unique to each, show up. These case types are derived from major state specific legislations as well as more cultural and geographical characteristics. Good examples are the High Court of Bombay, which has numerous case types dealing with Parsi personal law, and the High Court of Kerala, which has a number of Devaswom Board related case types.

### *Specific Challenges during Categorisation*

The difficulties that came up through the process of categorisation can be broadly summarised as follows. These challenges have prevented us from completely understanding the data and also impeded analysis.



1. *No official list of case types*: As mentioned before, no High Court has maintained a document on its website listing the case types and abbreviations used by that particular High Court. The lack of easily available information from an authentic source made the collection process very time consuming.
2. *No centralised key or full forms available to understand case types*: For several High Courts, the available written format of case types was merely a list of abbreviations. We could not find official expansions or a key to the shortened versions released by the High Courts and had to look at order sheets of individual case types to determine what the full form was. Even after this exhaustive exercise, there are still case types which cannot be understood or expanded. The High Courts of Bombay and Kerala contain a large number of such case types. The lack of centralised key resulted in categorisation being very time consuming and leaving a higher margin for ambiguity and error in expansion and thus in categorisation.
3. *Difference in case type lists between case status page and cause lists*: Once we started collecting data from the High Courts, it soon became obvious that the case type list available on the case status pages of the High Court websites and the case type list used in the cause list (from where DAKSH collects a majority of its data) were not the same. On several occasions, there were case types that had different names on the case status page and cause list. To illustrate, in the High Court of Delhi, there is a case type named 'CO. APPL.(C)'. Expanded, this case type refers to a civil company application. However, on the cause list, civil company applications are given the case type name 'CA(C)'. Another

problem was that there were case types that had not appeared on the case status page (in the drop-down menu), which appeared in the cause list. For example, from the High Court of Kerala's cause list, we found case types 'DOC' and 'DPage', however neither of these appear on the drop-down menu on the case status page of the High Court's website. These are just two examples out of hundreds of such case types. This resulted in uncategorised and unmatched case types appearing in the database, which further left analysis incomplete. To correct this, a categorisation of case types from the cause list had to be carried out. The dichotomy of case types between the case status page and the cause lists is one for which no explanation has been found and raises questions on judicial administration—how do the Registries themselves match case types from these two separate lists? Having two different lists means that updating the categorisation table will be a hugely time-consuming task.

4. *Large number of case types*: The sheer volume of case types, over 2,500 of them, was the primary cause for the difficulty of the categorisation process. Given the fact that categorisation was completely manual and not automated in any way, case types had to be matched and categorised one by one.
5. *Ambiguous case types*: When we were adding categories and super categories (formulated by us), there were case types that could fit into multiple categories. For instance, does a criminal miscellaneous appeal fall under miscellaneous appeals or criminal appeals? Do civil revision petitions fit better under civil petitions or revision petitions? These are just two of the tens of ambiguous case types we came across.

As case types are lists created by the High Courts, without any definitions provided, ascertaining where the case types would fall could not stay a very scientific and precise process. In addition, when the ‘civil’/‘criminal’ tab was added, there were numerous case types that were meant to include both civil and criminal and thus could not be tagged as just one.

### *Reasons for Standardisation*

While there are numerous specific reasons for case types to be standardised, they can be grouped under the following heads.

1. *Systemic reform:* While the lack of standardisation in case type categorisation does not affect the majority of litigants and individual players within the judicial system, it poses a mammoth challenge from the point of view of systemic reform. Without proper categorisation, how certain kinds of cases fare in courts cannot be effectively compared. Comparisons need to be made both amongst and within courts, in order to benchmark delay and to understand judicial efficiency. For instance, there are certain kinds of criminal cases that need to be resolved with more urgency than other matters, however if these criminal cases cannot be identified, it cannot be confirmed whether this is, in fact, being occurring.
2. *Ease of administration:* An organisational position to maintain standard case types at the High Court level would allow more transparency, ease of understanding of the judicial system, and alleviate the inconvenience of processes such as transfer of cases.
3. *Poorly and loosely defined case types:* The fact that case types are so nebulous, numerous, and without rigid definition give parties

space for manipulation and creates disorder. There are also higher chances of cases being filed under the wrong case type, which could result in the judge asking for the case to be refiled. Case types need to be more watertight and well-defined to prevent confusion or wrong application while filing the case.

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## **CHANGES IN DATA MANAGEMENT: SOME RECOMMENDATIONS**

Based on our experience with data from the High Courts and e-courts websites, we recommend a few changes, that we believe are not large-scale, but can have a large impact on the manner in which things will progress. Some of them are listed below.

### **Declare Case Types Publicly**

Since the relevant rules are clear about case types, the case types that High Courts—and subordinate courts—use can be made public on the e-courts and High Court websites. These case types should be annotated with a description for each type, so that both the litigant and the court clerk can understand details easily.

### **Standardise Case Details**

Some data such as ‘Date Filed’, ‘Act’, ‘Section’, ‘Criminal/Civil’, ‘Case Stage’, ‘Decision Date’, ‘Order Type’, and lower court details such as ‘Current Stage’, ‘Purpose of Hearing’, ‘Whether Reached’, ‘Order Type’, ‘Parties Present’, and ‘Adjournment Requested by Party during Hearing’ should be made mandatory and available online, so litigants, administrators, and analysts can equally benefit.



## Standardise Case Stages and Orders

There are detailed rules about the stages that a case goes through in each court, but the software used does not reflect those rules. Data entry and later tracking will improve significantly if case stages are standardised and selected from a list of available choices instead of being left to the vagaries of data entry. A similar approach to order types will help make things easier for everyone concerned.

## Standardise Names of Key Individuals

Information such as litigants' names cannot probably be standardised, but judges' names certainly can. This step will help schedule things better for judges, given the caseload, and help the courts move cases as needed very easily.

## Ensure That References to Statutes Are Coded Correctly

Where data such as applicable statutes and their sections is actually available, it is embedded in badly formatted strings. Making sure that they are available in a predictable format will ensure that judges and clerks spend a lot less time poring through unrelated files. For example, updating a list of related cases that advocates present will make sure judges can get to the related information (including judgments) quickly.

## Track Transfers and Other Transactions

Only a few of the High Court websites record transfers, reclassifications, and case regroupings online. The e-courts system however does this very well—implementing a similar system in all the courts will ensure that cases can be tracked

and pendency assessed in a more transparent manner.

## Update Details of Order/Judgment and Party in Whose Favour It Was Made

Since precedents are very important in the legal system, litigants (and other participants including lawyers and judges) would be well served in understanding, on their own, the results of other cases that they see similarities with. Updating this information after the conclusion of a case would make the system that much more transparent and accessible.

## Validate Data Before Making It Public

Right now, websites, particularly the High Court websites, include data with dates from the 12th century. This is because of errors in data entry—2014 being entered as 1204, for example. Most court websites have made no effort, it seems, to clean the data before it is made public, leading to confusion and a general lack of trust in the website data. Basic cleaning of data before being made public will make a huge difference in the general public trusting these sites as much as they trust the court system.

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### Notes

1. Supreme Court of India. 2015. *Court News*, 10(3), available online at <http://supremecourtindia.nic.in/court-news/July,%202015-sept-2015.pdf> (accessed on 5 April 2016).
2. The portal can be accessed at [zynata.com/base/src/index.html#/access/signin?portal=dakshlegal.in](http://zynata.com/base/src/index.html#/access/signin?portal=dakshlegal.in) after completing the registration process.

3. The data analysed in this section is as of 1 April 2016 in our database.
4. For this, and other analyses, of subordinate court data presented in this chapter, we have chosen only those subordinate courts for which we have over 1,000 cases in our database.
5. Law Commission of India. 2014. *Report No. 245: Arrears and Backlog: Creating Additional Judicial (wo) manpower*, available online at <http://lawcommission-ofindia.nic.in/reports/Report245.pdf> (accessed on 15 March 2016).

# Bringing the 'E' to Judicial Efficiency: Implementing the e-Courts System in India

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*Atul Kaushik*

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*If our business methods were  
as antiquated as our legal  
system, we would have become a  
bankrupt nation long back.*

Lord Devlin<sup>1</sup>

Information and communication technology (ICT) has become the *sine qua non* of efficiency and development in the 21st century. Government benefits from technology as much as private sector organisations<sup>2</sup> and the judiciary is no exception. This chapter discusses the e-Courts Mission Project of the government of India, which is aimed at ICT enablement of courts in India.

The biggest challenge for Indian courts is the huge pendency of cases. At the end of 2014, 3.06 crore cases were pending in various courts in India, though down from 3.2 crore cases the previous year. Both the executive and the judiciary in India have been *au fait* on the issue. Chief Justices' (CJs) conferences have been emphasising the need to reduce/eliminate arrears. The CJs Conference held in 1985 resolved to eliminate arrears with utmost speed. The Conference of Chief Ministers and Chief Justices (CM/CJ Conference) in 1993, taking note of various reports of the Law Commission of India as also the report of the Arrears Committee (1989–1990), recommended that every state should establish a committee to go into the question of elimination of frivolous litigation and take remedial measures. The CM/CJ Conference of 1994 resolved that a management exercise be carried out in all courts to reduce arrears on priority basis including exercises on caseload management and court and resources management by working out a judge–case ratio instead of a judge–population ratio. It also resolved that time management be strictly enforced through reducing the number of adjournments and the time given for oral arguments.

The CM/CJ Conference of 2006 for the first time acknowledged the use of various ICT tools and a modern court management system for reduction of arrears and speedy disposal of cases. The CM/CJ Conference of 2009 resolved that the High Courts will make scientific and rational analysis as regards accumulation of arrears. Deliberations in this conference, coupled with suggestions in the 230th Report of the Law Commission of India,<sup>3</sup> resulted in the Vision Statement and Action Plan 2009<sup>4</sup> which, *inter alia*, decided upon the creation of a National Arrears Grid for a scientific study of arrears. The Action Plan also laid down elaborate measures for computerisation of courts.<sup>5</sup> In 2011, it resulted in the establishment of the National Mission for Justice Delivery and Legal Reforms<sup>6</sup> in the Department of Justice of the Government

of India and the National Court Management System<sup>7</sup> in the Supreme Court of India.

## THE FIRST TENTATIVE STEPS

Clearly, policymakers recognised the use of ICT as a facilitator in improvement of the justice delivery system in India. In sync with this realisation, efforts of the government towards computerisation of courts in India began in 1990 in the Supreme Court with a special dispensation made by the Planning Commission through the National Informatics Centre (NIC). A chronological account of these efforts is given in Table 1.

**TABLE 1.** Events Leading to the e-Courts Project

1	The Planning Commission recognised computerisation as part of judicial infrastructure by initiating upgradation of computerisation in High Courts	1992–1996
2	430 district courts were computerised by the NIC through funds from the Ministry of Information Technology	1997
3	In parallel, several state governments, led by Karnataka, attempted computerisation at district level	1990s
4	Complete computerisation of 27 district courts began with Nanded district in Maharashtra	1998
5	A centrally sponsored scheme for judicial infrastructure funded the computerisation of 700 city courts in Delhi, Kolkata, Mumbai, and Chennai, and 900 courts in state capitals or cities where High Courts were situated	2003–2004
6	The e-Committee to formulate a national policy on computerisation of the Indian judiciary and advise on technological, communication, and management-related changes was constituted on 28 December 2004	2004
7	Funds were released for computerisation of 3,475 district and subordinate courts through 100 per cent central funding	2004–2005
8	The e-Committee submitted the first National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian judiciary, eventually resulting in the e-Courts Project	August 2005
9	The Project for Information and Communication Technology Enablement of Indian Judiciary was launched	October 2005
10	The Department of Justice identified 14,948 subordinate courts for computerisation in three stages	2005
11	Computerisation of courts was delinked from the centrally sponsored scheme for judicial infrastructure and converted to a Central Sector Scheme, with 100 per cent central funding, and ₹ 600 crores was allocated to this scheme in the 11th Five Year Plan	2006–2007

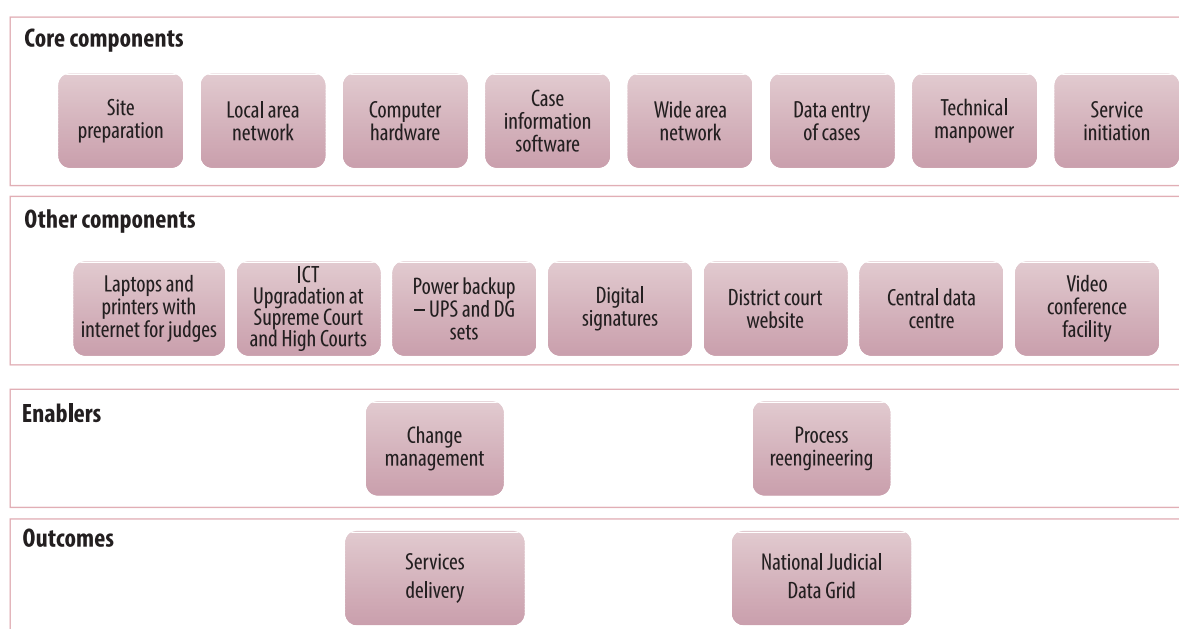
12	NIC was approved as the implementing agency for the first stage of the e-Committee's National Policy	2007
13	Approval was given to computerise 14,249 courts in 3,069 court complexes, along with provision of requisite connectivity for case data to be collected and made available on a national portal by 31 March 2014	2010
14	By the end of Phase 1, about 95 per cent of the project activities were completed in terms of hardware provision and service delivery	2015
15	Phase 2 of the e-Courts Project approved	July 2015

The unprecedented breadth and depth of the project threw up various implementation challenges. The court sites had to be ready for computerisation by provision of a Judicial Service Centre for electronic processing of case registration and movement of cases in courts, a server room with sufficient power back up, creation of ducts for fibres for local area network (LAN) installation, sufficient bandwidth for connectivity of courts with data

centres through leased lines and virtual private network (VPN) over broadband procured from Bharat Sanchar Nigam Limited (BSNL), adequate technical manpower at courts to help in the initial provision of services, and training of judicial officers and the court staff. The architecture of implementation planned to achieve this gargantuan task is given in the Figure 1.

**FIGURE 1.** Plan for Implementation of e-Courts Project

### e-Courts MMP: Components, enablers, and outcomes



The computerisation of courts at the end of Phase 1 on 31 March 2015 is given in Table 2.

**TABLE 2.** Hardware and Software Deployment under the e-Courts Project

High Court	Site	LAN	Hardware	Software
Allahabad	2,009	1,997	2,003	1,991
Andhra Pradesh	889	835	835	806
Bombay	1,908	1,891	1,908	1,896
Calcutta	774	774	770	762
Chhattisgarh	774	231	218	242
Delhi	0	0	0	410
Gauhati	319	297	300	294
Gujarat	837	811	738	710
Himachal Pradesh	101	101	101	98
Jabalpur	1,151	1,101	1,101	1,119
Jammu & Kashmir	184	171	156	102
Jharkhand	536	479	479	430
Jodhpur	788	775	787	778
Karnataka	786	773	768	754
Kerala	420	396	413	397
Madras	784	752	668	668
Orissa	423	423	423	423

High Court	Site	LAN	Hardware	Software
Patna	1,060	922	788	796
Punjab and Haryana	714	689	689	743
Sikkim	10	10	10	10
Uttarakhand	184	184	178	152
Tripura	64	41	62	57
Manipur	34	18	34	27
Meghalaya	7	7	7	7
<b>Total</b>	<b>14,756</b>	<b>13,678</b>	<b>13,436</b>	<b>13,672</b>

Phase 2 of the project now envisages universal computerisation of courts in the country and delivery of services to stakeholders. A consolidation of all the initiatives and measures proposed to be taken up and installation of the components planned in Phase 2 will result in multi-platform services for the litigants under the charter of services. Services include, *inter alia*, case registration, cause lists, daily case status, and final order/judgment uploading which have been provided in Phase 1. Further, information kiosks at all district courts, e-filing of cases, e-payment of court fees, process service through e-mail and through process servers having handheld devices, digitally signed copies of judgments, and multiplatform service delivery to stakeholders are some of the services to be added in Phase 2. The Litigants' Charter is given in Table 3.

**TABLE 3.** e-Courts Project: Litigants' Charter

No.	Service to the litigant	Platform						
		SMS push	SMS pull	E-mail	Web	Mobile app	JSC	Kiosk
1	Case filing confirmation	√	-	√	√	√	√	√
2	Case scrutiny — Defects notification	√	-	√	√	√	√	√
3	Case registration confirmation	√	-	√	√	√	√	√
4	Case allocation notification	√	-	√	√	√	√	√
5	Case next date notification	√	-	√	√	√	√	√
6	Process issued notification	√	-	√	√	√	√	√
7	Case listing notification	√	-	√	√	√	√	√
8	Case disposed notification	√	-	√	√	√	√	√
9	Cause list	√	√	√	√	√	√	√
10	Case status information	-	√	√	√	√	√	√
11	Daily orders/proceedings	-	-	√	√	√	√	√
12	Judgments	-	-	√	√	√	√	√
13	Online certified copy with 2D barcode authentication	-	-	√	√	-	√	√
14	Certified copy application status	√	√	√	√	-	√	√
15	Certified copy ready notification	√	√	√	√	-	√	√
16	Certified copy delivered notification	√	√	√	√	-	√	√
17	Caveat filed information	√	√	√	√	-	√	√
18	Case filed against caveator	√	√	√	√	-	√	√
19	Appeal/revision filed against order/judgment in case	√	√	√	√	√	√	√
20	Digitally signed orders	-	-	√	√	√	-	-
21	Digitally signed judgments	-	-	√	√	√	-	-
22	Digitally signed decrees	-	-	√	√	√	-	-
23	Digitally signed certified copies of case record	-	-	√	√	√	-	-
24	Process service through e-mail	-	-	√	-	-	-	-
25	e-Court fees	-	-	-	√	-	√	√
26	e-Payment to courts	-	-	-	√	-	√	√
27	e-Filing of cases for SC/HC/DC	-	-	-	√	-	-	√
28	Regional language DC website	-	-	-	√	-	-	√
29	Disabled-friendly website	-	-	-	√	-	-	√
30	Court complex location	-	-	-	√	√	-	-

The key to the success of the project was now the availability of case data online so that services could be delivered, for which having a robust connectivity between the courts and the National Data Centre was paramount, as was the development of a unified software application. Alongside the population of courts with hardware, therefore, research into the application software continued in NIC.

## UNIFIED APPLICATION DEVELOPMENT

Software was being developed at the instance of different High Courts from the time computerisation of courts began in the early 1990s. A variety of applications were being used across the country, each having different scripts and logic, and each suited to the specific circumstances and procedures used by the courts under the directions of the relevant High Court. This would potentially result in 24 different software applications, generating different types of case data of disparately defined case types in different formats and diverse reports; amalgamating them into one national data set would be a nightmare.

The genesis of the development of a common e-courts software programme can be traced back to 1997 when the NIC along with the Supreme Court of India developed the first software application in C language on Linux platform with dumb terminals. The entire project was on open source, a characteristic carried forward to date. Thereafter, preparation of computer software programmes aimed at the use of technology for automation of court procedures by the Supreme Court and High Courts has continued through NIC. In parallel, district courts started having their own websites and making available case data online on them. JUDINET was prepared and deployed in Maharashtra in 2006 as the first common data

platform using data generated by the computerised courts.

The diversity of applications and platforms used was a challenge to comprehensive computerisation. The e-Committee overseeing the delivery of services under the project recognised the need for a uniform application for all courts in the country in order for the case data to be seamlessly integrated for all levels of courts and used for judicial monitoring and management. The e-Courts Project aimed to address this challenge.

In May 2008, the e-Committee decided to standardise and implement a common case information system (CIS) software application for the e-Courts Project. By April 2009, the e-Committee had decided that the best application for a unified CIS was the one prepared by NIC, Pune and rolled out in many subordinate courts in the jurisdiction of six High Courts: Maharashtra, Gujarat, Kerala, Tamil Nadu, Assam, and Andhra Pradesh. Taking the CIS version as the starting point, suggestions on outputs/reports required in various jurisdictions were solicited so that changes could be made to that version to include outputs required all over India.

In consonance with the decision taken in 1997 to operate on free and open software system (FOSS), it was decided to use Linux based platform with Ubuntu operating system for CIS. The Open Technology Centre (OTC) of NIC has been providing support services for developing and tailoring applications on FOSS environment for the project. After making the suggested changes, the unified CIS was successfully rolled out as a pilot in Ernakulam in October 2009. It was gradually spread across all courts in Kerala, and by December 2010, to Karnataka and Andhra Pradesh as well. CIS was fully implemented in Maharashtra, Kerala, Andhra Pradesh, and Karnataka by 2012 with uniform code and database.



Other High Courts came up with numerous requirements not covered in this version. Though the Pune unit of NIC was strengthened to address the challenge, it was decided that there would be one software and one database for e-courts. In order to respond to some specific requirements of courts in certain jurisdictions that were not universally practised in the country, a National Core (NC) version would be developed and High Courts would be allowed to develop a peripheral version to address their specific needs. Since legacy systems existed on structured query language (SQL) server/visual basic (VB), migration script was written to enable migration of all legacy data on NC. The complexity of the application can be gathered from the fact that it has 1,245 menu items, 590 data entry forms/reports, 8,011 captions, 54 functional behaviours, and 214 menu items with behaviours. By February 2013, after a satisfactory roll-out in many courts, it was decided that the CIS version developed for the southern states would be called NC 1.0 and deployed all over India.

By August 2012, an exercise to unify the Delhi version had begun so that all courts in northern India could also be migrated to NC 1.0. Once NC 1.0 was ready for deployment all over the country, integrated project management was developed. The basic data structure of the application was designed in a manner as to enable unification despite the variations in the applications used in various states, and even variations within states (owing to customisations to suit the local environment). By the end of 2015, migration of case data under the jurisdiction of all High Courts, except Delhi and Madhya Pradesh, was completed.

Following the decision to implement Phase 2 of the e-Courts Project, work on NC 2.0 has also started. NC 2.0 has already been tested and is on its way to be rolled out all over India. It is more user-friendly, has a better look and feel, while maintaining the same data entry and report generation

modules as NC 1.0. For the newly migrated courts, for example from Gujarat and Delhi, version NC 2.0 has been successfully deployed to avoid duplication of the migration effort. Thus, CIS application for the e-Courts Project has stabilised and is ready to deliver on its promise.

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## COMPREHENSIVE ICT ENABLEMENT OF COURTS

In Phase 1 of the e-Courts Project, the Department of Justice was responsible for strategic direction and guidance, apart from managing financial matters. On the other hand, the e-Committee, representing the user—the judiciary—was responsible for presenting its requirements to the Department of Justice (including customisation of application software) to the NIC, coordinate with the Supreme Court and the High Courts for resolution of implementation issues, and take the lead in process reengineering. NIC was the implementing agency for the project, which involved both procurement and supply of hardware as well as preparation and installation of software applications. An elaborate evaluation of the project was undertaken in order to assess achievements in Phase 1 as well as elicit suggestions for further improvement of ICT enablement of courts.

In 2014, the e-Committee finalised the Policy and Action Plan for Phase 2 of the project (the Policy Document)<sup>8</sup> for implementation in three years. Since the judiciary, as the user, was best-positioned to steer the project, the e-Committee decided that it would provide policy planning, strategic direction, and guidance, while the role of the Department of Justice was limited to financial approvals, monitoring the budgetary aspects, and allocation/reallocation of funds across different

components. Further, the High Courts, instead of the NIC, would be the implementing agencies so as to acquire increased ownership of the project.

Phase 1 provided for a judicial service centre (JSC), which acted as the central filing centre (CFC). However, there was no provision for a reception and enquiry centre where lawyers and litigants could seek clarifications on case status and get general queries addressed, for which they had to go to individual courts and sometimes wait until the court staff was free from their main job in regular proceedings. Further, computers are required for additional court-related functions, such as issuance of computer generated notices, summons, warrants, certified copies, general administrative, accounting activities, etc. Hence, the Policy Document proposes to double the number of computers from four to eight in each computerised court, so that all court activities can benefit from efficient computing facilities. All additional courts that have come up after Phase 1 was finalised, and are likely to come up during the currency of Phase 2 will also be provided similar number of computers. Further, process servers will be provided with handheld devices for efficient service of notices by courts so that proceedings can be expedited.

Courtrooms in High Courts have digital display monitors indicating which case is being heard at any given point of time. Similar display facilities are proposed in Phase 2 for district and subordinate courts. Each court complex will also have touchscreen-based kiosks at the JSC–CFC for litigants and lawyers to be able to access case status from a centralised location in the complex. Video-conferencing facility has been provided in 500 court complexes and corresponding jails in Phase 1. It is proposed to provide this facility to all court complexes in Phase 2. This enables courts to conduct remand proceedings without the accused having to be ferried from the jail to the court on each

hearing, thus saving the state significant expenditure and reducing security concerns in transport of accused. Further, the facility can also be used to record evidence without witnesses having to visit the court. This will also save costs of state agencies such as forensic laboratories and hospitals.

Many other components of Phase 2 are aimed at enhanced ICT enablement. The case data is proposed to be hosted on cloud computing environment, thereby optimising server requirement as well as facilitating big data computing. It is also proposed to leverage national knowledge network<sup>9</sup> (NKN), state wide area network<sup>10</sup> (SWAN), national informatics centre network (NICNET), broadband, etc for seamless connectivity for courts as well as to take care of the need for robust connectivity options on the cloud. Mobile applications are being prepared for SMS-based citizen-service delivery. In order to provide uninterrupted power to courts, use of solar energy as alternate power source in 5 per cent of court complexes is being proposed. Further, integrated library management system (ILMS) using KOHA (FOSS),<sup>11</sup> use of data warehousing, data mining, online analytical processing (OLAP), and business intelligence tools for policy purposes are proposed to improve case and court management. By the end of the project, it is proposed to ensure availability of case data for all courts on the national judicial data grid (NJDG). This will not only enable better judicial monitoring and management by the courts, but also enable the government to use the data for policy purposes. Since district and subordinate courts use both the English and regional languages, it is proposed to have a bilingual module for data entry and report generation in Phase 2.

The ultimate outcome of the e-Courts Project is to facilitate citizen-centric services. For this, a Litigant's Charter has been prepared, with services mentioned in Table 3.

## DATA TO INFORMATION: BENEFITS AND CHALLENGES

Once the exercise to generate case data was completed, the next step was to convert the massive data into information, and ultimately, knowledge. It was also necessary to host the data on a single portal for ease of use by all stakeholders. Thus, the portal <http://ecourts.gov.in> was created. This was necessary not only to make available the case data in identical outputs across India but to create the NJDG to facilitate judicial monitoring and management at the High Court and Supreme Court level as well as capture data on a single dashboard for policy analysis. This exercise began in June 2013. By August 2013, sufficient data had been captured on the NJDG for the Chief Justice of India to formally announce the launch of the NJDG. In September 2015, NJDG was opened up to the public.

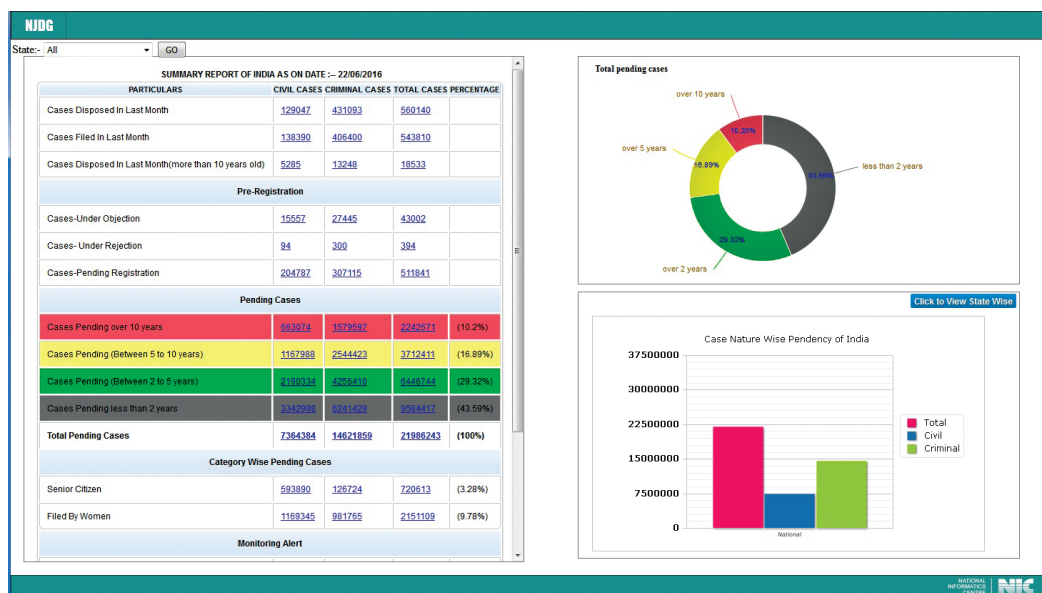
The e-courts portal is linked to the eTaal, which is a web portal for dissemination of e-transaction

statistics of central- and state-level e-governance projects including mission mode projects, and the portal has recorded 26.55 crore transactions so far since August 2013.<sup>12</sup> Thus, lakhs of stakeholders (citizens, litigants, lawyers, researchers, judicial officers, etc.) access the portal every month.

Through the NJDG portal anyone can access aggregate information on pending court cases in subordinate courts in India using the URL [http://164.100.78.168/njdg\\_public](http://164.100.78.168/njdg_public). The portal allows us to drill down from aggregation at the national level to the state, district and court levels and individual case data sheets. This is of immense use not only to the judiciary and the government for policymaking and measuring judicial performance, but also to universities, research institutes, and individual researchers to undertake any analysis relevant for bringing in more efficiency in court and case management.

Some screenshots to illustrate data available on the portal are given in Figures 2–5.

**FIGURE 2.** Home Page of NJDG with Details of Pending Cases



**FIGURE 3.** State-wise Disposal of Cases

**NJDG**

State:- All

STATE WISE REPORT OF INDIA AS ON DATE :- 22/06/2016

Show 10 entries Search:

Cases Disposed In Last Month(Over 10 Years)			
State	Civil	Criminal	Total
ANDAMAN AND NICOBAR	0	0	0
ANDHRA PRADESH	13	56	69
ASSAM	18	76	94
BIHAR	400	1841	2241
CHANDIGARH	2	1	3
CHHATTISGARH	78	223	301
DELHI	13	55	68
DIU AND DAMAN	0	0	0
DNH AT SILVASA	0	0	0
GOA	12	2	14
Cases Disposed In Last Month (Over 10 Years)	5285	13248	18533

Showing 1 to 10 of 32 entries

NATIONAL INFORMATICS CENTRE NIC

**FIGURE 4.** District-wise Disposal of Cases in Bihar

**NJDG**

State:- All

DISTRICT WISE REPORT OF BIHAR AS ON DATE :- 22/06/2016

Show 10 entries Search:

Cases Disposed In Last Month(Over 10 Years)			
District	Civil	Criminal	Total
ARARIA	69	256	325
AURANGABAD	16	82	98
BANKA	24	32	56
BEGUSARAI	18	163	181
BETTIAH	10	27	37
BHAGALPUR	1	4	5
BUXAR	9	36	45
DARBHANGA	4	40	44
GOPALGANJ	42	171	213
JAMUI	4	52	56
Cases Disposed In Last Month	400	1841	2241

Showing 1 to 10 of 31 entries

NATIONAL INFORMATICS CENTRE NIC

**FIGURE 5.** Court-wise Disposal of Cases

State: All GO

Back

ESTABLISHMENT WISE REPORT OF BEGUSARAI AS ON DATE :- 22/06/2016

Copy CSV Excel PDF

Show 10 entries Search:

Cases Disposed In Last Month(Over 10 Years)			
Establishment	Civil	Criminal	Total
Civil Judge Division	10	0	10
CJM Division	0	106	106
D J Division	6	52	58
Munsif Court Manjhaul	2	5	7
Total Cases Disposed In Last Month(Over 10 Years)	18	163	181

Showing 1 to 4 of 4 entries Previous Next

NATIONAL INFORMATICS CENTRE NIC

However, there are still challenges in getting a more disaggregated data set of details of pending of cases as well as differentiated case data based on the types of cases pending in courts. These challenges arise primarily due to the variety of ways in which cases are classified in various courts, the nomenclature given to different types of cases, the lacunae in the filling up of case data in courts and the fact that the e-Courts Project is attempting to coalesce disparate already functioning electronic databases into a single software application.

Let us examine the issue of case types first. In the High Court of Delhi, for example, there are 78 main category of cases, which are given a three- or four-digit numeric code, most of them having one to seven sub-categories with five- or six-digit numeric codes.<sup>13</sup> The High Court of Madras also has numeric coding of cases, but with 178 categories, further divided in sub-categories running into 88 pages, each main as well as sub-category having a seven-digit numeric code.<sup>14</sup> The High Court of Bombay, on the other hand, has 39 two-digit numeric case categories with numerous (about 400

categories of cases) two-digit numeric sub-categories running into 14 pages.<sup>15</sup> The High Court of Karnataka, has about 500 case types running into 17 pages in alpha or alphanumeric codes.<sup>16</sup> The district and subordinate courts generally follow the same listing and categorisation formula as the High Courts; some additional categories, which are relevant only for district and subordinate courts, are at times added and certain categories in the High Court list which are not relevant for them are deleted in district courts. Sometimes, specific case types are added in some of the district courts that may not exist in other districts under the jurisdiction of the same High Court.

The second challenge is that the case categories may have different nomenclature in different High Courts. Thus, a 'criminal miscellaneous appeal' may be called 'CrMA' in one court and 'MA(Cr)' in another. Similarly, one High Court may call a murder case a 'murder' case and another may call it an 'IPC Section 302' case. A case under Section 166 of the Motor Vehicles Act may be called 'MVOP' in Andhra Pradesh, or be called 'MACP' in Gujarat.



It is a challenge, firstly, to harmonise the case types across all High Courts and across different districts within the jurisdiction of each High Court, and secondly, to come up with a single list of types of cases for which data entry is undertaken. It is a further challenge to give a unique name to each case type so that there is no confusion in generating reports from the entered case data. While the latter challenge can be met by creating behaviour control tables integrating state-wise application behaviours, the former is a gargantuan task requiring convergence of case types across the country. Keeping in view the relevant legislations such as the civil and criminal procedure codes, and efficient case and court management requirements, the High Courts evolve procedures and practices for all stages of court proceedings. These procedures and practices include details regarding nature and type of cases, subject categories, etc. For harmonisation of nature of cases, a process reengineering exercise has been initiated in each High Court. Once that is completed, convergence of case types will be attempted in order to avail the benefits of information technology to disaggregate case data for different types of cases.

The third challenge relates to incomplete or inaccurate data entry. As of now, data entry of cases is undertaken after court hours every working day and uploaded through the court complex server to the NJDG. Often some of the fields are not filled up or not filled up with the clarity required to fetch data into useful information to generate reports. In CIS version NC 2.0, additional compulsory fields have been codified to partly address the problem. However, unless data entry is robust, the problem will remain.

Finally, it merits mention that e-courts as an outcome is functioning in some form or the other since late 1990s in many district courts where computers were provided by the state governments or the central government and software applications

were prepared mostly by different NIC development teams, as well as private vendors. The applications were diverse, with diverse forms of master data, transaction data, link and field labels, buttons, and messages. As stated earlier, these applications were also on diverse platforms. All of them had to be migrated to Linux/PHP/PostgreSQL platform with Graphic User Interface and a sustainable architecture. This was a daunting exercise, like trying to repair an automobile engine while the automobile is moving, with its engine running! The NC 2.0 version of the software is configured to express uniform nomenclature of cases through view control tables and behaviour control tables, thereby addressing this diversity.

Today, the NJDG has data entered in diverse forms with diverse nomenclature from which some reports can be generated by backend integration through ingenious programming. The NJDG can still however not provide reports of different case types. This is theoretically possible, but requires intensive process reengineering of all High Court Rules which contain procedures for case classification, registration, proceedings, and other functionalities of the courts requiring automation, and specific procedures developed in individual districts for generation of unique reports. In addition to the focus on facilitating automation of procedures in each High Court's Rules in order to leverage IT tools, process reengineering will also need to work towards harmonisation of rules across all High Courts. High Courts being independent constitutional authorities, this is a desirable but daunting task.

With the exception of cases involving general tortious liability, petitions filed in courts generally emanate from a statutory provision in a central or state enactment. The court establishments all over India are divided into civil judges and magistrates (and their senior and appellate posts). Hence, at the level of providing civil and criminal cases

separately, the harmonisation across the country has been achieved. For the rest of harmonisation across case types, results of the process reengineering exercise is awaited. The process reengineering exercise is currently underway in all High Courts under the aegis of the e-Committee of the Supreme Court of India.

## GLOBAL COMPARISONS AND EFFORTS TO MEET GLOBAL BENCHMARKS

The National Policy prepared by the e-Committee of the Supreme Court in 2005 did not refer to or use any international benchmarks on the use of technology in court administration. No international benchmarks have been used in the policy document prepared in 2014 by the e-Committee for Phase 2 either. Still, the project has resulted in computerisation of most district and subordinate courts in the country, making available case data and orders/judgments online, thus instilling transparency and facilitating easy access to case information by litigants and lawyers. It has also established the NJDG as a tool for the judiciary to analyse court performance and for the government to take steps to reduce pendency of cases.

Nevertheless, some aspects of the World Bank Ease of Doing Business Index<sup>17</sup> and the World Justice Project (WJP) Rule of Law Index<sup>18</sup> may be relevant for assessing India's justice delivery. Similarly, areas of organisational excellence for courts identified by the International Framework for Court Excellence (IFCE)<sup>19</sup> may be relevant in making such an assessment. India ranks 142 out of 189 countries on the World Bank Ease of Doing Business Index, which is based on 10 parameters, one of which is enforcing contracts. On enforcing contracts, India ranks 186 out of 189 countries. The ranking for enforcing contracts is based on three

indicators, namely, the time and cost of enforcing contracts and the number of procedures involved.

Singapore, Luxembourg, Iceland, South Korea, and Austria rank as the top five countries based on these criteria. Each of the top performing countries commenced computerisation of courts decades before India. Globally, one of the most common features of reforms in contract enforcement in the past year was the introduction of electronic filing. Greece, Kazakhstan, Lithuania, Mauritius, and Turkey all made their courts more efficient by implementing electronic filing platforms. These enable litigants to file initial complaints electronically—increasing transparency, expediting the filing and the service of process, limiting opportunities for corruption and preventing the loss, destruction or concealment of court records. In Singapore the judiciary launched an electronic litigation system designed to streamline the litigation process and improve access to justice. The system allows litigants to file their cases online—and it enables courts to keep litigants and lawyers informed about their cases through e-mail, text messages, and text alerts, to manage hearing dates, and even to hold certain hearings through video conference.

However, within a short span of time, India has reached almost the same level of computerisation as the top performing countries and benefits have started to accrue to the citizens now. Lawyers are now getting cause lists online and in some cases even through mobile applications. Lawyers and litigants are able to access case status and copies of judgments and orders from the district court websites as well as from the NJDG portal. The public can also access information on cases pending in each court in the country, along with the details of individual cases. This information is available in an aggregate form for all district and subordinate courts which have been linked to the NJDG (which is almost 90 per cent of the total functional courts in the country).

The indicators for enforcing contracts in the methodology for ranking by the World Bank relate to the efficiency of the commercial court system in the country without directly addressing the quality of the judiciary or the judicial infrastructure. As stated above, the enforcing contracts indicators measure the procedures, time, and cost to resolve a commercial dispute. However, the number of procedures involved in enforcing contracts would not be dependent upon court administration alone. Similarly, enforcement of a judgment given by a court and the cost thereof is not on account of court administration but enforcement agencies in the government. Hence, improvement of court administration may not by itself improve India's ranking unless the factors outside the control of court administration are also improved. The e-Courts Project, by ICT enablement and making available case data online and through the NJDG will create an enabling environment for the judiciary to improve court and case management and monitoring the performance of judges.

The World Bank has envisaged that additional parameters will be added while determining the ranking in its next report (2016). On enforcing contracts, the indicator set will be expanded to cover aspects of judicial quality and court infrastructure, focusing on well-established good practices that promote quality and efficiency in the commercial court system. One of the new indicators will measure court efficiency. This will record whether the initial complaint can be filed electronically, whether case management is available, whether electronic case management is available, whether there is a pre-trial conference as part of the case management system, and whether process can be served electronically. Two of these components will be available on the conclusion of Phase 2 of the e-Courts Project—electronic filing of cases and electronic process service. The e-Courts Project will also facilitate electronic case management

supplemented by changes in the court rules, as well as for pre-trial conferences as a part of the case management system. Thus, efforts made under the e-Courts Project, supplemented by policy, legislative and judicial administration measures should improve India's ranking based on this indicator also.

Further, it is pertinent to mention that in order to holistically look at improving court administration in general and the stakeholders involved in achieving it, a comparative study of best practices in court administration globally may be required. There appears to be no such study at the global level at present. The World Justice Project prepares a report<sup>20</sup> on the state of Rule of Law in 102 countries, which includes dispensation of justice as one of the four principles of Rule of Law. India ranks 59 overall. Civil and Criminal Justice are two of the eight factors of the WJP Rule of Law Index. India is ranked 88 on Civil Justice and 42 on Criminal Justice.

Finally, the IFCE<sup>21</sup> has developed guidelines for achieving court excellence. While it does not undertake any ranking exercise, it has a holistic strategy for court excellence. It has evolved seven areas of court excellence: leadership, customers, strategy, people, processes, knowledge, and results. The purpose of IFCE is, using the seven areas of court excellence, to provide for a path for improvement in the quality of the court and represents a methodology for continuous improvement. These are aligned with the objectives of Vision 2009<sup>22</sup> of the Indian justice system as well as the various initiatives mentioned above; IFCE can help evolve a framework to implement this Vision. Further, a court excellence self assessment questionnaire is used by IFCE to identify what areas of court excellence must be addressed in the short term and in the long term, developing a roadmap from 'what is' to 'what can be'. These IFCE modules can be studied and it can be examined whether India should



join IFCE to benefit from their research and best practices.

## THE WAY FORWARD

ICT in courts can enable measuring and improving court performance if used effectively by the stakeholders, particularly judges and court staff. Once deployed, it can make delivery of citizen-centric delivery of services possible through electronic means. Notwithstanding challenges to the deployment of ICT, the government of India has computerised most of the district and subordinate courts in the country. Not only that, it has developed and deployed a unified software application across all these courts, so that case data from these courts can be seamlessly shared in an aggregate form. Further disaggregation of data based on case types and universal computerisation of courts and bringing them on the NJDG is an ongoing effort of the government. In the meanwhile, the NJDG is functional, with data of more than 5.5 crore decided and pending cases and almost 2 crore judgments available to the general public online. This data is available to the judiciary and government for improving case and court management as well as policy purposes. Having started the e-Courts Project in 2007, this is no mean achievement of India, even when compared with similar initiatives elsewhere in the world.

Technology changes rapidly these days. Applications being used currently need to be constantly evolved in the light of new innovations. Further, there is a need to take a holistic look at the issue of court excellence. The government, therefore, cannot sit on its laurels; it needs to continue the efforts to further enhance ICT enablement of courts in the future in collaboration with the judiciary.

## Notes

1. He was writing about the British legal system, but is often quoted by Indian judges. See, for example, the Report of the First National Judicial Commission, Vol. 1, November 1999, p. *iii*; and 117th Report of the Law Commission of India on Training of Judicial Officers, November 1986, p. 2.
2. Ken Miller. 2010. *We Don't Make Widgets: Overcoming the Myths that Keep Governments from Radically Improving*. Washington, DC: Governing Books.
3. The report is available online at <http://lawcommission-ofindia.nic.in/reports/report230.pdf> (accessed on 2 November 2015).
4. Available online at [http://doj.gov.in/sites/default/files/Vision-Statement\\_0.pdf](http://doj.gov.in/sites/default/files/Vision-Statement_0.pdf) (accessed on 12 May 2016).
5. Vision Statement, pp. 25–28.
6. Available online at <http://doj.gov.in/national-mission/national-mission-justice-delivery-and-legal-reform> (accessed on 12 May 2016).
7. The NCMS Policy and Action Plan Document is available online at <http://supremecourtindia.nic.in/ncms27092012.pdf> (accessed on 2 November 2015).
8. The Policy Document is available online at [http://supremecourtindia.nic.in/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed\\_Sign.pdf](http://supremecourtindia.nic.in/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf) (accessed on 10 December 2015).
9. Details available online at [nkn.in](http://nkn.in) (accessed on 22 January 2016).
10. Details available online at <http://deity.gov.in/content/state-wide-area-network-swan> (accessed on 22 January 2016).
11. See, <http://www.koha.org/> for background of this library system software.
12. Available online at <http://etaal.gov.in/etaal/CentralChart.aspx> (accessed on 19 January 2016).
13. Codification available online at <http://delhihighcourt.nic.in/casecategorization.asp> (accessed on 10 December 2015).
14. See, listed as Subject Categories, available online at <http://www.hcmadras.tn.nic.in/codelist.pdf> (accessed on 10 December 2015).
15. This subject categorisation is only for the main cases, and is listed on the High Court website as Subject Categories, available online at <http://bombayhighcourt.nic.in/latest/PDF/ltupdtbom20120111110606.pdf> (accessed on 10 December 2015).

16. List of case types is available online at <http://karnataka-judiciary.kar.nic.in/noticeBoard/casetypes.pdf> (accessed on 10 December 2015).
17. The report is available online at <https://openknowledge.worldbank.org/bitstream/handle/10986/20483/DB15-Full-Report.pdf?sequence=1> (accessed on 15 December 2015).
18. The WJP Report is available online at <http://world-justiceproject.org/rule-of-law-index> (accessed on 15 December 2015).
19. Available online at <http://www.courtexcellence.com/> (accessed on 16 December 2015).
20. Available online at [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf) (accessed on 16 December 2015).
21. Available online at <http://www.courtexcellence.com/> (accessed on 16 December 2015).
22. Available online at [http://doj.gov.in/sites/default/files/Vision-Statement\\_0.pdf](http://doj.gov.in/sites/default/files/Vision-Statement_0.pdf) (accessed on 12 May 2016).

# Reaping the Benefits of the e-Courts System

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*Kishore Mandyam*

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Beginning as early as 1997, when the first 430 courts were computerised in India, we now have nearly 15,000 courts in India using computers for tracking cases and hearings. This data is made available on a public website ([ecourts.gov.in](http://ecourts.gov.in)), so litigants can see details of what happened in the last hearing and when the next step in the process will happen. As systems go, this is possibly one of the largest justice systems to be deployed anywhere in the world. The British court system (on which the Indian system is rumoured to be modelled) has a little over 1,000 courts; we have nearly 16,500. American courts have less than 4,00,000 cases pending and add/dispose less than 3,00,000 cases a year. In India, we probably have over three crore cases pending; we add about 80 lakh cases and dispose of a little over 80 lakh cases every year. Just on a daily basis, the Indian court system generates about 15 lakh hearing-related records every work day, a huge number by any standard.

The e-courts mechanism is particularly well-structured for the litigant—s/he can see exactly what happened in a given hearing and when the next hearing is scheduled. And lawyers can use this information, too, for similar operational tracking. Further, with the National Judicial Data Grid summaries, people can see general statistics about how courts are doing—how many cases are being added every day or month, how many are being disposed and so on. So the system very clearly is of great value to the immediate participants that need data.

So what's the problem here? The problem is not in the e-courts system itself, it is its inability—for now—to address the big picture. Over the last 66 years of having our own judicial system, Indian courts have consistently fallen behind on disposing cases in line with new cases being added. We now have about three crore cases pending across

the country, adding even more as the economy and access to justice improve. At best, courts dispose about 25 per cent of pending cases every year and add nearly as many as that. That means about 2.2 crore cases that are not making any real progress every year. The rate of litigants filing new cases cannot be artificially stifled, either—the fact that the system is clogged cannot come in the way of someone's right to justice. Obviously, there's no way the court system can catch up—in fact, pendency will probably get worse over the near term. So what's the solution?

A number of solutions have been discussed in recent times. Here are some of them:

1. Offloading minor operational tasks from judges to trained court personnel, so that the judge can focus on cases whose records are complete and can be disposed of quickly.
2. Pre-screening cases so only those that have litigants and representatives in place will actually appear in front of judges.
3. Creating alternate dispute resolution mechanisms, particularly for commercial disputes, so the overall caseload reduces.
4. Identifying specific stages in some types of cases that could be streamlined (or done away with), so overall court time is maximised.
5. Increasing the number of judges and filling vacant benches, so the system can run closer to planned capacity.

Designed correctly, each of these—and other—ideas can help reduce pendency. Some may make a big difference and even obviate the need for systemic changes. The challenge is to figure out which ones may work and which ones may not. In a system that is adding nearly 40,000 cases per day on average, even minor changes need analysis,

design, piloting, tracking, and then scaling. And, during the implementation of such changes, all parties concerned must be able to see details of the change as it affects litigants: a registrar, for example, should be able to track the cases that s/he can review before placing them before the judge. With the data that the e-courts system already collects, this is all possible in the short term.

The data that the e-courts system has is rich and large but hugely distributed. Possibly because the system has been deployed over so many years, its data sits not in one or a few databases but in 4,000 different databases. There is currently no way, for example, for a non-technical person to compare the pendency of one court with that of another. The way the e-courts system has been implemented, it needs strong programming skills to extract any analyses other than the ones already available. Even small comparisons among courts need an understanding of the underlying database structures, their technical connections, their differences, esoteric structured query language (SQL), and finally, a supported programming language. Instead, by bringing all this data together under one large store that has analysis tools built in, all kinds of analyses suddenly become possible, by people who are not programmers but are knowledgeable about the justice system.

In general, data by itself is useless. To recognise the 'data' that 36°C is the measure of temperature is pointless—knowing that it is that hot outside may mean that I decide to skip an outdoor lunch engagement—that is the power of 'information'. With a common data store, the e-courts data can be interpreted and put in context in various ways, turning it into information that can then help all kinds of decisions. For example:

1. An analysis of, say, the cases in Madhya Pradesh may throw up a pattern of specific order types that could very well be decided by

a trained non-judicial official in the Registry. Even if that amounts to 10 per cent of the cases that are heard every day, it is 10 per cent of the cases that a judge need not have to deal with, freeing him/her up for other judicial decisions.

2. An analysis of the reasons for deferral of cases may throw up a pattern of plaintiffs and respondents routinely delaying appearing in front of the judge. Other officers could then be trained to handle such situations, where only cases with 'complete' records will actually get the judge's attention.
3. There may be certain types of commercial cases that take an unnecessarily large number of hearings relating to the commercial value of the cases themselves. It may be possible to move them to external arbitrators, leaving judges to focus on other matters.

As more of the data becomes available in easily accessible dashboards and charts, judges, and other court officers can make informed decisions on a daily basis—decisions that directly reduce pendency.

From a purely technical standpoint, the e-courts system may benefit from these enhancements, apart from tools for analytics:

1. A single physical database that has all the cases across the country in one, easily accessible store. The typical arguments against this model—too much data, multiple data models, having to collate data from multiple courts into a single numbering system, etc.—are all technical issues that have been solved in much larger contexts already. For example, cloud systems routinely deal with millions of records every hour, all packed into shared databases using auto-generated GUIDs.<sup>1</sup>

2. Better controls on the inflow of data from the court systems. For example, the Andhra Pradesh courts routinely seem to submit data for cases from the 12th century, since local court systems seem to take pretty much any date keyed in. Automated data checks in the inflow process for realistic data can improve the quality of data and identify upstream problems easily.
3. A user interface that lends itself to mobile use. Consumers routinely access systems like e-courts on their phones, but the current e-courts system renders very badly on devices.
4. A navigation model that is more intuitive for the litigant. For example, a case number search right from the main page, so people do not have to click through five pages and several combinations before getting to their cases.
5. A more GET-oriented set of pages.<sup>2</sup> The e-courts site relies heavily on the HTTP POST protocol, even for what should obviously be just GET requests for data. While programmers may justify the POST because it updates (we assume) logs in some manner, simple GET requests perform better and lend themselves to all kinds of automation in the future.
6. An API<sup>3</sup> model that outside agencies can use, for various purposes. Given the wealth of data that e-courts has, opening it up for other agencies—government and otherwise—via programmatic interfaces will engender a huge amount of collaboration, analysis, and general improvement in court systems.

The e-courts system is collecting a treasure trove of data right now. It is ideally suited to become the basis of tremendous progress in reducing pendency,

as also overall improvements in the justice delivery system. It can also be the basis for all kinds of support programmes, where judges can help their officers and juniors to be tremendously effective very quickly. We only need to move from 'data' to 'information'!

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### **Notes**

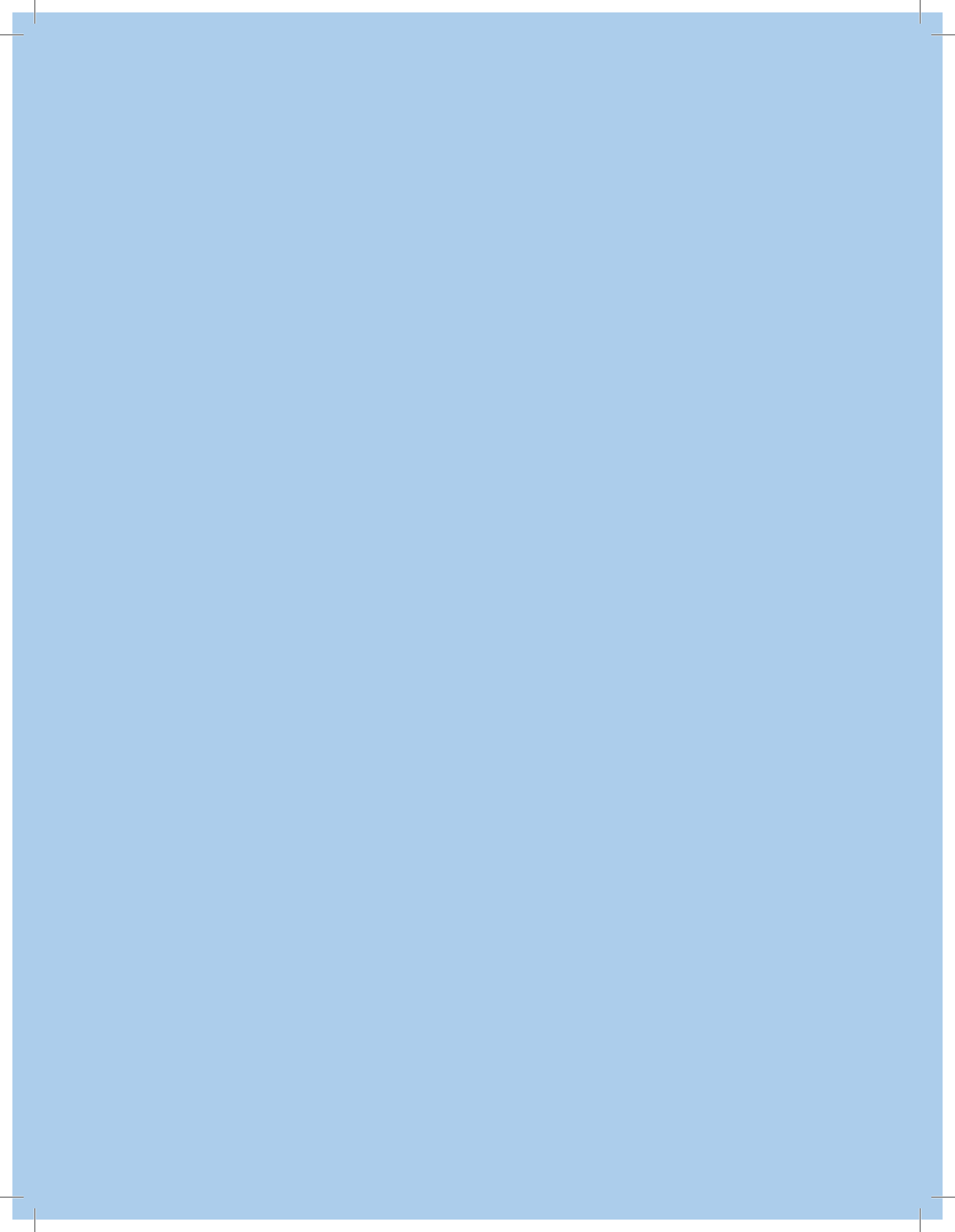
1. GUID stands for 'globally unique identifier', a randomly generated sequence of numbers and digits that, on their own, signify nothing but can be used to uniquely

identify a case or a hearing or some such element. Contrast this with 'human-readable' identifiers such as a 'case number', where the first few characters identify the 'case type', the next four the year of filing, and the last digits a sequence number within the case type. Such identifiers become troublesome when the ambit of their use expands; for example, if you were to put cases from multiple courts into the same file, then you would need to add a 'court name' to the human-readable case number, since the same case number appears in multiple courts signifying different cases. With a system-generated GUID, no such overlap occurs.

2. GET and POST are technical methods by which Internet browsers (and other systems) communicate with websites. Typically, GETs are used to get data from a website and POSTs are used to change data in a website.
3. API stands for 'application programming interface', a way for computers to talk to each other.

SECTION TWO

ADMINISTERING THE  
JUDICIAL SYSTEM





# A Case of Self-Selection: Judicial Accountability and Appointment of Judges

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Raju Ramachandran

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In October 2015, the Supreme Court of India delivered one of its most significant judgments. By a 4:1 majority, it struck down the Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 (NJAC Act), which sought to replace the existing 'collegium' system of appointments to the higher judiciary with a new one.<sup>1</sup> For more than two decades, judges of India's Supreme Court and High Courts have been appointed through the collegium system, which is in essence one of self-selection. That is, judges are appointed by a group of other judges from within the system. The NJAC Act proposed the establishment of the National Judicial Appointments Commission (NJAC), consisting of members of the judiciary, executive, and civil society, to replace the collegium system.

The Constitution of India does not mention the collegium system. It was created by and evolved through three Supreme Court judgments, which are collectively known as the 'Judges Cases'. In *S.P. Gupta v. Union of India*,<sup>2</sup> the first of them, the Supreme Court held by a majority that the opinion of the Chief Justice of India in appointing judges to the High Courts need not be given primacy. The Court also held unanimously that President of India was not bound by the advice of the Chief Justice of India, and that 'consultation' did not mean 'concurrence'.<sup>3</sup> This judgment tilted the balance in the appointment process towards the executive. The judgment in the *First Judges case* was reconsidered by a larger bench in *Supreme Court Advocates-on-Record Association v. Union of India*,<sup>4</sup> which prescribed a new procedure for appointing judges to the Supreme Court and High Courts. The Supreme Court overturned the *First Judges case* and held that the opinion of the Chief Justice of India was binding on the President of India and 'consultation' did amount to 'concurrence'.<sup>5</sup>

Finally, in *Special Reference No. 1 of 1998, re*,<sup>6</sup> the Supreme Court of India re-interpreted its judgment in the *Second Judges case* by clarifying who should (and not) be part of the 'collegium' and the question of 'primacy' of the Chief Justice's opinion in case of disagreement with other collegium members. Through its decisions in the *Second* and *Third Judges cases*, the judiciary wrested control over judicial appointments from the executive.

On 16 October 2015, the Supreme Court pronounced as unconstitutional both the constitutional amendment that introduced the NJAC, and the NJAC Act, which prescribed its features and working, thus asserting judicial primacy in the matter of judicial appointments. It was in the wake of this development that Raju Ramachandran delivered DAKSH's Fourth Annual Constitution Day Lecture at the Indian Institute for Human Settlements (IIHS) Auditorium, Bengaluru on Saturday, 28 November 2015, on the topic of 'Judicial Independence and the Appointment of Judges'. Calling the *NJAC judgment* the most noteworthy feature of the year gone by (2015), he argued that it is completely contrary to the system of checks and balances which is inbuilt in the Constitution. Nonetheless, he opined, there is a silver lining: in wrongly asserting judicial primacy to be part of the independence of the judiciary, the court showed great independence against a powerful executive with a good majority in Parliament.

A transcript of Mr Ramachandran's lecture follows.

In 1951, one year after we the people gave ourselves this Constitution, Jawaharlal Nehru said, 'This magnificent Constitution that we have framed has been kidnapped and purloined by lawyers.' When he said lawyers, he meant lawyers and judges. He meant the robed fraternity. Many kidnappings have happened since then. However, the most egregious kidnapping in recent times happened on 16 October this year when the Supreme Court struck down the

Constitution's 99th amendment and the NJAC Act, which tried to bring in a new constitutional regime governing the appointment of judges.

Now, let us start with some basics. We the people have given ourselves this Constitution which embodies the rule of law. If judges have been given the power by our Constitution to strike down the laws of Parliament which violate fundamental rights, in essence, the Constitution has given the judges a political role. The role of the higher judiciary, let us all be clear, is a political role and therefore, if we the people have given such vast powers to the judges, do we the people have the right to participate in the process of appointment of judges, or should judges self-select? Arun Jaitley used a really apt expression, 'a gymkhana club', to describe a situation where members decide who the new members are going to be. Now this question, therefore, needs to be viewed as one which concerns the whole culture of constitutionalism in our country, not as a partisan battle between the executive and legislature on one hand and the Judiciary on the other.

Let us clearly understand one more judiciary-evolved concept—the basic structure theory. Till the *Golaknath case*<sup>7</sup> in 1967, it was accepted that the Parliament's power to amend the Constitution was untrammelled. It was 17 years after the Constitution came into force, in *Golaknath*, that the Supreme Court by a majority said that Parliament's power to amend the Constitution cannot touch the fundamental rights, and then, later again by a definite majority, the largest-ever bench of the Supreme Court held that the power of Parliament to amend the Constitution does not extend to abrogate the basic structure of the Constitution.<sup>8</sup>

I am a known critic of the basic structure doctrine on conceptual grounds. But that is irrelevant for the purpose of today's talk and discussion. We will proceed on the basis, as we have to, that the basic structure theory is the law of the land. The basic structure is not defined in the Constitution itself, it is spelt out by judges on a case-by-case basis. Interestingly, in *Kesavananda Bharati*, which first propounded this theory, though different judges set out illustrative

examples of what might constitute the basic structure, not one judge says independence of the judiciary is a part of the basic structure. Justice Khanna says ‘possibly’ judicial review, but independence of the judiciary was not set out in illustrations given by the judges themselves as being part of the basic structure. Nonetheless, that doesn’t matter. If there is a basic structure theory, I do not think there can be any quarrel with the proposition that independence of the judiciary is part of the basic structure of the Constitution. As is democracy, as is separation of powers, as is a system of checks and balances. However, the problem arises when, while analysing the basic structure, you forget the architecture, you forget the design, and you come down to individual bricks.

Let me just develop this a little: when you talk of a structure, four professions are involved—architecture, civil and structural engineering, masonry, and bricklaying. Now, when an amendment to the Constitution is struck down, what are the considerations? Are you going to look at how the overall architecture is damaged? How the structure of the Constitution, as a whole, is damaged? Or are you going to look at the colour and the quality of individual bricks and say that even if one brick is replaced by another, the entire basic structure is automatically violated? That is the central problem with this judgment, which we will come to as we get into more details.

Normally when we talk of basic structure we think of the original Constitution. Though, conceivably you can say that when significant additions are made, in due course those additions themselves may become basic. However, when we are talking of the basic structure theory, in the context of our relatively young Constitution, we are talking of the original Constitution.

Now, what was ‘basic’ in the matter of judicial appointments as far as the original Constitution was concerned? That the President, which means the executive, did not have the untrammelled right to appoint judges to the superior judiciary, unlike the case with many constitutions around the world,

where the executive has the absolute right to appoint judges, and remember, such constitutions are constitutions of countries which boast of judiciaries no less independent than ours. The choice was made that the President will not have this untrammelled right and that he would make appointments in consultation with the Chief Justice of India and such other judges of the Supreme Court whom he might find fit to consult. Now, in the *First Judges case*, 1981, the Supreme Court accepted the position that what Article 124 of the Constitution envisaged was *consultation*. Consultation of course means due regard, deference, but, consultation did not mean concurrence. But, the *Second Judges case*, in 1993, reversed this position, and, in my view, rewrote the Constitution to hold that in effect, consultation meant concurrence. The Supreme Court advanced an interesting theory to justify this. The Court viewed it from the point of view of competence to select. Who, which, is the best institution to select judges? It is the judiciary, because lawyers are made judges. Courts are the arena of their performance and therefore, judges are best equipped to assess the suitability of candidates for judgeship and so there is really no question of primacy as such. Now that judgment, as I said, was an egregious rewriting of the Constitution. By no process of reasoning could consultation be understood as anything other than consultation. However, the political class did not stand up and did not assert itself at that time.

The surrender of the political class to judicial supremacy was evident from 1973, after *Kesavananda Bharati*. Earlier when the first inroad was made in the *Golaknath* case, there was at least one strong champion of parliamentary rights, socialist MP, Nath Pai, who made it his life’s mission to get the judgment of the Supreme Court in *Golaknath* overruled by the constitutional process. However, that was not to be. This surrender of the political class, which began post *Kesavananda Bharati*, continued thereafter. The imposition of the Emergency soon after cemented the belief that the only thing that stood between dictatorship and the people was the Supreme Court and the basic structure theory. Therefore, even in 1993, while the Supreme Court created a constitutional

institution called the collegium and defined its composition, there was no political consensus to oppose it. In 1998 again, when the collegium was redefined to make it a larger body, and the memorandum of procedure was drafted, which essentially relegated the role of the executive to that of a security agency, the political class didn't take any action. However, the experience of the collegium system over the years ultimately led to this rare unanimity in the political class, which led to this major amendment being passed nearly unanimously.

To briefly recapitulate what the features were:

The National Judicial Appointments Commission would have the Chief Justice of India and two senior most judges as ex-officio members. The executive was represented by a lone member—the law minister. A very refreshing innovation—representatives of civil society—was brought in by prescribing that there would be two eminent members, one of whom would be from among either SCs/STs/OBCs/minorities or women. An innovation in the interest of diversity. It also provided that the working and the procedure would be prescribed by the Act and the regulations under the Act. The Act provided that if any two members in the six-member body had reservations about a recommendation, that recommendation would not go through, which was considered a veto, but it was really a special majority (that you needed a majority of four out of six). In any case, the provision of veto was a provision of the Act, not the constitutional amendment. Despite that, the constitutional amendment itself has been struck down on the ground of there being a veto. It was held that the Act and the amendment are part of a package deal and therefore, both must go.

Now, what is the basis of the judgment of the majority? There are four judgments and therefore, it is confusing, but let us try to cull it out as lawyers. The essential logic seemed to be that independence of judiciary is part of the basic structure, and the process of appointment of judges is a necessary part of the independence of judiciary, and therefore primacy of the judiciary is a necessary part of the process of appointment, which is how the independence

of the judiciary is maintained. By taking away this primacy, the constitutional amendment violates the basic structure, and the amendment is bad, the Act is bad, period.

Now let's come back to the four professions which I referred to. Primacy is not part of the architecture. It is supposedly a part of a wall and primacy is gone because the judges are three out of six, just because they do not have the majority to overrule the decision of civil society and the executive. Now, therefore, we are coming to bricks and we do not confine ourselves to the structure, contrary to the Supreme Court's earlier view in dealing with challenges to other constitutional amendments. So there is a relaxation of standards here, because there are very few instances, four or five, where the Court has struck down constitutional amendments, wherein the Court has held that it has to be some overarching principle which is violated before we can strike down the constitutional amendment on the ground of violation of basic structure. But, when it came to the Court's own perception of judicial independence, it said goodbye to that test.

Let us assume for the sake of our argument that yes, primacy is part of the basic structure. What does primacy mean? When the amendment gave an institutional majority to the judiciary, that is three out of six, and deliberately opted for giving institutional minority to the executive—one and institutional minority to civil society—two, weren't the requirements of primacy met? If you have institutional majority, wasn't the requirement of primacy met? Apparently not, in the view of the Supreme Court, because primacy must mean *their* overwhelming majority, *their* veto. This, I submit, is a deeply flawed view and a self-serving view.

Now, let me come to the next point. Why is it that outside participation is necessary in the process of judicial appointments to a judiciary which enjoys such vast political power? The first reason is based on the doctrine of checks and balances itself, which is also part of the basic structure. If the judiciary can strike down laws of Parliament passed by elected representatives of the people, surely there ought to be

evidence of democratic participation in the appointment of those judges in whom such vast power is vested. Vested by whom? By the people who have created this Constitution, who have created these courts. So the checks and balances theory requires that there must be an element of democratic participation in the process of judicial appointments.

Secondly, independence of judiciary is very narrowly viewed by this judgment and by our robed fraternity generally, as independence from executive interference. Now, independence from executive interference is only one aspect of independence of the judiciary. Independence of the judiciary also means judges must be independent of corporate houses, of business lobbies, of lawyers, of law firms, and most important, judges need to be independent of themselves. Independence from themselves means independence from their own prejudices and proclivities, independence from caste and religious considerations because after all, judges are all from the same society, independence from the career interests of their own kith and kin. Who is to interrogate judges on these aspects unless there is outside participation? Then comes the question of the social philosophy of judges, which is something essential in a constitutional court.

Now, I think a large number in this audience would've been shocked at the judgment of the Supreme Court in the 377 case.<sup>9</sup> Why did that happen? Because there was no one to interrogate prospective Supreme Court judges on their social philosophies. So let us not get scared by this expression 'social philosophy'. Those of us who grew up, who came of age, in the 1970s and were taught that 'social philosophy' is a dangerous concept because, when Mrs Gandhi wanted to supersede judges who did not see eye to eye with her in her socialistic reforms, one of Mrs Gandhi's ministers, the late Mohan Kumaramangalam, articulated the reason for this with great candour and honesty, by stating that the social philosophy of judges is important. And we thought that was something problematic because social philosophy meant that courts were going to be packed with judges who are convenient

to the executive. But, social philosophy as we see now means much more and therefore, judges need to be interrogated on their philosophies, and this can only be done with outside participation.

The last important reason for outside participation is that judges, when they self-select, act in mutually beneficial ways, and that's why you have had this completely ridiculous spectacle over the years of Chief Justices of India who have held office for 17 days, 30 days, three months. Chief Justices have been sworn in in High Courts for even one day and two days so that they could get the Chief Justice's salary for the purpose of their pension. On the one hand, you would say that the CBI director must have two years, the home secretary must have two years, foreign secretary must have two years, but, the Chief Justice of India, and Chief Justices of High Court do not have to have a minimum period. The point I'm driving at is that the concept of manpower planning in the interest of effective functioning of an institution is completely alien to the minds of judges when they sit and self-select.

There is another interesting concept which I read about in the context of rise in hierarchies in the field of business management. The concept of 'homo-social cloning' or 'homo-social reproduction'. This has been studied in the context of gender discrimination, and women and minorities not rising up the ranks in an organisation. When a homogenous body self-selects, it subconsciously selects people in the same mould, 'people like us' or 'PLU'. Why does a judge like a particular young lawyer who is appearing before him? Because, when he sees him, he sees himself in his own young days. It is that kind of a lawyer who makes an impression on him. This is a fact of human nature and therefore, as a check on homo-social cloning also, the importance of the outsider cannot be forgotten.

Now to this judgment, and I will just give a brief analysis for the benefit of lawyers and law students present in the audience, and then come to my concluding point.



This is for lawyers now—for the future of the basic structure theory, this judgment opens up frightening possibilities. One is this concept of derived basic structure, the brickwork of the basic structure. Second, in prioritising between different pillars of the basic structure, if you have to choose between different pillars of the basic structure, then the independence of the judiciary is the most important. And, the third is that, in matters involving the judiciary itself, there is going to be a significant lowering of the threshold as far as applying the basic structure theory is concerned. Now you can forget all about overarching principles. Anything which the judges feel merely affects the independence of the judiciary can be brought in within the basic structure concept. So that is for the lawyers and the legal academics here to ponder over.

Now, to civil society, I would want to highlight the fact that this judgment shows a certain condescension and a certain contempt for civil society. One judgment says, and I read and re-read the line to see if there was some typo in that line, whether something was missed, but no, it is there: that at the present juncture civil society is ‘not evolved enough’ in our country to make any kind of meaningful contribution. Another judge says in his judgment that it is quite possible that both the civil society and the law minister can be influenced by extraneous considerations. There is a deep distrust of the political class, which is bad for the Constitution. The political class ultimately is a class which is answerable to the people, which is elected and which gets thrown out, unlike those learned people, who once appointed to the Bench cannot be removed except by special majority of Parliament. If Article 124 of the Constitution is amended to provide that judges can now be impeached by a simple majority and special majority, the Court will probably strike it down. But, here, in the context of judicial appointments that special majority is said to be bad. Now, civil society in my view can be the ultimate saviour in situations where judges and lawyers and the law minister ‘gang up’ although, I wonder why this judgment is only thinking of others ganging up against judges? Why is it presumed that the three judges

will think alike? This is not necessarily so, this is not the experience of the collegium also. On the other hand, the law minister is often a very eminent lawyer. It is important to remember this because, during arguments in this case, people only thought of one particular crafty politician who was the law minister, but, there are renowned lawyers who are also law ministers and who are part of the same cosy club as the judges. That an eminent senior advocate who is law minister today will soon demit office during the change in government and he will be addressing these judges in court is in fact the general norm. So, the law minister can also have some self-interest. This judgment doesn’t contemplate such a situation at all and perhaps doesn’t want to contemplate such a situation where three judges and one eminent lawyer ‘gang up’ together to promote a person like them, and civil society cannot veto this. There was some political unanimity earlier, after all this bill took concrete shape during the tenure of the previous Government and I, myself remember being invited to some consultations. It was only carried forward by the next government, maybe with a change here or there. It was passed with unanimity. But today the political situation has changed, I see little hope now for Parliament to reassert itself in the foreseeable future. I think we are back to where we were and I think this unhappy situation is going to be with us at least for another 10 years, if not 20 years.

But, the debate must go on. The Constitution is not the property of lawyers and judges alone. It belongs to everyone and if it does, this judgment ought not to stand.

Mr Ramachandran concluded his lecture by answering a few questions from the audience. Over the course of discussion, a number of interesting points came to light. Notable among these were when he termed Justice Chelemeshwar’s dissent in the *NJAC case* as the most significant dissent that the Supreme Court has seen since that of Justice Khanna’s in *ADM, Jabalpur v. Shivakant Shukla*.<sup>10</sup> He also clarified that while the judiciary remains the bulwark that protects the citizens from tyranny

of the majority, this does not mean that the selection of the judiciary should exclude civil society and the political class.

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### Notes

1. *Supreme Court Advocates-on-Record Assn. v. Union of India*, 2015 SCC OnLine SC 1322 (NJAC case).
2. 1981 Supp SCC 87 (*First Judges case*).
3. The *First Judges case* did not involve appointment of judges to the Supreme Court of India.
4. (1993) 4 SCC 441 (*Second Judges case*).
5. It was clarified that the President would not be bound by the Chief Justice's opinion if there was a disagreement between him and the Chief Justice of a High Court over the appointment of a High Court judge, or other senior Supreme Court judges over appointments to the Supreme Court.
6. (1998) 7 SCC 739 (*Third Judges case*).
7. *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (*Golaknath*).
8. *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (*Kesavananda Bharati*).
9. *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.
10. (1976) 2 SCC 521.





# Accountability in Judicial Administration

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*Arun Sri Kumar*

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In recent months, the public discourse concerning judicial reforms in this country has focused—entirely disproportionately—on the controversy surrounding who gets to appoint judges to the highest courts in the land. This is not surprising: for nearly 20 years, our political class—across the spectrum—has been fairly unanimous in its view that an unpardonable slight was inflicted on it by the Supreme Court in the *Second* and *Third Judges cases*,<sup>1</sup> when primacy in the process of selecting judges to the High Courts and the Supreme Court was arrogated by the Supreme Court unto itself. With the enactment of the Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 (NJAC Act) in Parliament—and their subsequent invalidation by the Supreme Court<sup>2</sup>—the debate surrounding the merits and workings of the ‘collegium system of appointments’ has only continued to dominate the headlines, and nearly all the other issues confronting the judicial administration apparatus in the country have thus, unfortunately, taken a back seat.

The administrative challenges confronting the Indian judiciary today are by no means trivial. The total number of established courts in the country is wholly inadequate, as evidenced by the abysmal judge-to-population ratio in India (when contrasted with any reasonable international benchmark).<sup>3</sup> With recruitments to vacancies in the lower judiciary taking place across the country at a snail’s pace,<sup>4</sup> and the process often spilling over several years (as it is invariably mired in litigation),<sup>5</sup> there is also a significant shortage in the number of support staff available across various courts to assist the judges. Not to mention, computerisation efforts are woefully slow, record-keeping practices are still archaic, physical infrastructure is inadequate in several districts,<sup>6</sup> on-the-job training for judges on emerging legal subjects is insufficient,<sup>7</sup> and legal aid cells are

barely functional and unable to render speedy and effective assistance to litigants. And, most significantly, the overarching issue of insufficiency of funds to tackle these various pressing needs has never been addressed in any meaningful way.

This large web of administrative challenges facing the judiciary has manifested itself, most alarmingly, in the shape of the ‘pendency’ crisis, which—as noted elsewhere in this Report—seriously questions the credibility of the Indian state to fashion a society founded on the ideals of justice and the rule of law as envisaged in the Constitution. The Ministry of Law and Justice has reported that, as of December 2014, approximately 2.64 crore cases were pending before the subordinate civil and criminal courts across the country, and a further 41.5 lakh cases were pending before the High Courts, bringing the total to approximately 3.06 crore cases.<sup>8</sup> In the absence of a clear understanding as to who is accountable to the citizen for this state of affairs, meaningful measures to address the problem cannot be taken.

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## WHO IS RESPONSIBLE FOR JUDICIAL ADMINISTRATION? LEARNINGS FROM THE CONSTITUTIONAL SCHEME

At the outset, it may be noted that the power to make laws (and to exercise corollary executive authority) in relation to the subjects of ‘administration of justice’ and ‘constitution and organisation of all courts, except the Supreme Court and High Courts’ is traceable to Entry 11-A in List III of the Seventh Schedule to the Constitution (that is, the Concurrent List). In other words, this power is shared between the union and the states; whilst the states are free to make laws on the subject, those laws will be void to the extent of any repugnancy

with a central law (except where special assent of the President, in the manner contemplated by the Constitution, has been obtained by the state in question).<sup>9</sup> Where the Supreme Court and the High Courts are concerned, the legislative (and executive) power relating to the constitution and organisation of such courts is vested exclusively with the union, in terms of Entries 77 and 78 in List I; however, insofar as the subject of ‘officers and servants of the High Court’ are concerned, it is within the exclusive realm of the states (in terms of Entry 3 in List II of the Seventh Schedule). The onus of undertaking a periodic review of the strength of each High Court lies formally with the President, under Article 216 of the Constitution; however, it has since been clarified by the Supreme Court that this power must be exercised by the *Chief Justice of India* and the *Chief Justice of the High Court* concerned, with regular periodicity, in the interests of ensuring the effective administration of justice—and it is they who must make recommendations to the President.<sup>10</sup>

The ‘vertical’ distribution of power as between the union and the states in matters concerning the judiciary, as set out above, is complemented by a further ‘horizontal’ division of power, as between the executive and the judicial wings of government—and especially at the state level (that is, in relation to the subordinate judiciary). In this context, reference may specifically be made to Chapter VI of Part VI of the Constitution. While Article 233(1) contemplates that the appointments, postings, and promotions of District Judges shall be made by the Governor, in ‘consultation’ with the concerned High Court, it is now settled law that—in the interests of both securing judicial independence, and also ensuring the effective separation of powers—the Governor is required to engage in well-informed, ‘meaningful and effective consultation’<sup>11</sup> with the *High Court* (thus virtually giving the High Court primacy in this process, with the Governor merely passing formal orders).

Where direct recruits are to be made to the cadre of District Judges in any state, the High Court has been *expressly* given primacy by the Constitution, under Article 233(2).<sup>12</sup> The High Courts also enjoy overall control over all subordinate judges, including in matters pertaining to their promotions, postings, and disciplinary proceedings, by virtue of Article 235. However, in the matter of appointment of persons to subordinate judicial positions *below* the rank of District Judge, Article 234 contemplates a role for the State Public Service Commission as well (in addition to the High Court), and furthermore, rules may be made by the state government to regulate the process of appointment, by virtue of Article 309 of the Constitution.

It may be noted that the prevalent practice in many states is that a judge of the High Court nominated by the Chief Justice of that court sits with the State Public Service Commission, for the purposes of making selections under Article 234 (for entry-level positions in the state judicial service *below* the rank of District Judge); in many other states, the power of selection under Article 234 is also ultimately vested exclusively in the High Court<sup>13</sup> itself, in terms of rules made under Article 309.

In other words, in all matters relating to the selection for appointment, promotion, and postings of subordinate judges, it is the *High Courts* which are the principal repository of the authority under the Constitution, and the role of the state government/Governor is invariably only formal in character, and there is no role at all contemplated for the Supreme Court. The disciplinary jurisdiction also vests in the High Court, on whose recommendation formal orders are eventually issued by the Governor. Insofar as all other service conditions of subordinate judges are concerned, it is again the High Court which is the competent authority, and it wields all the real administrative power—subject only to the rules (if any) made under the proviso to Article 309 of the Constitution.

In addition, the power of the Supreme Court and the High Courts to regulate their own administrative affairs in the matter of staff appointments has also been stipulated for, by making provision in the Constitution itself for the Chief Justices of these courts to make appointments of the officers and servants of the court—either directly, or through such other judge or officer of the Court as the Chief Justice may direct—in Articles 146 and 229. This power includes the power to suspend, dismiss, remove, or compulsorily retire any officer or servant of the court from service.<sup>14</sup> The roles of the Governor<sup>15</sup> and the State Public Service Commission<sup>16</sup> under Article 229, though not merely formal, are ultimately limited: they are expected by the constitutional scheme to give due deference to the recommendations of the Chief Justice of the High Court.<sup>17</sup>

While the above constitutional provisions are salutary from the perspective of ensuring the functional *administrative* independence of the judiciary, it is to be noted that no specific provision has been made in the Constitution to ensure the larger *financial* independence of the judiciary, and to empower it fiscally to pursue the goals of securing justice for the common man wholly independently of the executive. Even Articles 146(3) and 229(3), noted earlier, only stipulate that the administrative expenses of the higher courts shall be charged upon the respective consolidated funds of the union and the states; however, the budgets required for the day-to-day running of the larger judicial apparatus in each state are still under the control of the executive in the respective states. It was not thought necessary by the framers of the Constitution to ensure a complete separation of powers in this respect, by making provision for the express protection of judicial budgets (notwithstanding the goals enshrined in Art. 50). Therefore, although much of the administrative power in respect of matters pertaining to the judiciary has been vested in the courts

themselves (and, most notably, in the High Courts at the various states) as explained above, the judiciary continues to be entirely dependent on budgetary allocations made by the executive for carrying out its work.

## THE NEED FOR A FINANCIALLY INDEPENDENT JUDICIARY

In his consultation paper titled ‘Financial Autonomy of the Indian Judiciary’ that was submitted to the National Commission to Review the Working of the Constitution (NCRWC), 2001–2002,<sup>18</sup> Justice M. Jagannadha Rao, the then Vice-Chairman of the Law Commission of India (and former Judge of the Supreme Court) noted:

1.1 Today, the Judiciary in India is blamed for the huge backlog of cases. It is time that the public is made aware that during the last 50 years after independence, little attention has been paid by the Government for improvement of the infrastructure of the Judiciary. There is a dearth of Courts and Judges and of buildings both for Courts and Judges and officers and staff. In several cases even minimum facilities have not been given. The reason is that there is no planning and proper budgeting of the Courts’ requirements in consultation with the Judiciary as is done in other countries. Nor is there a long range Plan or at least a Five Year Plan. The result is that most courts are over burdened with cases on the civil and criminal side. Delay results in a serious infringement of right to speedy trials, to violation of human rights in various cases. A stage has reached when the parties are thinking of taking the law into their hands.

1.2 In the above scenario, it has become necessary to go into the subject of ‘financial independence’ or ‘financial support’ of the Judiciary in India at some length on a comparative basis and also to consider

the need for adequate provision for the Judiciary as a ‘Plan’ subject.

The paper further notes the progress made at deliberations over the previous 60 years in various domestic and international fora—including at the United Nations—on the subject of achieving functional financial autonomy of the Judiciary;<sup>19</sup> and it acknowledges that, time and again, international conferences have concluded that an effective, independent judiciary can be built in democratic societies only by giving the judiciary a meaningful say in the preparation of its own budgets, and by giving a body in which the judiciary is sufficiently represented (such as ‘judicial councils’—which often comprise representatives from the executive and from civic society, in addition to serving judges) the administrative control over judicial infrastructure systems.

Justice Rao’s sub-committee therefore suggested to the NCRWC that adequate provision be made—among other things—to (a) immediately ensure the *separate allocation of funds in the five year plans* by the Planning Commission and the Finance Commission, for the purposes of the state judiciaries in particular (which, hitherto, was not being done—even though most subordinate courts were adjudicating matters pertaining to rights and offences created under central laws); (b) create a suitable new constitutional or statutory body at both the central and state level—such as the ‘judicial councils’ set up in other countries—having adequate representation from the judiciary itself, to deal with the overall administrative needs of the judiciary (including policymaking, drawing up of budgets, and their implementation in relation to the subordinate courts); (c) create a healthy convention whereby budgets prepared by the judicial councils in consultation with the executive are accepted by the legislatures without any downward revision; and (d) permit full re-appropriation of amounts by the judicial councils towards any alternative heads

of expenditure, within the overall budgetary allocation, in the event of an exigency—without need for further bureaucratic clearance from the executive.

The recommendations made in the consultation paper were largely echoed in the final recommendations of the NCRWC, which—in Chapter 7 of its final report—observed:

7.7 The Commission recommends the setting up of a 'Judicial Council' at the Apex level and Judicial Councils at each State at the level of the High Court. There should be an Administrative Office to assist the National Judicial Council and separate Administrative Offices attached to Judicial Councils in States. These bodies must be created under statute made by Parliament. The Judicial Councils will be in charge of the preparation of plans, both short term and long term, and for preparing the proposals for annual budget....

7.8.1 The Commission is of the view that the budget proposals in each State must emanate from the State Judicial Council, in regard to the needs of the subordinate judiciary in that State, and will have to be submitted to the State Executive. Once the budget is so finalized between the State Judicial Council and the State Executive, it should be presented in the State Legislature.

7.8.2 Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State judiciary in each of the States.

Of the various suggestions forwarded to the government by the NCRWC, perhaps the only one to have received some attention thus far is the proposal for making a separate allocation of funds for the judiciary in the reports of the Planning

Commission and the Finance Commission. The report of the 14th Finance Commission, for instance—which has made recommendations to the union government for the period 2015–2020—endorses the proposal of the union government's Department of Justice for earmarking a sum of ₹9,749 crores, over a period of five years, for the creation of new courts, for the re-design of existing courts to make them more litigant-friendly, for providing technical manpower support to judges, for bringing in new computerisation technologies, for supporting law schools, for the creation of Lok Adalats and alternative dispute resolution (ADR) centres, and for other capacity-building measures.<sup>20</sup> However, unlike the 13th Finance Commission—which had recommended a grant-in-aid to the states of a total sum of ₹5,000 crores for improving justice delivery systems<sup>21</sup>—the 14th Finance Commission has merely recommended that the states use the 'additional fiscal space' proposed to be made available to them in the tax devolution to take up the projects recommended by the Department of Justice; in other words, no additional grants-in-aid of the states' revenues were recommended. The observations of the NCRWC noted earlier—to the effect that the union government ought not to shy away from its obligation to provide funds for the subordinate judiciary—thus appear not to have found favour with the 14th Finance Commission.

The various other recommendations of the NCRWC, which were noted above, have found even less favour with consecutive parliaments: there has thus far been no move whatsoever to create any separate constitutional or statutory body to take over the administration of the judicial system from the judges, and nor has there been any move to wholly hand over the purse strings in matters pertaining to judicial administration to the judges. However, since a grant of ₹300 crores was approved by the 13th Finance Commission for



the various states to appoint ‘professionally-qualified court managers’—typically, persons with MBA degrees—to assist the various Benches of the High Courts, and also the Principal District and Sessions Judge in each judicial district, in the administrative functioning of the courts, many High Courts did select and appoint court managers on an experimental (contractual) basis. The impact made by these appointees, and their effectiveness in performing the tasks<sup>22</sup> assigned to them, has thus far not been disclosed publicly; by some accounts, even tailor-made courses designed by law schools to specifically train candidates in court management have not produced any graduates interested in opting for a career in court management.<sup>23</sup>

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## **HOLDING THE SYSTEM TO ACCOUNT: CHALLENGES, AND THE WAY FORWARD**

In the analysis of some former judges we spoke to, the seemingly discordant constitutional scheme described earlier—which distributes administrative powers and responsibilities to the High Court, on the one hand, and overarching financial control to the state executive, on the other—has ultimately evolved as an accountability mechanism in its own right. With the Supreme Court having repeatedly ruled, in a wide variety of situations, that the constitutional framework gives primacy of place to the Chief Justices of the High Courts in matters pertaining to the administrative affairs of the subordinate judiciary, healthy conventions have developed in most states whereby requests made by the High Courts for administrative support to the judiciary are acted upon promptly by the state executive. The High Courts, in turn, recognising their own primacy in administrative matters pertaining to the judiciary, are increasingly appointing a larger number of senior judges (of the District Judge

cadre, and also subordinate judges) to discharge exclusively administrative functions—such as the functions of vigilance, recruitment, infrastructure and maintenance, computerisation and modernisation, running ADR centres, etc. In many states, the High Courts also invariably depute a judicial officer from the subordinate judiciary to the service of the state government, to serve as secretary to the government in the Department of Law and Justice—this is done with a view to ensuring smoother coordination between the High Court and the state executive, and to secure the effective support of the state’s administrative apparatus for implementing the executive decisions of the High Court.

The perspective of the Bar and the litigant public, however, tends to be somewhat more sceptical: with the concentration of administrative responsibility in the office of the Chief Justice, one often wonders whether any serious accountability mechanism with respect to judicial administration can be spoken of when the chief justices are themselves not expressly made answerable to any other constitutional authority in their discharge of their duties. If, for instance, the office of the Chief Justice is not amenable to the mandamus jurisdiction of the High Court, as has been argued before,<sup>24</sup> then—quite ironically—the litigant public may have no judicial recourse open to it in the event of an abdication of administrative responsibility by the Chief Justice.

Secondly, at a pragmatic level, given that the prevalent norms mandate that the Supreme Court’s collegium appoint an ‘outsider’ Chief Justice to any state’s High Court, and given also the relatively short tenure (of typically not more than three years) that a Chief Justice enjoys in any High Court, it becomes imperative to consider whether a Chief Justice—acting individually—will at all times be the best placed to take vital administrative decisions concerning the subordinate judiciary in the state. Often, it is seen that administrative complexities

can be effectively addressed only after giving due consideration to the relevant local conventions and practices of the High Court, and only after one has acquired a thorough understanding of all that has transpired previously (in relation to any imbroglio). A newly sworn-in Chief Justice may not immediately have access to the information necessary for making the most efficient administrative decisions, especially in relation to disputes pertaining to the appointments or service conditions of subordinate judges, and the time required to acquaint oneself with the background facts often compromises the efficiency of the system itself (especially if selections, appointments and/or promotions are not given effect to, pending resolution of the controversy). It is therefore advisable that, in such cases, where the administrative issue falling for the consideration of a Chief Justice is one that requires a deeper understanding of the local context, a larger body of judges—such as a ‘collegium’ of the senior-most puisne judges, or even the full court—be tasked with the administrative responsibility, and/or be available to assist and advise the Chief Justice.

Finally, it must be noted that even though the High Courts (and, in particular, the Chief Justices of the High Courts) are principally tasked, under the Constitution, with administrative superintendence over the subordinate judiciary in the states, the Supreme Court has itself also been exercising some of this power, by invoking its ‘continuing mandamus’ jurisdiction in *All India Judges’ Assn. v. Union of India*.<sup>25</sup> Directions have been passed from time to time in this petition over the past 27 years, including in relation to the building of infrastructure for lower courts and residential quarters for judges of the subordinate judiciary in various states, revision of pay scales for judges of the lower courts, review of their retirement ages, making facilities for provision of law books to judges, constitution of *ad hoc* committees to review the progress made by the state

governments from time to time in implementing these directions, etc. It is perhaps only on account of the absence of a clear accountability mechanism under the Constitution for the administration of our law courts, the ineffectiveness of a decision-making system that is centred almost entirely in the office of short-term Chief Justices at the High Courts, and the reluctance of the central government to address the issue (by either creating a new constitutional authority to provide administrative support to the judiciary, or by commissioning an all-India judicial service that is trained in not only the law but also in world-class management techniques), that the Supreme Court has found itself constrained to provide *ad hoc* solutions from time to time, through judicial fiat. Conversely, though, one could also equally argue that the reluctance of Parliament (and the executive) to usher in the next generation judicial reforms that have so often been spoken of now—by way of either effecting constitutional and/or statutory changes to create new administrative structures to manage the justice delivery system, or setting parameters that make the justice delivery system accountable to the litigant public, or mandating the use of technology in judicial functioning, or handing over control of the purse strings in relation to judicial administration to the judges themselves, etc.—can be traced back to the ferocity with which the Supreme Court itself has sought to insulate itself from external accountability systems, in the name of ‘judicial independence’. In either event, it is evident that the culture of *ad hocism* that has hitherto held sway does not serve any useful purpose any more, and a concerted effort is required to be made by all stakeholders now, urgently, to put in place proper institutional mechanisms that can take over the full-time task of administering the judicial apparatus from the judges, and to also evolve performance metrics to hold those administering the judicial apparatus to account for the functioning of the ‘system’.

## Notes

1. *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441 and *Special Reference No. 1 of 1998, re*, (1998) 7 SCC 739 respectively.
2. *Supreme Court Advocates-on-Record Assn. v. Union of India*, 2015 SCC OnLine SC 964.
3. A recent press release issued by the Ministry of Law and Justice, Govt. of India indicates that the judge-to-population ratio in the country, as of 29 February 2016, is 17.72 judge/judicial officers per million population. See, Ministry of Law and Justice, Govt. of India. 2016. 'Appointment of Judges', *Press Information Bureau*, 3 March, available online at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=137288> (accessed on 27 March 2016). In *All India Judges' Assn. (3) v. Union of India*, (2002) 4 SCC 247, the Supreme Court had directed that measures ought to be taken to increase the judges-per-million population ratio to 50, in keeping with previous recommendations of the Law Commission.
4. *All India Judges' Assn. (3) v. Union of India*, (2002) 4 SCC 247.
5. Justice Sunil Ambwani. 2009. 'Justice Administration: "Case and Court Management"'. Paper presented at the Judicial Training and Research Institute, Uttar Pradesh, 31 January, available online at <http://ijtr.nic.in/articles/article%2010001.pdf> (accessed on 13 March 2016).
6. *All India Judges Assn. v. Union of India*, (2010) 14 SCC 718.
7. *All India Judges' Assn. (1) v. Union of India*, (1992) 1 SCC 119.
8. Ministry of Law and Justice, Government of India. 2016. 'Pending Court Cases', *Press Information Bureau*, 3 March, available online at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=137291> (accessed on 13 March 2016). This figure does not include the 59,468 cases pending before the Supreme Court as of 19 February 2016, as also reported in the same press release.
9. Art. 254, Constitution of India.
10. In the *Second Judges case*, the Supreme Court had observed:  

[I]n making the periodical review of the Judge-strength of the superior courts, particularly the High Courts, the President must attach greater weight to the opinion of the CJI and the Chief Justices of the High Courts and that exercise must be performed with due dispatch.

Any proposal made by a Chief Justice of a High Court for increasing the Judge-strength of his Court concerned must be routed through the CJI, who on such recommendation has to express his opinion either by giving his consent or modifying the recommendation or otherwise for sufficient and sound reasons and forward the same to the President. Once the CJI has concurred with the proposal, then the Government should accept that proposal without putting any spoke in the wheel or disapproving it.
11. *A.C. Thalwal v. High Court of H.P.*, (2000) 7 SCC 1 (*Thalwal*).
12. See, *Thalwal*.
13. Justice B.P. Jeevan Reddy. 2001. 'A Consultation Paper on Superior Judiciary', *Final Report of the National Commission to Review the Working of the Constitution*, 26 September, available online at <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (accessed on 27 March 2016).
14. *Chief Justice of A.P. v. L.V.A. Dixitulu*, (1979) 2 SCC 34.
15. *State of A.P. v. T. Gopalakrishnan Murthi*, (1976) 2 SCC 883.
16. *H.C. Puttaswamy v. High Court of Karnataka*, 1991 Supp (2) SCC 421.
17. *State of H.P. v. P.D. Attri*, (1999) 3 SCC 217. See also, *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil*, (1997) 6 SCC 339.
18. Available online at <http://lawmin.nic.in/ncrwc/finalreport/v2b2-1.htm> (accessed on 27 March 2016).
19. In particular, reference is made in the paper to 'Financial Provisions' (Arts. 24, 25 and 26) of the 'Syracuse Draft Principles on the Independence of the Judiciary', which were formulated by the International Commission of Jurists at Syracuse, Sicily in May 1981. Justice Rao's consultation paper also noted the 'Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA region', adopted by the 6th Conference of Chief Justices of Asia and the Pacific.
20. 14th Finance Commission. 2014. 'Chapter 11: Grants-in-aid' and also Annex 11.2, 'Report of the 14th Finance Commission', available online at <http://finmin.nic.in/14fincomm/14fcengVol1.pdf> (accessed on 27 March 2016).
21. Department of Justice in the Ministry of Law and Justice, Govt. of India. 2011. "Improving Justice Delivery": Ready Reckoner on Thirteenth Finance Commission Grant, Government Orders and Guidelines Issued by the Government of India', available online at [http://doj.gov.in/sites/default/files/READY%20RECKONER%20TFC%281%29\\_5.pdf](http://doj.gov.in/sites/default/files/READY%20RECKONER%20TFC%281%29_5.pdf) (accessed on 27 March 2016).
22. According to the Registrar-General, High Court of Karnataka. 2014. 'Order No. LCA-II-74/2011 Bangalore dated 12th June 2014', *Proceedings of the High Court of Karnataka, Bangalore*, 12 June, available online at <http://karnatakajudiciary.kar.nic.in/recruitmentNotifications/cm-appointment-12062014.pdf> (accessed on 13 March 2016), the 'Duties and Responsibilities of Court Managers' have been notified to include establishing



performance standards applicable to courts, evaluating compliance with such standards, compiling and reporting statistics relating to court functioning, court management, case management, responsive management (access to justice, legal aid, etc.), quality management, human resource management, core systems management, and IT systems management.

23. Prachi Shrivastava. 2015. “‘Court Management’ Degree Proves a Flop in NALSAR MBA: College Now Scrambles to Find Corporate Jobs for 46 MBA Grads”, *Legally India*, 19 February, available online at <http://www.legallyindia.com/Law-schools/>

[nalsar-hyderabad-mba-program-progress-report](#) (accessed on 27 March 2016).

24. *Pramatha Nath Mitter v. High Court of Calcutta*, 1961 SCC OnLine Cal 134: AIR 1961 Cal 545.
25. WP (C) No. 1022 of 1989 (SC). A series of orders were passed by the Supreme Court in connection with the same case; *see*, WP (C) No. 1022 of 1989 reported in (1993) 4 SCC 288, (1998) 9 SCC 245, (1999) 5 SCC 185, (2000) 10 SCC 484, (2002) 4 SCC 247, (2004) 13 SCC 572, (2010) 14 SCC 718, (2010) 14 SCC 730, and (2011) 14 SCC 701.



# Karnataka High Court: People, Processes, Pendency

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*M.V. Sundararaman*

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*Varuni Mohan*

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Indian courts hardly document and publicise pendency figures, though judges and other stakeholders in the administration of justice frequently bemoan the high pendency rates at almost every available opportunity. According to DAKSH, an NGO collecting court-related data, their database contains over 19,39,096 cases that are pending before 21 Indian High Courts, out of which 2,66,631 cases are pending before the High Court of Karnataka.<sup>1</sup> There appears to be no relief from the chronic pendency of cases in the High Court of Karnataka despite its impressive disposal rate of nearly 18,000 cases per year.<sup>2</sup> Attempts to expedite disposal rates and lessen mounting pendency, such as establishment of permanent Lok Adalats, increasing bench strength, encouraging alternative dispute resolution (ADR) mechanisms, enhancing infrastructure of courts, etc. do not seem to have had the desired effect. While judges are heard attributing delays and pendency to the Bar, the Bar has always been quick to respond and attribute delays to the competence of the Bench, to court congestion, the need for more courts, etc. This chapter discusses the current scenario in the High Court of Karnataka in relation to pendency, judges' workload, the administrative mechanism of case filings and record maintenance, based on available, published data.

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## JURISDICTION OF THE HIGH COURT OF KARNATAKA

The Indian Constitution has placed the responsibility of administration of justice in the state upon the High Court, which includes supervision of the working of subordinate courts and tribunals within the state. The responsibility is clearly on the High Courts to ensure proper judicial administration within their territory. The provisions of the Constitution and the Karnataka High Court Act,

1961 govern the jurisdiction, procedure, and powers of the judges of the High Court of Karnataka. The High Court wields a variety of powers and exercises vast jurisdiction over almost every area of the law.

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## ORIGINAL JURISDICTION

Though the Constitution does not minutely list out the extent of the High Court's jurisdiction, it is generally recognised that a High Court exercises its primary, original jurisdiction by the issue of writs. Article 226 confers power on the High Court to issue writs for the preservation and enforcement of fundamental rights. The original jurisdiction of the High Court also extends to matters relating to admiralty, probate, matrimonial, and contempt of court cases. It also has full powers to make rules to regulate its business in relation to administration of justice. It can punish for its own contempt.

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## APPELLATE JURISDICTION

The High Court's appellate jurisdiction extends to both civil and criminal matters. On the civil side, it broadly extends to cases tried by courts of civil judges (junior and senior divisions) and district judges. On the criminal side, it extends to matters decided by the Courts of Sessions.

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## OTHER POWERS

### Powers of Superintendence and Transfer

The entire administration of justice in the state vests in the High Court. The High Court's power of superintendence extends over all subordinate courts and tribunals in the state (except those dealing with armed forces in the state). If the High

Court is satisfied that a case pending in a subordinate court involves a substantial question of law as to interpretation of the Constitution, whose determination is necessary for the disposal of the case, it is empowered to deal with that case *suo motu*. Enormous powers are vested in the High Court to call for the records of any case from subordinate courts and tribunals to satisfy itself about the correctness and legality of the orders passed by them.

### Control over Officers and Employees

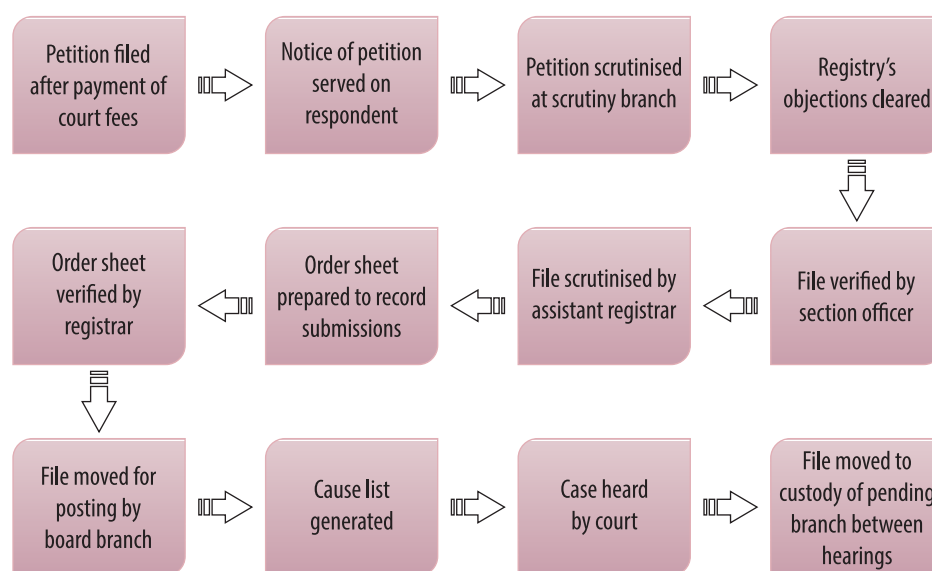
A whole gamut of functionaries working within a clearly laid out hierarchy operate the administrative set-up of the High Court. Appointments on the administrative side are made by the Chief Justice or such other judge or officer of the High Court as the Chief Justice may direct. The conditions of service are prescribed by rules made by the Chief Justice or another judge or officer of the High Court authorised by the Chief Justice. The administrative expenses of the High Court, including salaries, allowances, and pensions payable to its officers are charged to the Consolidated Fund of India.

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## ROLE OF THE REGISTRY

The administrative set-up of the High Court and its functioning are regulated by the provisions of the Karnataka High Court Act, 1961, with the Registrar General at its helm. Several other functionaries (additional registrars, joint registrars, assistant registrars, etc.) in the hierarchy assist in the Registry's functioning. The lifecycle of a case has its genesis in the Registry of the High Court. The Registry plays a vital role in ensuring smooth maintenance and transmission of case records, preparation of cause lists, indexation, maintenance of registers, etc. Figure 1 depicts that the Registry is instrumental in the movement, maintenance, and preservation of case files pending before the High Court.

**FIGURE 1.** Role of High Court Registry in Movement of Files



## BENCH STRENGTH, VACANCIES, APPOINTMENTS, AND TRANSFERS

Pendency figures and judge strength have never seemed to tally. A look at the prevailing scenario in the High Court is telling. The data is presented in Table 1.

**TABLE 1.** Current Status of Judge Strength in the High Court of Karnataka

	Approved strength	Current strength
Total strength	62	31
Permanent judges	47	22
Additional judges	15	9

Source: Department of Justice, Government of India. 2015. 'Vacancy in High Courts', Department of Justice, available online at [http://doj.gov.in/sites/default/files/userfiles/Vacancy-\(1.11.2015\).pdf](http://doj.gov.in/sites/default/files/userfiles/Vacancy-(1.11.2015).pdf); <http://karnataka-judiciary.kar.nic.in/profiles-sitting-judges.asp> (accessed on 16 November 2015).

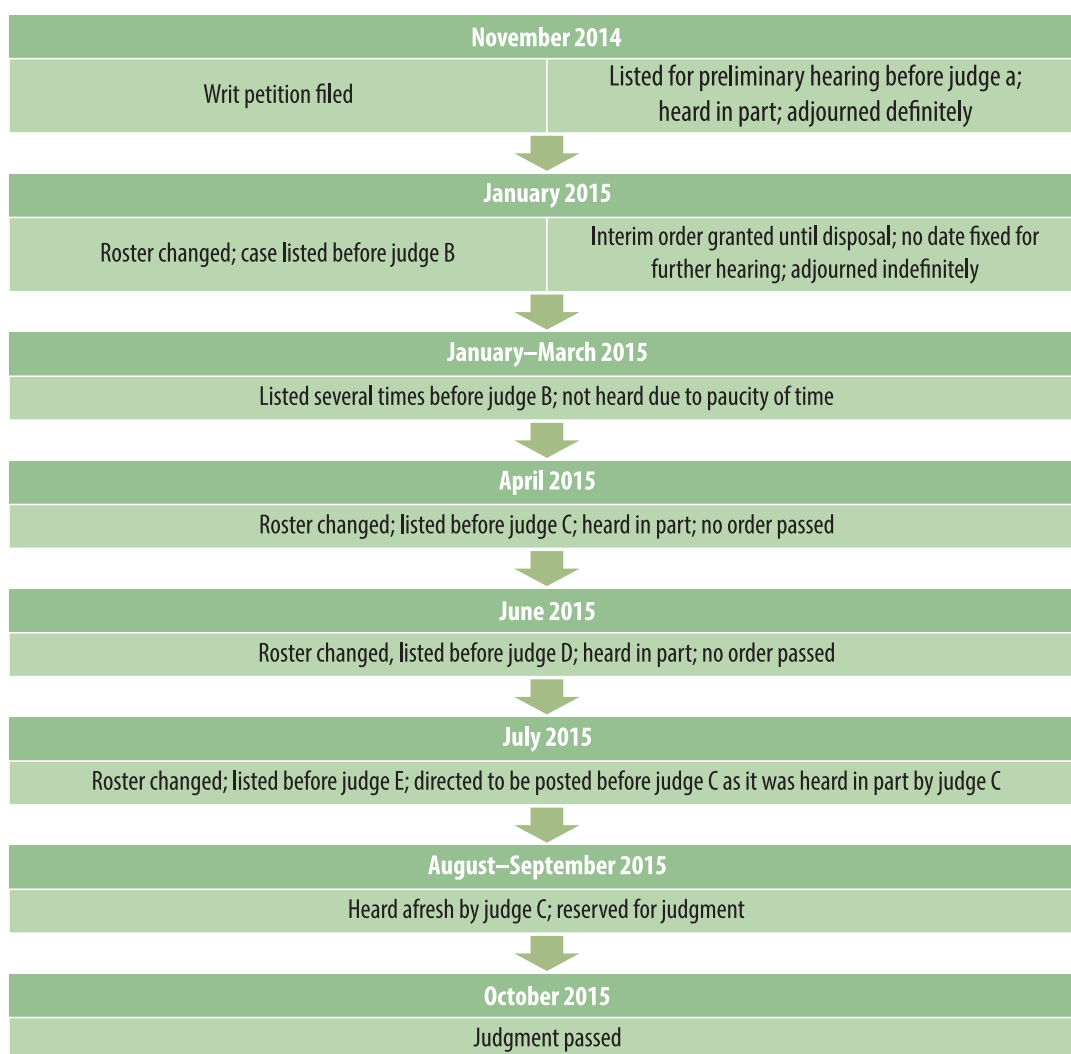
Evidently, this enormous vacancy—25 permanent judges and 6 additional judges—has impacted pendency rates in Karnataka.<sup>3</sup> Even as the High Court labours to deal with pendency at merely half its capacity, there seems to be no expedition in judicial appointments. Further, there are no clear parameters laid out or publicly available records to show the area/s of expertise of any particular judge of the High Court. Nor is there any publicly available record to show the regularity with which a judge has heard cases or been allocated cases based on areas of his expertise. Judges of High Courts are not prescribed any compulsory training or continuing education. Though the National Judicial Academy has been established with precisely this goal—judicial education and reduction of arrears—the need to frame an annual, compulsory schedule for training High Court judges has never been more urgent.

The absence of compulsory training and the urgent need for a mandatory, annually scheduled continuing education programme tells in many

ways. Judges learn on the job (about areas of law that they have never before worked on) and depend on their own research methodologies, law clerks, and the Bar for subject-matter inputs. It is not infrequent that cases are posted before Benches which have no expertise or experience in dealing with the subject matter of cases allocated to them as per the roster. This demands that the judge study and accustom himself (in a very short period of time, usually three–four months) to the law and

procedure in relation to the new subject. It is also not uncommon that when cases that require substantial hearing are posted a few days before the routine change in roster, they are adjourned for paucity of time to complete the hearing. These situations invariably contribute to the delay in disposal of cases before that Bench and increase pendency. Though these situations are common occurrences, they are hardly discussed in any forum. Figure 2 illustrates such a situation.

**FIGURE 2.** Progress of Writ Petition No. 54017/18 of 2014



## VACANCIES

Available data shows substantial pendency in the High Court today. This data points to the urgent need for an immediate and a massive recruitment drive for the High Court. The large number of judges needed to clear/reduce the backlog and the time likely to be taken to complete the appointment are clear indicators for expediting the selection process. To consider one significant factor, every year many vacancies arise through retirement, and sometimes death and transfers also add to this number. As Table 2 shows, between April and October 2016, six judges of the High Court of Karnataka have retired or are due for retirement, bringing down the working strength from 31 to 25.

**TABLE 2.** Retiring Judges of the High Court of Karnataka

No.	Judge	Date of retirement
1	Justice Pradeep D. Waingankar	10 April 2016
2	Justice N.K. Patil	2 May 2016
3	Justice A.V. Chandrashekhara	30 May 2016
4	Justice Ram Mohan Reddy	6 June 2016
5	Justice N. Kumar	28 June 2016
6	Justice H. Billappa	8 October 2016

Source: High Court of Karnataka.

## TRANSFER OF JUDGES

Judges' transfer is another issue that stirs up significant debate. Normally the criterion for transfer of a judge from one court to another is never officially disclosed except when a judge is transferred to another court to take charge as Chief Justice or when the conduct of the judge in question is public knowledge. The recent case of Justice C.S. Karnan

of the High Court of Madras who *suo motu* stayed his own transfer order, issued by the Chief Justice of India T.S. Thakur on 12 February 2016, is relevant in this context.<sup>4</sup>

The legality of judges' transfer has also been examined and discussed by courts. A full Bench of the High Court of Gujarat held that no judge could be transferred without his consent.<sup>5</sup> This view was however, reversed by the Supreme Court.<sup>6</sup> This issue was also elaborately discussed and the principles governing judges' transfer was laid down in several decisions of the Supreme Court.<sup>7</sup> At present, there are three judges who have been transferred to Karnataka from their state High Courts, namely, Chief Justice Subhro Kamal Mukherjee (Calcutta), Justice Jayant Patel (Gujarat), and Justice Raghvendra Singh Chauhan (Rajasthan). Of judges from Karnataka, Justice Manjula Chellur is the Chief Justice of the High Court of Calcutta, and Justice Huluvadi G. Ramesh was transferred to the High Court of Allahabad. Justice Ramesh's case is an example which shows judges themselves are sometimes unclear why they have been transferred. On the eve of his transfer, he remarked that the transfer was a result of political vendetta against him and that he was being victimised for his actions.<sup>8</sup> This is in stark contrast to the Supreme Court collegium's current vision of transferring judges for better administration and reducing vacancy.<sup>9</sup>

## ROSTER SYSTEM: PERIODIC ALLOCATION AND REALLOCATION OF WORK

Under the orders of the Chief Justice, the Registrar (Judicial) periodically publishes a 'sitting list'. This list assigns subjects/areas to each judge of the High Court effective from a stated date.<sup>10</sup> Sadly, this is not a permanent allocation. The sitting list suffers

vast changes, normally every 8–10 weeks, without any written rule as the basis. Perhaps the main objective of this periodic shuffling is to ensure that all judges deal with most subject matters in all Benches. But the obvious downside to this procedure (in the background of the lifecycle of a case) is that a case is invariably heard by several Benches before it is finally disposed of. Also, whether the expertise of any judge is considered before a particular subject matter is assigned to him in the sitting list is not known.

The news of establishment of the Dharwad and Kalaburagi Benches gave much-needed respite to the residents of these districts. But the establishment of these Benches has also thrown up a few unique situations, adding to the pendency problem. More often than not, hearings are not concluded within the lifecycle of a sitting list, forcing a *de novo* hearing before a new judge, leading to escalation not only in disposal time but also in legal costs. Figure 3 demonstrates this practical problem.

**FIGURE 3.** Progress of Civil Miscellaneous Petition No. 228 of 2014





## DISPOSAL OF CASES

‘No one expects a case to be decided overnight. However, difficulty arises when the actual time taken for disposal of the case far exceeds its expected life span and that is when we say there is delay in dispensation of justice.’<sup>11</sup> Although Order XX of the Civil Procedure Code, 1908 (CPC) broadly prescribes a timeframe for disposal of a civil dispute before a subordinate court,<sup>12</sup> no such timeframe is specified under any law for matters pending before High Courts. It is trite that denial of ‘timely justice’ amounts to denial of justice itself. Courts continue to lament over delays in disposals and pendency and its consequence on justice. Timely disposal of cases is essential for maintaining the rule of law and providing access to justice, which is a guaranteed fundamental right.<sup>13</sup>

In *Imtiyaz Ahmad v. State of U.P.*,<sup>14</sup> the Supreme Court noted:

Dispatch in the decision making process by court is one of the great expectations of the common man

from the judiciary. A sense of confidence in the Courts is essential to maintain a fabric of order and liberty for a free people. Delay in disposal of cases would destroy that confidence and do incalculable damage to the society; that people would come to believe that inefficiency and delay will drain even a just judgment of its value; that people who had long been exploited in the small transactions of daily life come to believe that courts cannot vindicate their legal rights against fraud and overreaching; that people would come to believe that the law—in the larger sense cannot fulfil its primary function to protect them and their families in their homes, at their workplace and on the public streets.

The Supreme Court in this case also issued several directions to the Law Commission on pendency and suggested methods to reduce mounting arrears, including creation of additional courts without compromising on the quality of justice rendered. These directions notwithstanding, the effort to contain and reduce pendency does not seem to have borne fruit. A snapshot of the trend and extent of pendency in the High Court of Karnataka is given in Table 3.<sup>15</sup>

**TABLE 3.** Pendency in the High Court of Karnataka

Year	Institution	Disposal	Pendency	Sanctioned strength (Number of working hours per week)	Working strength (Sanctioned strength minus vacancies and deputation)
2002	91,520	80,233	1,38,417	153	114
2003	86,221	86,251	1,38,387	207	153
2004	99,392	96,553	1,41,226	262	187
2005	1,17,979	1,19,727	1,39,478	265	167
2006	1,29,518	1,19,064	1,49,932	271	151
2007	1,19,167	1,17,248	1,51,851	273	145
2008	1,12,183	1,13,267	1,50,767	275	140
2009	1,46,300	1,36,451	1,60,616	281	234
2010	1,39,780	1,40,325	1,60,071	292	217
2011	1,41,359	1,43,195	1,58,235	292	222
2012	1,42,910	1,36,334	1,64,811	332	190

Source: Law Commission of India. 2014. ‘Arrears and Backlog: Creating Additional Judicial (Wo)manpower’, available online at <http://lawcommissionofindia.nic.in/reports/Report245.pdf> (accessed on 23 March 2016).

Similar data available for the period 2013 and 2014 does not depict a better scenario. The average time spent by judges on pending cases is almost 83 hours a week.<sup>16</sup> This number takes into account the time spent by a judge on judicial work not only while in court and but also outside. The writing of the judgment or order and deciding a case, often happens after the hearing is concluded, in chambers, outside court. Judges use out-of-court time to review counsels' arguments, examine evidence, refer to precedents, write judgments, etc.

Though statutes such as the CPC prescribe broad timeframes for certain stages in a civil trial—for filing written statement,<sup>17</sup> settlement of issues,<sup>18</sup> adjournments,<sup>19</sup> judgments,<sup>20</sup> etc.—no such time frame, even broad or directory, exists for proceedings before the High Court. Any effort at reducing delays in disposals must first examine how many cases in the system are actually delayed. This, in our view, requires determination of not only a 'normal' timeframe for a particular type/category of case but also the time to be spent at each stage within that case, so that anything beyond such a time frame is considered delayed.

## **INFLUENCE AND USE OF TECHNOLOGY BY JUDGES IN DISPOSAL OF CASES**

### **Journey of Computerisation in the Karnataka Judiciary**

Before computerisation, every judicial process was carried out and documented manually using typewriters and papers were physically indexed and filed. Even case filings and cause list preparation were done manually and case details were physically entered in bulky registers. In 1998, the National Informatics Centre introduced computers

in the form of server and non-interactive devices in the High Court.<sup>21</sup> UNIX-based operating systems and FoxPlus database were used. In 1999, another milestone was achieved when tracking of cases by entering litigant details, advocate details, and other preliminary details apart from the case numbers was made possible.<sup>22</sup> By the end of 1999, cause list generation was computerised. In achieving this, cause lists on a day-to-day basis could be generated effortlessly using available filing data from the server.

### **Computer Committee: Role in Reducing Pendency**

With the objective of ensuring better management of cases, court records and dockets through technology, the Computer Committee was constituted in 1995. The Computer Committee consists of seven judges of the High Court, and is presently headed by Justice Ram Mohan Reddy. All the technical staff act under the guidance of the Computer Committee and are under the control of the Central Project Co-ordinator (Computers), High Court of Karnataka, and the Principal District and Sessions Judge at Districts.

Most bottlenecks identified by judicial commissions and other committees on delays, arrears, and backlogs are sought to be overcome through computerisation and the introduction of a sound judicial management information system in the High Court of Karnataka. Several areas in the administration of the High Court have vastly benefited from this exercise and the use of technology has enabled easy access to information, tracking of pending cases, and movement of case files. In particular, the use of technology has enhanced productivity and reduction of delays in innumerable areas in relation to judicial administration and information management.

## CONCLUSION

The former Chief Justice of India, H.L. Dattu, recently announced that a decision had been taken to ensure that trial of a case does not linger beyond five years. Being conscious of the high pendency before higher courts, he however clarified that an appeal in a higher court 'may take some time'.<sup>23</sup> The staggering pendency and steep delay in disposals established by DAKSH data require to be urgently tackled by adoption of powerful case management techniques. This would also entail the need to effectively harmonise and implement uniform procedural rules for generation of cause lists, admissions, adjournment motions, filings, etc. in all courts. The need for critical legislative interference to streamline procedure before High Courts and introduction of time-bound hearing, filing of written submissions, time-bound pronouncement of judgments, etc. akin to those introduced by recent amendments to the CPC and the Arbitration and Conciliation Act, 1996, has never been greater. Low pendency and speedy despatch of litigation, it can hardly be gainsaid, will not only help immensely boost the credibility of our judicial system but also securing real justice to every litigant approaching our courts.

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12. The court is required to pronounce judgment either immediately, or as soon as possible, within 30 days of the conclusion of hearing of the case. If there are exceptional or extraordinary circumstances, the court must fix another date, but within 60 days from the date on which the hearing of the case concluded.
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# Budgeting for the Judiciary

*Surya Prakash B.S.*

This chapter provides an overview of the budgetary process followed in the allocation of funds to the judiciary, a comparative analysis of allocation by states on the judiciary and other social sectors, and statistical analysis of judicial expenditure across different states.

## BUDGETING PROCESS

A study of the budgeting process followed by an organisation reveals much about its functioning, its priorities, and objectives. And the judiciary is no exception.

The Supreme Court's budget is prepared by its Registrar General, and is forwarded by the union government Law Ministry to Ministry of Finance. This is also the practice followed by the High Courts and state governments. The High Court has the additional responsibility of preparing budgets for lower courts within its jurisdiction in the state (other than tribunals set up by the central government). Officials at the Registry of the High Court of Karnataka and the Ministry of Law and Parliamentary Affairs of the government of Karnataka, whom I interviewed, stated that budgets received from the judiciary are usually not subjected to debate or discussion, and allocations are made for most items of expenditure.

However, practices followed in preparing the budget are rudimentary, as is made clear from a policy document prepared by the National Court Management System Committee (NCMSC) appointed by the Supreme Court:

In Taluka Courts, District Courts and High Courts, experience shows that the clerical staff picks up demands as were made in the earlier years for funds and grants and the same is forwarded to the

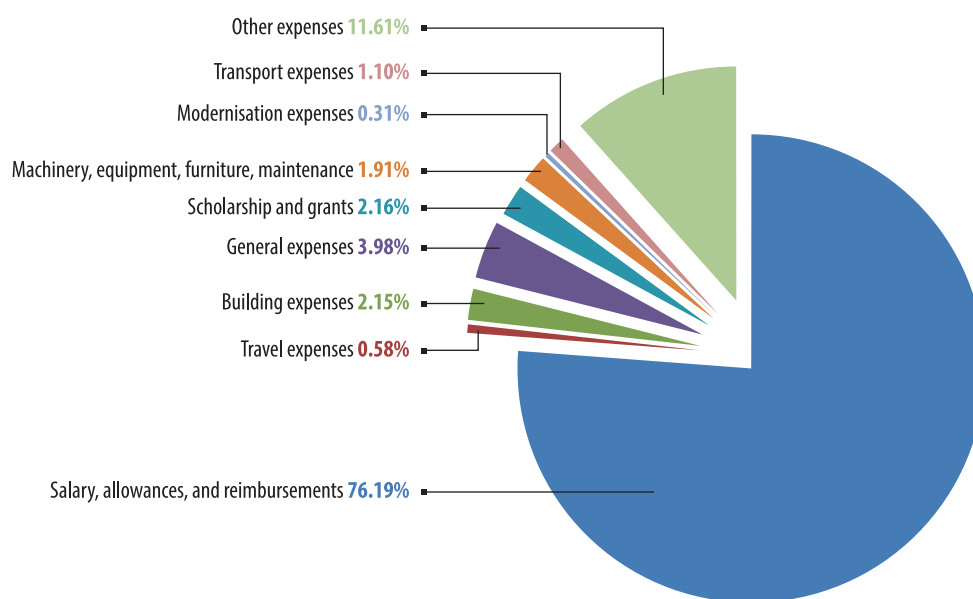
Government by taking signature of the Judges in the Districts or Registrar General at the level of High Court. Most of the Judicial Officers are not proficient in the art of planning and preparation of Budgets so that the Budget meets the requirements for the next year and is neither excessive nor short. Need of expert assistance at these levels is matter of consideration.<sup>1</sup>

About 70–80 per cent of the state’s expenditure on the judiciary is incurred towards cost of manpower. As an illustration, *see* Figure 1, which gives details of expenditure incurred by the government of Karnataka on the judiciary for financial year 2014–2015, categorised based on the nature of expenses. Salary and allowances make up 76 per cent of the total expenditure.<sup>2</sup> Therefore, the bulk of the budget, and the time taken in its preparation is taken up by this item.

## ANALYSIS OF BUDGETARY ALLOCATION

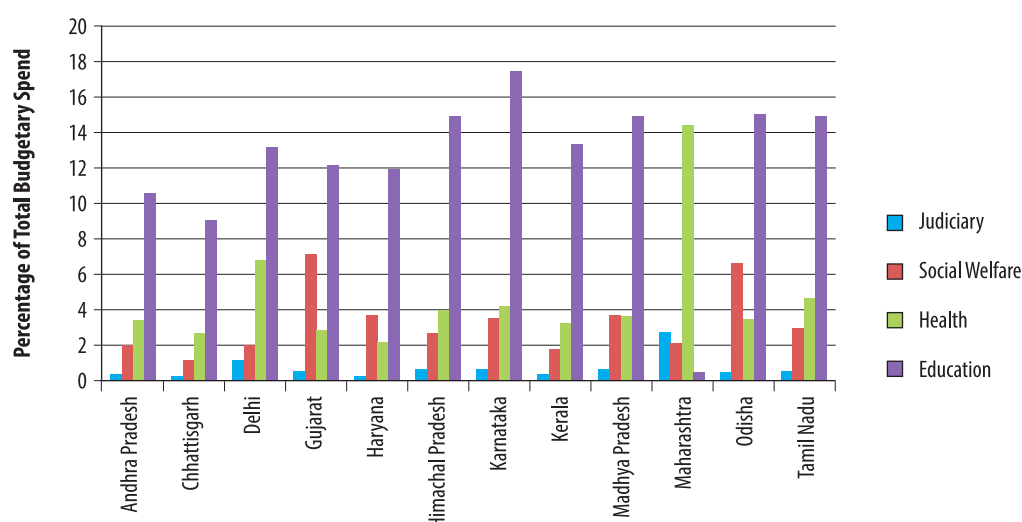
There is no consensus on how the quantum of budgetary allocation to the judiciary should be evaluated. The Supreme Court and the Law Commission have, in their reports, compared allocation to the judiciary with allocation to the social welfare, health, and education sectors. Figure 2 shows a comparison between expenditure on the judiciary and expenditure on other social sectors (as a percentage of total budgetary expenditure) in a few select states. It is clear that expenditure on judiciary is much lower than that on social and welfare sectors.

**FIGURE 1.** Expenditure towards Administration of Justice by the Karnataka Government



Source: Annual Financial Statements of the Karnataka Government.

**FIGURE 2.** Comparison of Budgetary Allocation amongst Social Sectors by States



Source: 'NCMSC 2012. *National Court Management System: Policy and Action Plan*. New Delhi: Supreme Court of India, p. 26.

Note: Average expenditure on judiciary for the years 2007 to 2011 has been considered.

The 127th report of the Law Commission of India had highlighted, as early as in 1988, the poor quality of infrastructure with which the courts have to make do in their functioning. It remarked, 'The administration of justice is not regarded as part of the developmental activity and therefore not provided through the five year or annual plans. Justice is thus a non-plan expenditure.'<sup>3</sup>

## GRANTS

In light of the concern over low budgetary allocation to the judiciary, the 13th Finance Commission awarded<sup>4</sup> a special grant of ₹5,000 crores over a period of five years (2010–2015) to both the union and state governments to be utilised for the following purposes:

1. Operation of morning/evening/special shift courts
2. Establishing alternative dispute resolution (ADR) centres and training of mediators/conciliators
3. Lok Adalats
4. Legal aid
5. Training of judicial officers
6. State judicial academies
7. Training of public prosecutors
8. Creation of posts of court managers
9. Maintenance of heritage court buildings

A summary of the funds allocated, released, and ultimately used, for various schemes under the 13th Finance Commission, is set out in Table 1.

**TABLE 1.** Summary of Funds Allocated, Released, and Utilised under 13th Finance Commission

Schemes	Allocation (₹ crores)	Release (₹ crores)	Percentage of allocation	Expenditure (₹ crores)	Percentage of allocation
Operation of morning/evening courts/shift courts	2,500	850.49	34	237.93	10
Lok Adalats/legal aid	300	120.36	40	67.89	23
Training of judicial officers	250	151.05	60	110.37	44
Training of public prosecutors	150	78.16	52	52.45	35
Maintenance of heritage court buildings	450	198.93	44	106.03	24
State judicial academies	300	171	57	123.02	41
ADR centres/training to mediators	750	391.21	52	272.1	36
Court managers	300	106.73	36	40.37	13
<b>Total</b>	<b>5,000</b>	<b>2,067.93</b>	<b>41</b>	<b>1,010.16</b>	<b>20</b>

Source: Department of Justice, Ministry of Law and Justice. 2015. 'Thirteenth Finance Commission (TFC) Award (Status, as on 31st March, 2015)', available online at <http://doj.gov.in/sites/default/files/TFT-Award-Status-31.03.2015.pdf> (accessed on 4 April 2016).

Note: Figures are as of 31 March 2015.

As can be seen from the above, at the end of the five-year period, funds of ₹ 1,010 crores were ultimately utilised against the initially allocated amount of ₹ 5,000 crore, a mere 20 per cent. Further analysis is required to identify the reasons for such abysmally low levels of funds utilisation, which is outside the scope of this chapter.

However, the 14th Finance Commission has dispensed with most centrally sponsored schemes and special grants, of which the grant to judiciary is also one. Therefore, the onus of providing additional funding to meet the requirements of the judiciary is now squarely on the state governments. This is amply clear from the recommendation of the 14th Finance Commission to the proposal of the Department of Justice for additional funds of ₹ 9,749 crores: 'The Commission in its report has endorsed the proposal of the Department and urged State Governments to use the additional fiscal space provided by the commission in the tax devolution to meet such requirements.'<sup>5</sup>

The Planning Commission had also instituted certain centrally sponsored schemes to augment the resources of the state governments with respect to judiciary, such as the e-Courts Project, which envisages computerisation of district and subordinate courts across the country. During the 12th Five Year Plan period (2012–2017), ₹ 1,670 crores was budgeted for this project.<sup>6</sup>

## MANPOWER REQUIREMENTS

Manpower cost forms 70–80 per cent of the expenditure of the judiciary.<sup>7</sup> However, in respect of all posts, including judges, there is a yawning gap between the number sanctioned and actual appointments. This vacancy has persisted for a long time. The Law Commission's 120th report was the first to raise the red flag on this topic.<sup>8</sup> It remarked in paragraph 4 of its report:



[T]he relevant questions are as follows:

- (a) On what principles since independence, have questions been taken concerning the appropriate strength in each cadre of the judiciary?
- (b) Have these principles or norms ever been publicly articulated?
- (c) Have they changed over the last four decades, and, if so, through what kind of discourse?

The 127th Law Commission Report provided further details of how sanctioning of additional manpower requirements needs to be rationalised and appointments need to be made in time.<sup>9</sup> However, the position has not changed much since then.

A significant outcome expected from a budgeting process is the plan for additional resources required in the future. The public discourse on judicial manpower requirements is fixated with the number of judges, without considering the fact that more judges would need more support staff for them to function efficiently and effectively. An attempt at understanding manpower requirements should also factor in how increased use of technology would change the human resource requirements both quantitatively and qualitatively.

The persistence of manpower shortage and the lack of funding form a perfect vicious cycle—one reason for vacancies is lack of funds, and adequate funds are not allocated because budgeting is done based on manpower cost likely to be incurred. There is a clear need for change in the budgeting practices and planning to get out of this cycle.

## OUTLAY VERSUS OUTCOME

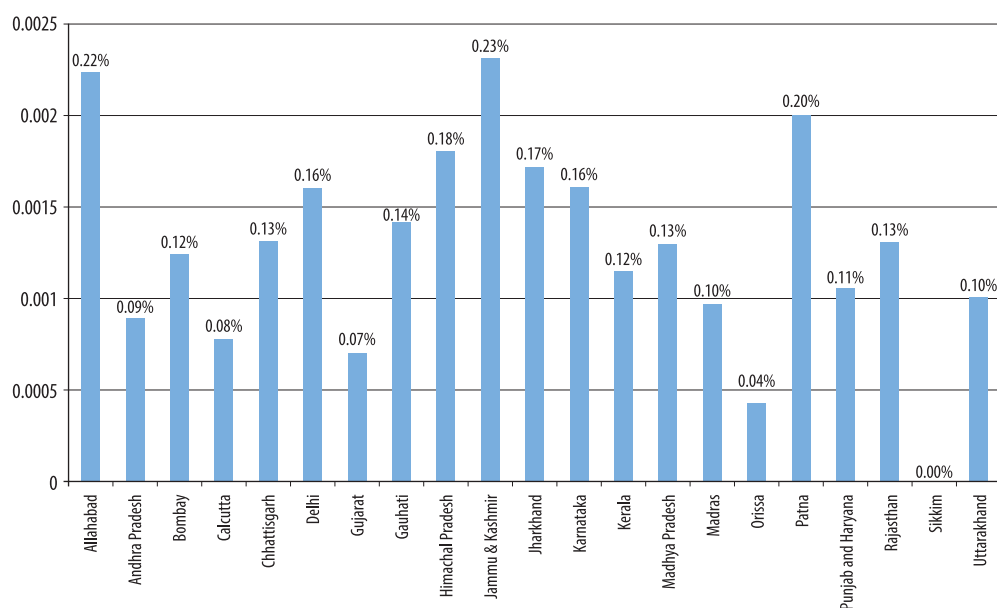
While there is no denying the need for increased allocation towards court infrastructure and court staff, there is a need to balance this with outcomes. The examples that follow suggest lines of inquiry that could be followed in analysing expenditure on the judiciary. A deeper analysis needs to be carried out to measure the impact of quantum and nature of expenditure with efficiency of the judiciary.

The following figures depict expenditure on the judiciary across states. Information in respect of each state have been grouped to include jurisdictional High Courts and Benches. For example, Bombay includes Maharashtra, Goa, and Daman and Diu.

Figure 3 shows the average budgetary allocation of states towards the judiciary during 2013 and 2014 as a percentage of net state domestic product (NSDP) at current prices. As is apparent, most states allocate in the same range, between 0.10 per cent and 0.20 per cent.

Figure 4 compares per capita expenditure on judiciary. Most states spend between ₹50 and ₹150 per person on an average per year. Figure 5 depicts average expenditure by various states per case. Most states spend between ₹1,600 and ₹2,700 per case per year on average.

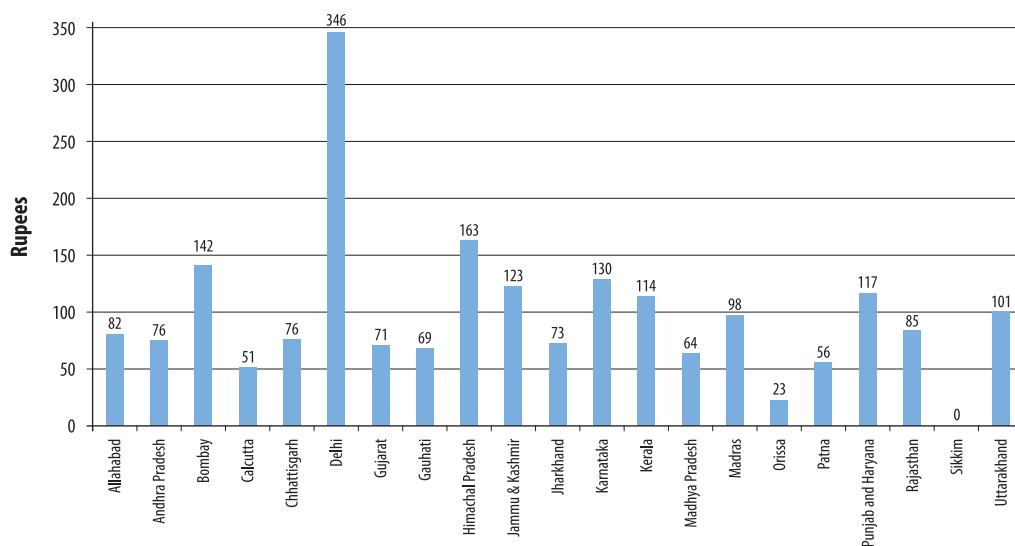
**FIGURE 3.** Expenditure on Judiciary as a Percentage of NSDP



Source: Annexure II to the Agenda for the Ninth Meeting of the Advisory Council of the National Mission for Justice Delivery and Legal Reforms accessed at <http://doj.gov.in/sites/default/files/Minutes-Ninth-Meeting.pdf>. NSDP figures are from India Public Finance Statistics released by Ministry of Finance.

Note: Average expenditure (gross of fees and fines) and NSDP during 2013 and 2014 is considered.

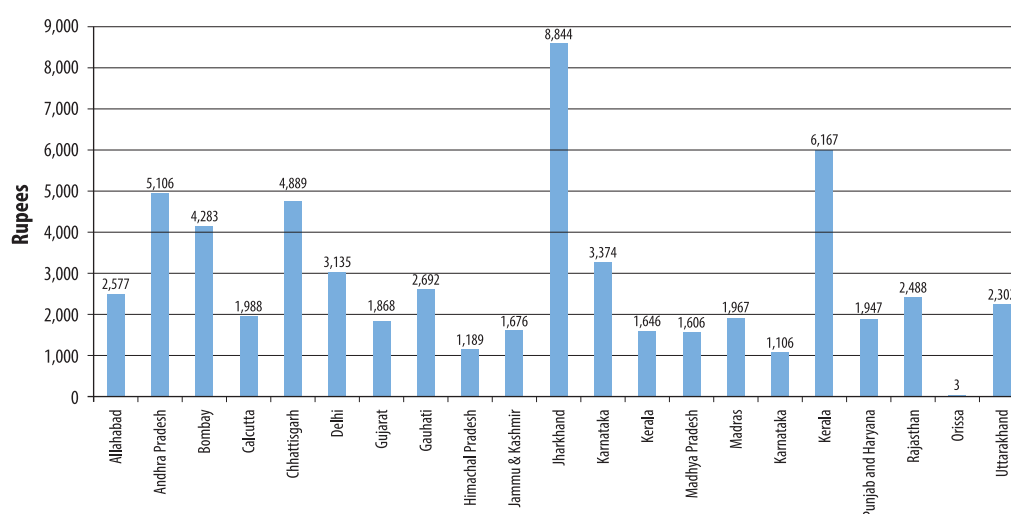
**FIGURE 4.** Expenditure on Judiciary (Per Capita)



Source: Annexure II to the Agenda for the Ninth Meeting of the Advisory Council of the National Mission for Justice Delivery and Legal Reforms accessed at <http://doj.gov.in/sites/default/files/Minutes-Ninth-Meeting.pdf>.

Notes: (i) Average expenditure (gross of fees and fines) during 2013 and 2014 is considered. (ii) Population figures are as per 2011 census.

**FIGURE 5.** Expenditure on Judiciary (Per Case)



Source: Annexure II to the Agenda for the Ninth Meeting of the Advisory Council of the National Mission for Justice Delivery and Legal Reforms accessed at <http://doj.gov.in/sites/default/files/Minutes-Ninth-Meeting.pdf>. Information relating to cases filed and disposed are from the Supreme Court's Court News, Volume VII, Issues 3 and 4, Volume VIII, Issues 1–4, and Volume IX, Issues 1 and 2.

Notes: (i) Average expenditure (gross of fees and fines) during 2013 and 2014 is considered; (ii) 'Case' refers to the average of the number of cases filed and disposed of during these two years.

## CONCLUSION

Budget preparation practices need to consider improvement in operational efficiency and capital expenditure requirements in order to be effective. The administrative capacity of the judiciary with respect to budget-making needs to be enhanced. From the annual financial statements released by state governments, it is not possible to analyse the quantum of expenditure on modernisation, computerisation, upgradation, and expansion, and more detailed disclosures need to be made. This assumes even more significance as the 14th Finance Commission has put the onus on state governments for making budgetary allocation to the judiciary. Given the enormous social impact of the operation

of the judiciary, the High Courts and the Law Ministry should consider the idea of transparent budget-making process based on public inputs and presenting the same separately from the general budget. This would also assuage any concerns about the independence of the judiciary from a financial perspective.

The quantum of allocation needs to be increased to accommodate increasing manpower and information technology-related infrastructure needs. There is also a need for further detailed study on the exact reasons for the varying levels of efficiency of the different courts and how the nature and quantum of budgetary support affects them.

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## Notes

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# International Experiences in Judicial Administration

*Sandeep Suresh*

It is not easy to define the term judicial administration exhaustively. More than once, people tend to confuse judicial administration with the judicial process of adjudicating cases and delivering justice. Nevertheless, we can describe this term in terms of functions and objectives. Generally, judicial administration refers to the system of management and governance of the courts of law. It consists of practices, procedures, and offices that deal with the management of a court's overall machinery.<sup>1</sup> According to a report of the European Commission for the Efficiency of Justice (CEPEJ), judicial administration is a set of resources required for the organisation, structuring, and functioning of the tasks assigned to the justice system and its proceedings.<sup>2</sup> In essence, the objective of judicial administration is to give administrative support to judges for efficiently performing their judicial and constitutional duties.

## QUALITY OF JUSTICE AND JUDICIAL PERFORMANCE

Judicial adjudication of cases by judges and judicial administration form two sides of the same coin. When we talk about the judiciary, the common man sees only the former as the primary feature of the judiciary. However, for judges to execute their duties and for litigants to access and benefit from the justice system, efficient administration of courts is essential.

The quality of judges and their judgments are not the only characteristics that ensure quality of justice. For adequate operation of courts, proper tools of case management as well as sufficient financial resources which make it possible for judges to hear cases and make decisions in an expedient, effective,

and efficient manner are inevitable.<sup>3</sup> In addition, the massive impact which the judicial system has on the society means that it is essentially about the citizens who approach courts for justice. Therefore, court machinery should be managed in such a way that the litigants find access easy. For example, an improper system of case management could lead to delay in disposing of cases.

Theories about quality in organisations have as their impetus the idea that not only should an organisation be able to fulfil its tasks in an efficient and effective manner, but it should also be customer or client-oriented.<sup>4</sup> Such an approach will consequently help in gaining the trust of litigants, who are the customers of the judiciary in a lighter sense.

Efficient judicial administration is a criterion that ensures quality of justice systems, and it can be considered as a credible yardstick for evaluating judicial performance. Evaluation of judicial performance covers performance of judges as well as the judiciary as an institution. It is important to measure judicial performance, but care must be taken to use the proper methods. For example, quality of judgments cannot be assessed quantitatively.

## **VALUE OF JUDICIAL ADMINISTRATION: A COMPARATIVE STUDY**

This section will examine the various reforms adopted to improve fairness and efficiency of the judiciary as an institution in Ireland, South Africa, Netherlands, Philippines, and the United Kingdom (UK). The analysis of results achieved by some of those reforms will demonstrate that judicial administration is a non-negotiable aspect for the judiciary to achieve a certain standard in the quality of justice.

## **Ireland**

Since 1924, the administration of courts in Ireland, including management of courts, funding, judicial salaries, and human resource management, was within the authority of the executive, represented by the Ministry of Justice. However in 1995, after persistent demands from the judiciary, the Irish government constituted a working group to assess the possibility of having an independent administrative agency.<sup>5</sup> Based on its recommendations, the Courts Service Act, 1998 was enacted, and an independent agency called the 'Courts Service' was established.

The Courts Service is governed by a board comprising 17 members, of whom nine are from the judiciary, including the Chief Justice of the Supreme Court of Ireland, who is its Chairperson. Other members include the chief executive officer of Courts Service, lawyers, Ministry of Justice representatives, Courts Service staff, and an expert in matters of finance, commerce, and administration.<sup>6</sup> The broad functions of the Courts Service are to manage the courts, provide support services for judges, provide information on the courts system to the public, provide facilities for users of the courts, and provide, manage, and maintain court buildings.<sup>7</sup> The Courts Service's organisational structure is comparable to that of a corporate house, and has several divisions of work responsibilities. For example, there are separate departments for management of the Supreme Court and High Courts on one side and Circuit and District Courts on the other. Further, there are separate committees for infrastructure matters, human resource management, and development of reform measures.<sup>8</sup>

In 2014, the Courts Service completed the Combined Office Project, which restructured several circuit court and district court offices and their staff in county towns to create a unified court office with a common manager, deputy manager,

and county registrars. This project resulted in reducing the number of circuit and district court offices by half between 2010 and 2014.<sup>9</sup> This was an innovative measure to reduce expenditure on travel and payroll of personnel, and maintenance costs and lease expense of buildings. More importantly, it made access more convenient for litigants easily by situating court offices at one location. These and other similar measures—reorganisation of court venues and securing accommodation for circuit court judges near their assigned courts, which meant less travel and more time to hear cases—helped the Courts Service reduce the judiciary's expenditure, and since 2008, expenses fell by 30 per cent.<sup>10</sup> Another reform that the Courts Service facilitated helped in faster disposal of asylum pleas. The number of sittings across the country for hearing asylum cases was increased, and an additional judge was appointed.<sup>11</sup> This meant that the litigants' waiting time for disposal of asylum cases reduced from 30 months to nine months by the end of 2014.<sup>12</sup>

In the 2014 European Union Justice Scoreboard released by the European Commission, the Irish legal system was ranked second in Europe in terms of the level of judicial independence.<sup>13</sup> The independent agency model of judicial administration via the Courts Service, acting as the middle path between the judiciary and the executive in terms of court administration, meant that the judiciary was less dependent on the executive. Further, with the administrative burden shared, judges could focus more on their judicial functions.

## South Africa

In a lecture he delivered at the University of Stellenbosch on 25 April 2013, the Chief Justice of South Africa, Mr Mogoeng Mogoeng, cited preparation of court budgets without consultation with the judiciary, inadequately trained staff, and

shortage of courtrooms and chambers for judges as some main problems relating to judicial administration.<sup>14</sup> The movement for a more judiciary-led court administration system resulted in the enactment of the Superior Court Act, 2013 which vests certain judicial administration powers with the newly developed Office of the Chief Justice (OCJ). The OCJ is mainly authorised to (a) provide legal and administrative support to the Chief Justice; (b) provide communication services and internal coordination; (c) develop courts' administration policies, norms, and standards; and (d) support the judicial functions of the Constitutional Court and activities of the Judicial Service Commission and the South African Judicial Education Institute.<sup>15</sup>

One of the first reforms initiated by the OCJ was the introduction of Norms and Standards for the Performance of Judicial Functions (NSPJF) on 28 February 2014.<sup>16</sup> The NSPJF was formulated to tackle issues such as judicial delays and substandard performance of judicial officers.<sup>17</sup> It introduced some significant norms and standards, such as:

1. No matter may be enrolled for hearing unless it is certified 'trial ready' by the concerned judge and judges must ensure there is compliance with all applicable timelines.
2. Every civil case must be finalised within one year of the date of issuance of summons (High Courts) and within nine months (magistrates' courts). For criminal cases, judges must ensure that every accused person pleads to the charge within three months from the date of first appearance and efforts must be made to finalise the case within six months thereafter.
3. Judgments should not be reserved without fixing a date for pronouncing it and efforts should be made to give judgments within three months after the last hearing (unless there exists exceptional circumstances).



In a workshop organised by the OCJ in March 2014 to review the efficiency of these norms (which were tested on a pilot basis), it was revealed that trial dates, after certification by a judge in the Western Cape High Court, were being allocated within three months, as opposed to two years.<sup>18</sup> Further, in the Kwazulu-Natal division of the High Court, waiting time for trial dates had reduced from one year to between six and eight months.<sup>19</sup>

Official statistics also suggest that implementation of the NSPJF has resulted in reducing case backlog.<sup>20</sup> According to the data released by the 2015 Estimates of National Expenditure Report, given in Table 1, the number of criminal cases on the backlog roll in the High Court divisions had reduced every year.<sup>21</sup>

**TABLE 1.** Reduction in Backlog of Cases

Year	Number of cases
2011–2012	374
2012–2013	362
2013–2014	287
2014–2015	281

Therefore, a transition from the executive model of judicial administration to a judiciary-led model has helped the South African judiciary make progress in terms of institutional efficiency.

## Netherlands

In European Union member countries such as France, Spain, Portugal, Italy, Sweden, and Denmark, several models of Councils for the Judiciary were in place for a long time. The main task of these councils was to function as intermediaries between the government and the judiciary for administering the courts and managing its

resources.<sup>22</sup> The judicial administration system in Netherlands has closely followed the path taken by these countries.

The Judicial Organisation Act was enacted in 2002 and the Council for the Judiciary, an independent body, was set up under this statute to evaluate the quality of the judicial system and provide support for the management of courts, like preparing budgets.<sup>23</sup> Additionally, the Council has to handle the automation and information provision within the courts, housing and security, quality of the work processes, organisation of the courts, and personnel matters. The Council has five members—three judicial members and two from outside the judiciary who must be experts in finance and organisation matters.<sup>24</sup>

The central aim of the Council in its initial years was to deal with the issue of lengthy court proceedings. To regulate criminal trials, the Council implemented two main measures. In 2004, a National Coordination Centre for Mega Cases was opened.<sup>25</sup> This centre is responsible for the initial examination of big and high-priority criminal cases, such as organised crime or terrorism, which require several hearings and greater resources. Thereafter, the centre considers the workload of the concerned court with jurisdiction and the need for specialised judges. Subsequently, along with the president of the criminal court, the centre decides the court to which the particular mega case must be allotted for hearing. This programme was intended to reduce the burden of smaller criminal courts that would not have the necessary resources, specialised judges, and the requisite time to spend on a complex matter. The Council also developed the ‘adjournment protocol’, which described specific situations when adjournments could be granted.<sup>26</sup> This measure removed unnecessary discretion from the hands of judges and indirectly contributed to the cause of ensuring time-bound trial proceedings.



A most frequently mentioned problem was the unreasonable delay in the proceedings of particularly civil and administrative cases.<sup>27</sup> To reduce pendency of civil cases, a centralised judicial unit called the ‘Flying Brigade’, composed of 6 judges and around 30 law clerks, was instituted. The Flying Brigade assists overburdened courts in reducing the number of pending cases by preparing draft judgments for cases that have been already heard. The Brigade has prepared around 8,000 draft decisions.<sup>28</sup> These reforms considerably aided in reducing the average duration of civil case proceedings, from 626 days in 1998 to 436 days in 2012.<sup>29</sup> Further, according to the surveys conducted by the Council, the number of litigants satisfied about the waiting time for trials had increased from 48 per cent in 1998 to 78 per cent in 2013.<sup>30</sup> Notably, the general satisfaction of litigants about the court process and administration has also increased from 66 per cent to 78 per cent in the same period.

One of the most unique strategies used by the Council is the output-based budget allocation system.<sup>31</sup> According to this system, the judiciary would be allocated funds in accordance with its productivity, that is, the number of cases disposed in the year previous to the budget year. This incentive-based system was reviewed by the Deetman Committee in December 2006, and found that during the period 2002–2005<sup>32</sup> there was a moderate (8 per cent) increase in overall productivity.<sup>33</sup>

Therefore, statistics and survey results illustrate that apart from the decline in delay of case proceedings, there has been an overall rise in the level of judicial administration after the Council was established in 2002.<sup>34</sup>

## Philippines

In 2002, some regional trial courts ( RTCs) in the Philippines witnessed an average of 268 new cases

being filed every month. However, only 234 cases were disposed of in that entire year.<sup>35</sup> In addition, one RTC had 130 cases in its registry that were pending for more than nine years.<sup>36</sup> On 1 July 2003, as part of its action programme for judicial reform, the Supreme Court of the Philippines introduced a pilot project on case flow management in selected RTCs and metropolitan trial courts (MTCs).<sup>37</sup> Under this scheme, incoming cases were categorised as:

1. Fast track (cases requiring very minimal judicial interference).
2. Complex track (cases requiring the most judicial interference).
3. Standard track (cases requiring normal judicial interference).

The allotment for each case was to be decided by the concerned judge in consultation with the lawyers and the parties based on nature of the case, evidence to be produced, and claims and defence of parties.<sup>38</sup> Each of these tracks had different time-frame requirements and would be tracked using software. If it was found that the cases were not progressing according to prescribed timelines, the case details would be coloured in red so that court office clerks could check regularly and ensure that all the cases were brought back to the track. The evaluation of this pilot project evidenced positive results. At the MTC level, of all the cases filed after 1 July 2003, 95 per cent of civil cases and 90 per cent of criminal cases were disposed of according to the set time frames.<sup>39</sup> At the RTC level, disposal of cases increased from 2,750 cases in 2002 to 3,600 during July–December 2003.

## United Kingdom<sup>40</sup>

After the enactment of the Constitutional Reform Act, 2005 (CRA),<sup>41</sup> the Lord Chancellor’s position

was converted to that of a Secretary of State and like other cabinet ministers, a member of the legislature.<sup>42</sup> The judicial authority of Lord Chancellor as the head of the judiciary was transferred to the Lord Chief Justice.<sup>43</sup> The Lord Chief Justice is responsible for representing views of the judiciary to the parliament, training of judges, and allocation of work within the courts.<sup>44</sup> This was a key reform in terms of strengthening judicial independence in the UK. Apart from restructuring the Lord Chancellor's Office, the CRA established the Supreme Court of the UK, which absorbed the judicial functions of the House of Lords.<sup>45</sup>

Even though the Lord Chief Justice is the head of the judicial system, administration of courts is not solely his responsibility under the CRA. Administration of the Supreme Court is supervised by the chief executive, a non-ministerial statutory office formed by Section 48, CRA. The chief executive's main duties are to manage finance and audit reports, regulate and supervise work of the staff, and ensure the infrastructural quality of court buildings and courtrooms.<sup>46</sup> For the administration of all other courts and tribunals in the UK, there is an agency called Her Majesty's Courts and Tribunals Service (HMCTS) within the Ministry of Justice.<sup>47</sup> Unlike the chief executive for the Supreme Court, members of HMCTS include representatives from the Ministry of Justice.<sup>48</sup>

After the structural reforms in 2006, a significant measure initiated for better judicial administration was the better case management (BCM) programme,<sup>49</sup> introduced through the Criminal Procedure Rules, 2015 and the Criminal Practice Directions, 2015, which took effect from 5 October 2015. The central scheme under this programme is the Early Guilty Plea Scheme.<sup>50</sup> In the UK, the majority of criminal cases result in guilty pleas.<sup>51</sup> Under this scheme, magistrates' courts will engage in early review of those cases that are likely to result in guilty pleas with the help of the

concerned lawyers and parties to discover the core issues in those cases.<sup>52</sup> The rules require that all the cases must be listed for the first hearing in the Crown Court within 28 days after being sent from the magistrates' court.<sup>53</sup> This is to ensure that the first hearing is as effective as possible, and if the accused pleads guilty at the hearing, the judges must be able to order the sentence as soon as possible.<sup>54</sup> In other cases, the courts must issue clear directions and list the case for trial without the need for interim hearings.<sup>55</sup>

To supplement schemes under the BCM programme, the Crown Court Digital Case System (DCS) was also launched simultaneously. The DCS creates digital versions of the case files in courts. It allows the parties, lawyers, and the judges to upload and access case documents, make notes and present cases in the courts digitally in an orderly manner.<sup>56</sup> For example, prosecution evidence will be deemed to be served when it is uploaded on the DCS and a notification is sent by email to the other party.

As these are newly introduced schemes, there is no reliable empirical evidence that reveals its outcomes. For evaluation of such initiatives, HMCTS conducts surveys and opinion polls among citizens who use the courts. Based on these surveys, usually HMCTS publishes the results with a ranking that corresponds to the right level of quality of the courts and thus promotes a competition between the courts.<sup>57</sup>

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## CONCLUSION

Judiciaries in every part of the world are under pressure owing to increase in case backlog, lack of institutional independence, substandard performance of judicial officers, and so on. In response, governments and judiciaries have developed reform strategies and new institutions to deal with those

problems. Importantly, they have looked to improve judicial administration for the convenience of litigants and other court users, who seek an effective judiciary for securing justice and their rights.

An effective judiciary is predictable, resolves cases in a reasonable time frame, and is accessible to the public.<sup>58</sup> Predictability can be understood in terms of the consistency of judgments and legal principles developed by courts as well as that of court proceedings. Accessibility can be measured in terms of the existence of constitutional or legal rights to approach courts for grievance redressal as well as the convenience in using the court machinery to file their cases and getting justice. Resolving cases within a reasonable time frame is also not merely about the judicial process of judging a case, but also depends on a well-administered court management and case flow system. Hence, the effectiveness and quality of the judiciary is certainly dependent on the standard of both judicial adjudication and judicial administration.

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# Judicial Efficiency and Causes for Delay

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*Alok Prasanna Kumar*

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It is a matter of concern that for several years now, India's rank among nations in 'Enforcement of Contracts' in the World Bank's Ease of Doing Business Report has been among the lowest of all nations. India's ranking in the 'Enforcement of Contracts' metric was 186 out of 189 nations, and later revised to 178 in the 2015 Report and is currently 178 out of 189 nations according to the 2016 Report.<sup>1</sup> This ranking is attributable to the 1,420 days (approximately four years) it takes to resolve commercial disputes in the courts in New Delhi and Mumbai and that it costs about 39.1 per cent of the value of the claim to enforce it.<sup>2</sup> Though the World Bank's methodology is limited to studying just the district courts of Mumbai and New Delhi and cannot possibly represent the full picture of the Indian judiciary, the numbers reflect what is perceived to be a widespread malaise in the Indian judiciary—delay.

The World Bank's numbers reflect some of the wider ills that are perceived to afflict the Indian judicial system—delays, uncertainty, and high cost. While the World Bank's report does not reflect other attributes of India's judiciary, such as independence or fairness—where India's judiciary may be doing better than most other nations—the fact remains that an independent and fair judiciary that is unable to deliver its verdicts in a reasonable time frame is failing its purpose.

What are the benefits of an efficient judicial system? Studies carried around the world seem to suggest that judicial efficiency has a bearing on the optimal functioning of the economy.<sup>3</sup> Improved judicial efficiency, in addition to inflation, appears to also affect interest rates positively in that a more efficient judiciary that is better at upholding at rule of law seems to reduce the costs of lending and borrowing as well.<sup>4</sup>



On the other hand, judicial inefficiency in terms of high pendency of cases and large backlogs has been blamed for reducing investment and employment in Brazil by 10 and 9 per cent respectively.<sup>5</sup>

This is by no means to suggest that efficiency is the first or even the most important virtue of a judicial system. Independence, fairness, and certainty are just as, if not more, important to the working of a judicial system. However, the absence of efficiency tends to deter litigants from approaching the judicial system for resolution of their disputes. Popular culture and anecdotal evidence seem to suggest that this is happening in India. Whatever its other merits, a judicial system that is unable to deliver verdicts in a timely and cost-effective manner is unlikely to inspire confidence in litigants and users. Even apart from litigants who approach the court for resolution of disputes, delays in criminal trials are also responsible for widespread violation of civil liberties as under-trial prisoners and accused are effectively punished with imprisonment without having their day in court.

This chapter is therefore an analysis of the nature of the problems in the functioning of the Indian judicial system preventing it from disposing of cases efficiently and without too much of a delay.

This section has already outlined the broad literature available on judicial efficiency across the world, what the impact of more efficient courts is, and how to measure it. The next section will discuss the definitions of some of the terms being used. This is necessary to keep the problem—delayed cases—in sight and analyse it in the proper perspective. The section that follows looks at disposal of cases in select High Courts and district courts, based on data collected by DAKSH on the time taken to dispose of cases and the number of hearings that they usually entail. The fourth section will be a brief analysis of the numbers that emerge from

the data collected by DAKSH and accessed for the purposes of the present chapter.

This chapter by no means claims to be an exhaustive exploration of all the problems faced by the Indian judicial system or provide answers to all the problems pointed out here. The scope of this paper is not to try and assess what should be an ideal model or set a benchmark for how the Indian judicial system should function, but to compare speeds of disposal between courts in India. This is to provide a comparative perspective across courts in an effort to identify what reforms are needed and how they should be implemented.

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## DEFINITION OF KEY TERMS

The terms ‘arrear’, ‘pendency’, ‘delay’, and ‘backlog’ require some conceptual clarification before I proceed. These words are sometimes used interchangeably and confusingly, resulting in misidentification of the problem. For instance, the data point that ‘three crore cases are pending’ is one that is often presented in the public domain, sometimes as a matter of fact and sometimes as a matter of concern.<sup>6</sup> As per the National Judicial Data Grid (NJDG), the actual figure of total pending cases in the trial courts is 2,05,75,852. However, even this figure is not only non-illuminating, but is also misleading in many ways. What it does not reveal is that this figure has to be seen in the context of 15,562 judges in the trial courts,<sup>7</sup> the number of cases being filed (1,79,73,163) and disposed of (1,71,95,146) every year<sup>8</sup> and the time taken to dispose of these cases. It is futile to therefore speak of ‘pendency’ alone in the absence of such nuances.

Likewise, there does not seem to be universal acceptance on what constitutes ‘arrear’ or ‘backlog’ either. For instance, the Supreme Court classifies



cases that were pending for more than one year as ‘arrears’ in the Court News publication.<sup>9</sup> Yet, in the Chief Justices conference held in 2009, the term ‘arrears’ is used synonymously with the term ‘pendency’ to indicate all cases that are pending at any given moment.<sup>10</sup>

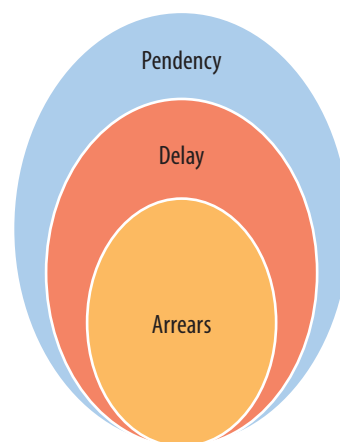
One attempt to set these terms straight has been made by the Law Commission of India in its 245th Report, *Arrears and Backlog: Creating Additional Judicial (Wo)manpower*.<sup>11</sup> Here, the Law Commission defines the terms ‘arrears’, ‘backlog’, ‘delay’, and ‘pendency’ as follows:

- a. *Pendency*: All cases instituted but not disposed of, regardless of when the case was instituted.
- b. *Delay*: 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.
- c. *Arrears*: Some delayed cases might be in the system for longer than the normal time, for valid reasons. Those cases that show unwarranted delay will be referred to as arrears.
- d. *Backlog*: When the institution of new cases in any given time period is higher than the disposal of cases in that time period, the difference between institution and disposal is the backlog. This figure represents the accumulation of cases in the system due to the system’s inability to dispose of as many cases as are being filed.<sup>12</sup>

‘Pendency’ therefore consists of the universal set of cases which have been filed and not been disposed of, ‘backlog’ refers to the difference between filing and disposal of cases in a given time period, ‘delay’ being a subset of ‘pendency’ where a case has taken longer than the ‘normal time’ that it should take for disposal of such a case, and ‘arrears’ being a further subset of ‘delay’ where the case has taken a longer time and no ‘valid reasons’ explain the same.

If it were to be represented as a Venn diagram, it would be as shown in Figure 1.

**FIGURE 1.** Representation of ‘Pendency’, ‘Delay’, and ‘Arrears’



Note: Diagram not to scale.

While these definitions do bring in some much-needed clarity to the topic at hand, there is still a certain degree of vagueness in these definitions which makes them difficult to use analytically. For instance, the term ‘normal time’ does not refer to a fixed time period by which a case should be disposed of, but is something that the Law Commission recommends should be determined through ‘case-specific time tables’<sup>13</sup> which it leaves up to High Courts to determine keeping in mind local needs. While this approach may be justified to assess individual judicial performance of district court judges, the absence of a standard time table does not really help us identify problems in the High Courts or in the Supreme Court. Even within the district courts, there is a danger that the benchmark may be set too low to really make a meaningful difference to the problem of delay and arrears. Nevertheless, the task of preparing case-specific time tables is one which can be undertaken to ensure that guidelines are set and cases are disposed of within said time frames.

Quite apart from this, the Law Commission also does not go into the ‘valid reasons’ which may be why a case is an ‘arrear’ one instead of being a ‘delayed’ one. Be that as it may, for the purposes of this chapter, the terms ‘pendency’, ‘arrears’, ‘back-log’, and ‘delay’ are used hereinafter in the same sense as used by the Law Commission of India, with the above caveats.

## MEASURES OF JUDICIAL EFFICIENCY

There are multiple ways in which judicial efficiency of the judiciary can be measured—whether in terms of the number of days it takes to dispose of a certain kind of case,<sup>14</sup> or in terms of the ratio of filing to disposal of cases.<sup>15</sup> Another possible measure of efficiency could be the use of judicial time, that is, the amount of time taken to dispose of a given case. The use of judicial time could be measured through the time taken for each hearing in a given case to see whether it took five minutes or a whole day to hear the case. However, at present, in the absence of detailed records being maintained on how long it takes for a case to be heard, or some empirical method of collecting this data, it will not be possible to assess in the Indian context.

Each of the above-mentioned measures has its own methodology and use depending on the context in which judicial efficiency is being measured. In the Indian context, while any of these measures would be useful to assess the functioning of the judiciary, this chapter will focus on the number of days it takes to dispose of cases and the ratio to filing and disposal of cases.

The data in the NJDG is categorised on the basis of the time periods for which case has been pending. This is presented in Table 1.

**TABLE 1.** Cases Pending in District and Subordinate Courts in NJDG Database

No.	Duration of pendency	Number	Percentage of cases
1.	Less than two years	86,29,818	41.75
2.	2–5 years	61,55,983	29.79
3.	5–10 years	36,91,959	17.86
4.	More than 10 years	21,89,925	10.6
Total		2,06,67,841	100

Source: NJDG database.

Note: Figures are as of 8 December 2015.

The uneven periods for which the cases have been split up makes it difficult to arrive at a median figure for delay. While the manner in which the data has been presented is no doubt problematic and unhelpful for a closer analysis, nevertheless it can be safely said that cases that have been pending for more than five years are definitely ‘delayed’, even if they do not constitute the full set of all cases that are ‘delayed’. If we assume that cases that have been pending for less than two years only constitute ‘pendency’ without necessarily being delayed,<sup>16</sup> from the NJDG figures, we can say that somewhere between 28.46 per cent and 58.25 per cent are ‘delayed’ of which about up to 29.79 per cent could be for valid reasons and the rest ‘arrears’. What these valid reasons could be, the Law Commission has not gone into in its report, and in the absence of applicable time frames, it is difficult to say for sure.

However, as Table 2 shows, when one looks at cases which have been disposed since 2000, from the data made available by DAKSH, we find that of 3,43,105 cases disposed of by 331 district and subordinate courts that DAKSH has obtained data from, 2,80,521 or 81.8 per cent of cases have taken more than five years to dispose of and were therefore definitely delayed. Of these, 1,94,814 or nearly

57 per cent of cases in total have taken more than 10 years to dispose of.

**TABLE 2.** Time Taken by District and Subordinate Courts in DAKSH Database to Dispose of Cases

Time taken for disposal	Number of cases	Percentage of total
Less than five years	62,584	18.24
5–10 years	85,707	24.98
10–15 years	1,91,412	55.79
More than 15 years	3,402	0.99

Source: DAKSH database.

Note: Figures are as of 15 February 2016.

While the sizes of the datasets are no doubt different, the vast discrepancy in the numbers available on the NJDG and the DAKSH dataset for cases suggests that the NJDG numbers may in fact be painting a rosier picture of the delays in cases than the actual position. It also highlights the need for more granular data from the NJDG to be able to effectively analyse the true position of delay and pendency.

At present, while the NJDG gives broad figures about the number of pending cases, sorted into uneven yearly buckets, we do not have specific data on how long it actually takes to get a case disposed of at various levels in the Indian judicial system. At most, it is possible to say how long it would take to dispose of pending cases without the burden of additional cases and at the same number of judges. Obviously this is not a very realistic assumption to make while proposing solutions, and we must therefore examine data more minutely where possible.

To this end, I have examined the data collected by DAKSH on the number of cases that have been filed and disposed, how many hearings it took to dispose of the cases, and how long it took to dispose of the cases, at the High Court level.

## ANALYSIS OF JUDICIAL EFFICIENCY

In assessing judicial efficiency, this section looks at certain case types in the High Courts for which DAKSH has been able to collect data and for those where such categories are known. While DAKSH's data does not cover every case that has been filed and disposed of, by examining details of cases that have been listed for hearing and details of such hearings we can gather many valuable insights on the functioning of India's High Courts.

### Hearings Taken to Dispose of a Case

From DAKSH's data, it is possible to see both how long it takes to dispose of cases and how many days have elapsed between hearings. Of the High Courts for which DAKSH had data both on days taken to dispose of cases and average number of days between when each case was heard, I was able to assess how many hearings it took to dispose of the cases. This analysis is presented in Table 3.

**TABLE 3.** Average Number of Hearings Taken to Dispose of Cases

High Court	Number of days to dispose of cases	Average lag between days of listing	Average number of hearings (Rounded off)
Calcutta	1,778	16	111
Bombay	1,025	43	24
Jharkhand	1,018	37	28
Andhra Pradesh	2,536	29	91
Karnataka	482	79	6
Madras	303	27	11
Madhya Pradesh	616	30	21
Patna	896	28	32

Source: DAKSH database.

Note: Figures are as of 15 February 2016.

From the above, there seems to be no correlation between the time period between hearings and time taken to dispose of cases. Indeed, more hearings only suggest greater inefficiency as the Court is unable to conclude the case, adding to the expense of parties.

## Time Taken for Disposal in the High Court

Table 4 presents data for four High Courts where sufficient data was available to show the time taken to dispose of the cases. Breaking down the numbers for cases from the selected High Courts, sorted into five-year buckets, we find that the vast majority of cases (86.82 per cent) took 10–15 years to decide.

**TABLE 4.** Time Taken to Dispose of Cases Sorted in Five-year Buckets

High Court	Less than five years	5–10 years	10–15 years	More than 15 years
Bombay	16	31	689	22
Gujarat	201	366	6,675	172
Orissa	1,366	1,399	20,986	691
Kerala	135	427	3,823	40
<b>Total</b>	<b>1,721</b>	<b>2,239</b>	<b>32,186</b>	<b>925</b>
Percentage of cases	4.64	6.04	86.82	2.50

Source: DAKSH database.

Note: Figures are as of 15 February 2016.

Compared to the district courts, the High Courts seem to be taking longer, on average, to dispose of cases. From the data made available by DAKSH, an even greater percentage of High Court cases have taken 10–15 years to dispose of, giving some

indication of the systemic delays. While this may not necessarily be the details of all cases decided by courts in the last few years, nevertheless, it gives us some indication of the extent of delays being faced in disposing cases.

## Time Taken for Disposal of Different Types of Cases

When we review the average time taken to dispose of various types of cases, we find that there are vast differences in the time taken to dispose of cases *within* a High Court as well. Data was obtained from DAKSH on the time taken to dispose of the following types of cases: Civil Revision Petitions, Criminal Revision Petitions, Civil Writ Petitions, Criminal Writ Petitions, Civil Appeals, and Criminal Appeals. Even within the same High Court, there seem to be vast differences in the time taken to dispose of certain case types, as Table 5 shows.

**TABLE 5.** Average Time Taken to Dispose of Certain Case Types<sup>17</sup>

High Court	Case type	Number of days
Bombay	Civil Revision Petition	77
Orissa	Criminal Revision Petition	260
Orissa	Criminal Writ Petition	373
Kerala	Criminal Revision Petition	380
Kerala	Civil Writ Petition	511
Gujarat	Criminal Revision Petition	513
Orissa	Civil Writ Petition	536
Kerala	Civil Appeals	1,075
Kerala	Criminal Appeals	1,576
Kerala	Civil Revision Petition	1,788

High Court	Case type	Number of days
Gujarat	Civil Appeals	2,082
Orissa	Civil Appeals	2,162
Uttarakhand	Civil Appeals	2,242
Bombay	Civil Appeals	2,303
Bombay	Criminal Appeals	2,402
Gujarat	Criminal Appeals	2,815

Source: DAKSH database.

Note: Figures are as of 15 February 2016.

Looking at the number of hearings and the number of days it takes to dispose of a case, it is clear that some categories of cases seem to move faster than the others in the High Courts. If we break down the numbers just by case type, the pattern across the selected High Courts emerges as set out in Table 6.

**TABLE 6.** Average Time Taken to Dispose of Certain Types of Cases across High Courts

Case type	Average number of days taken to dispose of case
Criminal Writ Petition	373.00
Criminal Revision Petition	384.33
Civil Writ Petition	523.50
Civil Revision Petition	932.50
Civil Appeals	1,972.80
Criminal Appeals	2,264.33

Source: DAKSH database.

Note: Figures are as of 15 February 2016.

Generally, writ petitions and revision petitions, civil and criminal, seem to take much less time to dispose of than appeals by a fairly wide margin.

## POSSIBLE CAUSES OF JUDICIAL INEFFICIENCY AND POSSIBLE SOLUTIONS

As pointed out earlier, it is not possible to identify every single cause for delay in disposal of cases at the trial court and the High Court level within the scope of this paper. It is also not easy to estimate what should be the desirable time frame within which a given case should be disposed of, since this requires an in-depth study of the reasonable time frame within which delayed cases should also be disposed of, taking into account the capacity of the judges and the judicial system to be able to do so.

The absence of a time frame to dispose of a case is also seen in the widely divergent time periods between hearings in different categories of cases across the High Courts, even within the same High Court. While Civil Revision Petitions are decided in 77 days on an average in the High Court of Bombay, Civil Appeals take 2,303 days to be decided on average. Even across High Courts, there are wide variances in the average time taken to dispose of certain categories of cases as discussed above. The procedures for these cases are not vastly different and do not require taking on board evidence as in a trial, though the scope of the revisional jurisdiction of the High Court is much narrower than the appellate jurisdiction.<sup>18</sup> The actual number of steps required to decide a Civil Revision Petition by the High Court are not fewer than those needed to decide Civil or even Criminal Appeals. Yet, we find that Civil and Criminal Appeals seem to take much longer and involve more hearings to decide than Civil Revision Petitions.

The number of hearings and the time period taken to dispose of cases across the system suggest that there is a serious problem of case management in procedure law in India. One possible explanation for the numbers discussed above is that

adjournments are granted too easily and freely, and in the absence of a fixed time table to dispose of cases leads to delays in disposing of cases.

The delays in hearing appeals and writ petitions in the High Courts, cases which have fewer procedural requirements, are a matter of concern since there is little scope for changes in the procedure to improve the speed of disposal. One suggestion that may be made is the 'case management hearing' which has been introduced in the procedure of commercial disputes.<sup>19</sup> A case management hearing, held after pleadings are completed between the parties, could clearly lay out a timeline for the disposal of a case and ensure adherence to this. In addition, the timelines set in the case management hearing must be accompanied by sanctions which may be imposed by the court against parties who fail to adhere to the deadlines.

There are of course other explanations for delays in disposal of cases and lack of efficiency, which cannot be fixed by legislative changes. A large factor could merely be lack of judges against the sanctioned strength of the High Court in question. At present, nearly 40 per cent of seats in the High Courts are vacant and vacancy has never been below 20 per cent in the last decade.<sup>20</sup>

There is of course no one magic bullet solution which can resolve the long-standing problem of backlog and delayed cases in the Indian judicial system. The magnitude of the problem requires a multi-pronged approach which, among others, should include efforts to improve the efficiency of courts in disposing of cases within a short time frame.

## Notes

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12. Law Commission, 'Arrears and Backlog', p. 3.
13. Law Commission, 'Arrears and Backlog', p. 7.



14. Marina M. Bellani. 2014. 'Judicial Efficiency and Foreign Direct Investments: Evidence from OECD Countries'. Paper presented at 5th International Conference on 'Economics of Global Interactions: New Perspectives on Trade, Factor Mobility and Development', Bari, Italy, 8–9 September, available online at <http://www.etsg.org/ETSG2014/Papers/358.pdf> (accessed on 7 January 2015).
15. Dakolias, 'Court Performance around the World'.
16. Assuming two years to be a reasonable time frame to dispose of a case by simply adding up the timelines contained in the Code of Civil Procedure, 1908 (CPC) and the Code of Criminal Procedure, 1973 (CrPC).
17. Numbers for Civil Revision Petition and Criminal Appeals from the High Court of Orissa were also provided. However, they have not been included in the present analysis as they seem to be complete outliers as a result of very few cases taking more than 20 years to dispose.
18. Under S. 115 CPC, the revisional jurisdiction of a High Court is limited to such cases where the subordinate court has exercised jurisdiction where it had none, refused to exercise jurisdiction when it should have, or committed an irregularity or illegality in the manner in which it exercised its jurisdiction, and no further appeal is allowed from such order of the subordinate court.
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# Evaluating Judicial Performance: A Comparative Perspective

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*Vasujith Ram*

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This chapter considers the utility of measuring judicial performance and explores the debate on the use of quantitative and qualitative data in performance measurement. It also presents some performance measurement mechanisms used internationally. Here, judicial performance includes both performance of judges and the performance of the judicial system and the institution.

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## WHY MEASURE JUDICIAL PERFORMANCE?

There are general benefits of performance measurement of any organisation. This applies to the judiciary as well: a large volume of information is concretised in clear and concise language, the setting and design of performance targets and improvement plan is simplified, perceptions and biases are eliminated, staff and personnel are incentivised and motivated, and resource allocation and budget decisions are rationalised. I list four broad advantages of measuring judicial performance: three pertaining to performance measurement relating to judges and one pertaining to performance measurement of the system.

### Measuring Performance of Judges

Measuring the performance of judges could play a crucial role in judicial appointments. The Supreme Court of India in its latest order in the *National Judicial Appointments Commission case (NJAC case)* has directed that a fresh memorandum of procedure (MoP) for judicial appointments be prepared by the government in consultation with the collegium.<sup>1</sup> The court has advised that the MoP include eligibility criteria. The importance of quantitative

data cannot be ignored. It is noteworthy that the National Judicial Appointments Commission Act, 2014 (NJAC Act), now declared *ultra vires*, specified ‘ability, merit, and any other criteria of suitability as may be specified by regulations’<sup>2</sup> as the basis for appointment of Supreme Court and High Court judges.

Independent of appointments, assessments of judges are internally useful. According to the American Bar Association’s influential *Guidelines for the Evaluation of Judicial Performance*, the broad goal of judicial performance measurement is to ‘improve the performance of individual judges and the judiciary as a whole’.<sup>3</sup> Apart from supplying useful information in cases of re-election, retention, and other cases of continuation of judges in office<sup>4</sup> (that is, its role in judicial appointments as described in the preceding paragraph), the guidelines also recognise that the measurement programmes can assist in (a) promoting judicial self-improvement by providing valuable feedback and (b) assignment of judges to rosters as well as improving the design of continuing education programmes.<sup>5</sup>

Performance measures are also a useful way of ensuring judicial accountability without impinging judicial independence.<sup>6</sup> A judge authoring an unusually low number of judgments or a judge with poor case management skills will be held accountable through well-designed, objective, and transparent evaluations. The line, however, is thin. In April 2001, *Wah India*, a magazine edited by Madhu Trehan, circulated a questionnaire among 50 senior counsels to evaluate judges of the High Court of Delhi on grounds such as integrity, understanding of the law, punctuality, among others. The assessment was then published with a photo of each judge along with his/her scores. This, however, invited the attention of the High Court of Delhi in a criminal contempt case, forcing Madhu Trehan to issue an unconditional apology.<sup>7</sup> This is not unique to India—it is a concern shared by judiciaries across

national borders.<sup>8</sup> However, performance measurement mechanisms instituted by judiciaries are likely to assist in shielding it from faulty ones instituted by other branches of the state.

## Measuring Performance of the System

The introduction of reforms and the subsequent analysis of the impact of the reforms can be amply informed by judicial performance measures. India ranks a lowly 178 in the ‘Enforcing Contracts’ category of the Doing Business Report prepared by the World Bank.<sup>9</sup> For this category, the time and cost of resolving a commercial dispute at the first-instance level, as well as a multidimensional ‘quality of judicial processes’ index are analysed. Among the best practices recommended by the study is the institution of specialised commercial division or courts. In response, amendments have been made to the Arbitration and Conciliation Act, 1996<sup>10</sup> and legislation has been passed to constitute commercial courts, commercial division, and commercial appellate division in the High Courts.<sup>11</sup> The impact of these reform efforts will be seen in subsequent World Bank reports.

Broadly, the utility of performance evaluation is well summarised by the European Commission for the Efficiency of Justice (CEPEJ): ‘The main aim of judicial statistics is to facilitate the efficient functioning of a judicial system and contribute to the steering of public policies of justice.’<sup>12</sup>

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## QUANTITATIVE AND QUALITATIVE PERFORMANCE CRITERIA: NOTES ON A PRELIMINARY DEBATE

In 2004, Stephen Choi and Mitu Gulati made a radical proposal: they argued for a ‘tournament

of judges' for selection of the next Supreme Court Justice in the United States.<sup>13</sup> Choi and Gulati argued that the most meritorious judge, as identified by *objective, measurable* and *quantitative* criteria, ought to be selected as the next Supreme Court Justice. Choi and Gulati ranked judges according to influence (citation counts), productivity (number of opinions and number of cases participated in) and independence (quantitative measurement of willingness to oppose politically like-minded judges). The article led to considerable controversy. Among the first to respond was Lawrence Solum, who argued that Choi and Gulati's tournament would be unable to identify excellent judges.<sup>14</sup> Solum theorised that excellent judges are those who possess judicial virtues, such as courage, craft, wisdom, skill, among others, and argued that while these virtues are discernable, they are soft, non-quantifiable variables.<sup>15</sup>

The Choi and Gulati–Solum debate captures the essence of a larger field of academic deliberation: the utility of quantitative measurements in judicial performance measurement. The thriving nature of this debate is reflected in arguments in the recently concluded *NJAC case*.<sup>16</sup> Among the three justices described by the Attorney General as examples of bad appointments, one was known to have authored just seven judgments while on the Supreme Court Bench and another was known to be 'inevitably late in commencing court proceedings'. Some commentators, at the time of argument, remarked that 'the number of decisions given by a judge is immaterial'.<sup>17</sup>

One of Choi and Gulati's core responses was that their measures (and arguably, other quantitative measures) would not, in *absolute* terms, identify a great judge, but succeed in marking out *relative* performance.<sup>18</sup> They used an analogy from the Tour de France: it is challenging to say what intrinsically makes Lance Armstrong a cycling great (this article was written in 2004), but one can very well

establish this by comparing his *Tour de France* wins with those of his fellow competitors. Consider the response of the Supreme Court to the Attorney General's arguments: 'He may well be right in *his own perception*, but the misgivings pointed out by him may not be of much significance in the perception of others, specially those who fully appreciate the working of the judicial system.'<sup>19</sup> In this instance, one could argue in response to the court that quantitative data sheds light on the *relative or comparative* performance of the judge—while excluding the role of 'perception'.

This debate is not limited only to performance of *judges*, but extends even to the performance of the *judicial system*. The question for example is: must one only take into account the presence of separate small causes courts and the access fees, or must a researcher engage with and survey litigants and court employees?

Considerable debate exists on whether quantitative data should be a *conclusive* indicator of judicial performance. The International Consortium for Court Excellence (ICCE), for example, points out that there is a 'worldwide tendency' to assess court performance using quantitative indicators (such as case clearance rates or cost per case) based on the maxim, 'justice delayed is justice denied'.<sup>20</sup> The ICCE in its report however argues that there may be cases where 'justice hurried' becomes 'justice buried', thus distorting the full picture for evaluators. Thus it is contended that the relative ease of quantitative measures must not cloud our effort to measure the judicial quality in a broader sense. However, few can deny its value. Evaluation of judicial performance through quantitative data allows for objectivity, nips the role of political, social, and ideological biases<sup>21</sup> and allows for transparency. In many instances, quantitative data supplements qualitative analysis or may be part of multidimensional indices allowing for robust evaluations.

## MEASURES OF JUDICIAL PERFORMANCE

This section discusses some measures of judicial performance developed internationally.

### International Framework for Court Excellence (IFCE)

The IFCE was developed by an international consortium consisting of the Australasian Institute of Judicial Administration (Australia and New Zealand), the National Center for State Courts (United States), the Federal Judicial Center (United States), and the Subordinate Courts of Singapore.<sup>22</sup> The aim of the consortium, through the IFCE, has been to develop a common, *universal* benchmark and framework, so that courts around the world can engage in self-evaluation and improve the quality of justice administration. The IFCE identifies 10 core ‘Court Values’ based on which Courts may aspire for ‘excellence’: equality before the law, fairness, impartiality, independence of decision-making, competence, integrity, transparency, accessibility, timeliness and certainty. Based on these values, seven specific *areas for court excellence* are listed: court leadership and management (driver), court planning and policies, court resources, court proceedings and processes (systems and enablers), client needs and satisfaction, affordable and accessible court services, and public trust and confidence (results).

It is important to appreciate the wide range of areas of ‘court excellence’ laid out by the IFCE: often, analysts tend to focus simply on court proceedings and processes, while overlooking other drivers of court performance.

## Global Measures of Court Performance

The primary IFCE report, however, does not provide clear and precise performance measures. A parallel document, again developed by the consortium experts, called the Global Measures of Court Performance<sup>23</sup> provides 11 ‘focused, clear, and actionable core performance measures’. These 11 measures are consistent with court values and areas of court excellence. They are as follows:

1. *Court user satisfaction*: Percentage of court users who opine that court provides adequate procedural justice.
2. *Access fees*: Average fees collected.
3. *Case clearance rate*: Percentage of disposed of cases vis-à-vis new cases filed.
4. *On-time case processing*: Percentage of cases resolved or closed within time reference points, differentiated by case type.
5. *Pre-trial custody*: Average time for which defendants are jailed, awaiting trial.
6. *Court file integrity*: Percentage of case files that meet benchmarks such as accuracy, timeliness, probability of time retrieval, etc.
7. *Case backlog*: Percentage of cases exceeding certain time benchmarks.
8. *Trial date certainty*: Proportion of trials that are held when first scheduled.
9. *Employee engagement*: Percentage of court employees who feel that they are productively engaged in the mission and work of the court.
10. *Compliance with court orders*: Percentage of monetary obligations collected.

11. *Cost per case*: Average cost borne by the court in resolving a case, sorted by case type.

## European Commission for the Efficiency of Justice (CEPEJ)

The CEPEJ was instituted by a Committee of Ministers of the Council of Europe.<sup>24</sup> Its aim is to improve the efficiency of justice systems of member states<sup>25</sup> through tools such as statistical evaluation.<sup>26</sup> The CEPEJ issues reports on the European judicial systems with reference to the 'efficiency and quality' of justice every two years. These reports are comparative in nature and contain a wealth of cross-country data. The nature and method of the study is worth considering since legal systems of vastly disparate countries across the European continent are considered.

The evaluation process was based on collection of data from national correspondents (mostly based within the respective law and justice ministries) of 45 member-states. The national correspondents respond to a questionnaire comprising of 208 questions, both of quantitative and qualitative nature.<sup>27</sup> The questions are organised under 12 heads. First, demographic and economic data is sought, and it includes budgetary data on the judicial systems. The second contains questions on the availability of legal aid and other questions concerning the users of the court (such as rights of court users and public confidence in the system). The third seeks data on organisation of courts, number of judges, number of public prosecutors, management of court budget, internal mechanisms for evaluation of performance of judges, among others. One of the most crucial heads, the fourth, 'fair trial' contains questions relating to first principles (presence of procedures to enforce basic rights) as well as questions relating to case flow management and timeframes of judicial proceedings. To elaborate on the latter, the questions primarily seek data on (a) on pending cases at

the beginning of the year, incoming cases, resolved cases and pending cases at the end of year and (b) on the length of proceedings in cases, both categorised by the type of cases (for example, homicide, insolvency, divorce, etc.). This enables computation of clearance rate, disposition time, efficiency rate, etc. The fifth contains questions on the service conditions of judges and public prosecutors, including questions on appointment, removal, disciplinary procedures, training, financial benefits, etc. The sixth and seventh heads seek information on the status of the legal profession and alternative dispute resolution mechanisms, respectively. The subsequent heads encompass enquiries on enforcement of decisions, notaries, court interpreters, judicial experts and possible reforms.

## European Union (EU) Justice Scoreboard

Based on data from the CEPEJ and supplementary sources such as the World Bank, World Economic Forum, and European Judicial Network, the European Commission releases the EU Justice Scoreboard ('Scoreboard').<sup>28</sup> The purpose of the Scoreboard is to provide 'objective, reliable, and comparable' data on the 'quality, independence, and efficiency' of justice systems (specifically civil, commercial, and administrative cases) of the EU member states. The Scoreboard is (a) taken into account while determining EU-level funding priorities and (b) used in making assessments of justice systems under the country specific recommendations (CSRs) issued by the European Council.<sup>29</sup> To determine efficiency, the Scoreboard charts length of proceedings, clearance rate, and pending cases. The Scoreboard also charts the time taken for specific cases important for business and the economy, such as insolvency cases, public procurement cases, and competition law cases. To measure quality, the following factors are considered: availability of monitoring-evaluation-survey tools (such as annual



activity reports, regular evaluation systems, surveys aimed at parties, etc.), usage of information and communication technology, communication policy (such as publishing judgments online, designated officials to explain judicial decisions to the media, etc.), use of alternative dispute resolution methods, training of judges, resources (court budgets, legal aid budgets, number of judges, etc.), and share of female judges. Independence is also measured using perception surveys, and an assessment of structural factors such as the nomination process, powers of judicial councils, method of determination of financial allocation, safeguards against transfer of judges, etc. The Scoreboard also maps justice reform initiatives by the member states.

## CONCLUDING REMARKS

While questions on methodology, data sources, and impact of judicial evaluation measures remain unresolved, there is broad consensus that periodic judicial performance measurement has significant utility. More and more countries are moving towards having an evaluation system in place. In India, while there is some publicly available quantitative data, it is far from adequate.<sup>30</sup> The Supreme Court e-Committee only recently unveiled the National Judicial Data Grid (NJDG),<sup>31</sup> which provides district judiciary level data on institution, disposal and pendency of cases as well as special information on pending cases instituted by senior citizens and women. There is also a glaring absence of any official<sup>32</sup> judicial performance evaluation mechanism. The National Court Management Systems (NCMS) Committee instituted by the Supreme Court for the purpose of establishing a 'National Framework for Court Excellence' (setting measurable performance standards) and 'National System of Judicial Statistics' has not produced any such framework or common system so far.<sup>33</sup> In this

context, data and reports from DAKSH, relating to case clearance rates, case pendency, and case length, among others, are especially handy. This data relates mostly to the performance of judges, but it is nonetheless a useful starting point.

Before closing, it is also germane to note the role of incentive structures and judicial behaviour. Two points, chiefly concerning to the performance assessment of judges, are worthy of close attention. One, as Judge Posner points out in his illuminating essay, the behaviour of judges across different legal systems and within a legal system is likely to differ due to differential incentives and institutional settings.<sup>34</sup> Any performance evaluation scheme must take this heterogeneity into account. Second, any official judicial performances have to be carefully crafted, since it has the potential to alter judicial behaviour to the detriment of the rule of law. If the performance evaluation results are highly visible or form the basis of promotions and higher appointments, judges have incentives to *game* the system and alter behaviour accordingly.<sup>35</sup> Any official methodology will thus have to be carefully crafted.

## Notes

1. *Supreme Court Advocates-on-Record Assn. v. Union of India*, 2015 SCC OnLine SC 1322.
2. Ss. 5(2) and 6(3), NJAC Act.
3. Guideline 1-1.
4. Guideline 1-2.
5. Guidelines 2-1 and 2-2.
6. David Brody. 2008. 'The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust', *Denver University Law Review*, 86(1): 115–156.
7. *Surya Prakash Khatri v. Madhu Trehan*, 2001 SCC OnLine Del 590; 2001 Cri LJ 3476.

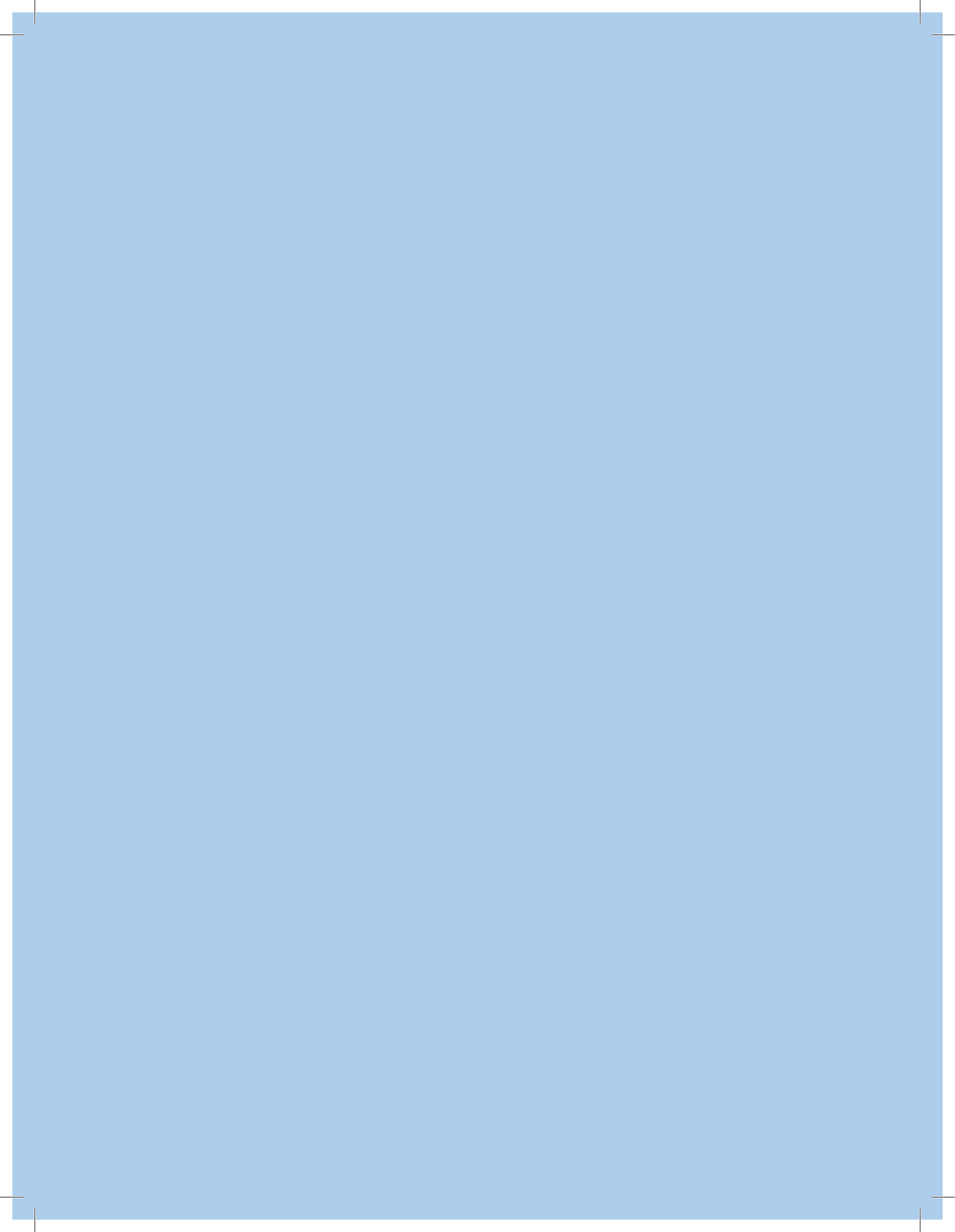
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9. World Bank. 2016. *Doing Business 2016: Measuring Regulatory Quality and Efficiency*. Washington, DC: World Bank Group.
10. Arbitration and Conciliation (Amendment) Act, 2015 (No. 3 of 2016).
11. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (No. 4 of 2016).
12. Guideline 1, CEPEJ Guidelines on Judicial Statistics.
13. Stephen J. Choi and G. Mitu Gulati. 2004. 'Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance', *Southern California Law Review*, 78: 23–118; Stephen Choi and Mitu Gulati. 2004. 'A Tournament of Judges?', *California Law Review*, 92: 299–322.
14. Lawrence B. Solum. 2004. 'A Tournament for Judges. Mad? Brilliant? Clever?', *Legal Theory Blog*, 17 April, available online at [http://lsolum.typepad.com/legaltheory/2003/04/a\\_tournament\\_fo.html](http://lsolum.typepad.com/legaltheory/2003/04/a_tournament_fo.html) (accessed on 15 February 2016).
15. Lawrence B. Solum. 2005. 'A Tournament of Virtue', *Florida State University Law Review*, 32: 1365–1400.
16. *Supreme Court Advocates-on-Record Assn. v. Union of India*, 2015 SCC OnLine SC 964.
17. Faizan Mustafa. 2015. 'Allowing Judges to be Judged', *Hindu*, 20 June.
18. Choi and Gulati, 'Choosing the Next Supreme Court Justice', p. 30.
19. *Supreme Court Advocates-on-Record Assn. v. Union of India*, 2015 SCC OnLine SC 964. Emphasis supplied.
20. ICCE. 2013. *The International Framework for Court Excellence, 2nd Edn., March 2013*, p. 29. Available online at <http://www.courtexcellence.com/resources/the-framework.aspx> (accessed on 15 February 2016).
21. J.K. Elek and D.B. Rottman. 2014. 'Methodologies for Measuring Judicial Performance: The Problem of Bias', *Oñati Socio-legal Series*, 4(5): 863–879.
22. ICCE, 'International Framework for Court Excellence'. The ICCE was assisted by other expert bodies such as the European Commission for the Efficiency of Justice, the World Bank and Spring Singapore. The ICCE now has additional members from numerous countries.
23. The latest available is Discussion Draft Version 3, dated 9 November 2012, prepared by Dan Hall and Ingo Keilitz.
24. Resolution Res (2002) 12, Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies.
25. Art. 1, CEPEJ Statute.
26. Arts. 2(1)(a) and 3, CEPEJ Statute.
27. Scheme for Evaluating Judicial Systems, 2014–2016 cycle, CEPEJ.
28. European Commission. 2015. *The 2015 EU Justice Scoreboard*, p. 5. Brussels: European Union. Available online at [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2015\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf) (accessed on 15 February 2015).
29. European Commission. 2015. 'The 2015 EU Justice Scoreboard: Questions & Answers', 9 March, MEMO/15/4576, available online at [http://europa.eu/rapid/press-release\\_MEMO-15-4576\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4576_en.htm) (accessed on 15 February 2015).
30. Nick Robinson. 2013. 'A Quantitative Analysis of the Indian Supreme Court's Workload', *Journal of Empirical Legal Studies*, 10: 570–608; Aparna Chandra. 2015. 'The State of Judicial Statistics in India', *Daksh Blog*, 10 February, available online at <http://dakshindia.org/the-state-of-judicial-statistics-in-india/> (accessed on 12 May 2016).
31. The NJDG is available online at [http://164.100.78.168/njdg\\_public/main.php#](http://164.100.78.168/njdg_public/main.php#).
32. Barriers such as the threat of contempt of court actions remain disincentives for private actors to design unofficial measures. It is recommended that any proposal to have an official system in place must be statutorily or constitutionally backed to prevent undue interference from branches of government.
33. According to Supreme Court Office Order No. 4/SG/NCMS/2012, dated 2 May 2012, the NCMS was established under the supervision of the Chief Justice of India and with the institution of a 11-member committee.
34. Richard A. Posner. 2005. 'Judicial Behavior and Performance: An Economic Approach', *Florida State University Law Review*, 32: 1259–1279.
35. Solum, 'A Tournament of Virtue'.





SECTION THREE

BAR, BENCH,  
AND BEYOND



# 1

## Wielding the Gavel: View from the Other Side

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*Gautam Patel*

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The days start early, usually before dawn. I prefer it this way: it's very quiet, and the city isn't yet fully awake. There's time enough for a walk, plugged into music, and there's so much joy in watching the sun come up, slowly lighting up the trees and the roads. By seven, or a little before, I'm back at my desk. A quick check through e-mail and the newspapers, and then it's time to turn to the small mountain of papers for the day ahead. Most often, I bring them home with me, but there are days when the High Court sends around a van, one that looks like a small armoured truck, late at night. I've read some of them the evening before; the rest are for this morning.

This hits you hard, and hits you early, on the very first day as a judge with a senior colleague on a Division Bench: the rude realisation that almost the entirety of your work as a counsel was narrow to the point of being meaningless. From here, the vista is very different. You see a spread of cases and issues that is daunting in its width and frightening in its complexity. How on earth will I ever get on top of any of this? You ask yourself. Yet you must; it's what the job demands.

The sheer volume is terrifying. They keep coming at you, one case after the other. There is a relentlessness about it, and nothing you've been told prepares you for this volume or this range: municipal issues, constitutional challenges, matrimonial cases, tax, custody, rehabilitation, policy, public interest litigations, criminal work, corporate matters, intellectual property cases, civil disputes, commercial disputes, motor accident appeals, bail—it's impossible to describe. And there's upward of 80,000–90,000 new filings each year across the High Court's many Benches.

The Chief Justice assigns and distributes the work. In the High Court of Bombay, we're assigned

work by category. No one ever asks for a particular class of cases. You do what you're told to do, and you never know what you'll be asked to handle. With dwindling numbers on the Bench, you often wind up with 'multiple assignments', doing more than one class of case.

As lawyers, we're used to describing our cases as *big* and *small*, and this is a very loose way of describing the amount of work we expect to put into preparing for each. Here, we quickly see that there's no such distinction. There are *no* unimportant cases. There's no such thing as a small case. The shortest petition or plaint or application might have vast consequences. It might raise an issue of liberty, livelihood, a daily struggle. On day one, you lose all notions of such differentiation. What, you ask yourself, is more 'important': a case of thousands of pages that involves a few hundred crores or a short petition where the party says that unless we intervene, he will lose his only source of income, forcing him and his family into beggary?

This realisation is both shocking and liberating. It shocks because of the enormity of the gulf between one class and the next, and it is liberating because it absolves you, if you choose to see it like this, of having to make what I can only describe as the judicial equivalent of Sophie's Choice.

A few days after I was appointed a judge, I chanced upon a truly wonderful document. This is a transcript of 28 September 1984—at about the time I started studying law—of the Superior Court of State of Delaware at the investiture of Henry duPont Ridgely as an Associate Judge of that court. By our standards, it seems to be a strangely relaxed and informal process, and though no less solemn for all that, it is very different from our own procedures. This one was marked with wit, generosity, and humour. First Presiding Judge Stiftel said a few words of introduction, and then, after a prayer, he asked one of his colleagues, Justice Henry Horsey,

to administer oath to the new incumbent. Justice Horsey's words are ones I think we should all carry to the end of our days on the Bench. He spoke of the 'Ten Commandments for a New Judge' compiled by Chief Justice Edward J. Devitt of the Federal District Court in Minnesota. As Justice Horsey said, their universality is apparent. The Ten Commandments are these:

First, and foremost, be kind.

Second, be patient.

Third, be industrious.

Four, be prompt.

Five, there is no unimportant case.

Six, give the office the prestige and dignity expected of it.

Seven, but don't take yourself too seriously.

Eight, be tolerant of appellate courts if and when you are reversed.

Nine, don't leave home or the courthouse without your most precious tool, common sense.

Ten, pray for divine guidance.

In my case, I'd have to abandon the last, but that is a personal preference. Each of the remaining nine is a lodestar. The position of a judge is one that is very highly fault-tolerant: all our foibles and ignorance and mistakes are forgiven. Many are set right by courts in appeal. More often than not, the system works as it should. But accompanying this fault-tolerance is a real danger. In court, there are few instances when things we say or do are thrown right back at us. It is very easy, I find, to slip into a mode of constant annoyance or irritation, and to find excuses for it (this or that person is dishonest or incompetent, the work is too much, and on and on endlessly). We have the luxury of masquerading sarcasm as wit, of using a raised voice and harsh

words to people who are seldom in a position to respond. Where in private conversation or among equals we might find ourselves ticked off for this, the robes of a judge and the elevated position of his chair provides an immunity of sorts. The real struggle is to watch out for this in yourself and not to hesitate in apologising to the person in question when you have erred. It gives me no pleasure or joy to say that there have been three separate occasions when I have felt the need to apologise in court to a lawyer to whom I had spoken, in my view, in unfair terms. What astonished me when I did this was the very great surprise of the lawyers in question. I realised that they expected, and forgave, my transgresses, with no expectation of apology from my side. But I felt the need to do this because when we as judges are too harsh, we are quite clearly violating one or more of those nine or ten cardinal principles that should inform our every action and deed. Now not every judge does this, and perhaps I am wrong. But I ask myself this: in doing what I did, was the prestige and dignity of the office harmed? Was it not more harmed by my previous intemperance? And, this having happened in open court, is there any reason why reparations, for whatever they are worth, should be made in the privacy of our chambers and not in open court? There is no indignity or shame in acknowledging one's mistakes. But when we decline to do this, we violate that seventh principle, of taking ourselves much too seriously.

The second struggle is finding a balance between excessive leniency and excessive strictness. One is mistaken for weakness; the other for impatience (or worse). The sheer pressure and volume of work makes this struggle very, very difficult. I have tried to make it a point not to carry over irritation or annoyance from one case to the next, and to keep the atmosphere in court somewhat lighter than most expect. This is a very personal thing; it just works for me, for I am the kind of person who chafes at rigid formality. I believe it's just more

efficient and more work gets done if the stress and tension are taken out of the interaction. Something in a lighter vein here or there, well-timed, defuses a potentially difficult situation and leaves no ill-will. A senior judge of the High Court of Bombay, now Chief Justice elsewhere, once wrote that the discourse of law is the discourse of civility, and I cannot think of more pithy truism. Arguments from the Bar and responses from the Bench should be in the nature of an engaging conversation, a dialogue; at least I prefer it that way. I find it energising and exciting when that happens, and unutterably dull when it does not.

What of the work itself? I find it difficult to describe just how wonderful it is, how multi-faceted, multi-dimensional, challenging at every stage. All of it is, really, problem-solving, and that process, of taking opposing views, weighing them, and taking a decision is one that I find enlivening and enriching. It is the best thing I have done, and I have enjoyed nothing more than what I do now. To be sure, the workload is formidable. There are mountains of papers to read: our lists in the High Court of Bombay run to anything between 60 and nearly 200 cases listed each day. You can't of course read them all, nor can you read each one thoroughly. You don't even need to. Very soon, you discover the ability to read at very high speed, looking for the essentials, making the most cryptic notes. Depending on what the stage of hearing is, you may want to read further. At the early stages of a case's life cycle, this is not always necessary; it's seldom necessary. All cases go through set phases, and at some point they enter what I call maintenance mode, where routine filings are yet coming in. These need routine orders, and one need not spend much time on reading these cases in advance. There are cases for urgent orders or reliefs, and these I choose to read to the extent necessary. It is the ones that come up for final determination that take the most time. Of course, one reads these not with a

view to making up one's mind in advance, but only to get a sense or a drift of the matter. Most often, I find myself flagging pages for questions to put to the lawyers. I happen to enjoy reading, and I find myself uncomfortable addressing any work at any level without some measure of preparation, but this is also extremely personal. There is a view that one should never read ahead because one tends to predetermine the result. I am not of that school, and I have found myself frequently landing in a completely different zone than I expected when first I read the papers. Allowing space and time for arguments is vital.

What is very, very difficult for me is not the reading, but the writing. Judgments are torture. I struggle with the words, I harass and worry my drafts and even when I am finally forced to let them go, I always do so with reluctance and with the feeling that I could have bettered them: used fewer words, said the same thing more efficiently or quickly, fashioned the decision in a more appealing manner perhaps.

It is not so much a life of solitude as a solitary life. Amongst us, as judges, there is a very great deal of conviviality and bonhomie and we younger or junior judges—at least in the High Court of Bombay—are fortunate in our seniors, without exception. They are solicitous, careful, nurturing, and in times of crisis, always alert to divert risk away from us. I've said this before to my fellow appointees, and I truly mean it when I say that the High Court of Bombay is terrific place for a newly appointed judge. But none of that can help you when you're sitting singly. It can be terrifying. We are not just on display, five hours a day, day after day. We are on trial in some strange, subliminal way. We are constantly being pushed and tested, examined closely to see how we respond to varying situations, how much of what is flung at us we can take.

The work itself is incredibly tiring. I mean physically tiring. For those five hours, there is absolutely no down time. As lawyers, you can drift off for a few minutes, break for coffee or tea, spend time chatting with a colleague and perhaps even play hooky once in a way. Our timings are rigidly defined and, as I will explain in a bit, that can be both a blessing and a curse. We do not have the option of showing up late, or of not showing up at all, unless there is a compelling reason. And for those five hours, it is totally relentless: one case ends in some order and the next one is already being called and the papers are being put in your hands or on your desk. Often, you have to mentally switch tracks—and not just to an adjacent track. The next case could be something completely alien to the one before. When you think about it, you realise that at the Bar, none of us is compelled to work like this. By the end of the week, there is utter and debilitating exhaustion in your bones, and your brain feels completely addled. You then need that evening off, and I make it a point, just a matter of retaining sanity, to do that, and to involve myself in something else on Saturday mornings till lunch time. After that, and through Sunday, it's more work again, more reading, more research, more writing. The schedules can be overwhelming, and you learn early on to carve out time for yourself, for a walk, a swim, taking the family to a movie on the weekend, something like that.

I find, too, that the sheer volume of work has altered the rhythm of my life almost entirely. I no longer go out even for the shortest time, from Sunday evening to Friday evening. You cannot freely meet people and you wind up often being rude and asking for a guest list to make sure there's no potential embarrassment. Your world shrinks even as the work expands your horizons. Important in this is, I believe, being blessed in having friends outside the law, the kind of people who are close enough to tick you off when you've gone wrong and who can keep you grounded. The isolation coupled

with the sheer power of what we do can be dangerous. It is one thing to remain removed and distant. It is another to become detached from reality.

Of the many things we do, the most satisfying is not—strange as it sounds—ending a matter with a big judgment. It is the case that gets settled that yields the greatest satisfaction, and any one of those, especially in a family dispute, is worth a hundred judgments. Here's one recent example. The details of the case are unimportant, but it was once settled with consent terms being filed. A few months later, it all fell apart. Contempt petitions were filed. This was just before the summer vacation. Through the court term that followed, the two young lawyers broke their backs to get parties to settle. I saw that it could be done, and that the lawyers needed help. But the parties were adamant. As I listed the matter week on week, suggesting one way, then another, I felt nothing like a judge but more like a legal pedicurist, scraping away all that accumulated dead skin and detritus of years of suspicion and distrust. Through the lawyers, I pointed out the dangers of not settling. Slowly, the areas of controversy narrowed. It almost got done, and then it almost got entirely undone, on one solitary issue. There, I weighed in and expressed a view, and said I would not hesitate to put it in an order. I fashioned some sort of an order that seemed to work. The lawyers went back to renegotiate. There were days when they seemed so close: in the morning, they'd ask me to take it up in the afternoon or at the end of the day. And it went on like this from June to October. Then, on the day before Dussehra, just like that, it got done. They signed reams of documents, took a final order and it was over. I was overjoyed, and so too, clearly, were the lawyers and the parties.

And yes, this took time, and it took many adjournments, that thing for which we are all pilloried so very often. But those adjournments are sometimes, though not always, necessary and

often unavoidable. Parties must be given some time to put in their responses. I do agree though that mindlessly adjourning cases is self-defeating and undermines our system. As a rule, I don't allow it, and follow a simple mantra. An order of a court is not a suggestion or a recommendation. If a party has been given a time frame for filing, he or she must keep to it. A short extension for good reason is not unreasonable. But a second or third attempt at seeking time runs up against my self-generated brick wall. I just refuse or, if I must give additional time, I impose costs. That always works. I usually couple this with a self-operative order that provides for consequences of default in compliance and that seems to work well too. It is, in my experience, a grand myth to believe that lawyers want adjournments or profit from them. I do not think this is at all true, at least in the High Court. Keeping matters alive, and revisiting them again and again is burdensome. Lawyers welcome cases being finished and moving on to the next one.

People are wont to attribute the delays in our judicial system to adjournments, lengthy arguments and the insufficiency of appointments. Each of these has a role to play, but none of them is singly responsible, nor will addressing any one of them solve the issue. Should oral arguments be limited? I do not subscribe to that. There are some cases that are complex and require time and elucidation; they just cannot be abbreviated. Besides, we, both judges and lawyers, are not sufficiently trained in the writing of concise and precise briefs or notes of written arguments. Quite the reverse: too often I find to my very great annoyance that the written submissions contain material never argued. Worse yet, they seek to withdraw points conceded during oral arguments. How does one deal with written material like this, something that comes in though never argued? Our system is centred around oral arguments. It is one thing to put some time limit on those arguments, and I am all for it. Oral



arguments are important, too, because a skilled counsel will not press (or might even concede) a given point as a matter of strategy. Most important of all (to me at least) is that oral arguments allow for an actual dialogue, an exchange. This is impossible in written briefs. We need oral arguments to question, to probe, to answer our own doubts, to test our own understanding. And oral arguments do take time. I believe it is inherently unsafe to discard oral arguments completely or even relegate them to second place behind written briefs. Those who are not judges find this baffling. They cannot understand why this should be so. After all, they argue, isn't it 'simpler' to read something, make up your mind, and decide? No, it's not. It takes the human element out of it. It robs litigation of *discourse*, of *dialogue* and ultimately of understanding. There is a much quicker setting of one argument against the other. And then there's this: give anyone more to read than she or he already has and expect matters to be delayed even further. Very often, we decide matters quickly, on the spot, making up our minds immediately. If we were asked to go back and study each set of briefs and *then* return a judgment, how much longer might that take? Also, does one apply this rule of written-arguments-only to *all* litigations, irrespective of their complexity, or only to a select few? Why? It is not a question of which of the two is 'determinative'. The question more accurately put is which of the two yields a sharper understanding of the issue more often? We use written briefs in a limited way, as an *aide-memoire*, to supplement our own notes. That, I think, is how it should be.

To say, too, that simply by appointing enough judges all our problems will be solved is a grotesque oversimplification. It assumes that all judges are equal, that they are somehow like computers, and if you have enough of these judge-computers, you can spit out judgments. This is a bogus approach with not the slightest shred of merit in it. I have

sometimes heard a single case for a considerable length of time. I thought the issues justified it. The very same case in the hands of many of my colleagues might conceivably have been finished in half as much time. I may have taken a very great deal of time to write a judgment on them; others may have finished it in a few hours. It is only partly a numbers game, in the sense that the volumes are so high as the DAKSH study shows, that we need more manpower to see them through their life spans. But to assume that having a full complement of judges will *automatically* result in an eradication of all arrears is simply wrong and without any basis or understanding of the process of judging.

Every day brings new challenges, many forced by my own limitations. I find I cannot remember details with sufficient clarity to be able to correct an order dictated in court several days later. I have had to force my staff (a wonderfully supportive lot) into a different rhythm: they must give me the day's orders in soft copy by the end of the day. I correct them in soft copy and it is an invariable rule that turnaround times are 24 hours: orders dictated one day must be made available the next and no later. I think that is every litigant's right, and it makes no difference to him whether I have in that day dealt with five cases or fifty. His interest is in his case, and he is, I think, not unreasonable in asking that an order copy be made available to him in the shortest possible time.

It also troubles me that we use so little of the technology at hand. My secretarial staff lives a distance away and to ask them to stay late, come in early, or come in on weekends is onerous. One of them must travel 90 minutes in one direction and the same time to return. It is much more efficient, I've found, to use a digital voice recorder and transmit the digital audio file over a secure connection. They download it at their residences (both have computers at home) and type it up without having to commute, in their own time, and return soft



copies by email. That is more than enough, and it works seamlessly. I do not suggest that this workflow is for everyone, only that it is one that works very well indeed for me.

I find my work liberating in ways I did not imagine. Even the now almost routine receipt of virulent and accusatory mail does not diminish this sense of freedom. We set our own pace and timelines, and the neat structuring of each day is comforting. We do have constraints, especially social ones, but I find these matter little as long as one is careful. My friends outside the profession remain close, and within the profession I count as true friends those who are my fiercest critics; and there is no dearth of those, for good reason.

I enjoy the solitary nature of the work and, yes, the enforced retreat and solitude. It brings with it quiet, and time and space for thought and reflection and study. Most of all, I relish the reading and the writing the work involves.

I am not going to pretend that anything I describe here is typical. I cannot; I simply don't know the routines and rhythms my colleagues follow, or what it is they do in other courts elsewhere. This is, therefore, a very personal view and, too, one that is in a sense nascent: I haven't been long enough on the Bench, just short of three years now, to know if there is anything like a 'standard' in these matters. I am glad for the opportunity to write this. I admit to some hesitation: I do not know if it is appropriate or inappropriate, but as I do not propose to write of any specific case or even a class of cases, I suppose it should not matter very much.

I grant that this may not be the approach or outlook of every one of my colleagues. This is, after all, an entirely personal perspective. But it is the only one I know, and one to which I am now not just accustomed: for the work of a judge is addictive, and I freely confess to succumbing to that addiction.



# Never a Restful Moment: A View from the Bar

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*Arun Kumar K.*

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A typical day starts early. Invariably, thoughts on waking are about how to present an issue before the judge, a legal principle, or about how to approach a cross-examination. But it isn't all law. It's also the kids at home, issues of near and dear ones, chores around the home. On a relaxed day, when there is nothing else, you may even debate whether tolerance is a social issue.

Office starts with colleagues seeking instructions, early-bird clients, and the general rush of getting to court. Much as these colleagues seek peace and quiet, mornings are chaotic. There will be last minute changes, printing and alternating arrangements often necessitated by a new brief, the appearance of a new client, a sick colleague, or even a new thought. When these litigators walk out of the office doors, the office breathes easy, dust settles, and the non-litigation lawyers unplug their headphones. It is as if a tsunami has gone past.

Negotiating the road and its traffic may seem like a problem. Often, this time is well spent catching up with a colleague or even in fine-tuning the preparation for the task at hand. If the traffic is beyond what was budgeted, then begins a stream of calls to colleagues in court and sometimes to fellow lawyers to make appropriate requests or motions to tide over a possible calamity.

The day in court normally begins with an argument or two. That's because the High Court, the home for the argumentative, is often the first point in the day's transit. It is a choice made by its early start and by the knowledge that its deities are generally less accommodative. The High Court offers instant gratification, as it invariably culminates in an order or a decision. The proceeding here will leave its flavour for the rest of the day. An effort appreciated, a successful persuasion, an imprinted

erudition, a successful outcome, or a thrilled client to start the day is an elixir for better rewards.

The next stop invariably is the trial court. Getting to the trial court from the High Court is like going from the king's palace to the municipal market. Like a market it is mangy, crowded, and smelly. While the lords at the palace are prone to whim, the proceedings at this local market are strictly according to set rules, often unwritten. The proceedings at the palace are solemn, at the market place it can be a brawl. Like in a market, the day's proceedings begin by taking stock. Cases, parties, and sometimes their lawyers, are called out loudly for all to hear. The judge then picks a few ripe for serious business. The rest are dismissed for a few weeks at least. The process often leaves a teeny bit of time in the pre-lunch session. This remainder of the pre-lunch session, is in most courts, reserved for trial.

They are not trial courts because they are pensive. The trial is a well-manicured technique devised to sift truth from untruth.

The trial judge deserves a mention. Paid a pittance, they don't often attract the best of talent. Those chosen often have limiting backgrounds and are inept for fast-paced societal needs or the expediciencies of business. There are some who manage to run through their careers by passing the buck, meandering through the inessential, and by adjourning what is material. Yet there are many, driven by a cause, who bring a high a sense of propriety and importance to their calling. While criticism is easily directed, it cannot be overlooked that these judges, conscientious and despite all their limitations and working in circumstances demeaning the stature and power of their office, often outperform every limitation. It is also not rare when their analysis of facts and often, the law, are amongst the most well-considered, erudite, and learned ever.

Facts to these courts of law are not determined by the sway of public opinion or the campaigns of journalists and media houses. Here, facts are what are established by the testimony of witnesses and documents at trial. There was a time when the process of trial required lawyers to elicit words from their witness in open court, before the public, the judge, and his opponent. An art it was, to enable the elimination of many falsities that the witness could not get himself to utter publicly. But that is a thing of the past. The trial is now limited to cross-examination of statements made by witnesses on affidavits. It is the opportunity of the opponent to contradict and discredit the witness, and to elicit his own case. Cross-examination is the high art of a litigating lawyer. Art they say is a gift from God. An adept practitioner will be no less, his skill measured by the perfection of its blend of learning, prudence, and timing. The heady skill can rarely be acquired without an impeccable knowledge of people, law, society, tact, strategy and an assiduous understanding of his client's case.

The post-lunch proceedings in court are normally reserved for the longer opportunity of argument and persuasion. The session will invariably see elaborate elucidation of facts, interpretation, and meticulous application of the law. This period of the day brings out the best in a lawyer. He runs a tight rope. Persuasion is not easy when he also has to hold on to the court's attention. An inept lawyer may unwittingly induce a catnap, and find his efforts wasted.

Lawyers compete for court's attention. Some days are wondrous, when the lawyer gets to spend the whole day on his feet attending cases from one court to another, from the cross-examination of a witness to a multitude of legal arguments in diverse cases. Then there are others, when they return to their lair confident that the bustling activities of a wasted day has at least honed their adroitness for patience.

More famous is the court for its delays, than an understanding of its processes. There are more casualties to a court's delays than just lawyers' time. Worse is the despair, as a litigant in the wrong will be rewarded by Court's delays, while the one who is right will be wronged. There is nothing more difficult than explaining why no tangible progress was made. More clients are lost to adjournments, than to rank incompetence of their lawyers. Likewise, more lawyers are rendered incompetent by it, than by their lack of learning, skill, or erudition.

The journey back to the office is made at every available opportunity. More than once, on a typical day. It ensures a quiet lunch with colleagues, and an opportunity for further research for the day's work at court. It is also an opportunity to nibble at the list of office work that piles on us ever so often. The eventual journey back to office is special. It will have the flavour of the day's proceeding in court. A good result is an excuse to indulge the office. That will induce a pit stop to grab some ice cream, *kulfi*, cake, or the like, for the food-loving ever-hungry legal eagles.

It is every lawyer's dream that his evenings at office are busy as hell. A quiet evening for a lawyer may become a source of disquieting concern. Evenings are when client meetings are normally scheduled. This is the time when facts are sifted,

and strategy is crafted and put in motion. Clients can be interesting, famous, learned, pious, painful, dishonest, or just plain drudgery. But they are people to whom lawyers devote their lives.

Clients have to be heard. What is heard has to be recorded for posterity, summarised, and revisited for its multiplex content, both stated and unstated. Narratives are only an invitation to identify what is fact. A keen ear for unstated details and patient hearing helps decipher the relative strength and weakness of the case, and identify the objective behind the client's grievance.

Interspersed during the day will be the evolution of legal arguments, review of research, and the formulation of legal argument and positioning. When client meetings are completed and the clients have retired to their homes, the lawyer goes to work, preparing for the day to come. There are routine chores too, to be done in between the excitements that come by, such as billing, following up on recovery of fees, managing work at office, and so on.

We are known to visit friends, and socialise late in the night. We are expected at wedding receptions and other functions only after the event is done. Of course, we don't understand the insinuation that we are creatures of the night. We are at it day and night.



# Playing the Waiting Game: A Lawyer's Day in Court

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*Anupama Hebbar*

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A day in the life of a litigating lawyer is nothing like you see on television. All right, maybe a little bit. It is equal parts exciting and frustrating. Given the number of variables a litigating lawyer has to work with, it is near impossible to tell anyone how a day progresses, but I will try. The very first mantra is—every case is urgent and everything must be done immediately. That's what your client will tell you. It took me the better part of four years to recognise the true emergencies and to learn to successfully mollify those clients whose cases could wait!

I begin my work day at about 9:30 am. This gives me a half hour to ensure I have everything I need for court and to mentally prepare for my best laid plans to go awry. In Bengaluru, most courts start by 10:30 or 11 am and are in session till 5 pm. The High Court of Karnataka works five days a week. The trial courts and tribunals six days (with the exception of second Saturdays of the month). Sounds intense? We do get to take a break during vacations when courts shut for four weeks in summer and two during Christmas. (Time for long holidays and the only thing corporate lawyers truly envy us for!)

Now, on to why our days are so unpredictable—shocking fact number 1, the High Court of Karnataka does not have the practice of fixing dates for cases. What they do instead is release a list of cases to be heard in court the next day at about 7 pm the previous evening. I have tried and failed to understand this system and a lot of unpredictability can be attributed to this one factor. Most lawyers learn from experience which cases to expect when, but there really is no method and you often find yourself spending all night preparing for a case listed unexpectedly.

As if that isn't sufficient to throw your day, all courts follow a different procedure for hearing cases

and if you have cases in multiple fora you must make educated guesses about which case is likely to reach at what time and try and race (sometimes in cars, sometimes we just run) from one location to the other, lest you annoy any judge by being late! I truly wonder how they managed this before mobile phones!

Then there is the human element—the judge. Our strategy for getting most out of the day must necessarily factor in the temperament of the judge. Different judges hold court differently—some are fast, some slow. Some are strict, some more accommodating. When you need an adjournment, some allow you to ‘mention’ the case at the start of the session and some expect you to wait all day till the case is taken up to grant an adjournment. A whole day of waiting so you can live to die another day.

Let’s start with the High Court. There are about 30 courtrooms and each court has a minimum of 70 cases per day. Most lawyers have multiple cases listed on any given day. If your case is, for instance, at serial number 10 in one court hall, you must wait your turn till the preceding nine are done. Lawyers make educated guesses on how long it will take for a court to reach serial number 10 depending on the nature of cases at numbers 1–9 and the judge’s pace. This is how they juggle between court halls. If you are really lucky, your case will reach at the anticipated time and you attend your other cases and/or get back to the office. About 60 per cent of the time, however, I wait longer than expected, or I miss one case for the other, or none of my cases are even taken up on the day! Even if my case does reach, the outcome of the hearing is far from predictable. Sometimes the opponent takes an adjournment, sometimes are asked to argue the entire case although it is listed for hearing on an interim application, sometimes the judge will to hear it another day ... the list of possible outcomes is endless.

It is no different at the trial courts and tribunals. Fixed dates are given for cases here so you can be better prepared but there are so many more stages in a trial that the probability of anything substantive happening in your case on every date is quite low. Court starts with a first calling of the case when the counsels for parties indicate whether they are ready to proceed with the case that day. If they aren’t, the case is usually adjourned (unless one counsel or the judge opposes, in which circumstance it is entirely the judge’s discretion). If they are ready, the case is ‘passed over’, and called out again later in the day. Most trial courts follow a system where they take up evidence cases pre-lunch and hearings/arguments post lunch. On an average there are 60–70 cases before a judge. Out of these maybe 8–10 are listed for evidence. Some get done early. However, if there is a cross-examination set down for the day, it is excruciatingly slow and could take hours. By the time first hearing is done and evidence taken up, it’s noon. That gives the court two hours till lunch. This is usually not even enough to finish one case, forget multiple cases. Then court resumes at 3 pm to start hearings and sits till 5 pm. Once again, some arguments are short and some take days to complete. All this while, all the lawyer can do is wait. And hope. And wait.

So there you have it—the reason why lawyers never schedule client meetings between 10 am and 5 pm. Even we don’t know how long we will be stuck in court on any given day. All this waiting sounds exasperating—and it can be. Nonetheless, most days there is much to be learnt (and entertainment to be had) by watching court proceedings so it’s tolerable!

I have tried very hard to use this ‘dead time’ more productively but it is difficult to do substantive work, such as drafting, in court. We can’t take our laptops—so I just take another file or some research to read. There is also usually so much of a crowd in court that you don’t always get a seat or



the kind of quiet you need to concentrate. It's better to download 'Candy Crush' and make peace with the waiting.

After all the waiting (I can't use 'waiting' enough), it is hard to face clients. If your client is defending the action, they can usually see the plus side of a long drawn out legal battle but for people who are in desperate need for the court's assistance, it can be rather difficult to explain why I am unable to help them get any relief day after day after day. I advocate getting clients to attend court once or twice—just so they empathise and know that a litigator is being totally honest when they send them an invoice for 10 hearing dates and showing zero progress. Clients from outside the country are the hardest to explain to—they find it almost impossible to understand our systemic delays.

After 5 pm, I get back to the office and take a short break. I know all I have done is wait, but it is surprisingly exhausting to sit around in the heat under three layers of clothing and do nothing all day. Then begins the day's work—drafting, research, preparing, correspondence, meeting clients, returning phone calls, etc.—all those things I couldn't do when stuck in court. Many days I have arbitrations that start at 6 pm. Those days are the longest and most exhausting.

Then it comes to be 7 pm again and if your case is listed before the High Court the next day, there go all your plans. If the case involves briefing a

senior counsel (who are usually very busy), meetings start only at 9 pm or early the next morning. Before you know it, it is the next day. If you don't learn to adapt and anticipate, it can be daunting—this flurry of days passing by unnoticed. We cope by taking educated guesses and trying to find ways to making it work. The system could of course be better—there really is no need that for every case taken up, 10 lawyers waste their time waiting.

On an average at a busy office (like my former office), my day ended at 9 or 10 pm. This was six days a week. Sundays would be off or working days depending on your cases for Monday! At my current office however, I wrap up by 8 pm and encourage colleagues to do so too so we can try and achieve a work-life balance and encourage women in the profession—especially married women and working mothers.

This job can be harder for women and younger lawyers. If you are both, the system is geared against you, and you are most likely always dismissed as being a junior who is there just to ask for an adjournment or mark time till a senior lawyer comes. Seldom are you presumed to be a competent counsel in her own right who knows her case. It is also the case with clients who find it harder to trust women lawyers. This is of course not true of every judge or client. I try to look at the positive side of this and hope that this low bar makes it easier for me to leave an impression.



# Behind the Bench: Perspectives of Court Clerks

*Shiva Hatti*

The scene in a court hall, about 10 minutes before proceedings begin: lawyers walking in and out hurriedly, some casually reading from their files, and others, nervous newcomers, looking all at sea; litigants waiting anxiously, hoping their matter will move ahead today; one person, right below the dais, stacking files, answering questions, entering case numbers, an eye constantly on the clock, anticipating the judge's arrival. This person, officially called the 'bench clerk' (sometimes truncated to a pithy 'bench'), is the closest possible observer of proceedings in the court. He interacts with every stakeholder, whether litigant, lawyer, police, or judge, and his importance cannot be undermined.

Given their vantage point, bench clerks (or court officers, as they are called in the High Court of Karnataka) are veritable mines of information. I interviewed two court officers and two clerks each from the civil and criminal courts in Bengaluru,<sup>1</sup> to elicit their views on what they observe closely every day—how the courts work.

Over several cups of tea after their shifts ended, we talked about how they started as clerks, career prospects, pressures of work, and most significantly, the sheer volume of cases pending before every court. Their views on pendency and delay were however aired only on the promise of absolute anonymity.

## WHAT DOES A BENCH CLERK DO?

### Duties

Every day, before proceedings begin, the bench clerk prepares the files of cases that are slated to be heard, placing them in the same order as the cause list. Once the judge walks in, the clerk calls out each

case number from the list. (Some clerks use a clear singsong voice; others mumble and hurry through.) After calling out each case, the clerk checks to see if the parties or lawyers are present, as he places the file before the judge. While lawyers make their submissions, the clerk assists the judge in finding the documents he needs. In between hearings, the clerk notes the date of the next hearing and the stage to which it has been posted in the 'court diary'. Once the proceedings for the day end, he checks the files to see all necessary elements are entered before sending them back to the 'pending branch' where they are stored. He then accounts for the files for cases posted the following day, which are usually sent to each court hall in the afternoon. As the last but important task, he hands over the court diary to the typist, who will make note of the dates to which the cases have been posted.

These tasks constitute about 80 per cent of a bench clerk's duties. His work hours are typically between 9 am and 7 pm.

## Qualifications and Recruitment

The Karnataka Public Service Commission recruits bench clerks in Karnataka, as first division assistant (FDA) or second division assistant (SDA) clerks, through a written exam. To be eligible, the applicant must have passed the 10th standard.

The court officers in the High Court of Karnataka are SDA/FDA clerks who have completed their LLB or have a law degree. Some court officers in the High Court have even got master's degrees in law.

## Training

There is a training institute located in the city civil court complex for bench clerks, but only 20 per cent of them are selected for training, which usually

lasts a month. The rest of them learn through experience. None of the six clerks I spoke to was trained in the institute, but they all said that those who were trained by the institute were extremely lucky, as it is immensely beneficial. They said that the training must be made compulsory in order to prevent the difficulties they face during the initial days of their posting.

Novice court officers in the High Court are trained in the High Court premises.

## Work Pressure and Work Satisfaction

The bench clerks in the lower courts opined that they were overburdened at least three days a week. Their work had only increased over the years. One of them mentioned that a newly appointed bench clerk is burdened with the duties of his colleagues too. Work distribution is extremely poor.

Job security, salary, and a chance to learn seem to the three common aspects that attracted them to this position. A couple of them, however, mentioned that they had taken up this job only to make ends meet at home. When asked about work satisfaction, they seemed to be happy with what they were doing; a couple of them even said they were extremely satisfied.

## Dealing with Advocates and Litigants

When asked about the nature of interaction with litigants, bench clerks responded that litigants usually approached them when their advocates were absent for the hearing. Litigants wanted to know if their case has been heard and what had happened during the hearing.

Advocates on the other hand usually approached them to take a look at the order sheet<sup>2</sup> or a particular document in their case files. More significantly,

advocates sometimes requested the clerks to give them time before calling out their cases the second time, after they were passed over.<sup>3</sup>

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## HOW MUCH TIME DOES A CASE SPEND IN COURT?

### Civil Court

When asked how long a civil case takes to be first heard from its date of filing, two bench clerks answered that it varies from a day to a week. Where urgency is indicated, that case is heard on the day it is filed, but in the normal course, it could take about eight days. When I enquired about the number of days between two hearings, they pointed out that it depends mostly on the stage and age of the case. On an average, if the case is new, it is heard once in 35–50 days. If the case is an old one, it is heard once in 15–20 days. They opined that it takes a minimum of two to three years for a case to be disposed, while the maximum can go up to 10 years, or even longer—as one of the clerks pointed out, a couple of cases have been pending for more than 15 years in his court.

### Criminal Court

When asked how often a case is heard, bench clerks at both the criminal courts pointed out that on an average it was between 25 and 30 days, but depended on the stage of the case. They were of the opinion that a case takes a minimum of two years and a maximum of 12 years to be disposed of. When I enquired whether the rule of ‘bail is the norm, jail is the exception’ was being followed, they opined that the rule is definitely adhered to. In a bail hearing, oral arguments are heard and more often than not bail is granted, but on the condition

of a cash or personal surety. Judges are very particular about sureties and they make sure adequate surety is furnished before the accused is released on bail.

When asked about the oldest case, a clerk from the magistrate’s court mentioned that one was pending for more than 13 years.

Two bench clerks mentioned that the court more often than not accepts all the charges pressed by the police, as the charge sheet is usually prepared after consulting the public prosecutor. When asked about the percentage of witnesses turning hostile, one of them was quick to point that close to 15 per cent of witnesses turn hostile. Three clerks mentioned that habitual offenders have a very casual attitude and they do not take proceedings seriously, whereas the accused being charged and produced for the first time are extremely nervous.

I was also informed that in-camera proceedings occur only in cases under the Prevention of Children from Sexual Offences Act, 2012.<sup>4</sup> During an in-camera proceeding, the court hall is cleared of everyone except the judge, lawyers from both sides, victim, and bench clerk.

All the bench clerks I interviewed said that the media fails to report cases properly. There is a certain degree of distortion of facts, and trial by media is rampant, with the accused more often than not being portrayed as convicts. They mentioned several instances of being approached by the media to reveal insider information.

### High Court

One of the court officers mentioned that 60–70 per cent of cases in the High Court of Karnataka comprise writ petitions. When I enquired about when a writ petition is first heard after being filed, I was informed that in the normal course it takes about

six days, and urgent cases are heard on the same day. The lifetime of a writ petition in their opinion varied, from a minimum of one day to a maximum of five years. Specifically, they pointed out that company matters (mostly winding-up petitions) take 6–12 months.

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## WHO'S RESPONSIBLE FOR DELAY?

When asked about judicial delay, their first response was that they couldn't talk about it. After being promised anonymity, five of the six clerks I interviewed mentioned that it was extremely worrying to see the delay in cases. They attributed reasons to all the stakeholders: litigants, advocates, investigation agencies, and judges. Some of the reasons they listed are below.

### Delays by Litigants

Litigants come to court at the very first instance of a dispute, however small or frivolous the reason may be, they felt. Having filed the case, they sometimes look to prolong a case, on grounds of ill health and personal tragedies, especially when it is time to depose. Two clerks pointed out that 30–40 per cent of witnesses do not turn up on the given date. Another tactic used to delay the proceedings is when one litigant insists on settling the matter outside court. More often than not, judges encourage litigants to settle the matter and accordingly convince the opposite party to try alternate methods of resolution. But when one of the litigants is insincere and adopts this method to delay proceedings, time is lost in trying to settle matters.

### Bench Hunting and Lack of Preparation

Bench hunting is one of the major reasons for delay, the clerks pointed out. This is when lawyers wait for a 'favourable' judge to be posted to hear their case. Some clerks mentioned that lawyers 'arrange' for files to be 'misplaced', so that a particular judge does not hear their case. The file automatically surfaces once a new judge (read favourable judge) is appointed. Additionally, according to the clerks, about 70–80 per cent of lawyers do not come prepared to court, which forces them to press for an adjournments. They called such methods entirely unfortunate.

### Incomplete Investigations

In most criminal cases, the state police investigate cases. The clerks mentioned that the police take a long time to serve summons to witnesses, since they need to trace them, and this contributes to delay. They also said that often police fail to file the charge sheets within the allotted time, on the grounds that investigation is incomplete. One of the clerks was of the opinion that in approximately 80 per cent of cases, charge sheets are not filed on time.

### Adjournments, Judicial Knowledge, Efficiency, Caseload

The clerks I interviewed pointed out that 50–60 per cent of the cases listed for the day get adjourned (without progress), and in their opinion, only 20–30 per cent of them are warranted. In their experience, adjournments are granted easily, if the case is new. But when the case is more than four years old, adjournments are discouraged and reasons are recorded in the order sheet.

They also pointed to instances when judges, who do not possess adequate knowledge or experience

about a particular branch of law (for example, intellectual property law), take more time to dispose of matters, when compared to judges who are well versed in that subject.

The clerks also noted that an efficient judge, in their opinion, hears more cases than he adjourns. But they also struck a note of caution, saying that there is a certain capacity to each judge, and he cannot push himself beyond a certain limit. Typically, a minimum of 40 and a maximum of 140 cases are listed every day. According to the clerks, when there are more than 80 cases a day, it is near impossible for any judge to do justice on all of them.

## Solutions

When asked about possible solutions to fix delays, all the six bench clerks were of the opinion that the public should look to settle matters by alternative means of dispute resolution, such as negotiation and mediation. They also opined that the public should stop filing cases for frivolous matters, which according to them are more a result of clashing egos than real causes of action. They also believe that if the public were informed about the time a case can take in court, they would definitely be deterred from coming to court!

The clerks opined that if advocates picture themselves in the place of litigants, and look to understand the problems of litigants, they would handle things differently.

They also pointed out that the police need to complete their investigation as soon as possible, so that charge sheets are filed on time. The police need to be efficient in serving summons to the witnesses as well. Three bench clerks suggested an increase in the strength of the police force as a solution.

When asked if increasing the strength of the number of judges was a solution, four clerks said

it would not be of great benefit, while the other two did vote for the idea. The former opined that if judges hear matters to the best of their capacity, delays would be reduced significantly. They reminded me, however, that there has been a change in attitude towards adjournments, which are now not granted easily. Thanks to orders from the High Court and Supreme Court to dispose of cases within six months, judges are less inclined to grant adjournments. They also cautioned that while the change in attitude is partly because of awareness amongst public about this issue, there is the danger of it fading out soon.

When I enquired whether computerisation has played a role in reducing delays and their work, all the six of them agreed. In the lower courts, computerisation has helped with the latter in particular, especially preparing cause lists, and in the High Court it has helped in finding records, orders, and sorting information about cases.

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## MEMORABLE INCIDENTS

When I asked about an incident that had stayed in their memory, three clerks recalled being so impressed by lawyers who had argued their case with such impeccable quality that they had almost been tempted to quit their jobs and practise as lawyers. One of them recalled a case where the accused was being tried for cheating, and his lawyer argued that case so well that the judge discharged the accused.

On the negative side, memorable incidents about being taken to task by judges for not doing a particular job well. One of them recalled an incident where he was appointed as a typist when he had hardly any experience in the court. As a result, he was not able to match the pace of the judge, which had resulted in embarrassment in open court.

A couple of clerks recalled incidents where litigants had fought in court over a property dispute. One of them mentioned an incident where two brothers almost came to blows when it was turn of each of them to appear as a witness.

a civil servant, having missed out in his previous attempt by a few marks. He hopes to make it this year.

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## OFF THE RECORD

After talking to the clerks closely, I have learned that they are fairly humble and down-to-earth individuals, who strive hard every day without commensurate wages. If you interact with them after court hours you will know that it is stress and workload that makes them look officious in the court.

When I asked about the one thing that bothered them during their work hours, pat came the reply—lack of respect. They feel their work in court is appreciated the least. One of the bench clerks even mentioned that he is preparing to be

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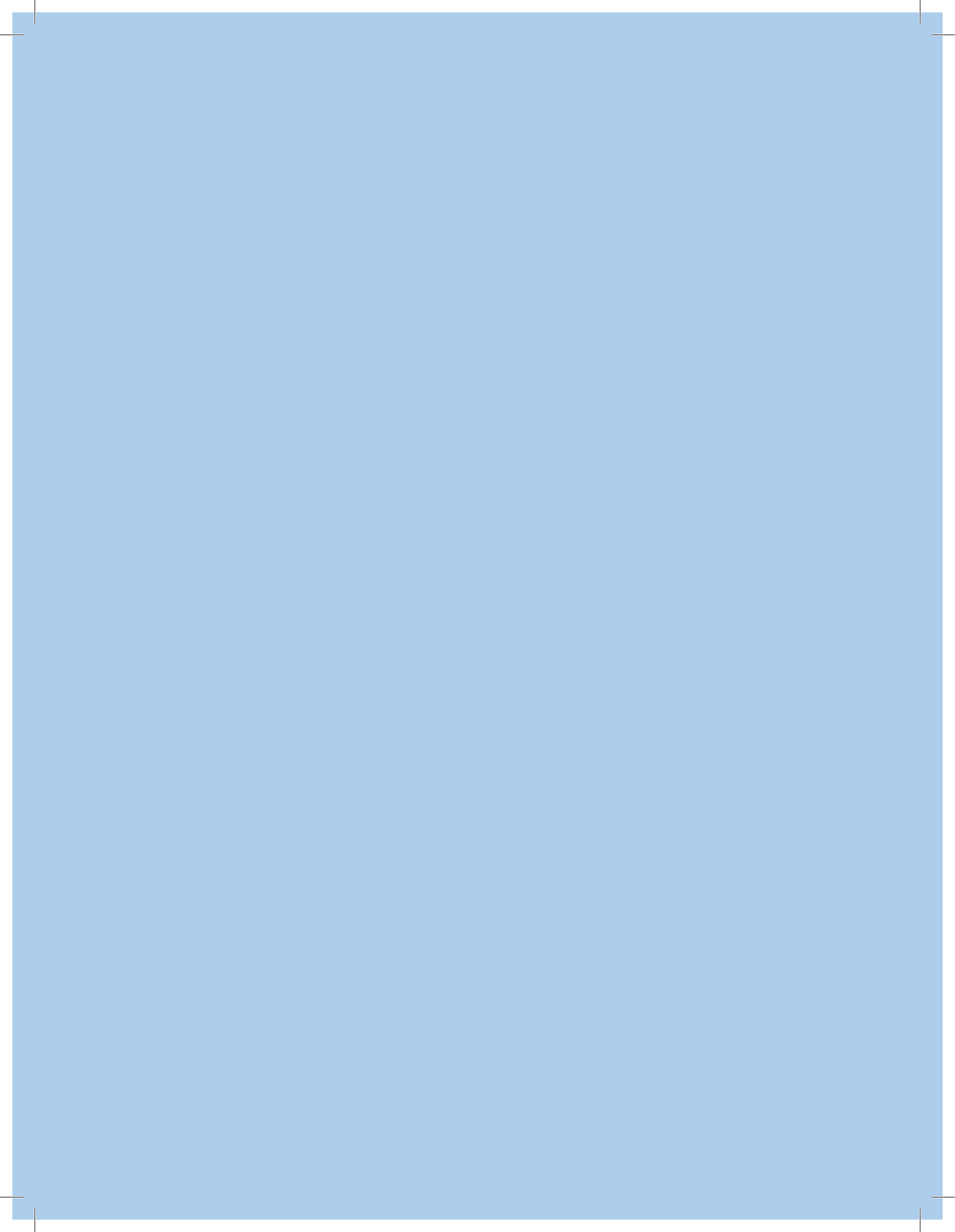
## Notes

1. Several clerks I spoke to excused themselves on grounds of excess work, while a couple of them answered so blandly that nothing constructive could be deciphered from them. All of them were decidedly guarded on the question of judicial delay and pendency.
2. This contains the orders passed by the judge in each case, records the progress of a case, and has other related remarks.
3. In the lower courts, all cases in the cause list are called out in the first round. Some matters, which are to be heard in detail, for example, to record evidence or hear oral arguments, are passed over. Passed-over cases are heard after the first round is completed—they are usually called out in the same order as originally listed.
4. In-camera proceedings occur only in two court halls in the City Civil Court Complex, Bengaluru.



SECTION FOUR

ACCESS TO JUSTICE



# Access to Justice Survey: Introduction, Methodology, and Findings

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*Harish Narasappa*

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*Surya Prakash B.S.*

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*Yashas C. Gowda*

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**D**AKSH's Access to Justice Survey is the first systematic study in India to explore the needs and expectations of the users of the judicial system—the litigants. The survey assesses how justice is being delivered in courts across the country. It maps litigants' perceptions on several issues relevant to their experiences in the judicial system, such as the factors that influence the ease with which they can access the system, their ability to use the court system to resolve disputes effectively, the quality of judicial services, and the socio-economic fallout of judicial delay. The survey also gathers essential information about the background of litigants, nature of cases they are involved in, relationship between opposing litigants, and previous litigation experience. Since several actors are involved in the judicial process—judges, lawyers, and administrators—the survey also examines how their actions impact litigants' rights. The findings of the survey will be valuable to both socio-legal researchers and the courts themselves.

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## METHODOLOGY

The survey was conceptualised by the DAKSH team over the course of three months, to include questions about the socio-economic background of litigants and those pertinent to civil and criminal legal procedures. The questionnaires were designed separately for both civil and criminal cases—63 questions for civil cases and 69 questions for criminal cases.

The survey interviewed a total of 9,329 litigants. The surveyors visited a total of 305 locations in 184 districts in 24 states. The initial locations were chosen randomly, from a total list of 4,566 district

courts made available on eCourts.gov.in, ensuring that the courts are representative of most of the states in the country. The surveyors were to visit to any one or two courts from the list of selected districts, and collect 20–40 responses from each court visited.

The survey form designed by DAKSH was made available on an Android-based app. All surveyors were therefore expected to own an Android phone with an active internet connection. The questionnaires were designed in a single scroll page on the app, with a mixture of multiple choice as well as single-point answers. All responses were recorded only at the completion of the survey via a ‘submit’ button, allowing the surveyor to double check and verify answers in the case of mistakes. The app was tested for errors by the DAKSH team before it was introduced to the surveyors.

Prior to the survey, which began on 15 October 2015, the DAKSH team conducted a training session with the survey team at Centre for Development, Planning and Research in Pune to establish rules of conduct and explain the intentions behind the survey. In this, it was emphasised that this survey was in no way interested in the legal merits of a case. Each surveyor was also instructed to use some form of randomisation in selecting respondents—making sure to include women, different case types, and to spend alternate days in the same court.

Using this app, the surveyors were to physically visit district-level courts—which are a mixture of civil and criminal courts—in 305 locations across India. Each surveyor was expected to spend up to three days in a court, and interview a minimum of 10–20 plaintiffs and 10–20 respondents in person. The surveyor was instructed to interview the litigants only on the court premises but not inside the court halls.

The survey respondents had to be persons currently involved in an ongoing case in the court that a surveyor visited. The surveyor was instructed to ensure that the person surveyed was not a relative or related person, but necessarily a plaintiff or respondent in the case. Likewise, the respondent could not be a representing lawyer. Surveyors were also asked to ensure that the persons surveyed were aware of the case number of their ongoing case.

The Access to Justice Survey app recorded the details of the questionnaires live on a Google-sheet that allowed the DAKSH team to monitor the integrity of the survey process. In addition, the DAKSH team made site visits to the courts where the survey was undertaken, to ensure that the surveyors complied with instructions.

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## DATA ELEMENTS

The survey collected data on variables such as:

1. *Socio-demographic indicators:* Age, education, occupation, annual family income, nature of household accommodation, types of assets owned.
2. *Cost structures:* Types and costs of travel, expenditure on hearings, cost of time spent, social support systems (family or friends accompanying litigant to court), expectations of outcome vis-à-vis time and delay, alternate methods of dispute resolution (if any) used prior to filing cases, access to lawyers, and case information.
3. *Case-related information:* Nature of case, subject matter of dispute, relationship between opposing parties to the case.

## IMPORTANT FINDINGS\*

### Hope and Expectation

Findings from the survey reveal a story of hope and expectation. Hope is reflected in the fact that 55 per cent of civil litigants and 67 per cent of criminal litigants surveyed expected their cases to be resolved within a year when they first filed them. By the time we interviewed them, about three–five years had passed, and the litigants' expectations from the system had dropped dramatically, with only 32 per cent of civil litigants and 42 per cent of criminal litigants still hoping for resolution within one year. The difference in the expectations of civil and criminal litigants is significant, as it tells us the urgency with which litigants come to the system. When asked about reasons for delay in their cases, the respondents cited judges not passing orders quickly (62 per cent), other party not appearing (27 per cent), and other party influencing the judge (8 per cent) as the contributing factors. Ten per cent of the respondents felt that there was no delay in their case. These perceptions tell us a great deal about the culture of courts, as experienced by the litigants.

### Costs

While lawyers' fees and court fees can be quite steep, the personal costs borne by an individual litigant can also be significant. On an average each litigant spent ₹520 per day to attend court. Assuming a minimum of two litigants per case and multiplying it by the number of subordinate courts in the country (we have taken the number as 16,400, although according to the Supreme Court data there are at least 20,000 subordinate courts in the country), and the average number of hearings per day in each court, we can calculate the total

amount of money being spent by litigants just to attend court hearings. Even on this conservative basis, the amount is ₹30,000 crores per year! It is a staggering amount by any yardstick. Even more unfortunate is the fact that litigants with an annual family income of less than 1 lakh per annum spent 25 per cent of their earnings in attending court hearings, *other than on legal fees*, in a year. Perhaps this is the reason that 33 per cent of the civil litigants interviewed by our survey attested to using alternate means of dispute resolution before approaching the courts—having approached family elders, village or caste panchayats, or the police to settle matters before going to court.

We also asked about loss from taking time off from work, loss of wages, and business losses. This was on average ₹873 per litigant. Using the same methodology as mentioned before, we computed the productivity loss, and the number is a staggering ₹50,387 crores per year! As a national cost, it amounts to 0.48 per cent of India's GDP.

### Legal Aid

Despite a substantial number of litigants being poorly educated and from lower income groups, only 2.36 per cent of all litigants were seen to be using court-appointed lawyers. According to the National Legal Services Authority Act, 1987, individuals from scheduled caste (SC) and scheduled tribe (ST) communities, women, and persons with an annual income of less than ₹30,000 per annum are eligible for free legal services, including the services of lawyers for those accused in criminal cases, and the waiver of legal fees for civil disputes (*see*, <http://ecourts.gov.in/sonipat/free-legal-aid>). It can be estimated that a significant proportion of litigants with an annual family income of less than 1 lakh per annum would qualify for legal aid paradigm and require institutional support. In

\*. See pages 142 to 155 for detailed findings.

particular, since 15 per cent of the litigant body is made up of women, 3.2 per cent from ST communities, and 11 per cent from SC communities, it is disheartening to note that such a meagre number of individuals were given court-appointed legal services. Clearly, there is a need to increase legal literacy measures.

## Criminal Matters

Of the survey respondents involved in criminal matters, 56 per cent were accused. Of these, 53 per cent reported an annual family income of less than ₹1 lakh and 22 per cent were uneducated or had studied up to the primary-school level. These respondents were primarily self-employed (13 per cent), working in agriculture (27 per cent), or labourers (18 per cent). Sixty-two per cent of these litigants were other backward castes (OBCs), SCs, and STs across religions. Ninety-five per cent of the respondents who were accused in criminal matters had not been accused in any other case previously.

The survey also asked questions about the dark secret of our criminal justice system: under-trial prisoners spending more time in prison than the prescribed punishment for their alleged offence. About 21 per cent of the accused declared that they had spent more time in jail than the prescribed punishment, and 31 per cent of individuals accused of bailable offences claimed that they continue to be in jail as they do not have the means to afford the bail or guarantors to stand surety. Both these figures are shocking, even providing for margins of error and misplaced perceptions. The judiciary is not solely responsible for the entire criminal justice system, nevertheless these numbers are a sad reflection of the state of affairs.

Our surveyors also found that 10 per cent of all accused were brought to the court premises

in handcuffs. The Supreme Court has consistently held since 1978 that prisoners should not be handcuffed, as it is at first sight a violation of their human rights. Nearly 40 years later, the Supreme Court's order continues to be violated.

## Civil Disputes

The survey also asked about what litigants are fighting about. Nearly 66 per cent of respondents involved in civil cases said that their disputes were about land and property—whether landholdings, titles, compensation, or inheritance. This is an astonishing statistic (although not according to many lawyers). While it raises interesting issues about our society, disputes among people, awareness of civil rights, and how breaches of rights are being resolved, the primary conclusion is the urgent need for land law reforms. Land laws in the country are chaotic, a combination of title laws promulgated by the British and revenue procedures going all the way back to the 18th century. The judiciary is unfortunately the institution where this enormous mess has come home to roost. The parliament and executive need to take note of the seriousness of this issue and initiate land law reforms on a priority basis. Unless such reforms take place, it is unlikely that the number of land-related cases in the country will come down. And unless these cases are tackled, it is unlikely that the delays in civil litigation will reduce.

## Women

Women constituted only 15 per cent of all survey respondents, which raises the questions about the ease with which women (compared to men) can access the legal justice machinery. Of the women respondents surveyed, 14 per cent were victims of crimes, out of whom, 70 per cent had an annual family income of less than ₹1 lakh, and were

less educated than those with an annual family income of ₹1–3 lakhs. Of survey respondents who were accused in criminal matters 5 per cent were women, and 57 per cent of them were women with an annual income of less than ₹1 lakh, and 34 per cent were either uneducated or schooled up to the primary level, and engaged in agriculture, labour, private service, or as homemakers. Of the women who had an annual family income of ₹1–3 lakhs, education levels were seen to vary between class 10 and undergraduate degrees. Women, like men, are seen to be predominantly involved in land and property disputes, with up to 57 per cent of civil disputes involving women and being about land and property matters.

### **Litigants' Background**

An important finding is that individuals with an annual family income of ₹3 lakhs and below form 90 per cent of the litigant body. Likewise, litigants with undergraduate degrees constitute 14 per cent of the litigant body, and those with postgraduate education were only 0.6 per cent of the litigant body. Of those individuals who had a degree and/or postgraduate education, 17 per cent were initiators of legal battles in the court, across civil and criminal matters. Since the relatively affluent and well-educated appear to be a much smaller proportion of litigants than those from more backward economic categories with lesser education, it raises question about whether these groups are being able to bypass the legal system in the resolution of their disputes.

Another significant finding from the survey is that the plaintiffs and defendants in civil cases are generally from similar socio-economic backgrounds. Similarly, in criminal matters, the accused and the victims are also from the same or similar socio-economic strata. Socio-economic strata include caste and religion. We found that 61 per cent of land litigation is between the same caste groups, and 69 per cent between the same religious groups. This finding reveals that similar categories of individuals who bring no visible external leverage of social or economic privilege against each other go to court to resolve their disputes. Of course, we are assuming for the purpose of our study that litigation is aimed at genuinely redressing disputes, rather than a mechanism to merely enforce power or hold off resolution which could be the case in many circumstances.

### **Citizen-centric Measures**

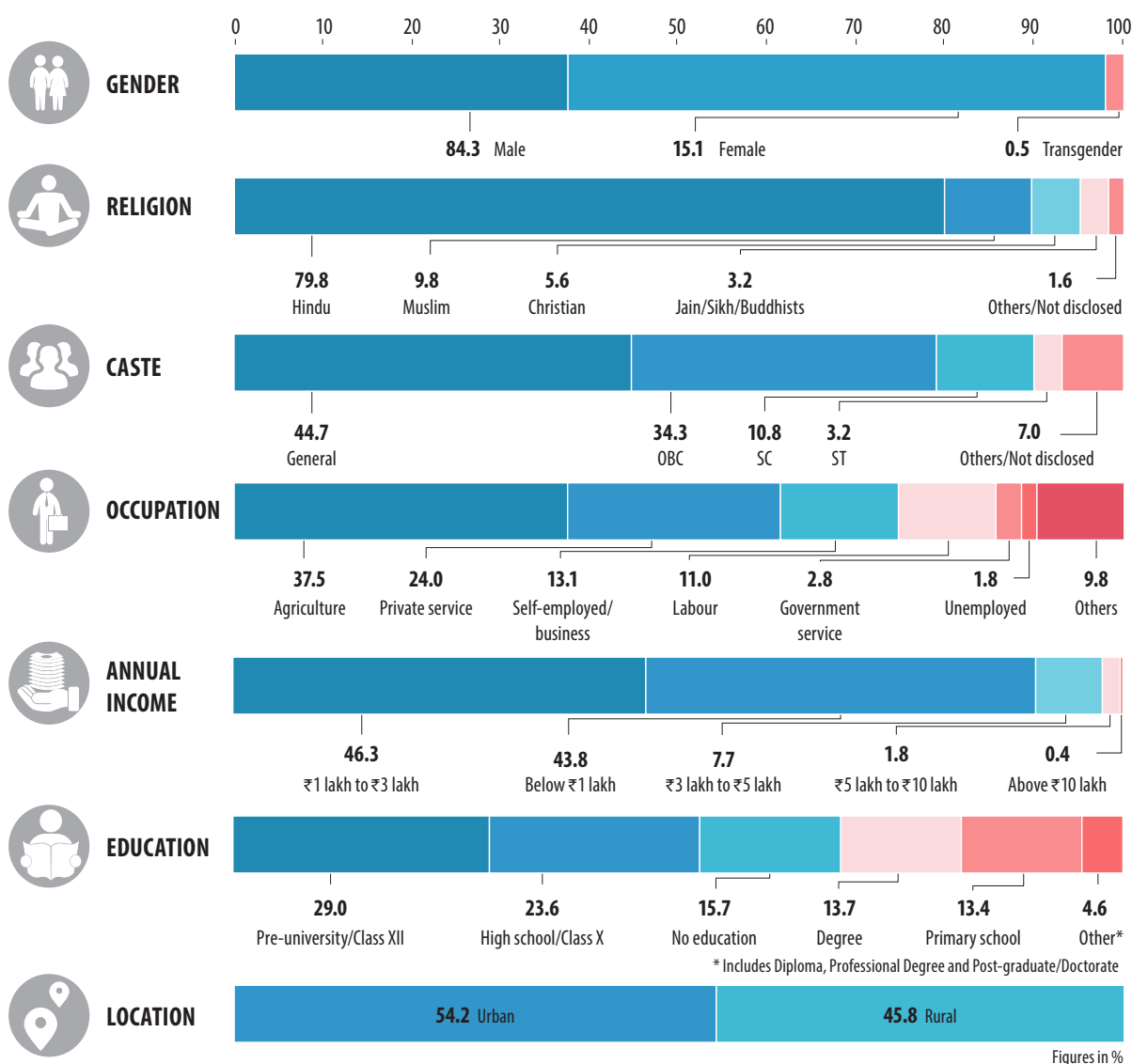
Citizens continue to approach courts regularly, as the survey shows, despite the many problems they experience. To repay the faith citizens repose in the judiciary, it is important that the state (judiciary, legislature, and executive) takes on board the views of the citizens and implement steps to ensure that the justice system serves the judiciary better. Experiences from other countries show that positive responses from the state, including the judiciary, to citizens' views has resulted in an efficient judiciary and increased citizens' trust in the judiciary. The Indian state needs to step up.

## DETAILED FINDINGS

### Who is Accessing the Judicial System?

This section contains a summary of the socio-economic profile of the litigant body across civil and criminal questionnaires as per social, economic and institutional parameters. Our survey data is representative of the social profile of the Indian demographic as per Census 2011. Women account for 15% of the survey respondents. This is in keeping with the National Judicial Data Grid data that states that only 14% of litigants in India are female. Survey respondents are primarily composed of individuals fighting against other individuals.

**FIGURE 1.** Socio-economic Profile of Survey Respondents

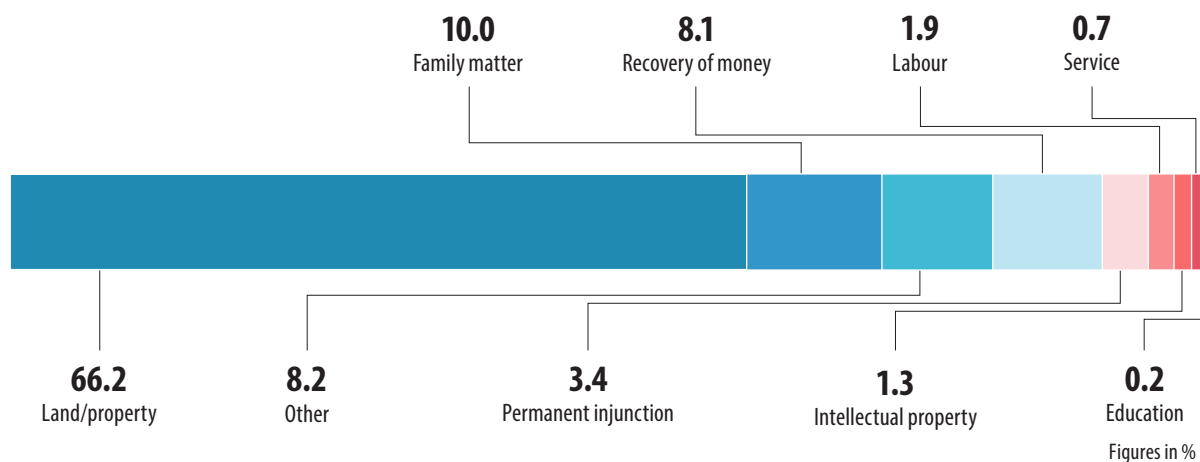




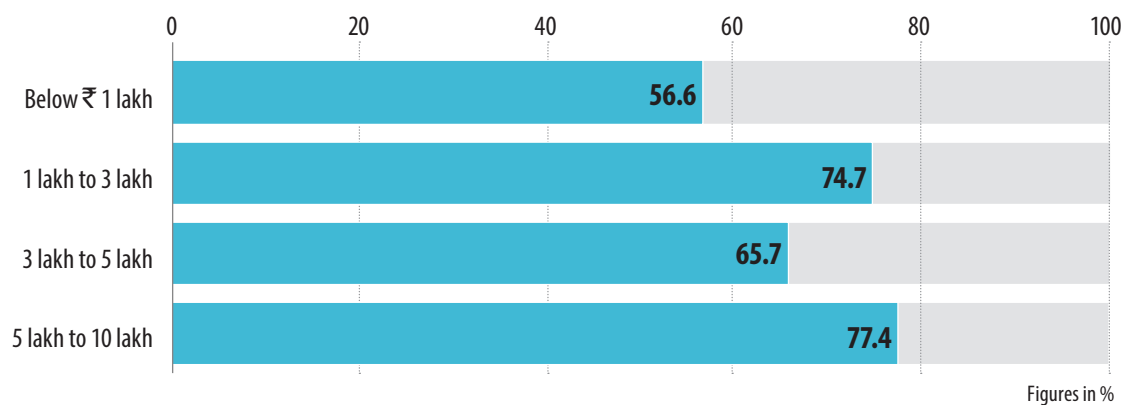
## What Are Litigants Using the Judicial System for?

**FIGURE 2.** Subject Matter of Civil Cases as Per Survey Respondents

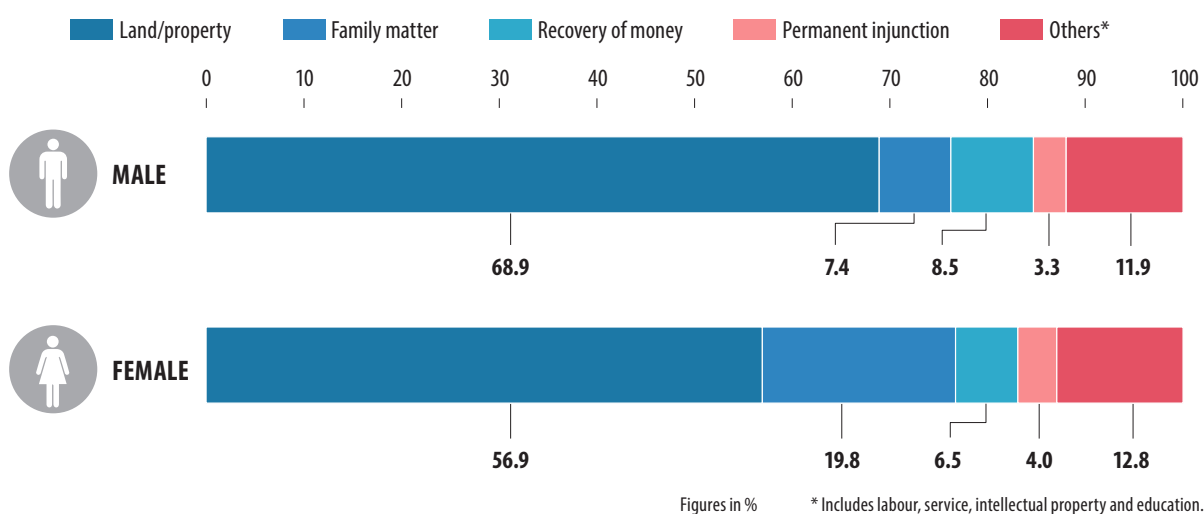
Land and property matters dominate civil litigation across the country. This is followed by litigation on family matters.



**FIGURE 3.** Share of Land/Property Cases in Total Civil Cases by Income Group



**FIGURE 4.** Gender-wise Break-up of Civil Cases (Plaintiffs and Respondents)



**FIGURE 5.** Religion Matrix of Civil Cases

		Religion of opponent					
		Hindu	Muslim	Christian	Jain/Sikh/Buddhist	Not mentioned	Other
Religion of survey respondent	Hindu	73.8	1.5	7.5	0.6	15.4	1.1
	Muslim	23.8	42.6	15.6	0.3	15.9	1.9
	Christian	20.0	1.7	74.9	0.0	2.7	0.7
	Jain/Sikh/Buddhist	15.0	1.8	9.0	41.3	32.9	0.0
	Not mentioned	26.1	0.0	21.7	0.0	39.1	13.0
	Other	25.8	3.2	9.7	0.0	6.5	54.8

Figures in %

This graph maps civil cases by religion of contesting parties. So, for example, 73.8% of cases by Hindu survey respondents are against other Hindus and 1.5% against Muslims and 7.5% against Christians. The colour spectrum ranges from red (high percentage of cases) to blue (low percentage of cases).

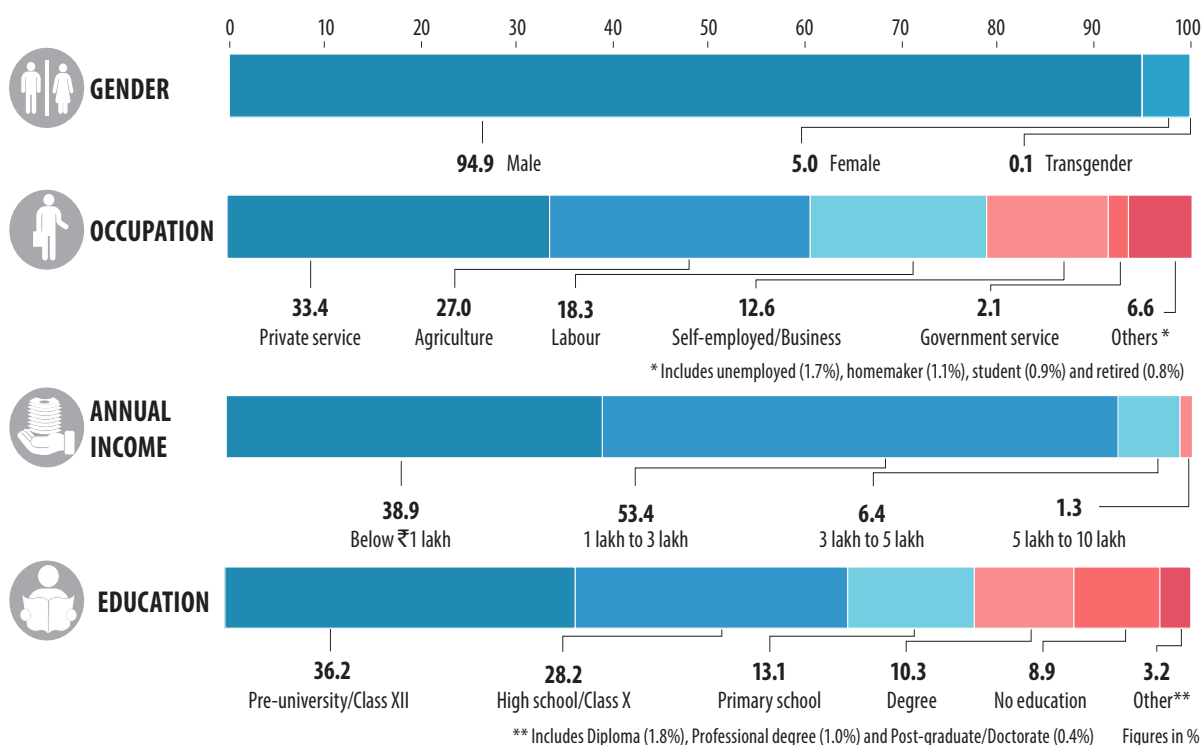
**FIGURE 6.** Caste Matrix of Civil Cases

	Caste of opponent					
	General	OBC	SC	ST	Not mentioned	Other
General	68.8	7.4	1.7	0.6	19.6	1.9
OBC	10.9	62.9	4.2	0.9	19.0	2.1
SC	15.6	15.8	58.7	1.2	6.4	2.4
ST	16.9	10.6	7.0	51.4	7.7	6.3
Not mentioned	24.4	7.3	3.7	0.0	54.9	9.8
Other	38.0	12.4	3.6	1.2	8.0	36.8

Figures in %

This graph maps civil cases by caste of contesting parties. So, for example, 68.8% of cases by survey respondents of the General category are against others of the same category, and 7.4% against OBCs and 1.7% against SCs. The colour spectrum ranges from red (high percentage of cases) to blue (low percentage of cases).

**FIGURE 7.** Socio-economic Profile of Survey Respondents Who Were Accused in Criminal Cases



**FIGURE 8.** Profile Matrix of Criminal Cases

Across the board, individuals were seen to be litigating against other individuals, or the government. When the government was the complainant, the opposing party primarily consisted of individuals.

		Accused				
		Individual	Government	Governmental body	Corporate entity	Others
Complainant	Individual	84.4	10.4	0.4	1.5	3.3
	Government	93.1	3.5	0.5	2.1	0.7
	Governmental body	74.3	5.7	17.1	0.0	2.9
	Corporate entity	83.1	0.0	0.0	12.3	4.6
	Other	26.8	2.0	2.4	1.6	67.1

Figures in %

This graph maps civil cases by profiles of contesting parties. So, for example, 84.4% of cases by complainants who are individuals are against other individuals, and 10.4% against the government. The colour spectrum ranges from red (high percentage of cases) to blue (low percentage of cases).

**FIGURE 9.** Previous Criminal Record of Accused

Amongst the accused surveyed, only 5% had been previously accused in other cases and of these individuals, only 46% were convicted on those charges.

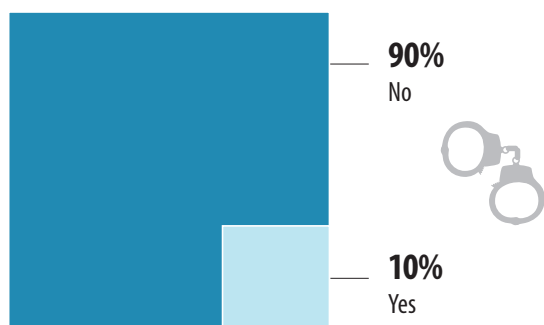
Never previously accused  
**95.0**

Previously accused, but never convicted  
**2.7**

Previously accused and convicted  
**2.3**



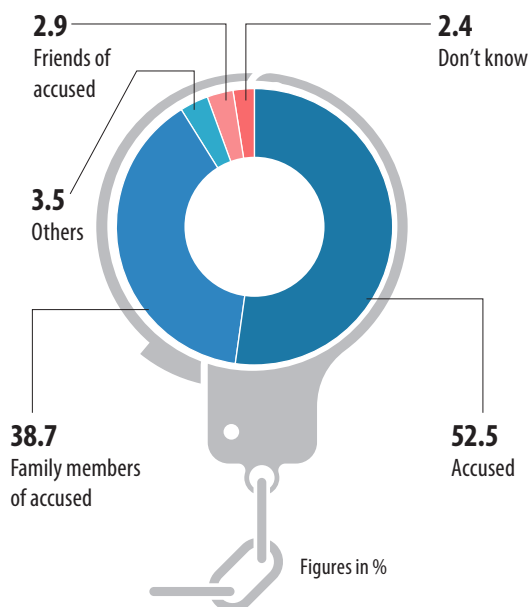
**FIGURE 10.** Handcuffing of Accused during Proceedings



10% of accused were handcuffed within the court premises. Supreme Court guidelines guarantee a minimum freedom of movement which even an undertrial prisoner is entitled to under Article 19 of the Constitution, that cannot be cut down by application of handcuffs or other hoops. [*Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494, AIR 1978 SC 1675].

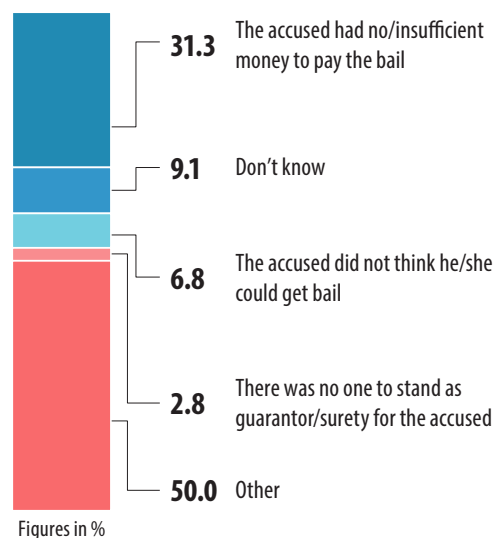
**FIGURE 11.** Provider of Surety for Bail

92% of respondents accused of bailable offences are granted bail



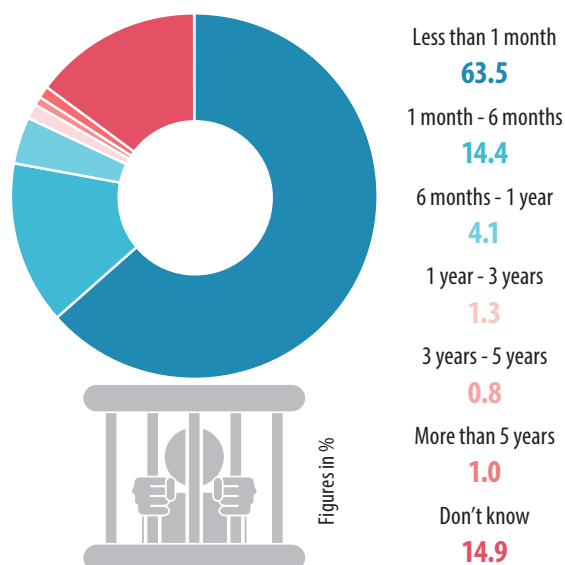
**FIGURE 12.** Reason for Not Availing Bail Where Due

The main reason individuals could not meet the conditions for bail was due to a lack of sufficient funds.



**FIGURE 13.** Time Spent in Jail by Those Who Were Granted Bail

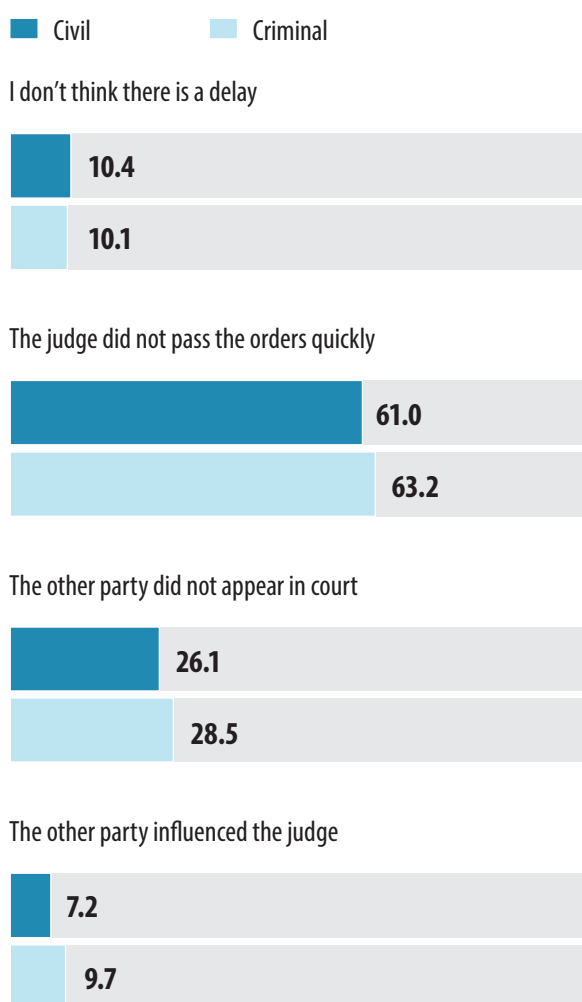
63.5% of accused who were granted bail were in jail for less than one month.



## Litigants Perception of Delay in Courts

**FIGURE 14.** Reasons for Delay (in Survey Respondents' Case)

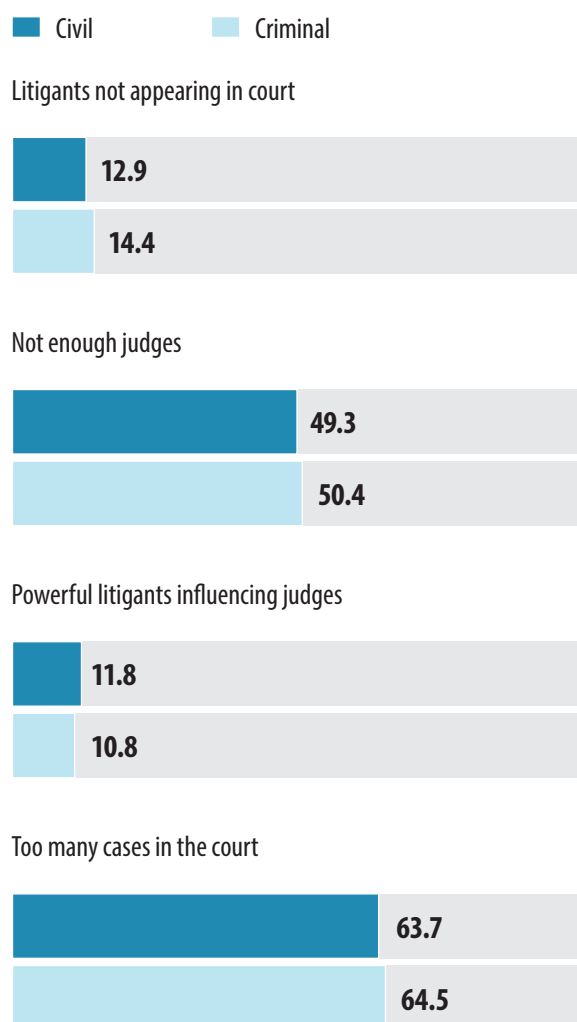
A clear majority of litigants strongly felt that delay in their cases is caused because judges do not pass orders quickly. They also felt that their cases are getting delayed due to non-appearance of opposite parties on the dates fixed for trial.



Figures in %

**FIGURE 15.** Survey Respondents' Perception for Reasons for Delay in General

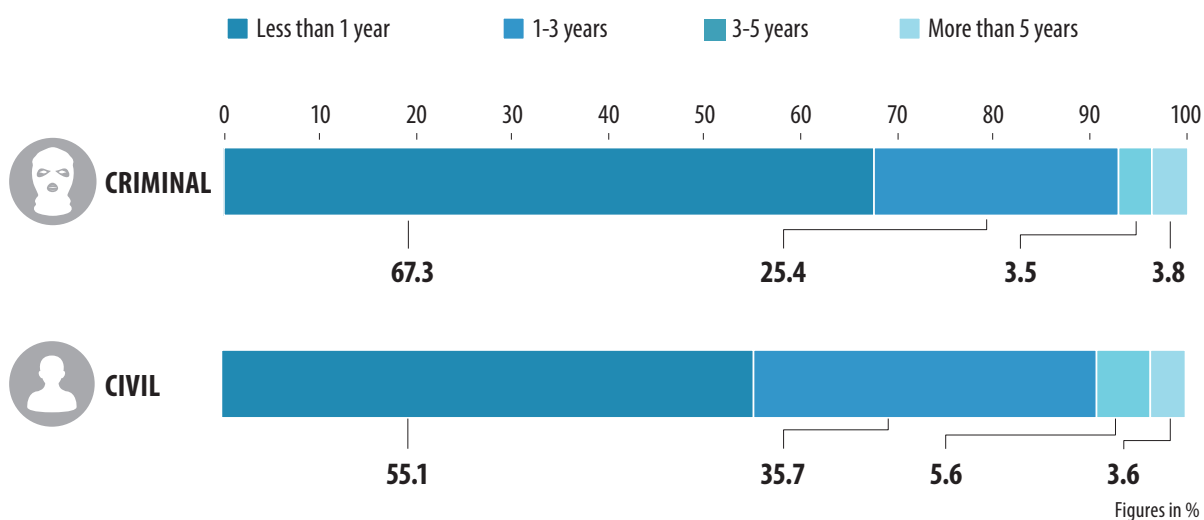
Litigants responded that the lack of judges in subordinate courts is the primary reason for delay in general in the courts.



Figures in %

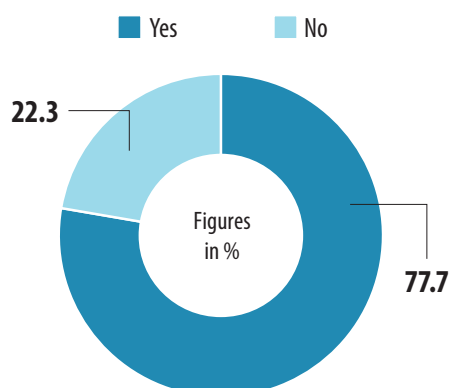
**FIGURE 16.** Estimated Disposal Time at the Time of Filing Case

On asking litigants how much time they expected it would take for their cases to be disposed, we found that 55% of civil litigants and 67% of criminal litigants expected their cases to be resolved within a year when they first filed their cases.



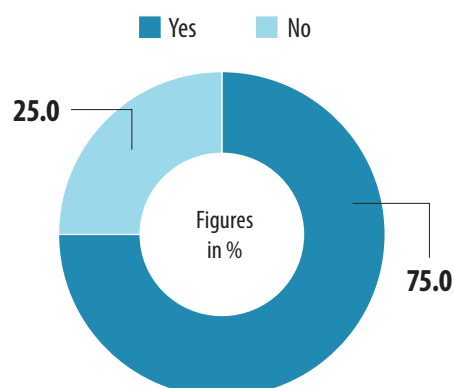
**FIGURE 17.** Prior Experience with Courts in Civil Matters

Did your previous experience encourage you to go to court this time?



**FIGURE 18.** Prior Experience with Courts in Criminal Matters

Did your previous experience encourage you to go to court this time?



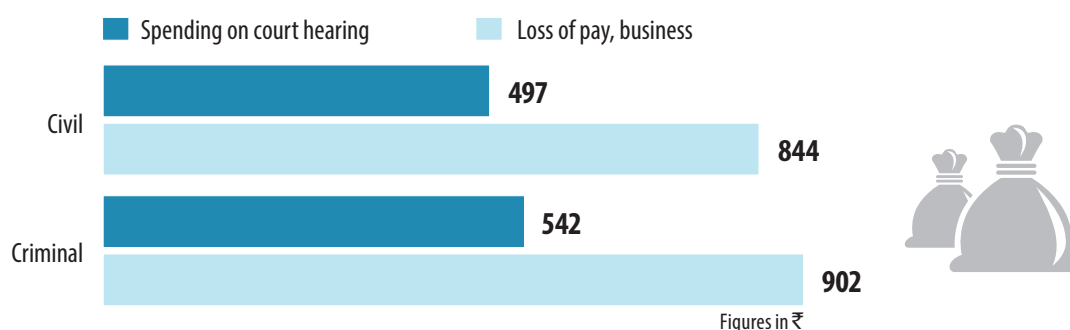
## Costs of Accessing Justice

We sought to understand the following cost structures:

- Expenditure involved in attending court hearings
- Legal fees
- Opportunity cost of attending hearings (wages and work time lost)

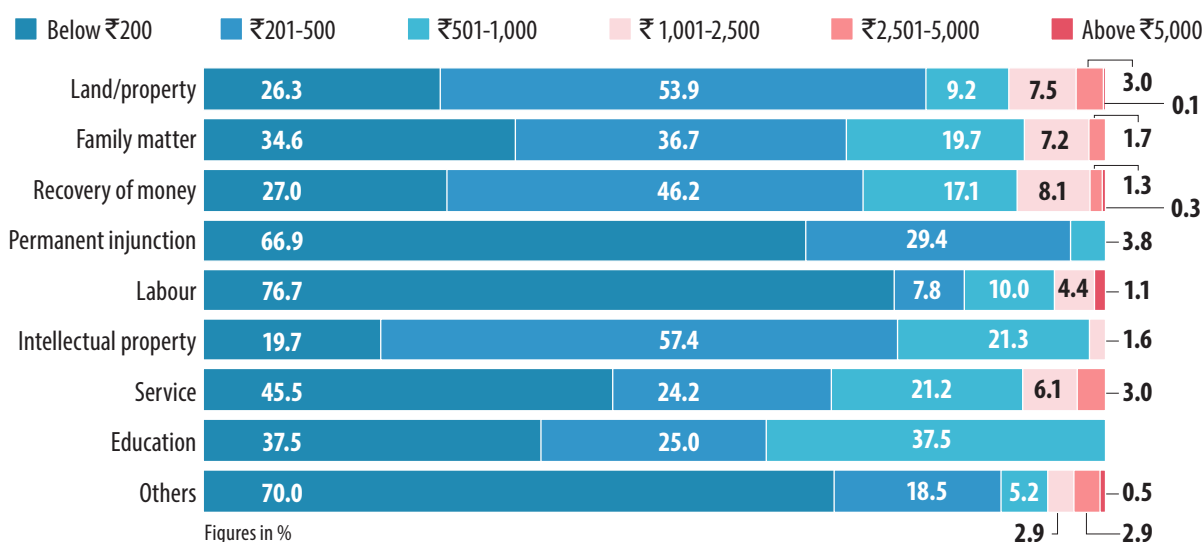
**FIGURE 19.** Cost Incurred and Earnings Lost for Court Hearing

Civil litigants spend ₹ 497 per day on average for court hearings. They incur a loss of ₹ 844 per day due to loss of pay. Criminal litigants spend ₹ 542 per day for court hearings on average and incurred a cost of ₹ 902 per day due to loss of pay.



**FIGURE 20.** Cost Incurred for Court Hearing by Type of Case

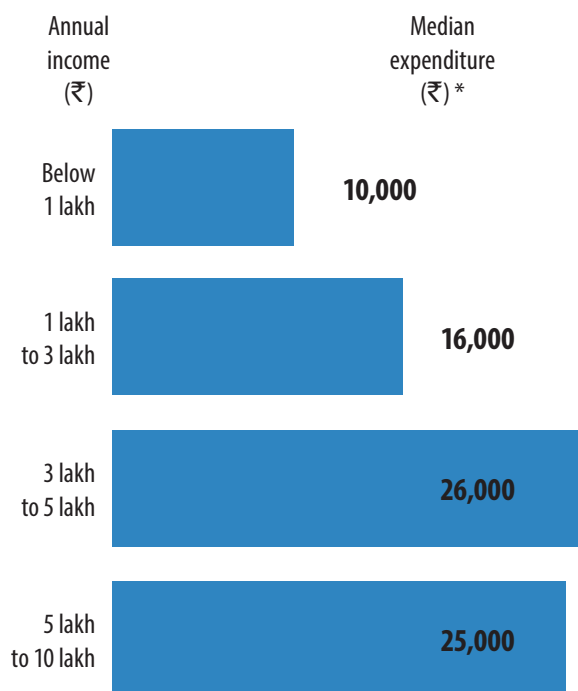
Litigants in family matters and service cases spend more on each hearing than other litigants.





**FIGURE 21.** Costs Civil Litigants Expect to Incur Till the Case Is Decided: Income Level-wise

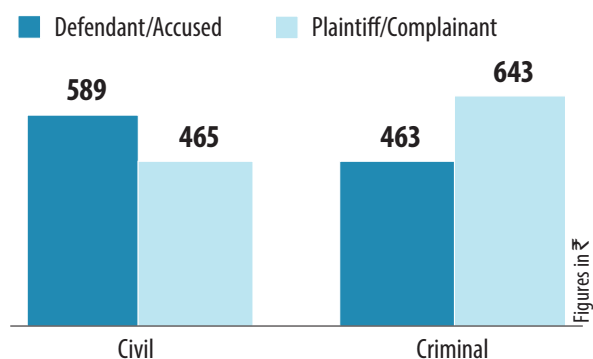
Litigants in the lowest income bracket incur a greater cost over litigation than others.



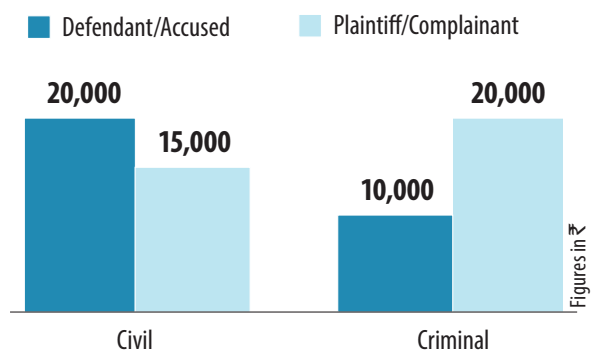
\* Median is the middle point, where the number of respondents above equals those below

**FIGURE 22.** Average Cost Per Day

The average daily expenses of plaintiffs is 21% less than that of defendants.



**FIGURE 23.** Expenses that Litigants Expect to Spend Till the Case Is Decided: Civil versus Criminal

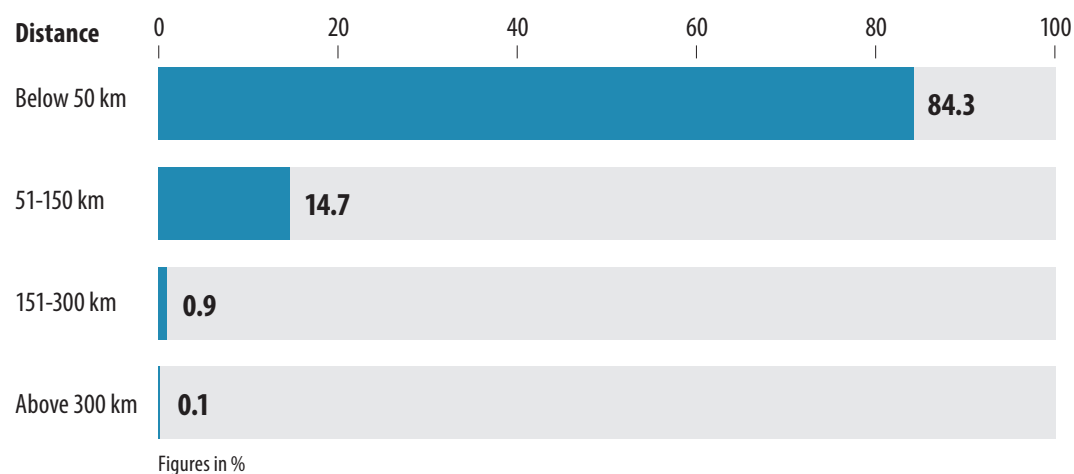


### *Expectation and Ability to Appeal*

The lowest income group (with an annual income of less than ₹1 lakh) is seen to be most optimistic about their cases being resolved within one year. 44% of litigants cited expense as a major deterrent for filing appeals in the High Court if their cases were not resolved in their favour.

**FIGURE 24.** Distance Travelled to Court for Hearings

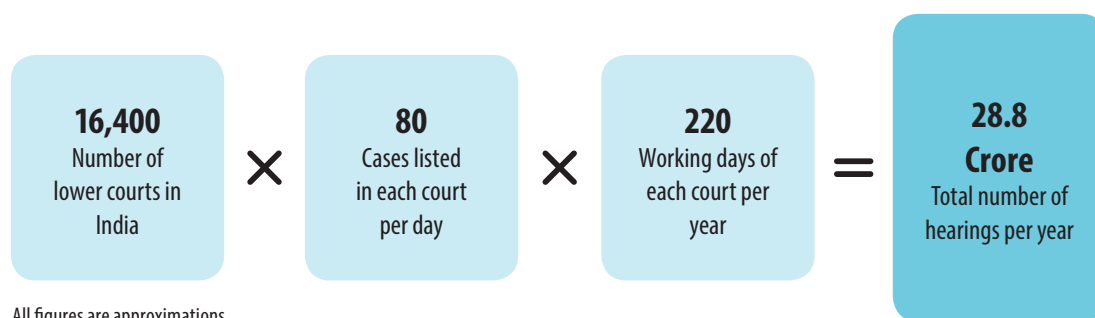
15.6% of all litigants travel between 50 km and 300 km to reach the courts for hearings.



**FIGURE 25.** Cost of Litigation

The loss of productivity due to attending court hearings because of wages and business lost comes to 0.48% of the Indian GDP\*.

### Cases per year



All figures are approximations

### Cost of litigation per year to the litigants

● All cases per year



\* GDP as per Economic Survey 2016: ₹ 1,04,27,701 crore

### Expectations of Litigants

#### *Estimate of Duration of Case: Civil Cases*

56% of litigants expected their cases to be resolved within a year when they first filed their cases. However, on the date of the survey, only 32% litigants had the same expectation.

### *Estimate of Duration of Case: Criminal Cases*

When cases were originally filed, 67% respondents expected their case to be disposed of within one year. However, on the date of the survey, only 42% litigants had the same expectation.

## **Access to Lawyers**

### *Civil Cases*

A majority of criminal respondents found their lawyers by way of reference from colleagues and acquaintances, or family members.

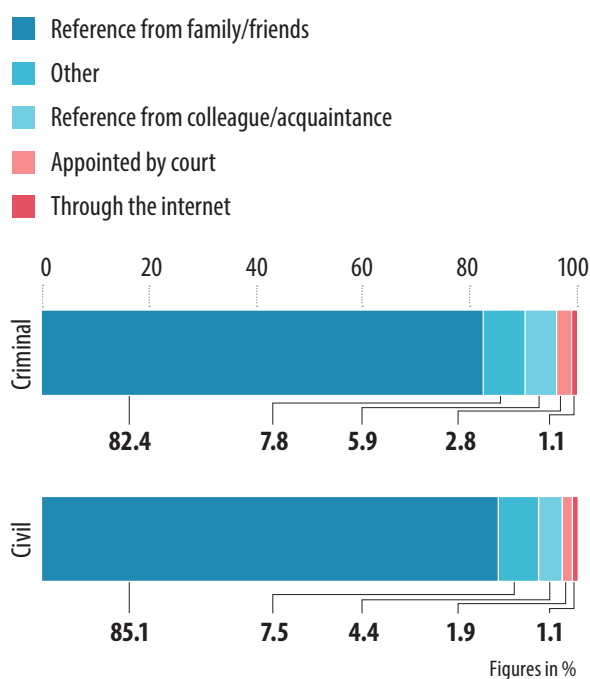
Only a meagre 90 respondents were allotted lawyers appointed by the court through legal services authorities (without any fees).

### *Criminal Cases*

A majority of criminal respondents found their lawyers by way of reference from colleagues and acquaintances, or family members.

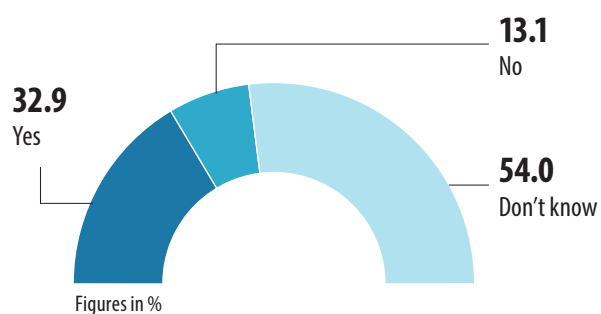
Only 132 survey respondents were allotted lawyers appointed by the court through legal services authorities (without any fees).

**FIGURE 26.** Finding a Lawyer



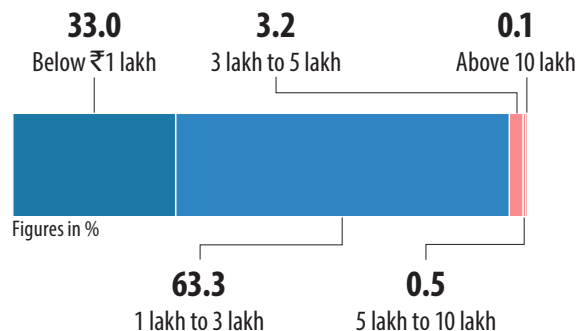
**FIGURE 27.** Use of Alternative Dispute Resolution Methods in Civil Cases

We find that 33% of survey respondents had used ADR methods to settle their cases before approaching the courts.



**FIGURE 28.** Annual Income of Those Who Used Alternative Dispute Resolution Methods in Civil Cases

Out of the litigants who opted for ADR methods, 96.3% litigants belong to the lower income groups with annual income below ₹ 3,00,000.





# In the Temple of Justice: A Survey Experience

*Ramya Sridhar Tirumalai*

As I step off my flight and on to the tarmac, the distinctive humidity of Kerala's air instantly surrounds me. I am in Kerala's capital, Trivandrum, for just a day, to monitor the execution of DAKSH's Access to Justice Survey. As part of our Rule of Law Project, we are conducting this nation-wide survey to study the experiences and map the perceptions of litigants in the Indian judicial system. Surveyors will visit district courts across the country. When we finish, we expect to have surveyed 10,000 respondents across 250 towns and cities. Exiting the airport, I find the pre-arranged taxi, and am greeted by Binu, who is my driver for the day. Immediately, we are off, first to pick up the surveyors and then to proceed to the courts.

The narrow, winding, and still quiet roads of Trivandrum are familiar to me, having made many trips here to see my grandparents. My thoughts dwell on the peculiarity of coming here on work instead of leisure. Suddenly, a harsher irony of this visit crosses my mind. The roads are familiar, however their final destination, the court, is quite foreign to me. Though I am a lawyer in name and degree, I've made only a few visits to the court. While I am well acquainted with the judicial system and process thanks to the work I have done at DAKSH and the Rule of Law Project over the last 18 months, my physical trysts with the courts have been mostly restricted to internships in the High Courts of Kerala and Karnataka, with an odd administrative visit thrown in for good measure. As I reflect on this, I feel a bit nervous. What am I going to see? What will I hear? Will I be able to document everything that I need to?

I am abruptly pulled out of my musings as the car stops. We are picking up my companions for the day, the surveyors. They make a contrasting duo as they cross the road to get in the car, one tall, lanky, and bespectacled, and the other shorter

and broader. The taller one settles down in the front seat, while the shorter one sits in the back with me, and once again we are on our way.

As I talk to the surveyors, some of my nervousness starts to fade. The one next to me is an affable and jovial chap. His introduction counts him as the second Binu in the car. His more reserved co-surveyor in the front seat is Rajiv. Right off the bat, Binu narrates his survey experiences in ultra-rapid Malayalam. In my mind, I silently thank all the summers with my grandparents for instilling the ability to follow this speech, which is bubbling out at breakneck speed.

Binu is eager to answer my questions. When I ask him what the main problem they face while conducting the survey, pat comes the reply, '*Madam, aarkum avarde case number arinjuda!*' That is, no one knows their own case number. To say that I am surprised would be an understatement. Case numbers are the unique identities or 'fingerprints' assigned to each case. In the litigation system, not knowing one's own case number seems akin to not knowing your name in everyday life. I wonder out loud, how do these litigants then, manage in the courts? Binu explains that all the lawyers have clerks, who know the case numbers. These clerks are present in the court premises throughout proceedings and coordinate with the litigants to ensure they appear at the hearing. Without the clerks, Binu says, the litigants would be completely lost.

Binu has more (unpleasant) surprises in store for me—for instance, he reveals that they have not managed to interview even a single female respondent. When I question him as to why, he launches into a long-winded explanation on what kind of cases the female litigants are involved in, and how the shame and fear of social stigma make them unwilling to talk, ending with the cryptic, 'When we get to the court, you'll see'. This becomes Binu's

catch phrase in response to most of the questions I ask him.

It is not all bad though. Binu tells me how much he and Rajiv have learnt about the court system in the past month and how he's applying some of his newly acquired knowledge to a case he is involved with. He is surprised when I tell him that I am a lawyer. 'You are too soft-spoken to be one!' he exclaims, and adds the now ubiquitous, 'When we get to the court, you'll see how real lawyers are.' Though duly chastised on my decidedly un-lawyerly nature, I am unfazed and continue quizzing Binu. It is then that he makes a particularly pertinent observation, one which revealed a perspective that had never occurred to me previously, and which I still cannot get out of my head. 'You know the main problem with this survey, Madam?' Binu asks, when I shake my head, he continues, 'Asking people questions while they wait in court is like asking people questions while they wait in the hospital.' His words send a jolt through me. Though comparable in the quality of being obvious and many times inevitable final institutions dealing with problems of law and health respectively, I've never thought to compare the two. In my mind, courts have held a high place among institutions, as temples of justice. Is that how the common person sees the court, as they see the inside of a hospital? A place filled with dread and suffering and anxiety?

I have time to ponder this and other complexities on the long drive. Today we are visiting the courts in Attingal. Attingal is a municipality about 40 kilometres away from Trivandrum. Despite being a major transport hub and a significant town, Attingal seems tiny to me. The roads get dustier as we come to a big intersection. The trio of Binu, Binu, and Rajiv look as lost as I feel. None of them has been to the courts at Attingal before. We ask a few people, take a circuitous path, and make a sharp turn up a steep slope before finally slowing to



a stop. Surveyor Binu exuberantly announces that we have reached our destination for the day. I step out, squinting in the too-bright sunshine, and there it is—the Attingal court complex.

My mouth drops open for a few seconds as I survey my surroundings. Sitting at the top of the slope is a ramshackle collection of motley buildings. Some have a traditional tiled roof, while the main one is a badly painted concrete block. In front of the buildings, not fitting in with the rest of the scene, are rows of pots, in rainbow colours. An afterthought to beautify perhaps? In any case, this is far removed from what I had pictured. Ruefully I make an internal note to stop using that exemplary piece of red brick architecture, the *Attara Kacheri*, which houses the Bangalore Bench of the High Court of Karnataka, as a benchmark for court buildings.

Rajiv and Binu inform me that we are going to visit the court of the Chief Judicial Magistrate, First Class, Attingal. I've never been to a district-level criminal court and I wonder which one of the buildings it will be. It turns out that we need to take a bit of a walk to the rear of the court complex to find the court of the Chief Judicial Magistrate, First Class. When we come to the last building in the complex, we see the board for the court in question.

The court of the Chief Judicial Magistrate, First Class, Attingal is housed in dilapidated cream-coloured building that has yellowed with age. It is more a single large room than building. A faded blue tarpaulin sheet has been extended over the side of the room to create shade for the sitting area where litigants wait to be called. For seating, there are two long wooden benches placed against the walls. There is a notice board that contains what looks like remnants of notices from 2009. It becomes painfully clear to me how far away the ideas I had, and the pictures I had painted, are from reality.

Rajiv tells me that we are very early. I'm impatient to start the actual survey, so I suggest we start looking for respondents. Binu tells me that this is a difficult time, as people will be stressed about the outcomes of their hearings, but he scans the vicinity for possible respondents. I feel that Rajiv and Binu are being a tad reticent, but decide not to interfere for the moment, and resort to observing. I sit down on the bench and take a look around. *Prima facie*, Binu seems to have drawn a correct comparison to a hospital, as the faces all around me show signs of anxiety. Some are in deep conversation with their companions, while one is repetitively clenching and unclenching his fists as he looks straight ahead unblinkingly, and another is tightly clutching a rosary while silently moving his lips in what I assume must be prayer.

Binu and Rajiv reappear on the scene with a group of three men in tow. They have found the first respondent for the day. His name is Manikandan and he (surprisingly) knows his case number. He seems to be a young man, in his late 20s or at most early 30s. He is dressed in a dark-green half-sleeved shirt and a starched white cotton *mundu*. His stiff shoulders and rigid posture indicate his tension. I smile at him, hoping to put him at ease, but I get no returning smile. He is the accused in a petty theft case and is here with an uncle and a family friend.

Rajiv will be asking the questions and entering them in our questionnaire, which is accessed through an Android app. As none of the litigants know English, Binu and Rajiv translate the question and answer choices on the spot to Malayalam. Manikandan's case number is entered and we start. Almost immediately, it seems that Manikandan is regretting agreeing to participate. We are at question three and he interrupts, asking what good this survey will do. Binu gives him the standard response about understanding the perceptions of litigants, and he snorts contemptuously. 'Why do you need to understand?' he asks angrily. I'm taken

aback by his irritation and hostility. A pattern is set for the interview, with Manikandan jumping at the surveyor's throats between questions. When we reach the question on his educational qualifications, he informs us that he has failed 10th standard and turns sullen, replying to all further questions monosyllabically, or saying that he does not know. Thankfully, his companions are easier to talk to and they ply us with the required information.

We learn that Manikandan is a labourer, that he comes to the court by walk and then bus, and that out of our list of 15 possible assets, he has only three, an LPG stove, ceiling fan, and mobile phone. The question on annual income particularly seems to infuriate him and he storms off. Alarmed, I look at Binu, who makes a gesture to wait with his hand, indicating that Manikandan will return. As we wait, Binu and Rajiv make small talk with the companions, who are curious about the survey. They ask if we are with the government, and when I say that we are not, the uncle laughs dismissively and asks of what use our survey is then.

Manikandan returns, and we proceed to struggle through the remainder of the questions. Surprisingly, it is the questions that seek his perceptions which rile Manikandan up the most. When asked how long he thinks his case will take to be decided, he snaps at us, saying that his perception is irrelevant as it is only the judge who can decide that. Bail is also a touchy subject, with Manikandan alternating between refusing to answer and expressing his suspicion of our intentions. I breathe a sigh of relief as Rajiv hits the save button and we finish the interview, hoping fervently that the subsequent respondents won't be so unfriendly.

Binu and Rajiv head off for a quick cup of tea and I go back to my place on the bench. I need a brief sit-down to make some notes and process the interview. What cuts the sharpest is not just Manikandan's cynicism, but the duality of it. Not

only is there pessimism towards judicial process, but there is also scorn, distrust, and contempt at attempts to better the system. I speculate to myself on how and why a person can refuse to share opinions of a system that they are forcibly entrenched in and clearly hate, yet be disparaging of any efforts to improve it at the same time?

Rajiv and Binu reappear, raring to go after their chai break. Rajiv stays at the front of the court, while Binu ushers me to the corner of the waiting area. There is another man, who has been watching us with some interest. Binu explains our survey to him and happily he agrees to answer all our questions. Our second respondent's name is Suresh and he is accompanied by his mother.

Binu had mentioned that a significant obstacle to the survey was the reluctance of people to speak. I truly understand this hurdle as we attempt to get answers from Suresh, and more specifically, his mother. As we ask a section of questions relating to the opposite party, it emerges that Suresh and his uncle had a dispute over family property. Before Suresh can tell us any more, his mother angrily hisses at him to stop talking. We proceed with the questions, and after four more, Binu prods Suresh into giving us details about his quarrel. Once again Suresh's mother jumps in, warning her son not to divulge any more. Binu and I try to placate her and ensure that anonymity will be maintained. She is clearly disbelieving, telling us it is bad enough that she has had to come to court. She further admonishes us for asking these questions, which she feels violate their privacy.

Our interview with Suresh continues. He too is a labourer and has had a violent clash with his uncle over family property. He has been coming to court for three years now. After Manikandan's brash and surly manner, speaking to Suresh is a treat. He is cautious, but endeavours to answer each of our questions to the best of his abilities. Suresh's

mother is on tenterhooks and towards the end of the survey, she snaps. 'Please just leave us alone,' she entreats. Her eyes well up with tears and she continues, 'How will any of this help us, how can you help us? Nobody can do anything for us!' It is evident that the sense of shame she feels in connection with this case is deep, as she starts sobbing. As Binu quickly finishes with the questions, Suresh's mother recovers and adds her final thoughts on our survey. She feels that our endeavours and involvement are meaningless and declares, 'Only the court can solve our problems.' Once again the obvious contradiction in the conversation stuns me. In the space of five minutes, Suresh's mother has demarcated the court as the source of all problems as well as the saviour. How is it that there is acceptance and moreover belief in a system that is difficult to navigate on the best of days and completely hostile on its worst?

Other than thoughts and questions on the courts, the survey starts to throw up some worrying facts. For example, Manikandan and Suresh have both said that they spend on an average ₹1,000 each time they visit the court. The annual income each has declared is about ₹1 lakh and both suffer loss of pay when they come to court. This means they are spending 1 per cent of their yearly income on each hearing, approximately amounting to three days' wages. While in both these specific cases, there is no alternative to the courts as the respondents are accused parties in criminal cases, this figure nonetheless raises alarm bells on the general economic costs of going to court. The big picture is even more disconcerting, as the amount mentioned is only the monetary cost for a single hearing. Most cases in this country drag on for multiple hearings over many years. The question arises do these exorbitant costs effectively prohibit access to justice?

Binu and Rajiv continue the survey, but I take a break from the interviews to watch the court

proceedings. The court, as mentioned before, is a single room. The judge, Chief Judicial Magistrate, First Class, is seated on a high platform, to the side of which is a witness box. In the middle of the room, there is a U-shaped table at which all the lawyers are seated. There are policemen and those accused crowded in the back and sides of the room. It is pandemonium, with the lawyers, clerk, police, litigants, and judge all talking at once.

There is a clerk in front of the judge calling out one case number after the other, without pause. Sporadically there is an answer from a lawyer and the calling stops. Many an adjournment is sought, but sometimes the accused are also brought before the judge. They are all men, and are roughly pulled by the police, to stand before the judge. Subservient seems too mild a word to describe their manner. As the scene unfolds, there is one moment that stands out, stamped in my memory indelibly.

I mentioned previously, that the legal fraternity considers courts to be temples of justice. To expand on this notion, it is believed that justice can be dispensed only in these institutions. Their hallowed halls are thought of as temples due to the almost sacred value they hold in the legal systems. In the court of the Chief Judicial Magistrate, First Class, Attingal, I see the flip side of these temples. One of the accused in a case is shoved before the judge. He falls on his knees with folded hands and tears running down his face, as he repeatedly asks the judge to forgive him. It strikes me that the court is a temple to him as well, though in a totally different sense than it is to the legal fraternity. It is the final frontier for clemency, pity, and pardon, headed by a seemingly unforgiving overlord. The judge appears to be supremely unconcerned of the plight of the man in front of him and moves from case to case in the blink of an eye. It then occurs to me that Binu's statement on courts being akin to hospitals may be far more astute than I gave it credit for.

I return to Rajiv and Binu. They have finished a few more surveys and are currently interviewing Prasad. Prasad, like Suresh, is eager to speak with us. While he answers questions about himself, he is clueless about all matters relating to the court and has no independent ideas on his case. When I ask him how much longer he thinks his case will go on, he says, 'As long as the judge sees fit.' Unfortunately it turns out that we cannot submit his interview as he has no knowledge of his case number. Hearing my colleagues' experiences on their field visits to survey locations and seeing the survey responses we have received so far, the lack of information from respondents about their cases was something I have come to expect. However, seeing it in reality shocks me all over again.

The day progresses and we speak to a few more respondents, but meet an equal number of litigants who want nothing to do with us. Binu's prophetic words, 'When we get to the court, you'll see', have come true more than once. A case in point is the underrepresentation of women in our survey. There were only two women litigants in today's court, both of whom emphatically refuse to speak to us. Finally, Binu declares we have met the day's target in terms of the number of responses, and are done. As we climb in the car to head back to Trivandrum, I'm exhausted, but am leaving with a wholly different perspective of the courts.

In addition to coming face to face with the problems litigants face and the realities of court infrastructure, the challenges of conducting a survey in the Indian courts have become evident. What

seemed so straightforward when we created these questionnaires is in practice a painfully slow and arduous task to execute. The hindrances are vast and varied. From the reluctance of respondents to talk, the information that we lose in translation from the vernacular, the litigants' lack of knowledge of key information to even technical problems, no cellular network in remote areas (meaning our app-based surveys do not work), collecting this kind of data is clearly an onerous endeavour.

As the car speeds back to Trivandrum, I engage in desultory conversation with Binu and Rajiv. The six hours I spent in Attingal have opened up an utterly novel view of the courts for me, in substance as well as form. A big separation I have made in my mind is severing the link between justice and the courts. Are the haphazard proceedings I witnessed or the ill-informed litigants I encountered indicative of justice? Those of us who do not need to go to the courts to resolve disputes or seek justice are oblivious to the reality courts represent to the vast majority of the populace who use them. Binu was spot-on in drawing congruence between the court and a hospital. We insiders may see courts as places of work and as sanctuaries of justice. This is far removed from what they represent to those who approach them to solve disputes. They are unfamiliar surroundings, they are halls of dread and doom, and they are the final say. Yet paradoxically, they are also the last and only hope. I take my mind off my ruminations and turn to Binu, who asks me one last question. 'So, Madam, did you see?' My answer is a resounding yes.

# Paths to Justice: Impact of Access to Justice Surveys on Judicial Reform

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*Krithika Gururaj*

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As a student of public policy and development studies, I was first introduced to the concepts of public sector reform through the school of thought known as new public management (NPM). The public sector has undertaken massive reforms under the auspices of the NPM, with the aim of bringing private sector-like efficiency and effectiveness in its functioning.<sup>1</sup> These reforms came in the form of privatisation, marketisation, increased focus on customers, and the like. Greater accountability and transparency were also objectives of such reforms. The Indian public sector landscape has thus seen widespread reform such as privatisation of banks and large public sector companies. The Indian judiciary is an important public institution. A properly functioning legal and judicial system is critical not only as an end in itself, but also as a means of facilitating the achievement of other goals and objectives of the Constitution. Finding better and more efficient ways to uphold the rule of law and deliver justice is the key to reforms in the judiciary.<sup>2</sup>

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## STATE OF THE INDIAN JUDICIARY

The 37th Chief Justice of India, Justice K.G. Balakrishnan, at the Indo-EU Business Forum in London in 2008, noted the inefficiency plaguing the judiciary and efforts undertaken to reform case management techniques to reduce backlogs.<sup>3</sup> Similarly, the 13th President of India, Pranab Mukherjee, at a Bar Council seminar in Guwahati in 2013, observed the urgent need to reform India's judiciary to keep up with the overwhelming current and future demands being made of the system. He also noted that such reforms were only possible with a thorough understanding of the current shortcomings and future needs of the system.<sup>4</sup> There have been observations made in Law Commission

reports starting from as early as 1958, calling for judicial reforms.<sup>5</sup> These recommendations have been repeated in subsequent Law Commission reports of 2009<sup>6</sup> and 2014.<sup>7</sup> Chronic dearth of scientifically reliable and actionable data pertaining to the judiciary has been the biggest hurdle in achieving any measure of reform. Scope for judicial reform is vast, ranging from judicial appointments to improving court infrastructure. However, this chapter will focus primarily on reforms relating to access to justice, which is a fundamental right of all citizens.

## ACCESS TO JUSTICE SURVEYS

To address the lack of actionable data, DAKSH commissioned the ‘Access to Justice Survey’. The overarching purpose of the survey is to build a profile of litigants in the judicial system and map their access to justice, the results of which would highlight gaps in the system and facilitate reform. A useful tool to judge the efficacy of a new programme or initiative is to review existing research and literature.<sup>8</sup> Since DAKSH’s Access to Justice Survey is the first of its kind in India, a look at other jurisdictions will prove useful in analysing the impact of such surveys on policy making.

This chapter will focus on the landmark Paths to Justice Survey conducted in England and Wales in 1997, its evolution and subsequent influence in the policymaking process of the government in the United Kingdom. The Paths to Justice Survey also influenced other jurisdictions such as Australia and the Netherlands, to adopt the tradition of using surveys to influence judicial reforms.<sup>9</sup> Lessons from an analysis of surveys undertaken in other jurisdictions might be relevant in the Indian context, allowing comparison of legal institutional frameworks and exploring the possibility of policy transfer

between jurisdictions.<sup>10</sup> Table 1 provides a synopsis of some surveys conducted in different jurisdictions between 1990 and 2011 based on the Paths to Justice Survey tradition. There are also numerous developing countries such as Bangladesh, Kenya, Cambodia, and Timor-Leste that have conducted judicial surveys with aid from the World Bank, aiming to reform parts of their justice system.<sup>11</sup>

**TABLE 1.** National Legal Need Surveys (Last 20 Years)

Country	Study	Date	Size
Australia	Law Australia Wide Survey	2008	20,716
Bulgaria	Access to Justice and Legal Needs Bulgaria	2007	2,730
Canada	National Survey of Civil Justice Problems	2004	4,501
		2006	6,665
		2008	7,002
England and Wales	Paths to Justice	1997	4,125
	Civil & Social Justice Survey (CSJS)	2001	5,611
		2004	5,015
		2006–2009	10,537
	Civil & Social Justice Panel Survey (CSJPS)	2010	3,806
		2012	3,911
Hong Kong	Demand & Supply of Legal & Related Services	2006	10,385
Japan	National Survey of Everyday Life & the Law	2005	12,408
	Access to Legal Advice: National Survey	2006	5,330
	Everyday Life and Law	2007	5,500
Moldova	Met and Unmet Legal Needs in Moldova	2011	2,489



Country	Study	Date	Size
Netherlands	Paths to Justice in the Netherlands	2003	3,516
		2009	5,166
New Zealand	Legal Advice & Assistance Survey	1997	5,431
	Unmet Legal Needs & Access to Services	2006	7,200
Northern Ireland	Northern Ireland Legal Needs Survey	2005	3,361
Scotland	Paths to Justice Scotland	1998	2,684
Slovakia	Legal Needs in Slovakia	2004	1,085
Taiwan	Legal Dispute Settlement Behaviour	2011	5,601
Ukraine	Legal Capacity of the Ukrainian Population	2010	2,463
United States	Comprehensive Legal Needs Study	1993	3,087

Source: Pascoe Pleasence, Nigel J. Balmer, and Rebecca L. Sandefur. 2013. *Paths to Justice: A Past, Present and Future Roadmap*. London: UCL Centre for Empirical Legal Studies.

## PATHS TO JUSTICE SURVEY

The Paths to Justice Survey was conducted during 1996–1998 by Prof. Dame Hazel Genn, professor of socio-legal studies at University College, London. It was commissioned by the Nuffield Foundation, an endowed charitable trust classified as a non-government, civil society organisation due to its economic and political independence. It was the first survey of its kind, conducted on a large scale by any organisation with the intent of gathering information about the public's perception of the legal system, common legal problems, and possible resolutions to those problems as well as building a repository of data, based on which legal services in the United Kingdom could be

improved.<sup>12</sup> The survey is thus classified as a legal needs survey, focusing on non-criminal matters. Although there was knowledge of the lack of access to justice and need for legal services in the United Kingdom during the mid-1990s, policymakers and other stakeholders such as lawyers and non-governmental organisations lacked the evidence required to develop effective policies and put it up for debate in the parliament.<sup>13</sup> Genn was able to address this gap with the survey, whose findings were published in 1999. The survey was conducted on a sample group from England and Wales, with the research subsequently extending to Scotland with the Paths to Justice Scotland Survey. The Paths to Justice Scotland Survey was also funded by the Nuffield Foundation and carried out by Prof. Genn and Prof. Alan Paterson of Strathclyde University between 1997 and 1999.<sup>14</sup>

The Paths to Justice Survey covered 4,125 respondents from the general population of England and Wales who were administered the survey on an individual level, with a 64 per cent response rate. The survey presented respondents with 58 different sets of problematic circumstances which were capable of being decided in the justice system, also known as justiciable issues. If respondents reported having faced those circumstances in the reference period of five-and-a-half years, they were then asked how they dealt with the problem in subsequent questions. The survey did not specifically question the respondents whether solutions were legal in nature. This allowed the survey to map the differing paths taken by respondents to resolve problems classified as legal in nature, while also determining a correlation between the respondent's socio-economic background and the path chosen. Questions included uncovering the nature of problem, strategy adopted to resolve the problem, nature of help obtained, and level of satisfaction with the help obtained, duration and mode of contact, processes used such as mediation,

court or tribunal, objectives, form of outcome, details of costs incurred, attitudes, awareness, and demographics.<sup>15</sup> This survey resulted in bringing to light structural factors that impede access to justice including costs, complicated procedures, and lack of awareness of the same. Most importantly, it helped bring to light the public's perception of the justice system, and whether citizens perceive that justice is being served in the system.

The Paths to Justice Survey was repeated in 2001 in England and Wales and was known as the Civil and Social Justice Survey (CSJS). The CSJS was carried out by the Legal Services Research Centre, an independently managed research division of the Legal Services Commission in collaboration with Prof. Genn. The Legal Services Commission was an executive arm of the Ministry of Justice, responsible for administering legal aid until 2013.<sup>16</sup> Since the Ministry of Justice institutionalised the survey, the Nuffield Foundation did not see the need to further fund the survey and research. Government investment in the survey demonstrates the importance of survey findings for the process of policy development. Further iterations of the CSJS Survey were conducted in 2004, and on a continuous basis between 2006 and 2009. The survey questionnaire was influenced by members of the Treasury and interpretation of survey findings was guided by members of the Legal Services Commission.<sup>17</sup> The CSJS was replaced by the Civil and Social Justice Panel Survey (CSJPS) in 2010 and was again carried out in 2012. Significant changes were made to the CSJS from the initial Paths to Justice Survey and to the CSJPS based on the experience of the CSJS, with a view to incorporate findings and fill in gaps identified at each instance.<sup>18</sup> For example, the focus of the CSJS survey shifted to problem resolution and decision-making as well as a change in the structure of the questionnaire to garner greater demographic information.

Subsequently however, due to funding from, affiliation with, and influence of the government, the survey lost its political and financial independence, throwing into question the objectivity of its findings. This aspect is particularly important in analysing how survey findings have influenced government policies in the United Kingdom, since surveys can be manipulated to push forward preferred policies. Governments tend to omit or control the release of data for political gains and hence data from surveys commissioned by governments are susceptible to manipulation.<sup>19</sup> Changes in public policy often depend on how an issue is framed and how research reports, surveys, and data are interpreted. Surveys and research can be used to defend, endorse, or maintain the status quo of policies.<sup>20</sup>

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## IMPACT OF THE PATHS TO JUSTICE SURVEY

The survey is known to have transformed understanding of public justice needs and influenced the way legal services are delivered in the United Kingdom. The Legal Services Commission, in a report<sup>21</sup> published in 2005, used findings from the CSJS surveys to set out its strategy. Of vital importance is the incorporation of survey findings in the design and delivery of legal services. The initial Paths to Justice Survey uncovered that, across a wide range of income groups there was great demand for the advice, information, and assistance provided by Community Legal Service, all of which were not being met. Findings from the 2001 and 2004 CSJS surveys, published in a report in 2004, greatly influenced the development of a Community Legal Service focused on issues that affect the socially disadvantaged and excluded groups, since these surveys provided an opportunity to evaluate civil justice policies over the long run. According to the



Paths to Justice Survey, migrant communities from non-English speaking backgrounds, illiterate and less educated people were at a disadvantage when it came to solving legal problems.<sup>22</sup> However, Prof. Genn's survey has been criticised by the Legal Action Group,<sup>23</sup> noting that it tended to marginalise the experiences of the above-mentioned disadvantaged groups, and that the sample size did not adequately capture the need for legal services within the group.<sup>24</sup>

In the 2005 Legal Services Commission report, Lord Falconer of Thoroton, Secretary of State for the Department of Constitutional Affairs noted the groundbreaking role played by the Paths to Justice Survey in providing a unique insight into the role of legal services in ensuring access to justice. He noted that in the era of evidence-based policymaking, the surveys provided ample evidence to aid the formulation of innovative policies.<sup>25</sup> The survey report was used to drive and support policy change, influenced expenditure on legal aid through the Legal Services Commission, and found its way into a number of English and Welsh government publications. The impact of the Paths to Justice Survey and CSJS can be illustrated as below:

1. *Spending prioritisation:* The Legal Services Commission was directly informed by the CSJS data. The CSJS findings during the period 2008–2011 were that reliable and good early advice prevents simple civil issues from escalating into complicated legal problems. The Legal Services Commission, therefore, developed a framework to join their services with legal aid providers to address and reconfigure the delivery and organisation of legal aid, based on the needs of a particular area.<sup>26</sup> The Constitutional Select Committee's report in 2004 on legal aid matters used the 1999 Paths to Justice and the 2001 CSJS survey findings extensively as evidence to question the government

regarding legal needs that were not being met, with fewer people being helped by the Legal Services Commission. This was in the context of legal reforms by the government that put a cap on civil legal aid expenditure that would adversely impact disadvantaged and socially excluded groups.<sup>27</sup> In response, the government referred to the Community Legal Service Direct programme, improving signposting into the Community Legal Service from other key services, and projects funded by the Partnership Initiative Budget, to showcase the initiatives undertaken to improve issues of access to justice.<sup>28</sup> The government also deferred any other action until findings from 2004 CSJS were released, stating that it would reflect the true state of affairs.

2. *Public legal education initiatives:* The 2004 CSJS survey pointed towards gaps in the knowledge, skills, and confidence of the sample population.<sup>29</sup> The survey reflected a high level of mismatch between actual provisions and the respondent's perception of local advice provisions. The survey findings also noted that respondents were unaware of the legal provisions and resources available to them, and did not do anything to solve their justiciable problems. The survey also recommended that certain social and demographic groups would greatly benefit from educational initiatives.<sup>30</sup> The recommendation made by the CSJS report regarding public legal education was taken up, and a National Public Legal Education Strategy was designed by the Public Legal Education and Support Taskforce (PLEAS). PLEAS consisted of school teachers, lawyers, university professors, directors of not-for-profit organisations, members of the Bar Council, Justice Society, Ministry of Justice, and the like as

members. PLEAS was to develop a proposal on how best to promote and improve public legal education. Following the taskforce's report, a Public Legal Education Network was developed to accumulate a body of knowledge of what makes for successful public legal education.<sup>31</sup>

3. *Redesigning existing legal aid services:* The 1999 Paths to Justice Survey as well as the 2001 and 2004 CSJS identified problem clustering as an issue in the civil justice landscape. The surveys used cluster and factor analysis to establish general and underlying connections between different problem types and arrived at the most prevalent cluster.<sup>32</sup> In order to address issues underlying the cluster, the Legal Services Commission responded by establishing Community Legal Advice Centres and Networks that offered a range of expert advice under one roof, thus minimising multiple referrals. By 2010 this initiative had provided significant benefits to the community. The model of service delivery was changed to combine social welfare services such as debt, housing, welfare benefits, and employment along with legal aid.<sup>33</sup>

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## SCOPE FOR DAKSH'S ACCESS TO JUSTICE SURVEY

There is significant scope for findings from DAKSH's Access to Justice Survey to influence and shape policy processes and reforms in the Indian judiciary, since it is the first of its kind, and as with the Paths to Justice Survey, it will no doubt provide unique insight into the state of the Indian judiciary. There is considerable overlap in the objectives of both surveys. Yet, the application and relevance

of both surveys is likely to vary considerably. The Access to Justice Survey's primary data will be open source and made available to research organisations and think tanks to interpret and analyse. Therefore, myriad interpretations will likely be derived from survey findings, dependent on the organisation's agenda and framing of the policy problem under investigation. However, the value attached to the findings of DAKSH's survey cannot be undermined. Various stakeholders, state and non-state, will have uses for such data.

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## SURVEY LIMITATIONS AND RISK MITIGATION

As with all surveys, there are certain limitations to the Access to Justice Survey. However, to the extent possible, survey design and data collection processes have looked to mitigate risks commonly associated with surveys of this size. For example, selection bias plays a significant role, since in any randomised sample survey, surveyors decide which respondents to approach for an interview. In the Access to Justice Survey, there was a risk of excluding a section of litigants unintentionally, such as under-coverage of female litigants, since most surveyors are male and owing to cultural norms, surveyors were hesitant to approach women. However, DAKSH survey guidelines required surveyors to interview an equal proportion of male and female litigants at a given location. An initial review of the survey data (in February 2016) showed that the proportion of women litigants interviewed by surveyors corresponded to the proportion of women in the justice system.<sup>34</sup> A common problem with surveys is ensuring the integrity of primary data. Due to the real time nature of the Access to Justice Survey data feeding into the database, surveyors cannot amend answers on the data form and in the

event of incorrect data being submitted, surveyors are required to conduct fresh interviews. Such controls ensure data reliability and integrity, increasing confidence in the survey findings.

As observed in the Paths to Justice Survey, identity of the survey sponsor has a significant impact on survey respondents and their responses. Respondents may be less or more likely to participate depending on the identity of the survey sponsor.<sup>35</sup> However, in case of the Access to Justice Survey, DAKSH as a non-profit, civil society organisation is ideally placed to elicit responses that are unbiased and objective. With respect to the Access to Justice Survey, linguistic diversity in India poses particular problems for surveyors since surveyors need to be able to converse in the language used by litigants, which may not necessarily be the case every time. Employing interpreters to aid in surveying might result in interpreter bias or occasional mistranslation affecting primary data. Surveys in the United Kingdom are not affected by this limitation except in the case of surveying immigrant communities where English may not be the principal language.<sup>36</sup> To work around this limitation, DAKSH insists that surveyors with proficiency in the native language of the state conduct survey interviews.

However, one drawback of the Access to Justice Survey is that response rates cannot be determined since the number of litigants approached but not surveyed is not recorded by the surveyor. An important objective in recording response rates is to determine the level of interest litigants have in contributing to the process of change in the legal system.<sup>37</sup> A valuable insight could have been gained from recording response rates. Table 2 encapsulates the key features of both surveys.

**TABLE 2.** Comparison between Paths to Justice UK and Access to Justice India

Criteria	Paths to Justice UK	Access to Justice India
Jurisdiction	UK	India
Commissioned by	Nuffield Foundation	DAKSH
Classification	Non-government	Non-government
Year	1997	2015–2016
Mode	Face to face	Face to face
Sample structure	General adult population	Litigants in the legal system
Demographic data collected	Yes	Yes
Language	English	Multi-lingual
Response rate	64 per cent	Not measured
Survey structure	Problem categories constructed	Objective questions
Reference period	5.5 years	Ongoing litigation
Scope	Civil	Civil and criminal
Survey length	53 problem sets	61 Questions — Civil 68 Questions — Criminal

Source: Data for the table is sourced from Pascoe Pleasence, Nigel J. Balmer, and Rebecca L. Sandefur. 2013. *Paths to Justice: A Past, Present and Future Roadmap*. London: UCL Centre for Empirical Legal Studies and DAKSH's survey guidelines.

It is the expectation of all those involved with DAKSH's Access to Justice Survey that it will result in initiating and contributing to the reform debate in the Indian judiciary, and allowing for greater access to justice to be achieved. The hope is a shift from a focus on lawyers and courts to litigants, so that policies are designed to meet the needs of the public. Surveys such as these, as evidenced from the experience in the United Kingdom, bring to light unique datasets and analyses to underpin evidence-based policymaking, and inform debates that advocate for reforms.

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# Institutional Dimensions of 'Access' and 'Justice'

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Chandan Gowda

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The issue of accessing justice is often never far from discussions of justice within social and political arrangements. The imagination of justice inside a political community tends to bring up an obligation to imagine modes of making it available to the members of that community.

Access to justice, of course, is a two-way relation: *first*, a legitimate political authority has to ensure justice arrives to its subjects, that is, make it accessible through stable institutional means; and, *second*, the subjects should be able to revise prevailing notions of justice, that is, justice has to make itself accessible to their experiences.

Justice, in the lines so far, has been restricted to its scope in modern political arrangements. Notions of justice can, and indeed do, prevail outside the state-mandated spheres of justice. Most notably, in the realms of what we consider civil society, where different religious and ethnic communities can be seen to subscribe to different notions of justice. For instance, some communities embrace the ideal of vegetarianism as they view the killing of animals for human consumption unethical. In addition to heterogeneous ideals of justice, socially privileged identities are often a source of cultural harm and injustice for those who inhabit the lower ranked ones. And, the idea of justice can even become manifest in other realms as well: Does the memorial do justice to the memory of the political leader? Did the translator do justice to the original story? In other words, the scope of justice is greater than the legal and other institutional instruments devised to manage its execution. This chapter, however, keeps its focus on legally mandated justice and the institution in charge of securing it in the lives of the citizens in India.

Modern democratic states have radicalised the issue of access to justice. Their conceptions of legal,



political, and social morality, and their application in different spheres of human activity, are to extend, in theory, at least, equally to all citizens. Unlike in the past, when polities distinguished between different social groups within their territory, and felt comfortable in arriving at differentiated notions of justice in accordance with those social differences, modern democracies are agreed that all of their citizens enjoy similar rights and freedoms. These democratic states, unlike ancient Greece, for example, will not withhold the legal, political, and social security extended to a class of people called citizens from another class of people called slaves. Nor will they entertain jurisprudence rooted in the metaphysics of caste or gender.

In the remaining sections of this chapter, I briefly discuss the two dimensions of the issue of accessing justice: the design of the institutions that make justice accessible and the interface of state-mandated justice with the plurality of existing socio-legal moralities. Next, I delineate the chief components of judicial infrastructure and the institutional ecology surrounding it. This section draws on relevant data that DAKSH's Access to Justice Survey (ATJS) has made available. The subsequent section offers a brief account of how 'access to justice' came to acquire discursive prominence in the 1970s and how Indian legal institutions had been actively aware of the value of making justice accessible even several decades prior to this discussion. The chapter concludes with a short discussion on how deliberations of access to justice need to think beyond the realm of procedural justice.

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## **TWO DIMENSIONS OF ACCESS TO JUSTICE**

Since modern democracies rule in the name of 'the people', and claim legitimacy from that very fact,

access to justice becomes a charged, open-ended political adventure. In order to stay responsive to evolving institutional realities, they will need to be open-ended both in their conceptions of justice and in their instruments of delivering it.

## **Institutional Design**

How precisely is justice to be delivered? In other words, what are the institutional mechanisms most suited to deliver justice? Democracies vary richly on this question. Their court systems, which deliberate and decide on a variety of cases, are structured differently with respect to the distribution of authority amongst their internal tiers, the appointment of judges, the requirements of legal training, among others. Needless to add, historical, cultural, economic, and demographic factors and the federal characteristics of the polity, all play a role in determining how states choose to craft a legal system most appropriate for the delivery of justice within their territory.

A close institutional ally in this regard is the police system that enforces legally stipulated notions of public order and actively assists in the management of judicial requirements pertaining to the redressal of breaches in criminal or civil law.

While the judiciary is the pre-eminent institution for the management of justice in the country, the legislature often introduces statutes, both at the centre and at the state, either as a result of self-initiated discussions or as a response to demands from its citizens, which revise the scope of judicial responsibilities accordingly. The bureaucracy, which issues numerous rules and regulations, in the domain of administrative law, to regulate the interactions of the citizens in relation to various public services, is also an institutional neighbour of the judiciary.



## Conceptions of Justice

The political morality of democratic states is frequently challenged and its scope and conceptual content redefined by social and economic developments. As T.H. Marshall's classic *Citizenship and Social Class* (1950) showed, citizenship rights did not arrive in modern England all at once. Civil rights that posited the idea of rule of law and the equality of citizens under it arrived in the late 17th century. Political rights, which were earlier restricted to propertied men, conferred voting rights to educated men in the early 19th century (working-class men got the right to vote in 1866 and women got it in 1928). Social rights of welfare that held that all citizens were entitled to a modicum of social and economic well being came last.

Marshall's important account remains one of the gradual widening of the sphere of citizenship eligibility and enlargement of the contents of liberal democracy. An account of how citizenship arrived in India will have to contend with its encounters with the heterogeneous conceptions of justice prevalent in India in both the colonial era and the post-independence era. The British government addressed its Indian subjects with the language of citizenship in the 19th century even when they were not citizens in the full sense of the term as we know it.<sup>1</sup> After independence, India's Constitution extended full citizenship status to its people.

The liberal conception of citizens as individuals with equal rights is enshrined in constitutional morality but is not widely shared among Indians. A source of much political exasperation—modern-minded social activists have long wanted the moral understandings on the ground to be aligned in the direction of constitutional morality. Diversity in socio-legal epistemologies exists and poses significant dilemmas for enthusiasts of liberal democracy. Indeed, in recognition of this fact, the Indian

government retained a modified model of village panchayat in matters of civil jurisdiction in villages in the early decades after independence. Recent discussions of legal pluralism have also sought to find parallel space for conceptions of justice outside the frame of constitutional liberalism.

Discussions of access to justice, in both senses of the term, are rarely ever purely theoretical; they strive to make it wider, easier, and surer. The work required for this very necessary task can be appreciated from two separate vantage points: the infrastructure of the judicial system and the institutional ecology that surrounds it.

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## JUDICIAL INFRASTRUCTURE

Judicial infrastructure includes all the personnel involved in the work of administering justice: the judges, the court staff, the lawyers, and the physical infrastructure such as buildings, court rooms, office space, storeroom and record keeping facilities, electricity and water supply, technical amenities such as phones, computers, and recording equipment and the generation of various paper documents, including affidavits, copies of judgment, and the like. Needless to specify, budgetary allocations for justice-related expenditure is an integral part of the judicial infrastructure.

Each of these items of infrastructure will need to be appreciated in detail and in relation to its context of use. An ideal judge, for instance, will have a sound knowledge of law and jurisprudence and high linguistic proficiency, stay free of social prejudice or partisanship, remain impervious to extraneous pressure, and embrace good work habits. In addition, the number of judges will have to be adequate for handling the current and prospective volume of cases.

According to the ATJS, 62 per cent of all litigants shared the view that the judge was slow to pass orders in their case, and 49.8 per cent also felt that there were not enough judges.

The matter of judicial infrastructure, therefore, is clearly is not a static one; it must be able to respond and adapt to the changes in surrounding context. Similarly, the court buildings and the technical equipment inside should be able to manage the ever-evolving needs of the courts. Other infrastructural factors like the location of the court and its surrounding transport facilities are often deciding factors in the litigants' decision to approach the courts: the farther the location, the more burdensome and avoidable the latter will seem; similarly, the more affordable and more regular the available transport facilities, the greater the ease of interaction with the courts.

## INSTITUTIONAL ECOLOGY

Even the most socially and economically appropriate justice system will require, for its ideal functioning, symbiotic support from agencies outside it.

The police department has to be adequately and appropriately staffed in recording first information reports (FIRs) or in delivering court summons, or in coordinating bail-related work, for instance. It is common knowledge that political and other kinds of 'influence' often interferes with the work of the police. It could result in, for instance, incorrect FIRs being recorded by police officers not eligible to undertake that task or in the tampering of evidence for the courts.

The various statutes and rules framed by the legislature and the bureaucracy, which decisively influence the experience of citizenship, are also key

components of the institutional ecology surrounding the judiciary.

More crucially, the preparedness of litigants is a hugely relevant factor in considering the issue of access to justice. The ordinary presumptions that litigants have basic legal literacy, or can locate professional legal help when necessary, or have the financial wherewithal to file a case and see it through, do not generally obtain in India.

While the fear of protracted delays in court procedure does deter citizens from approaching courts, making them instead seek settlement outside courts or reconcile with a less than ideal situation, the very institution of the court can appear forbidding and distant to those who feel socially helpless and vulnerable. Put differently, the economically and socially vulnerable citizens, who are likely to benefit the most from legal security, are the least likely to approach the justice system.

The ATJS draws necessary attention to the powerful part played by gender in the realities of litigation. A small section of the surveyed litigants (21 per cent) in civil cases tended to be female. Is this because households tend to file cases in the names of male members? Or, does this show that women tend to be less confident about entering the process of litigation? This is a subject that needs closer investigation.

Activist groups in civil society have attempted to bring legal awareness to tribals, Dalits, women, slum dwellers, workers in the informal economy, such as migrant workers, domestic servants, and street vendors, and other vulnerable social constituencies and encourage them to interact with the courts as equal citizens whenever relevant occasions arise. Human rights and other social activist lawyer groups also offer affordable legal services to the poor.

## HISTORICISING 'ACCESS TO JUSTICE'

Legal scholars have observed that something like an 'access to justice' movement was witnessed in global discussions of legal reform in the 1970s. In the multi-volume *Access to Justice* published between 1978 and 1979, Mauro Cappelletti identified three phases in this movement.<sup>2</sup> In the first wave, the focus was on reforming institutions to ensure affordable and swifter legal services to the poor. In the next phase, in response to the complexity of demands on the judicial system, especially with the rise of 'diffuse interests' such as those of consumers and environmentalists, new legal phenomena emerged: 'class action, public interest action and the various governmental solutions, such as the introduction of the consumer ombudsman'.<sup>3</sup> The final phase saw discussions of the value of relatively informal dispute resolving institutions alongside the formal courts.

This widely shared historical account of the global emergence and circulation of the term 'access to justice', occludes other, much older, efforts in countries like India, for instance, that have sought to make justice accessible through the process of judicial review, to accommodate plural conceptions of justice in matters of civil law, and to make court procedure economically more affordable.

In the decades following independence, the Supreme Court of India has emerged as a close arbiter of the constitutionality of the laws and regulations created by the legislature and the bureaucracy. This process of judicial review has allowed it on numerous occasions to liberally interpret the provision of rights in the Constitution and also to protect the latter's basic structure from being undermined.<sup>4</sup> (Pratap Bhanu Mehta, the political scientist, argues that the Supreme Court's interest in evolving a rights-based jurisprudence is less led by a civil liberties understanding of rights and more

by the framework set by the Directive Principles of State Policy.<sup>5</sup>)

Arrived at after extensive debates and comparative consultations with constitutions from across the world, the Indian Constitution opted for universal democratic citizenship and guaranteed fundamental rights and freedoms to all Indians. This was a radical decision, undoubtedly, as it announced the state's official disregard for the variety of social hierarchies in the country. In addition, it validated secular, liberal morality as the philosophical touchstone of justice.

The simultaneous availability of religion-based personal law in civil matters, however, is a clear instance of the Indian state's radical sensitivity to how individuals and communities might want justice to become accessible within their conceptions of the good life and not within universal principles expected to hold good for all citizens and communities.

The option of taking recourse to personal religious law in civil matters for various religious communities is testimony to the state's commitment to enable its citizens to access justice in civil matters in terms of a religious philosophy they consider legitimate. Occasionally, frictions arise, and show, importantly, how difficult the question of accessing justice is. The infamous Shah Bano episode, where a Muslim woman's rights of alimony were upheld by the Supreme Court but turned down by the Indian Parliament, is one example. And, more recently, the Rajasthan High Court deemed Santhara, the Jain custom of fasting to death in old age, as an act of suicide and a punishable offence, leading to wide protests from the Jain community.

In the initial years following India's independence, serious efforts were made to retain the panchayat at the village level. This was done with regard for the older traditions of the management

of justice in villages and also because that culture of justice was familiar to local villagers. A rich tradition of anthropological scholarship exists on legal deliberations in the panchayats in villages and among caste panchayats.<sup>6</sup>

As recently as the mid-1980s, Upendra Baxi distinguished between ‘the State-Legal System’ and ‘the Non-State Legal System’. The latter, which included panchayats, deliberative forums among the tribals, and state-created institutions such as the Lok Adalats (people’s courts), had to be taken seriously as spheres of justice.<sup>7</sup>

The discussion above illustrates how our justice system has tried to acknowledge the extraordinary cultural diversity of India and work with diverse jurisprudential logics.

A discussion of non-state legal systems in India ought to also recognise the variety of informal dispute settlements that occur outside the mediation of the official justice system, ranging from on-the-spot resolutions of motor accidents to rank extortionism to neighbourhood mediation in resolving a host of civil, and even criminal, cases. The informal social arenas display a complex array of conceptions of justice and injustice.

The judicial system has been cognisant of keeping the costs of court formalities affordable. Since the early 19th century, legal discussions have emphasised that court fees be abolished or kept minimal as high court fees can deter the economically weak litigants from approaching the courts. Similarly, after independence, the 14th and the 54th Reports of the Law Commission of India have also earnestly recommend that the court fees be reduced. Reiterating the rationale of the previous discussions, the Law Commission’s *189th Report on the Revision of the Court Fees Structure* dismisses the argument that higher court fees will dissuade ‘vexatious or frivolous’ litigants and asked that the

fee revision be done to adjust for the depreciation of the rupee.<sup>8</sup>

The more prohibitive costs, however, tend to involve the lawyers’ fees and costs related to travel, accommodation, and other expenses involved in visiting the courts. Several reports of the Law Commission have affirmed the need to lower the costs of litigation and devise swifter means of disposing cases.<sup>9</sup>

DAKSH’s ATJS clearly demonstrates that the higher costs of litigation at the High Courts deter low income litigants from opting for appeal at the High Court. This ought to be a matter of deep concern and oblige the government to think of means of making the costs of accessing the higher costs more affordable.

Free legal aid is now deemed part of Article 21 of the Indian Constitution that secures the protection of life and personal liberty of individual citizens. Introduced in the Constitution (42nd Amendment) Act, 1976, Article 39-A provides that ‘the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, *in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities*’ (emphasis mine).

In stark contrast to the noble intent of this amendment, the actual number of litigants availing this facility of free legal aid remains small. In DAKSH’s ATJS, only 90 out of the total number of surveyed civil litigants had availed of lawyers provided by the court through legal services authorities. Considering that one-third of the respondents earned less than ₹1,00,000 per year, it is clear that the courts are not doing enough in making free legal assistance more widely available.

Facts testifying to the mammoth backlogs of cases in the courts and the inordinate delays in court decisions are familiar refrains in both socio-legal scholarship as well as popular writings on the Indian judiciary.

According to DAKSH's ATJS, most litigants, at the time of filing the case, expect their cases to be resolved within a much shorter time than it actually takes. Fifty-five per cent and sixty-seven per cent of litigants in civil and criminal cases, respectively, expected their cases to be solved within a year's time. Twenty-one per cent of the litigants in criminal cases admitted to having spent more time in jail than the prescribed punishment for the offence. The impact of facts such as these for the subsequent interactions of the litigants with the court can be easily guessed.

A cognisance of these realities of delay has led to the creation of administrative tribunals, fast-track courts, family courts, consumer courts, labour courts, among other alternate dispute resolution (ADR) methods, where the procedure is less complex and decisions arrived at faster. The high volume of cases that pass through these courts do serve to lower the burden on the regular courts.

Legal scholars have tended not to accept the ADR measures as the most adequate response, arguing that the poor should be entitled to the same security of legal procedure as any other who interacts with the regular courts.<sup>10</sup>

DAKSH's ATJS offers compelling evidence that the ADR methods are not succeeding at their objective: about one-third of the respondents with civil cases (33 per cent) had used ADR methods before approaching the courts. Also, an overwhelming 96.3 per cent of the surveyed litigants who had opted for the ADR methods earned less than ₹3,00,000 a year (33 per cent of them earned less than a lakh). It is clear that those who can

afford it prefer to approach the regular courts. This proves yet again that other measures will have to be found to make the regular courts more accessible to the poor.

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## BEYOND PROCEDURAL JUSTICE

Understanding access to justice as affordable and quick means of settling cases in the courts is to keep the focus on the technicalities of legal procedure. Since justice is accessed within a wider institutional ecology, such a technical focus detracts from the wider expectations of the state's commitments to justice.

While the state actively thinks about making the judiciary more approachable, and more affordable, as an institution, it must give active thought to how the present parameters of justice might themselves harbour limitations. Social movements of various kinds have often aided the state in enlarging its conceptions of justice. The Forest Rights Act, which recognises that 'historical injustice' has been done to the tribals and wishes to secure autonomy with respect to their livelihoods, is an inspiring example in this regard.

If justice is viewed, along with Michael Walzer,<sup>11</sup> as seeking the end of domination, is not the state obliged to identify and remove sources of domination that subvert the state's pursuit of equality? The Indian state has of course been at work in this regard. Consider the legal ceiling on the ownership of agricultural land. Or, the greater taxation rates for higher income groups. Or, the recently mandated equality in property inheritance rights for Hindu women. As the numerous social struggles, large and small, remind us, the need for the state to enhance the scope of substantive democracy is usually present.



An active sensitivity to the unequal distribution of self-confidence among individuals and communities caused by deep social and economic inequalities is indispensable for enhancing the access to justice. Indians do not share similar levels of faith in the legal system nor view themselves primarily as citizens with legitimate claims on the state to provide them basic cultural, social, and economic security.

While the state-regulated education system does seek to provide political education to its citizens and make them aware of their rights, the continuing sources of social humiliation and prejudice, be it gender, caste, tribe, minority religion, or class, can decisively undermine their sense of being competent in their interactions with the state. In a country where the number of people with little or no formal education and who work in the informal economy is so large, the state's responsibility in cultivating in them the identity of a citizen with a sense of entitlement to social and economic security and justice is of a great magnitude.

Besides the state, in India, social movements and activist groups have done much to awaken cultural and political confidence among women, farmers, tribal, and minority caste and religious communities. In addition, the market's aggressive promotion of the image of the citizen as consumer is also playing a role in making individuals aware of their rights. In this regard, the experience of Western countries has been unhappy: citizens are seen being more assertive of their private rights as consumers than as individuals seeking to participate in the advancement of democracy. It remains to be seen how the Indian experience will turn out.

But as newer inequalities surface and harden, the state will have to respond in dynamic ways. For example, in the matter of high chances of exposure to air and water pollution among the urban poor, the state needs to devise creative solutions to check

the problem. The right to education is an encouraging example of the state trying to ensure that children from modest economic backgrounds will also access good quality education in private schools.

Finding better means of accessing justice is more likely to be a meaningful exercise if trust in the impartiality and neutrality of judicial institutions, and more broadly, in the workings of the state itself, is widespread. If popular cinema is an index of this trust, the findings in this regard will be unhappy. The legal and the political systems are routinely represented as pliable or indifferent to social urgency. Jokes about how the rich and the influential never go to jail, even when their crimes are colossal, are plenty.

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## CONCLUSION

In the country's pursuit of democracy, the judiciary has emerged as an exalted institution for securing the ideals of citizenship and fostering a socially just milieu. The moral and political relevance of making justice accessible could not be more obvious. An alertness to the factors that undermine citizens' access to justice and a keenness towards overcoming those factors, needless to add, become essential obligations for the judiciary.

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# Indian Judiciary and Access to Justice: An Appraisal of Approaches

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Evaluating the judiciary's role in facilitating access to justice should begin with a prior question: how *should* the judiciary conceptualise justice, and access thereto? This normative benchmark will set the standard against which judicial practice can be evaluated.

A convenient starting point into this inquiry is the Constitution. Accordingly, in this chapter, I first draw upon the Indian Constitution to understand the constitutional ideal of justice to which access is needed. Next, I explore its implications for how the judiciary should—normatively—understand its role in facilitating access to justice. Based on these conceptual segments, I then evaluate trends and approaches in judicial reform aimed at facilitating access, to understand the extent to which they meet, or fall short of, the constitutional conception of access to justice.

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## CONSTITUTIONAL IDEALS OF JUSTICE

*Justice* is the first virtue that the Constitution seeks to secure for the people of India.<sup>1</sup> The Preamble understands justice as having social, economic, and political dimensions. This all-encompassing notion of justice is reiterated in Article 38(1), which requires that the state strive to secure and protect 'a social order in which justice, social, economic and political, shall inform all the institutions of the national life.'

The constitutional set-up therefore speaks not only of juridical or legal justice, but a *social order* based on just relations in the various domains of human life—in the political sphere, the social and economic spheres. In fact, continuing injustice in the social and economic spheres was seen by Ambedkar as the greatest threat to the Constitution's

very survival.<sup>2</sup> For this reason, transformation of the unjust social reality into a just social order through the device of the Constitution, was at the core of the constitutional project.<sup>3</sup>

To operationalise its vision of justice, the Constitution recognises and guarantees various fundamental rights which are aimed at protecting and promoting political justice, along with creating the conditions for the realisation of social and economic justice. The Constitution also directs the state to secure various aspects of socio-economic justice through binding but judicially non-enforceable directive principles which are ‘fundamental in the governance of the country’.<sup>4</sup>

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## ACCESS TO JUSTICE AND THE JUDICIARY

If the Constitution views justice on this broad canvas of creating a just social order, what is the role of the judiciary in securing justice and/or enabling access to justice?

The framers of the Constitution envisaged the judiciary as being central to the project of securing social justice. Ambedkar, for example, called Article 32—the power to move the Supreme Court for enforcement of fundamental rights—the soul of the Constitution.<sup>5</sup> As a first step then, the judicial role in the constitutional vision of justice is that of enforcing fundamental rights. But that is not all. Fundamental rights are open ended entitlements, the contents of which are filled in through interpretation, including by the judiciary.<sup>6</sup> If rights are tools for securing justice, then the judiciary can further access to justice by fashioning rights into effective tools for securing socio-economic and political justice.<sup>7</sup>

In particular, the articulation of norms which enable access to basic human needs should be

understood as a first step in the justice project. Where legal or social norms limit the ability of the most marginalised and disempowered groups to meet their basic needs, access to justice in any sphere of human life recedes to the background in the struggle for survival.<sup>8</sup> Thus securing socio-economic entitlements to basic human needs, and converting these entitlements from paper norms to lived realities, has to be the starting point for creating a just social order.

Rights and entitlements not only help in securing basic needs, but can also signal to society as a whole, what is acceptable behaviour and what behaviour is subject of legitimate criticism.<sup>9</sup> Take, for example, the *Vishaka case*.<sup>10</sup> This decision did not end the practice of sexual harassment. But, by understanding sexual harassment as a violation of the right to life with dignity, it served the expressive function of de-normalising and de-legitimising sexual harassment, and provided women, individually and collectively, with a powerful vocabulary to understand and challenge the status quo in public discourse.<sup>11</sup> Further, it enabled women who face sexual harassment to call upon the state to recognise such behaviour as wrong, and remedy the behaviour.<sup>12</sup>

The judiciary also plays an important role in securing justice by providing fora for the enforcement of such rights, or for remedies against their violation. This corrective aspect of the judicial function aids in promoting social justice and enables social empowerment and transformation through law by limiting the culture of impunity for practices that result in disempowerment of large sections of the population, and by vindicating rights, particularly of the disempowered. Effective access to justice therefore entails the ability to call upon the state to use its power to ensure accountability for practices of disempowerment. Thus, access to justice should not be viewed only as a tool to provide justice in individual cases, ‘but also to attack

the dynamics of exclusion<sup>13</sup> by using the law's disapproval and sanction of certain practices as the impetus towards social change. Access to justice is therefore intrinsically tied to the vision of law as containing an emancipatory potential.<sup>14</sup>

As an example, access to corrective justice is crucial for ensuring that victims of domestic violence are able to call upon the state to use its resources to ensure their physical safety, to secure their means of livelihood, and to remedy past violence, in a social setting which largely condones practices of domestic violence. Case by case, the law becomes a tool for challenging the status quo on power relations between domestic partners, both by intervention in specific cases, and by signalling to the larger community about legally acceptable behaviour. Therefore, in a society marked by violence, discrimination, and exclusion, corrective justice facilitates empowerment, accountability, and an ending of impunity for the violation of constitutional and statutory entitlements.

In sum, then, constitutional justice has to be understood as comprising both the distributive aspects of justice (including the distribution of resources, as well as of rights and entitlements), as well as its corrective aspects. This implies that for the judiciary itself, the concept of justice should not be limited to juridical justice—that is justice through courts. Rather, juridical justice should be understood as a means towards achieving the end of social justice. As such the mandate of the judiciary should be the creation of a legal system which enables the realisation of social justice through substantive norms, procedural rules, and remedial functions. In fact, Article 39-A speaks directly to this issue, and mandates the state to secure 'that the operation of the legal system promotes justice, on a basis of equal opportunity'.

As such, an element of access to justice is the creation of an accessible legal system, equipped

with substantive rights that are protected and promoted effectively and efficiently through law. Note the focus of Article 39-A on the 'operation of a *legal system* that promotes justice'. Courts are one amongst various actors in the legal system. In the criminal justice system, for example, the legislature, the police, and prison authorities, amongst others are essential components of the legal apparatus. Criminal courts operate in this ecosystem and exercise some degree of authority and control over the system as a whole. Access to an effective and efficient criminal justice system cannot therefore be understood only as access to criminal courts, or to representation within the court. For it to be meaningful for both the victim and the accused, access to criminal justice should imply access to a responsive, rights respecting, and accountable system as a whole. The judiciary has an important role to play here in ensuring that legal norms articulated through the judiciary support this endeavour, and that the judiciary is itself accessible (both normatively and physically) as a forum for holding other parts of the legal system accountable.

Courts are not only spaces where rights are protected or enforced; as institutions of the state charged with coercive power, they may also be spaces where rights are violated. Access to justice, therefore, cannot be limited to access to the courts themselves, in the sense of being able to enter court to air and resolve grievances, but should also be understood as including access to just treatment in courts, and access to just outcomes from courts.<sup>15</sup> As such, the common tendency to conflate access to justice with access to courts, is misplaced. Access to justice requires, first and foremost, the creation of substantive rights, and second, all that is required to effectively remedy any violation of the right in a manner that is itself just. Access to *courts* is an essential but not the only component of access to *justice*.

In sum, then, the role of the judiciary in securing access to justice should include:

1. Articulating norms that advance the constitutional ideal of a just social order, for example, by articulating the right to food as part of the right to life with dignity.<sup>16</sup>
2. Articulating norms that make other wings of the state more accessible and accountable, for example, by interpreting a provision that confers administrative discretion as requiring that a person has a right to be heard before an adverse order is passed against her by any state authority.<sup>17</sup>
3. Articulating norms that increase the accountability/limit the impunity of state actors, for example, through replacing the concept of sovereign immunity with that of constitutional torts.<sup>18</sup>
4. Articulating procedural rules that facilitate effective and equal access to remedial measures through courts for the violation of rights, for example, relaxed locus standi requirements for approaching courts.<sup>19</sup>
5. Facilitating the creation of a court system that itself treats litigants justly, and strives towards just outcomes, by, for example, the requirement of legal aid for an indigent accused to facilitate a fair trial.<sup>20</sup>

Based on this constitutional and conceptual overview, the following definition of access to justice captures how the judiciary should understand the concept: *Access to justice implies equal and effective access to a system of substantive rights that are geared towards social, economic, and political justice, and to remedies for violations of such rights in a manner that is both procedurally fair and substantively just.*

## EVALUATING JUDICIAL APPROACHES TO ACCESS TO JUSTICE

The Supreme Court of India has itself recognised this expanded conception of Access to Justice.<sup>21</sup> It has also recognised that securing access to justice is not limited to removing barriers to accessing courts, though of course, this is an important element.<sup>22</sup> However, as I argue below, the focus of access to justice measures has largely been on access to courts. Within this framework, barriers to access to justice are viewed as a problem of lack of resources which causes a mismatch between demand and supply—there is too much demand for judicial services, but its supply is limited. The solution is to provide the resources to resolve the mismatch by constricting demand, or by increasing supply. I will argue that not only is this approach partial and incomplete, but also it can often be counter-productive to the broader vision of access to justice set out above.

Let us begin by looking at some typical examples of judicial reform measures undertaken by the judiciary and associated institutions like Legal Services Authorities, for promoting access to justice:<sup>23</sup>

1. The provision of legal aid, channelled through a network of legal services authorities; and increasingly, through creating cadres of paralegals and law school based clinics for facilitating legal aid as well as legal awareness.<sup>24</sup>
2. Efforts to reduce delay and arrears by (a) diverting cases to alternative dispute resolution (ADR) tribunals, informal justice mechanisms and tribunals;<sup>25</sup> (b) improving infrastructure and increasing human resources of the judiciary in order to process cases faster;<sup>26</sup> (c) introduction of court and case management techniques for speedier

disposal of cases;<sup>27</sup> and (d) through data driven responses to delay and arrears, by, as a first step, documenting and publishing data or delays and arrears.<sup>28</sup>

3. Introduction of e-justice apparatus, like e-(or paperless)courts; online availability of case status and orders; kiosks in court complexes for easy access to information, etc.<sup>29</sup>
4. Training for judges in court management techniques, and issues pertaining to access to justice, especially for marginalised communities.<sup>30</sup>
5. Introducing vulnerable witness courts and programmes to provide a safer and more congenial in-court experience for victims and witnesses.<sup>31</sup>
6. Access to higher courts for rights violations, especially through the innovation of public interest litigations.<sup>32</sup>

This is not necessarily an exhaustive list, but is nonetheless representative of the types of judicial reform measures currently being proposed or undertaken by the judiciary for improving access to justice. Most—though I argue below, not all—such measures are important steps towards facilitating access to justice. However, these judicial reform measures also betray an incomplete understanding of access to justice concerns as articulated in the previous section.

**First**, articulation of rights is absent from the judicial discourse on access to justice. Therefore, judicial evaluation of access to justice does not account for the impact of rights-limiting decisions of the judiciary, for example, where the court privileges the aesthetics of the city over livelihood concerns of impoverished populations living in slums;<sup>33</sup> or where the court restricts the meaning of ‘relationship in the nature of marriage’ under the

Protection of Women from Domestic Violence Act, 2005, and thus leaves many women remedy-less in case of abuse in intimate partner relationships;<sup>34</sup> or where the court upholds a law which restricts the right to stand for elections to local government positions to those who hold certain educational qualifications, have certain monetary characteristics, and have a functional toilet in their home.<sup>35</sup> This limitation serves to exclude, as the court itself acknowledges, a significant proportion of the population, mostly from the already socially marginalised groups. However, that calculation had no impact on the court’s reasoning. In a constitutional set-up which seeks to achieve social justice through equal political access by creating a democratic system based on universal adult franchise and non-discrimination, the court’s analysis does not account for the impact that its decision will have on the ability of marginalised groups to secure justice in the political sphere.

To be clear, the point here is not that the judiciary only delivers rights restricting decisions, or that its decisions have not substantively enhanced access to justice in the past. Rather, the concern is that in deciding on questions of substantive rights, the focus on access to justice is absent from the judicial evaluation of the right.

Similarly, articulating norms of accountability that give litigants the legal power to challenge rights violations and hold state officials accountable, is also not given adequate attention within the access to justice discourse. For example, in the *Akshardham temple attack case*, where the Supreme Court found that the entire case was fabricated by the police, and had resulted in two courts below imposing the death sentence, and in the accused serving eight years on death row for a crime they were framed for, no inquiry was directed or other action taken against the concerned police personnel.<sup>36</sup> Similarly, the Supreme Court has been requiring accused persons to show that material prejudice



is caused to them as a result of the violation of statutory rights in the criminal justice process, for such a violation to be considered as vitiating the trial or any aspect thereof. This places a very high burden on accused persons to prove a hypothetical—that had the violation not taken place, they would be materially benefitted. By requiring such proof, and by not automatically disallowing the concerned evidence, or process or the trial itself, the court condones routine violations of the statutory safeguards.<sup>37</sup> In sum, then, norms of accountability, which increase access to justice within the system as a whole, are largely ignored within the access to justice discourse.

**Second**, these judicial reform measures conceptualise access to justice primarily as access to courts.<sup>38</sup> There are two concerns with this approach. One, as mentioned above, courts are integrated into a wider ecosystem of institutions that together operate to process criminal and civil justice. Looking at courts in isolation from other institutions will only allow for partial access to justice. For example, the focus of legal aid efforts is often limited to the trial process. At the pre-trial stage, non-provision of legal aid has been held to not violate due process norms.<sup>39</sup> Such an approach understands the trial process as insular from the pre-trial and investigative stages. These phases are crucial for building the case for trial. They are also controlled by the police, and provide ample opportunities for manipulation and violation of rights. An accused person is particularly vulnerable at this stage due to power imbalances between them and the police and prison authorities as also due to the incentives upon the police to violate rights in order to build their case.

Access to a lawyer at this stage can address parts of this vulnerability by ensuring, for example, that the accused's rights against self-incrimination are protected,<sup>40</sup> that rights violations are brought to the notice of the court, and that the accused is

not made to undergo excessive detention pending trial.<sup>41</sup>

Similarly, delay reduction strategies are likely to be more effective if they focus, not only on reforming court processes for reducing backlog, but also on police and prosecutorial processes, serving of summons and warrants, the production of witnesses, custodial practices, and imprisonment during trial as well as post sentencing. Absent this scrutiny of other parts of the legal system, delay reduction efforts targeting only the judiciary are likely to remain ineffective in achieving their goal.

A related issue with understanding access from a system-wide perspective is that judicial reform measures tend to focus excessively on access to higher courts as part of access to justice strategies. No doubt, access to higher courts is an important element of access to justice. However, higher courts in the country are only located in 39 places, whereas district courts are present in every district of the country, and are therefore more accessible. They are also less expensive to access, since lawyers typically charge more in High Courts.<sup>42</sup> Further, courts that are imbedded in the local circumstances are likely to have a more nuanced understanding of the social dynamics at play in a given dispute. A bottoms-up judicial model, which promotes the availability of remedial justice in the immediate locality is therefore likely to be more effective, efficient, and accessible in addressing rights violations.

Provisions of the Civil Procedure Code (CPC), especially the subject matter jurisdiction clause of Section 9; the power of a civil court to address public nuisance or other wrongful acts affecting the public, by issuing declarations, injunctions and other appropriate reliefs on a suit filed by two or more public spirited individuals;<sup>43</sup> the power to entertain representative suits;<sup>44</sup> and of course the inherent power of the court to pass orders to meet the ends of justice,<sup>45</sup> can make civil courts viable

fora for public interest litigations. Similarly, criminal courts have ample powers of supervision to protect against violations of criminal process rights. So also, designating district courts as human rights courts, as envisaged in the Protection of Human Rights Act, 1993, will be an important step towards localising constitutional justice.

The only power that district courts do not enjoy, is the power to strike down legislative acts for violations of fundamental rights. However, both the CPC and the Code of Criminal Procedure (CrPC) empower such courts to refer a law to a High Court for determining its constitutionality.<sup>46</sup> Taken together, local courts can be activated to provide accessible remedies for violations of fundamental rights. Localising justice should play an important part in the discourse on access to justice.

**Third**, judicial reform measures for improving access to justice tend to focus on overcoming barriers to getting *into* court, rather than the treatment meted out *within* the court system, or on just outcomes *from* the legal system. As mentioned above, courts exercise public power, and more importantly coercive power, on individuals. Justice should therefore be seen not only as a matter of being able to litigate in courts, but also to fair treatment within courts, and to receive fair rulings from courts. Conflating access to justice with access to courts is based on an assumption that courts are necessarily just institutions. This does not take into account the profound sense of alienation felt by marginalised communities, from all state processes, including court processes. Communities that are vulnerable to exploitation and rights violations, whose survival is threatened by socio-economic structures supported by legal injunctions that deny them their basic needs, often see courts as part of the apparatus that serves to keep them disempowered. Marginalised and vulnerable populations are often brought to court as accused persons deserving punishment, rather than coming to

court to vindicate their rights.<sup>47</sup> Many marginalised groups are often categorised, if not legally than attitudinally, as inherently criminal or deviant,<sup>48</sup> or otherwise a hindrance to some larger state objective (of development, growth, etc.). This framing becomes a justification to use the criminal sanction to deprive such groups of their liberties and their resources. The legal travails of the *adivasis* of Bastar, and of legal aid lawyers such as the Jagdalpur Legal Aid group trying to assist them, point to the legal legitimisation of violence and violations that can occur in the face of social narratives that condone these practices.<sup>49</sup>

If the in-court treatment meted out to litigants is not consistent with their rights and dignity, their sense of alienation from the system, and therefore the voluntary usage of the system will itself decline. Such attitudinal barriers to access, which are based on narratives of incomprehensibility and intimidating nature of court processes, callousness of court staff including judges, re-victimisation and badgering by opposing counsel, lack of certainty in court processes, as well as the general perception amongst marginalised communities that the system is stacked against them, all play a very important role in keeping out from the court, those who require justice within. Focusing on in-court treatment is therefore not only essential for protecting the rights of persons who are within the court's purview, but is also a significant determinant of who approaches the court, for what, and under what circumstances.

Take for example, the bail law model followed in India, where,

courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor.... The poor find it difficult to furnish bail ... they have to remain in jail

until such time as the court is able to take up their cases for trial. ... It is here that the poor find our legal and judicial system oppressive and heavily weighted against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non-poor.<sup>50</sup>

A court should not then be understood as *ipso facto* a just space. Rather, the focus should be to make it so, *inter alia*, by making court processes litigant friendly, comprehensible, and transparent, and addressing those elements of the legal system which result in vulnerability and alienation within and through the courts. A good beginning in this regard has been made in Delhi, through the creation of a vulnerable witness programme, which includes facilities for making the court system more hospitable to the concerns of such witnesses.<sup>51</sup>

Provision of legal aid is an aspect of fair treatment in court and equal justice, and is a constitutional mandate under Article 39-A. The judiciary too has articulated very strong norms for ensuring legal aid to accused persons,<sup>52</sup> as well as to particularly vulnerable victims of crime.<sup>53</sup> Through a network of legal services authorities, legal representation is provided to indigent persons, to persons belonging to marginalised communities, to persons in custodial situations, and the like.<sup>54</sup>

Legal aid is seen as crucial for equal justice since, in an adversarial system of justice, legal power is accessed through legal representation. Access to legal representation is therefore essential for harnessing the power of the law in one's favour. However, the adversarial system works on the fiction of equality of arms between opposing sides—that is, equality of quality of legal representation, so that the outcome is determined, not by who one's lawyer is, but the rightness of one's case. Though this fictional formalism has for long been exposed in theory, our doctrinal formulations continue to base themselves on this approach. For

this reason, providing legal aid is seen as enough to overcome the challenge of providing equal justice to parties. However, the quality of legal aid provided is often a big determinant in the outcome of a given case.<sup>55</sup> The general quality of legal aid provided by legal services authorities is widely recognised to be of indifferent quality. This is owing to various reasons, prominent ones being that rates of remuneration for legal aid lawyers is low, that there is no requirement or culture of pro bono work in the legal community, and that there is no formal mechanism for grievance redressal at the behest of a legal aid client or any consequence for poor performance by lawyers.<sup>56</sup> For example, Indian courts have not recognised ineffective assistance of counsel as a ground for vitiating the trial process.<sup>57</sup>

As the Supreme Court has itself recognised, when one of the parties is vulnerable, the judge should be more interventionist, and ensure that the rights and interests of the person are protected.<sup>58</sup> One way in which a judge can intervene to protect the rights of a poorly represented person, is to proactively ensure that the rights of the person are being secured, without waiting for the party to file applications on the issue. This is especially true in criminal cases, where access to the benefit of many statutory provisions, including, for example, bail, depends on applications being moved by the accused, rather than on the burden being on the state to justify why an accused should continue to be held in incarceration pending trial.

A final example of how the courts can be sites of routine rights violations is the petty corruption endemic in the court bureaucracy. While the legal aid system seeks to project access to courts as cost free for indigent and marginalised litigants, in reality, 'it usually does not account for the bribes paid to the court staff, the extra fees to the legal aid lawyer, the cost of transport to the court, the bribes paid to the policemen for obtaining documents, copies of depositions and the like or to prison officials for



favours. Legal aid beneficiaries do not get services for “free” after all.<sup>59</sup>

The impact of these litigation costs will of course be felt most dearly by persons who are already impoverished. In this gap between the promise of a free and equal access to justice, and the quotidian reality of systemic discrimination, economic oppression, and impunity for rights violations, is the sense of alienation from court processes born.

*Fourth*, in the judiciary’s conception of access to justice, barriers to access are framed as a resource problem resulting in a mismatch between demand for and supply of judicial services.<sup>60</sup> The response to this mismatch is to either restrict demand, or increase supply. For example, a significant concern about access to justice through courts is that cases in the judicial system are severely backlogged, because of which litigants are not afforded timely justice. This crowds out impoverished litigants who cannot afford the costs of such delays, or otherwise disadvantages them through long periods of under-trial incarceration. Delays in the system therefore reduce access to justice.

In order to tackle this problem of delays, judicial reform measures tend to primarily focus on reducing the demand for judicial services by diverting cases to other dispute resolution mechanisms; and by increasing the supply of judicial services by adding more judges, other personnel, and court infrastructure on the one hand, and disposing of pending cases on the other.

Take for example two approaches to addressing the demand–supply mismatch—diversion of cases into alternative mechanisms, and, what I will call, a disposal-orientedness of the judiciary, where the primary measure of judicial performance, individually and systemically, is the number of cases disposed of, rather than the quality of the justice delivered in such cases.

Diversion of cases into alternative mechanisms has gained ground in the last few decades. After the amendment to the CPC in 2002, ADR has been located prominently within the civil justice process.<sup>61</sup> The National Legal Services Authorities Act mandates, as a core function of the legal services apparatus, the conduct of Lok Adalats, where dispute resolution can take place through informal mechanisms, rather than through a full court trial. On the criminal justice side, the introduction of plea bargaining through an amendment to the CrPC in 2005, allowed for a similar settlement between parties, albeit a settlement only on sentence, in certain types of criminal cases.<sup>62</sup> All these mechanisms are actively encouraged within the judicial system and are seen as core and prominent elements of facilitating access to justice, by disposing of cases, reducing backlog, and thus freeing up judicial services for more important matters.

This diversion of cases away from the judicial system, however, should be looked at with caution. What types of cases are being sent out of the system, who makes use of these alternative mechanisms, for what reasons, and with what outcomes, are important questions to be answered before one assumes that such diversion is necessarily good. If the judicial system is seen as a bulwark against the violation of rights, how robust is the decision-making in these alternative mechanisms in protecting such rights? What remedies are available to a litigant who does not get adequate recourse in these mechanisms, or who suffers violations in these alternative mechanisms? Without engaging with these questions, the diversion of cases into alternative mechanisms cannot be assumed to be a measure that facilitates access to *justice*.

Unfortunately, the focus of the judiciary appears to be on the numbers of cases disposed of through these alternative mechanisms, rather than on the quality of dispute resolution provided by them. Studies have raised serious concerns about the

operation of alternative mechanisms, especially informal mechanisms like Lok Adalats, whose success is measured based on the numbers of cases disposed of, creating perverse incentives to both divert cases to the Lok Adalat system, and to persuade, admonish, or even coerce parties into settling their disputes.<sup>63</sup> Diversion mechanisms rely on bargaining and consent to arrive at a resolution of cases. If the parties have an unequal bargaining position, as for example, a poor litigant against an insurance company in a Lok Adalat, or a person who has been in undertrial incarceration for long periods of time in a plea bargain for a crime against the state, then the less resourced litigant is more likely to settle for less than what she would have been entitled to under the law. Galanter and Krishnan have characterised these processes as ‘bread for the poor’, or as second best justice for those who cannot afford the luxury of a full court process.<sup>64</sup>

Diversion mechanisms, therefore, end up creating a three class judicial system—a first-class trial process with the full guarantee of all rights and remedies, available only to those who can afford the entire expense; a watered down, second-class version of the same for those who cannot afford the full expense, but who cannot (yet) be sent out of the system; and a third-class version for those who cannot afford the expense and can be conveniently pushed aside.

Recent access to justice measures at the national level, including schemes for training paralegal volunteers and for supporting legal aid clinics, further intensify this classification. Paralegal volunteers in legal aid clinics are supposed to provide legal aid by primarily assisting in the amicable resolution of disputes, and to send cases to appropriate ADR mechanisms, where possible. While legal aid clinics and paralegal volunteers can certainly amplify the impact of access to justice measures, these mechanisms are also meant to be used by persons who cannot afford to hire their own lawyers.

Provisioning such groups, and such groups alone, with the assistance of less than qualified lawyers, tasked with attempting as far as possible to keep the case out of court, is likely to have a disparate impact in terms of who gets excluded from court processes and whose entry is facilitated.<sup>65</sup>

Another disturbing feature of diversion mechanisms in the criminal justice process is that the same authorities who are tasked with providing legal services to indigent accused persons are also charged with conducting Lok Adalats and plea bargains.<sup>66</sup> The incentives of the personnel of these institutions are likely to be misaligned if they have to focus on diversion of cases from the legal system instead of quality legal aid within the judicial system.

Echoing the focus on the number of cases disposed of in these alternative mechanisms, is the disposal-orientedness of the judiciary itself. Judicial performance is measured by ‘units’ of cases disposed of by a particular judge. The performance indicators of the system as a whole, tracked for example, on the NJDG and the Supreme Court’s Court News, examine pendency and disposal figures to understand whether the performance of the judiciary as a whole is improving or not. Not only are judges incentivised to increase disposals, but also, the focus of judicial reforms is on enabling the system to dispose more cases, by, for example, adding more judges. The quality of decision-making or other reasons for delay in disposal of cases are secondary to the concern for numbers.<sup>67</sup>

Thus, while diversion and disposal-orientedness of the judiciary are justified as measures to increase access to justice, in practice, they often work against the interests of facilitating access to justice as conceptualised above. The exclusive focus on ‘docket explosion’ through increased pendency of cases, often masks concerns of ‘docket exclusion’ of marginalised groups.<sup>68</sup>

Diversion and disposals are not the only measures undertaken by the judiciary to address the issue of delays and congestion. Courts have been proposing and adopting more efficient methods for processing cases, for example, through the introduction of e-technologies. However, the focus in making e-Justice a reality is also primarily resource-centric—providing the hardware, software and know-how to transition from a paper based to digital system. Questions regarding court culture, lawyers' incentives, and litigant experiences are secondary concerns in the reform process.<sup>69</sup>

Similarly, another approach to reducing delay is by setting up fast track courts to deal with serious offences. These courts are conceived of as special institutions that will process cases faster than ordinary courts. However, fast track courts do not follow any special procedures. They operate under the same procedural norms as any other court. It is not clear that they provide swifter justice—there is little data to support or oppose the proposition. However, even if they do, it is worth asking why this is so. Is it a matter of culture or orientation of the judge, who on a fast track court feels more empowered to insist on timely processing of cases by lawyers? Does the ability to process cases faster come at the cost of quality of justice? And if fast track courts do have the ability to deliver quality justice in a timely manner, can all courts be made into fast track courts, rather than limiting this phenomenon to a select few? These questions are rarely asked and answered in the focus on increasing resources to the system, or addressing demand–supply mismatch.

To be clear, this is not to suggest that the judiciary does not have a resource problem. It does,<sup>70</sup> and there is urgent need to address resource constraints especially since delay and court congestion has a disparate economic impact on impoverished and marginalised groups. However, the problem is

that of reducing access concerns only to concerns about resources on the one hand, and a focus on resources without looking at the impact of resource reforms on the broader ideals of access to justice on the other. Simply put, resource constraints of the judiciary are problematic *because* they impede access. Therefore, removal of resource constraints should not take place in a manner that serves to *further* impede access. The prominent focus on resources and demand–supply mismatch ends up doing exactly that, and can become counter-productive to the goal of access to justice.

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## CONCLUSION

Thus, while the judiciary has made important and necessary judicial reform interventions to increase access, the focus of its interventions betray a partial and incomplete understanding of access to justice under the constitutional scheme. By focusing primarily on access to courts, and on questions of resources, the court loses the opportunity to meaningfully engage with the constitutional mandate of creating a just social order. Rather than viewing access to courts as the be-all of securing access to justice, the judicial conceptualisation of access to justice should be that of a means to the end of securing social justice. As a way to achieve this ideal, the judiciary should view access to justice not as a goal, progress towards which can be measured in concrete numbers or input/output variables, but as a *perspective* that should inform all aspects the judicial function—from decision-making on substantive rights, to construction of procedural norms, to fashioning remedies, to the very administration of the judicial set-up. These two attitudinal changes will go some way in addressing the present disconnect between the constitutional ideal of access to justice, and the judicial implementation thereof.

## Notes

1. Preamble, Constitution of India.
2. *Constituent Assembly Debates*, Volume XI (25 November 1949).
3. Granville Austin. 1966. *The Indian Constitution: Cornerstone of a Nation*. London: Oxford University Press, p. 50, quoted with approval in *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (*Kesavananda Bharati*).
4. Art. 37, Constitution of India. See, *Kesavananda Bharati*, para 672; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.
5. *Constituent Assembly Debates*, Volume VII (9 December 1948).
6. See, *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; (2003) 2 SCR 1136.
7. *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 (*S.P. Gupta*).
8. S. Muralidhar. 2005. 'Access to Justice', *Seminar*, available online at <http://www.india-seminar.com/2005/545/545%20s.%20muralidhar1.htm> (accessed on 27 March 2016).
9. See generally, Cass R. Sunstein. 1996. 'On the Expressive Function of Law', *University of Pennsylvania Law Review*, 144: 2021–2053.
10. *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.
11. For example, in universities or workspaces, and collectively through sustained engagement with Parliament, which led to a statute being passed in 2013.
12. See for example, *Apparel Export Promotion Council v. A.K. Chopra*, (1999) 1 SCC 759; *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297; (2012) 9 SCR 895.
13. Hilary Sommerlad. 2004. 'Some Reflections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid', *Journal of Law and Society*, 31(3): 345–368, p. 357.
14. See generally, Muralidhar, 'Access to Justice'.
15. UNDP. 2004. *Access to Justice Practice Note*, p. 6.
16. *People's Union for Civil Liberties v. Union of India*, WP (C) No. 196 of 2001 (SC).
17. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.
18. *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.
19. See, *S.P. Gupta*.
20. *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544.
21. *Bihar Legal Support Society v. Chief Justice of India*, (1986) 4 SCC 767.
22. *Imtiyaz Ahmad v. State of U.P.*, (2012) 2 SCC 688.
23. See generally, resolutions adopted at the Chief Justices' Conference in 2009, 2013, and 2015, available online at <http://supremecourtindia.nic.in/cjconference.htm> (C.J. Conference Resolutions). The Chief Justices' Conference is a high-level decision-making body of the judiciary which lays down roadmaps and policy guidelines for the judiciary. See also, 'National Mission for Delivery of Justice and Legal Reform: A Blueprint for Judicial Reforms', [http://lawmin.nic.in/doj/justice/National\\_Legal\\_Mission-7NOV2009.pdf](http://lawmin.nic.in/doj/justice/National_Legal_Mission-7NOV2009.pdf).
24. NALSA Scheme for Para Legal Volunteers (Revised); NALSA (Legal Aid Clinics) Regulations, 2011.
25. See for example, S. 89, Civil Procedure Code (CPC), 1908; Legal Services Authorities Act, 1987; C.J. Conference Resolutions.
26. See, C.J. Conference Resolutions; Law Commission of India. 2014. *245th Report on Arrears and Backlog*. New Delhi: Government of India.
27. C.J. Conference Resolutions.
28. See, National Judicial Data Grid (NJDG), available online at [http://164.100.78.168/njdg\\_public/](http://164.100.78.168/njdg_public/).
29. See for example, 'The Courts of Tomorrow', available online at [http://innovationcouncilarchive.nic.in/index.php?option=com\\_content&view=article&id=329&Itemid=115](http://innovationcouncilarchive.nic.in/index.php?option=com_content&view=article&id=329&Itemid=115).
30. See details of programmes at the National Judicial Academy, Bhopal, available online at <http://www.nja.nic.in/>.
31. The High Court of Delhi has set up special vulnerable witness courtrooms to enable such witnesses to give evidence in an atmosphere of reduced fear and trauma; see, 'Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters', High Court of Delhi, available online at [http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile\\_lcwc2x4.pdf](http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwc2x4.pdf).
32. See, *S.P. Gupta*.
33. *Almitra H. Patel v. Union of India*, (2000) 2 SCC 679.
34. *D. Velusamy v. D. Patchaiahmmal*, (2010) 10 SCC 469.
35. *Rajbala v. State of Haryana*, (2016) 2 SCC 445.
36. *Adambhai Sulemanbhai Ajmeri v. State of Gujarat*, (2014) 7 SCC 716.
37. See, Aparna Chandra and Mrinal Satish. 2016. 'Criminal Law and the Constitution', in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *Oxford Handbook of Indian Constitutional Law*, pp. 794–813 London: Oxford University Press.
38. A clear example of this approach is the National Commission for Review of Working of the Constitution, which recommended the incorporation of a fundamental right to access to courts as part of the Constitution.

39. *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1.
40. *Salduz v. Turkey*, Application No. 36391 of 2002: 2008 ECHR 1542.
41. See, United Nations Office on Drugs and Crime. 2013. *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. New York: United Nations, p. 6. Available online at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf) (accessed on 27 March 2016).
42. As an example, even National Legal Services Authority (NALSA) schemes stipulate higher retainers to Supreme Court Legal Services Committee panel lawyers, compared to High Court lawyers, compared to District Court lawyers.
43. S. 91 CPC.
44. Or. I, R. 8 CPC.
45. S. 151 CPC.
46. S. 113 CPC; S. 395 CrPC.
47. See, Muralidhar, 'Access to Justice'; Theodore Eisenberg, et al., 2012. 'Litigation as a Measure of Well-Being', Cornell Legal Studies Research Paper, Cornell University.
48. For example, de-notified tribes who were once branded as criminal tribes. Though statutory law does not classify such tribes as inherently criminal any more, they continue to be treated so by the criminal justice system. See, Dilip D'Souza. 2001. *Branded by Law*. Delhi: Penguin Books India.
49. See, Vrinda Grover. 2015. 'The Adivasi Undertrial: Prisoner of War', *The Justice Project*; Ashwaq Masoodi. 2015. 'A Few Good Men and Women', *Livemint*, 15 October, available online at <http://www.livemint.com/Leisure/t5K8jPWw2ooX7mqIHvFiPK/A-few-good-men-and-women.html> (accessed on 27 March 2016); Yashwant Dhote. 2015. 'The Handmaidens of Justice', *Outlook*, 28 December, available online at <http://www.outlookindia.com/magazine/story/the-handmaidens-of-justice/296159> (accessed on 27 March 2016).
50. *Natia Jiria v. State of Gujarat*, 1984 SCC OnLine Guj 228: 1984 Cri LJ 936.
51. See, 'Guidelines for Recording of Evidence of Vulnerable Witnesses'.
52. *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544.
53. *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.
54. Legal Services Authorities Act, 1987.
55. See for example, Law Commission of India. 2015. *262nd Report on the Death Penalty*. New Delhi: Government of India (discussing the impact of representation by legal aid lawyers on confirmation of the death penalty by the Supreme Court).
56. See for example, Multiple Action Research Group (MARG). 2012. *Needs Assessment Study of the Legal Services Authorities in the States of Madhya Pradesh, Jharkhand, Bihar, Uttar Pradesh, Odisha, Rajasthan, and Chhattisgarh*.
57. *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600.
58. *Lingala Vijay Kumar v. Public Prosecutor*, (1978) 4 SCC 196.
59. Muralidhar, 'Access to Justice'. See also, Krishnan, et al., 2014. 'Grappling at the Grassroots: Access to Justice in India's Lower Tier', *Harvard Human Rights Journal*, 27: 151–189.
60. See for example, C.J. Conference Resolutions; see also, C. Raj Kumar. 2013. 'Expanding Access to Justice', *Hindu*, 28 November, available online at <http://www.thehindu.com/opinion/lead/expanding-access-to-justice/article5398212.ece> (accessed on 27 March 2016).
61. S. 89 CPC.
62. Chapter XXIA CrPC.
63. Robert S. Moog. 1991. 'Conflict and Compromise, The Politics of Lok Adalats in Varanasi District', *Law & Society Review*, 25(3): 545–570; Marc Galanter and Jayanth K. Krishnan. 2004. "'Bread for the Poor": Access to Justice and Rights of the Needy in India', *Hastings Law Journal*, 55(4): 789–834.
64. Galanter and Krishnan, 'Bread for the Poor'.
65. See for example, NALSA Scheme for Para Legal Volunteers (Revised); NALSA (Legal Aid Clinics) Regulations, 2011.
66. See, 'History of Legal Movement in India', available online at <http://nalsa.gov.in/index.html> (accessed on 5 April 2016).
67. See, Law Commission of India, *245th Report* (discussing how increasing the number of judges is not enough to address delays and arrears).
68. G. Mohan Gopal. 2013. 'Supreme Court and the Aam Aadmi', *Frontline*, 3 May, available online at <http://www.frontline.in/cover-story/supreme-court-and-the-aam-aadmi/article4619585.ece> (accessed on 27 March 2016).
69. For example, the impetus to hold remand proceedings through video-conference, is based on the convenience of state authorities and not on the needs of impoverished litigants who often rely on court productions as the means to communicate with their lawyers (since often legal aid or poorly paid private lawyers do not visit their clients in prison), and meet family members.
70. See, Law Commission of India, *245th Report*.





# Institutionalising Justice: Gram Nyayalayas and Consumer Courts

*Ashwini Obulesh*

## 'JUSTICE FOR ALL': A CONSTITUTIONAL ASPIRATION

One of the many aspirations set out in our Constitution is the operation of a legal system that promotes justice on the basis of equal opportunity.<sup>1</sup> Although incorporated in the segment containing the non-justiciable Directive Principles of State Policy, it is heartening to see that Article 39-A imposes an obligation on the state to secure the operation of such a legal system and ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The preliminary step in realising this aspiration is through (a) establishing an uninterrupted mechanism for 'access' to the legal system, *inter alia*, physical access to legal institutions such as courts, forums, tribunals, and dispute resolution centres, in other words, reducing barriers to access judicial institutions and (b) identifying justice as the first virtue of legal institutions.<sup>2</sup> Some Law Commission reports<sup>3</sup> have unequivocally stated that the legal system must be equally accessible to all, and several judicial pronouncements have been instrumental in equating the status of 'access to justice' to that of right to life under Article 21 of the Constitution.<sup>4</sup> The legislature has passed a variety of progressive laws such as the Family Courts Act, 1984; Consumer Protection Act, 1986; Legal Services Authorities Act, 1987; and the Gram Nyayalayas Act, 2008. The judiciary has been working in tandem to ensure physical access of litigants to institutions such as Lok Adalats,<sup>5</sup> gram nyayalayas, mediation and conciliation centres,<sup>6</sup> and adopting electronic court processes. Such initiatives are in line with the twin goals of the National Mission for Justice Delivery and Legal Reforms set up by the Department of Justice in 2011: (a) increasing access

by reducing delays and arrears and (b) enhancing accountability through structural changes and by setting performance standards and capacities in the legal system.<sup>7</sup>

In this chapter, I highlight two promising measures adopted by the judiciary in the pursuit of access to justice: (a) the gram nyayalayas set up under the Gram Nyayalayas Act, 2008 and (b) the consumer forums established under the Consumer Protection Act, 1986.<sup>8</sup> They also work as good illustrations of the ‘concerted effort’<sup>9</sup> in India to move cases out of the formal courts, with alternate dispute resolution mechanisms assuming increasing significance and taking various forms. However, they fall at two ends of a spectrum when it comes to constructing effective reforms and having the political will for implementation—the consumer forums have been the focus of evolving reforms for improvement, while the gram nyayalayas portray a pathetic picture of poor political will.

## GRAM NYAYALAYAS

Gram nyayalayas as ‘forums for resolution of disputes with people’s participation in the administration of justice’<sup>10</sup> were first proposed by the 114th Report of the Law Commission of India, with a view to solve the questions of unconstitutionality and politicisation that plagued the nyaya panchayat system which had been practised since the colonial era. The nyaya panchayat was an informal system constituted by members of the grama sabha of each village. The nyaya panchayats became the object of controversy when the Law Commission opined that (a) nyaya panchayats cannot be treated as judiciary in the proper sense of the term, (b) they may degenerate into mechanical endorsement of untrustworthy recommendations, and (c) several systemic

errors and malfunctions had crept into the system rendering it extremely political and ‘distressed’.<sup>11</sup>

The Gram Nyayalayas Act, 2008 (‘the Act’) came into force in October 2009 mandating the establishment of an alternative forum for grievance redressal at the panchayat level as well as solving the nyaya panchayat constitutionality and politicisation crisis. Gram nyayalayas have been described as ‘strikingly different’<sup>12</sup> from nyaya panchayat in their structure and functioning. Gram nyayalayas are seen to be ‘closer to the “formal courts” in the country than to any indigenous or traditional institutions, real or idealised’,<sup>13</sup> in an apparent attempt to steadily expand the court system in India.

## Taking Justice to Citizens’ Doorsteps

The Act, in its preamble, unequivocally states that the establishment of gram nyayalayas at the grass-root level is ‘for the purposes of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities’, thereby mirroring the aspirations behind Article 39-A of the Constitution. The gram nyayalayas were envisioned to be supplementary to the existing formal court system, and not to oust their jurisdiction.

The Act states that the state governments, may by consultation with the respective High Courts, establish one or more gram nyayalayas and the PIB releases estimate a total of 2,500 gram nyayalayas that are to be established in various districts of India. Gram nyayalayas, established at headquarters of every panchayat at the intermediate level,<sup>14</sup> or for a group of panchayats in a district, are presided over by the *Nyayadhikari* appointed by the state government in consultation with the respective High Court and having the rank of a First Class Judicial Magistrate. The Act mandates that

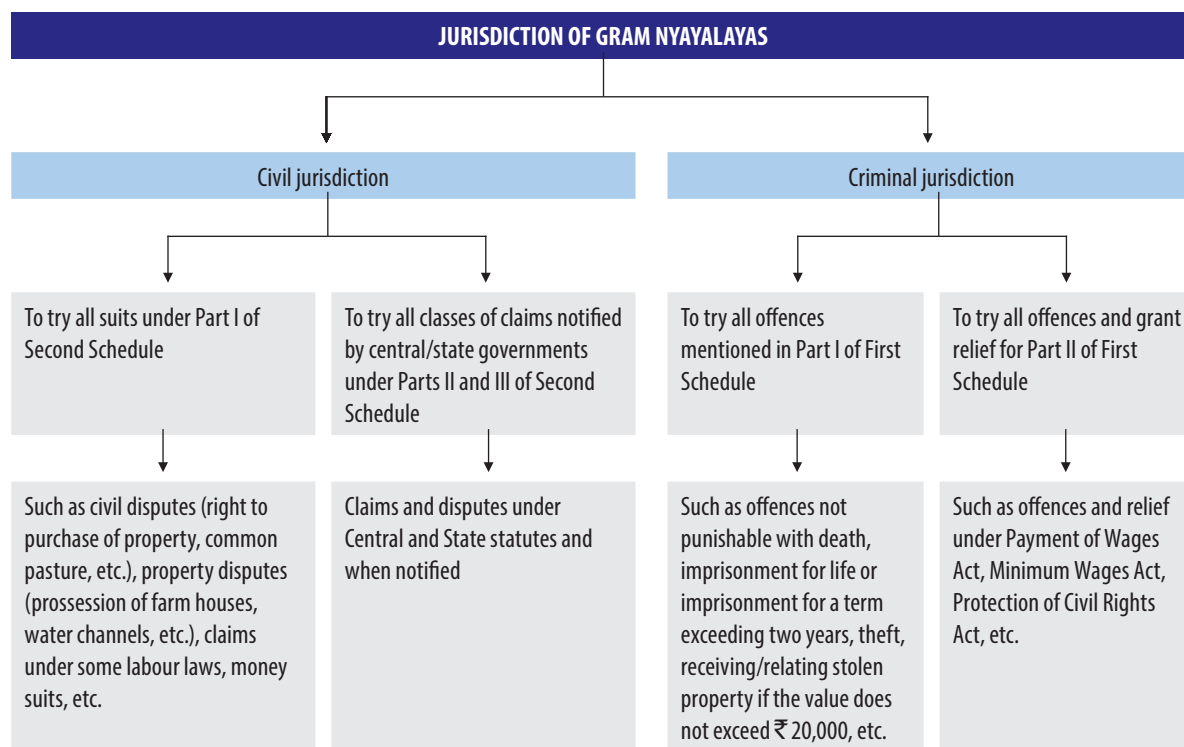


the *Nyayadhikari* periodically visit villages within his jurisdiction and conduct trial or proceedings at any place in close proximity to the place where the parties originally reside or where the cause of action has arisen. Even while the Act equates in status the judgment of the gram nyayalaya to a decree of a civil court, it makes provision for the gram nyayalayas to follow special procedures in civil matters, as may be just and reasonable. Statutorily, the gram nyayalaya seeks to blend, in an unconventional manner, legal formality<sup>15</sup> with convenience of the litigants. The Act goes a step further in seeking to improve physical access of people to courts by providing for mobile courts by the *Nyayadhikari* where

trials and proceedings can take place even outside traditional headquarters.

While the Act empowers gram nyayalayas with both civil and criminal jurisdiction, it also makes provision for dispute settlement in the first instance.<sup>16</sup> The jurisdiction of gram nyayalayas is comparable to that of the Judicial Magistrate First Class or Civil Judge Junior Division. Appeals from gram nyayalayas in criminal cases are directed to the sessions courts and appeals in civil cases are directed to the respective district courts.<sup>17</sup> Figure 1 sets out the jurisdictional limits of the gram nyayalayas.

**FIGURE 1.** Jurisdiction of Gram Nyayalayas



The Act also states that a district court or session court may transfer civil or criminal cases pending before any subordinate court(s) to be heard by the respective gram nyayalaya. Such cases can either be retried or be dealt with from the stage they were so transferred, as per the discretion of the gram nyayalaya. Another important feature is that the Act mandates a liaison between the gram nyayalayas and the respective state legal services authority by insisting that the latter prepare a panel of advocates and assign at least two of them to be attached to each gram nyayalaya, for the sake of those parties who are unable to engage an advocate. Further, while laying down the procedure to be followed in civil cases, the Act states that the maximum fee payable on any application is ₹100. In the interest of expedient justice, the Act mandates that the gram nyayalaya should dispose of an application, that is, any suit, claim or dispute filed before it, within a period of six months from the date of its institution. The Act also mandates that, as far as practicable, the proceedings before gram nyayalayas should take place in one of the official languages of the respective state other than English.

The Act also attempts to strengthen the organisational framework supporting the gram nyayalayas—every police officer within the local limits is bound to assist the gram nyayalaya in the exercise of its lawful authority. The state governments have been assigned the responsibility of determining the nature and categories of officers and other employees required to assist a gram nyayalaya in the discharge of all its functions. Such officers have been designated as ‘public servants’ in accordance with the Indian Penal Code, thereby imposing an amplified standard of care on them. As a checks-and-balances mechanism, the district court judge is

given the responsibility to appoint a judicial officer to inspect gram nyayalayas in their district at least every six months.<sup>18</sup>

## On-the-Ground Implementation

According to a statement by the PIB, the central government was to provide assistance to states for establishment of gram nyayalayas of up to ₹18 lakhs per court, and recurring expenses up to ₹3.20 lakhs per court per annum for the first three years.<sup>19</sup> Table 1 sets out the number of gram nyayalayas that were to be set up, along with funds they would need, in accordance with the 12th Five Year Plan.<sup>20</sup>

**TABLE 1.** Central Government Scheme for Establishing and Funding Gram Nyayalayas

Year	No. of gram nyayalayas to be set up	Requirement of funds (₹ in crores)
2012–2013	300	119.00
2013–2014	300	147.00
2014–2015	600	294.00
2015–2016	600	350.00
2016–2017	700	446.00
<b>Total</b>	<b>2,500</b>	<b>1,356.00</b>

Unfortunately, these numbers are in stark contrast to the actual number of gram nyayalayas notified and functional currently. A mere 194 gram nyayalayas have been notified so far, out of which only 159 gram nyayalayas have started functioning.<sup>21</sup> Table 2 sets out state-wise statistics on the relevant numbers, and indicates the release of funds by the government. A comparison of the figures in the two tables portrays a dismal picture.

**TABLE 2.** Number of Gram Nyayalayas Notified and Functional

No.	State <sup>i</sup>	Gram nyayalayas notified	Gram nyayalayas functional <sup>ii</sup>	Amount released (₹ in lakhs)		
				2012–2013	2013–2014	2014–2015
1	Madhya Pradesh	89	89	0.00	284.80	0.00
2	Rajasthan	45	45	243.00	215.20	71.78
3	Karnataka	2	0	0.00	0.00	0.00
4	Odisha	16	12	0.00	0.00	0.00
5	Maharashtra	18	10	15.80	0.00	100.80
6	Jharkhand	6	0	75.60	0.00	0.00
7	Goa	2	0	25.20	0.00	0.00
8	Punjab	2	1	25.00	0.00	0.00
9	Haryana	2	2	25.20	0.00	0.00
10	Uttar Pradesh	12	0	0.00	0.00	127.42
<b>Total</b>		<b>194</b>	<b>159</b>	<b>410.00</b>	<b>500.00</b>	<b>300.00</b>

Notes: (i) There are no statistics available on the status of pendency of cases before gram nyayalayas for any of the states in which they are fully functional. The website of the Department of Justice also does not attempt to fill this cavity.

(ii). See the response of Sadananda Gowda, Minister of Law and Justice, Government of India, to the question by Dr Shashi Tharoor, MP in the Lok Sabha, on 5 March 2015, available online at [http://doj.gov.in/sites/default/files/budget-session-27-febto7-may\\_2015.pdf](http://doj.gov.in/sites/default/files/budget-session-27-febto7-may_2015.pdf) (accessed on 15 December 2015).

Moreover, the Ministry of Law and Justice noted that a majority of states have set up regular courts at the taluk level instead of setting up gram nyayalayas,<sup>22</sup> perhaps with a view to avoid the complexities involved in implementation of a new legislation, fresh appointment of *Nyayadhikaris*, and negligible funding from the central government.<sup>23</sup>

Some field studies on the functioning of gram nyayalayas have observed that ‘there is considerable variation in the manner in which the provisions of the Act have been interpreted and applied in different states’.<sup>24</sup> One working paper observed that only one of the three gram nyayalayas studied functioned out of dedicated premises, that is, a separate building, while the other two were convened at the panchayat *samiti* offices of gram panchayats on the dates of hearing disputes.<sup>25</sup> While some gram nyayalayas had *Nyayadhikaris* who heard cases only in one of the court halls in the district court

designated as a gram nyayalaya, others used to visit villages on a frequent basis within its jurisdiction for hearings.<sup>26</sup> Press releases by the government have also noted that several issues plague the operation of gram nyayalayas, such as the ‘reluctance of police officials and other state functionaries to invoke jurisdiction of gram nyayalayas, lukewarm response of the Bar, non-availability of notaries and stamp vendors, problem of concurrent jurisdiction of regular courts’.<sup>27</sup> Further, it has been observed that in most villages, courts are held only once or twice a month while in others, the frequency is even worse,<sup>28</sup> mostly due to the lack of coordination between High Courts and state governments.

The gram nyayalaya system has also been criticised by some experts on the ground that ‘it violates the essential foundation of adjudication ... it makes a mockery of that which is most sacred to all law—that power, resources, and the quantum of

private gain will not determine the aims or means of the process that is adjudication'.<sup>29</sup>

Gram nyayalayas have a long way to go in fulfilling their purpose, whether improving access to judicial institutions or reducing pendency of cases before the formal courts. Despite being excellent models, gram nyayalayas have been grappling with systemic defects, lack of practice of recording case data and status, inadequate funding and worst of all, lack of political will.

## CONSUMER FORUMS

Since the beginning of the consumer rights movement, consumer forums have been attempting to elevate the position of consumers on the rungs of access to justice. It was to enhance the spirit of consumerism that the Consumer Protection Act, 1986 (COPRA) was enacted, with a view to provide speedy and inexpensive redress of consumer grievances.

The three-tier grievance redressal mechanism that COPRA provides for—with the National Commission at the central, State Commissions at the state level, and District Commissions in each district—has been designed to ensure better access to dispute redressal forums.<sup>30</sup> In contrast with the gram nyayalayas, which suffer from institutional absences, the COPRA website claims that 626 district commissions out of a total of 655 across states and union territories are functional, with only 29 being non-functional.

### Performance of Consumer Courts

The latest statistics of the total number of cases instituted before the National Commission, State Commissions, and the District Commissions<sup>31</sup>

depict a remarkable cumulative disposal rate, well above 90 per cent, as set out in Table 3.

**TABLE 3.** Numbers of Cases Pending and Disposed of by Consumer Courts

No.	Agency	Cases filed since inception	Cases disposed of since inception	Cases pending	Percentage of total disposal
1	National Commission	98,063	88,031	10,032	89.77
2	State Commissions	6,94,546	5,98,477	96,069	86.17
3	District Forums	36,50,986	33,65,999	2,84,987	92.19
<b>Total</b>		<b>44,43,595</b>	<b>40,52,507</b>	<b>3,91,088</b>	<b>91.20</b>

Most State Commission websites contain well-documented statistics about the numbers of cases instituted and disposed of, as well as percentages of disposal.<sup>32</sup> However, the time taken for disposal of each case,<sup>33</sup> lifecycles of cases, across District and State Commissions, and such other quantitative analyses are not possible from the information currently available on these websites.

### Administrative Weaknesses

Despite successes of consumer forums, administrative shortcomings—especially, the non-filling up of vacancies in the posts of presidents of commissions—have impeded celebrations. Although the COPRA website presents a positive picture with respect to filling up of vacancies to these posts, several newspaper reports<sup>34</sup> and research papers over the past year have expressed concern regarding pendency of cases before consumer forums shooting up due to vacancies in posts.<sup>35</sup>

Responding to the concerns on pending consumer cases, mainly due to structural and

administrative difficulties, the Ministry of Consumer Affairs, Food & Public Distribution has recently called for some measures for strengthening infrastructure in the Commissions.<sup>36</sup>

1. State governments to maintain a panel of candidates at all times for filling up of future vacancies of president and members and to avoid delay in appointments.
2. The National Commission to send circuit benches to visit states more frequently and also hold sittings in each state.
3. Additional benches in State Commissions to dispose of pending cases.
4. Holding Lok Adalats regularly for speedy disposal of cases.
5. Financial assistance by the central government to states to adopt computerisation and networking to facilitate quick disposal of cases.<sup>37</sup>
6. The National Commission to be provided with six more members to clear backlog of cases and improve disposal rate.<sup>38</sup>

The Ministry of Consumer Affairs, Food & Public Distribution has also introduced the Consumer Protection Bill, 2015 in parliament, with a view to 'make provisions for establishment of the Consumer Protection Councils and other authorities for better administration and for timely and effective settlement of consumers' disputes'.<sup>39</sup> One of the key features of the Bill is that it introduces mediation as a mode of consumer dispute resolution through consumer mediation cells attached to the redressal commissions at the district, state, and national levels.<sup>40</sup> The mediation cells have been proposed with a view to ensure that settlement through mediation has a legal sanctity when initiated through consumer forums.<sup>41</sup>

## STRENGTHENING INSTITUTIONS TO SAFEGUARD JUSTICE

In theory, both gram nyayalayas and consumer forums are good policy decisions made by the government. They not only attempt to realistically improve physical access to legal institutions but also make to an effort to reduce barriers for access to judicial institutions and demystify the institutional formalities surrounding regular courts.

Although the comparison may be unfair, given that COPRA is more than 30 years old and the gram nyayalaya statute has been in force for only eight years, there is no denying a stark contrast between them in terms of implementation. Effective functioning of gram nyayalayas requires political, executive and judicial will, which has hitherto appeared to be missing. Further, there is a lack of clarity on how the gram nyayalayas will function together with the existing court system, which perhaps is one of the main reasons for delay in implementing them. COPRA has not only helped consumers, but has also reduced the burden of the judiciary significantly and that is one of the reasons for COPRA's relative success. Other reasons for the visible discrepancies between the implementation of the two statutes are the different arenas—urban and rural—in which they function, as well as differences in levels of awareness amongst people and the impact of technology. The consumer movement has benefited from the increasing use of technology, such as social media and networking sites, and consumer awareness campaigns have assumed creative forms. The beneficiaries of gram nyayalayas do not have these advantages. Approaches by the ministries and government departments in charge of implementation of the two laws (including in relation to funding), have also contributed to the contrasting levels of success.

As the Indian socio-political-economic ecosystem continues to evolve, justice delivery systems must adapt themselves accordingly.<sup>42</sup> In the process of this evolution, it is extremely important to ensure that access to justice is not a mere aspiration, finding mention in the manifestos of major political parties in India every five years, but is a realistic notion within the reach of one and all. In this regard, mechanisms such as gram nyayalayas and consumer forums will go a long way in transforming 'institutions of law' into 'institutions of justice', if practised properly.

### Notes

1. Art. 39-A, Constitution of India, 1950.
2. This is an extension of Rawls' theory on the interplay between fairness and justice in his masterpiece *A Theory of Justice* in which he hypothesised the veil of ignorance. Behind the veil, no person has knowledge of another's status or position in society, intelligence or strength, and this ignorance would treat one and all with fairness and thus lead to a scheme of justice.
3. Report Nos. 114, 222, 230, and 245 of the Law Commission of India.
4. *Imtiyaz Ahmad v. State of U.P.*, (2012) 2 SCC 688.
5. According to the National Legal Services Authority, the National Lok Adalat held simultaneously across India on 23 November 2013 claims to have settled 71,78,178 cases in all.
6. According to the Law and Justice Minister's speech at the Conference of Chief Ministers and Chief Justices of the High Courts on 16 August 2009, every High Court in India has a functional conciliation and mediation centre.
7. Press Information Bureau (PIB) press release dated 13 August 2012.
8. I wish to thank Professor Robert Moog, Department of Political Science, School of Public and International Affairs, North Carolina State University, for his valuable guidance and references on studies on the working of consumer forums and gram nyayalayas in India.
9. Robert Moog. 2008. 'The Study of Law and India's Society: The Galanter Factor', *Law and Contemporary Problems*, 71(2): 129–137, p. 129. Also available online at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1470&context=lcp> (accessed on 18 December 2015).
10. Law Commission of India. 1986. *114th Report on Gram Nyayalaya*, p. 18. Available online at <http://lawcommissionofindia.nic.in/101-169/Report114.pdf> (accessed on 18 December 2015).
11. Law Commission, *Gram Nyayalaya*, p. 18.
12. Shishir Bail. 2015. 'From Nyaya Panchayats to Gram Nyayalayas: The Indian State and Rural Justice', *The Socio-Legal Review*, p. 101. I wish to thank Shishir Bail, Azim Premji University, Bangalore, for providing valuable insights into his field studies on gram nyayalayas in some districts of India.
13. Bail, 'From Nyaya Panchayats to Gram Nyayalayas', p. 102.
14. According to Art. 243(c) of the Constitution of India, intermediate level is 'a level between the village and district levels specified by the Governor of a State by public notification'.
15. S. 10 of the Act states that every gram nyayalaya shall use a seal of the court in the form and dimensions prescribed by the High Court.
16. Bail, 'From Nyaya Panchayats to Gram Nyayalayas'. The author conducted field studies in three selected gram nyayalayas and found that gram nyayalayas deal with far more criminal cases than civil cases.
17. The types of cases, civil and criminal, which can be tried by gram nyayalayas have been listed out in the First and Second Schedules to the Act.
18. Nicholas Robinson. 2009. 'Cause for Optimism', available online at <http://accountabilityindia.blogspot.in/2009/09/gram-nyayalayas-cause-for-optimism.html> (accessed on 2 January 2016).
19. PIB release dated 9 March 2015. As per the proposal, the central assistance to states was of ₹30.30 lakhs for non-recurring expenditure along with ₹9.35 lakhs per annum for the first five years of its operation towards recurring expenditure. ₹20.92 crores has been disbursed to the states of Rajasthan, Maharashtra, Madhya Pradesh, and Odisha under the scheme so far.
20. Swaniti Initiative. 2015. 'Development of Infrastructure Facilities for Judiciary including Gram Nyayalayas', available online at [http://www.swaniti.com/wp-content/uploads/2014/05/Development-of-Infrastructure-Facilities-for-Judiciary-including-Gram-Nyayalayas\\_v1-1.pdf](http://www.swaniti.com/wp-content/uploads/2014/05/Development-of-Infrastructure-Facilities-for-Judiciary-including-Gram-Nyayalayas_v1-1.pdf) (accessed on 18 December 2015).
21. PIB release dated 9 March 2015.



22. PIB release dated 9 March 2015.
23. When I approached the administrative office dealing with gram nyayalayas in Karnataka (within the High Court of Karnataka premises), I was informed that two gram nyayalayas have been notified for Karnataka, in Chikkaballapur and Gauribidanur districts. However, neither has been put in operation, and instead, the taluk-level courts in these localities have been made fully functional.
24. Shishir Bail and Sandesh Kotte. 2014. 'Gram Nyayalayas and Access to Justice in India'. Unpublished paper, available online at [https://www.academia.edu/9822842/Gram\\_Nyayalayas\\_and\\_Access\\_to\\_Justice\\_in\\_India](https://www.academia.edu/9822842/Gram_Nyayalayas_and_Access_to_Justice_in_India) (accessed on 10 January 2016).
25. Bail, 'From Nyaya Panchayats to Gram Nyayalayas'. The author conducted a field study of three gram nyayalayas in Bassi Taluka (Rajasthan), Haveli Taluka (Maharashtra), and Gwalior Taluka (Madhya Pradesh).
26. Bail, 'From Nyaya Panchayats to Gram Nyayalayas', p. 93.
27. PIB release dated 9 March 2015.
28. *DowntoEarth*. 2014. 'Where are Rural Courts?', *DowntoEarth*, 30 June, available online at <http://www.downtoearth.org.in/coverage/where-are-rural-courts-44754> (accessed on 15 December 2015).
29. Menaka Guruswamy and Aditya Singh. 2010. 'Accessing Injustice: The Gram Nyayalayas Act, 2008', *Economic and Political Weekly*, 45(43): 19.
30. In order to help achieve the objects of the COPRA, the National Commission has also been conferred with the powers of administrative control over all the State Commissions by calling for periodical returns regarding the institution, disposal and pendency of cases. The National Commission is also empowered to issue instructions regarding (a) adoption of uniform procedure in the hearing of the matters, (b) prior service of copies of documents produced by one party to the opposite parties, (c) speedy grant of copies of documents, and (d) over-seeing the functioning of the Commissions. See, <http://ncdrc.nic.in/> (accessed on 15 December 2015).
31. As available on the website of the National Commission, as of 20 December 2014. The independent statistics for cases instituted, pending and disposed of before all the three tiers independently are provided at <http://ncdrc.nic.in/>.
32. The disposal percentages in the State Commissions range from 59.62 per cent (Nagaland) to 99.14 per cent (Himachal Pradesh). The District Commissions, cumulatively, seem to be performing much better than the State Commissions in terms of disposal percentage, with Mizoram (98.99 per cent) and Lakshadweep (78.31 per cent) being the states/union territories with the best and worst figures respectively. Available online at <http://ncdrc.nic.in/> (accessed on 15 December 2015).
33. Some State Commission websites contain disposal-related data on cases, but in the context of timeframes prescribed by the COPRA. For instance, the Himachal Pradesh State Commission, which claims to have the highest disposal rate in India, indicates that only 68.88 per cent of its cases are disposed of within prescribed time norms. See, <http://hpconsumercommission.nic.in/stat.htm> (accessed on 15 December 2015).
34. U. Anand Kumar. 2015. 'Pendency Rises in Consumer Courts', *New Indian Express*, 23 August, available online at <http://www.newindianexpress.com/thesundaystandard/Pendency-Rises-in-Consumer-Courts/2015/08/23/article2988156.ece> (accessed on 15 December 2015).
35. Anuja Jaiswal. 2015. 'Vacancies in Consumer Forums Add to Pending Woes Across Chhattisgarh', *Times of India*, 12 January, available online at <http://timesofindia.indiatimes.com/city/raipur/Vacancies-in-consumer-forums-add-to-pending-woes-across-Chhattisgarh/articleshow/45856566.cms> (accessed on 15 December 2015). No cases are being taken up by commissions owing to vacancy in the president's post, despite the COPRA clearly stating that whenever a vacancy occurs, the senior-most member of the commission should discharge the functions of president. The COPRA also mandates, in S. 29-A, that no act or proceeding of any of the commission shall be invalid 'by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof'.
36. PIB release dated 11 December 2015.
37. According to a PIB release dated 10 March 2015, hardware has been supplied at 550 consumer forums (34 State Commissions and 516 district consumer forums) and online access has been provided to 521 consumer forums (33 State Commissions and 488 district consumer forums).
38. As discussed during the National Conference on 'Effective Functioning of Consumer Fora' organised by the Ministry of Consumer Affairs, Food and Public Distribution on 29 May 2015 in New Delhi.
39. Preamble of the COPRA Bill.
40. Manohar S. Kamath. 2015. 'Changes in Consumer Protection Act: Devil is in Implementation', *Deccan Herald*, 28 January, available online at <http://www.deccanherald.com/content/456083/changes-consumer-protection-act-devil.html> (accessed on 15 December 2015).
41. Ministry of Consumer Affairs. 2014. 'Comparative Statement on Proposed Amendments to the Consumer Protection Act, 1986', 5 November, available online at

<http://consumeraffairs.nic.in/consumer/writereaddata/Comp%20Statement%20CP.pdf> (accessed on 15 December 2015). The amendments are, however, silent on the reasons for interminable delays in the passing of orders, the reasons for continuance of specific formats for complaints, methods to reduce pernicious adjournments, and prolonged arguments or for time-bound disposal of cases.

42. Professor Moog aptly summarises this need of the hour: 'As the law-and-society movement amply demonstrates, the law and the actors involved in enforcing and interpreting it do not reside isolated in a rule-bound universe of their own making, but must interact with societal forces on a daily basis and respond to economic and political changes and demands.' *See*, Moog, 'Study of Law and India's Society', p. 137.



APPENDIX

Data Availability in High Courts

Data available

Data unavailable

	Rajasthan	Madhya Pradesh	Madras	Calcutta	Kerala	Delhi	Gujarat	Hyderabad	Karnataka	Allahabad	Himachal Pradesh	Orissa	Patna	Bombay	Jharkhand	Uttarakhand	Sikkim	Bombay at Goa	Punjab and Haryana	Tripura	Grand Total
Act																					7
Action Date																					1
Bail Number																					2
Before Honourable Judge Bench																					20
Case Listing Type																					14
Case Originated From																					1
Case Type																					2
Case Updated On																					20
Cause List Date																					11
Cause List Date																					20
Class Code																					3
Combined Case Number																					20
Court Hall Number																					20
Court State																					10
Current Position																					1
Current Stage																					15
Current Status																					20
Date Filed																					13
Date of Hearing																					3
Disposal Date																					8
Disposed Type																					5
Disposed Type District																					15
Filing Advocate																					2
Filing Number																					6
Last Action Taken																					2
Last Date of Action																					1
Last Listed On																					13
Last Order																					2
Last Posted For																					1
Latest Order																					1
Listed Times																					2
Listing Date																					4
Lower Court Case Number																					6
Lower Court District																					5
Lower Court Judges																					3
Lower Court Judgment Date																					7
Lower Court Name																					7
Lower Court Other Details																					2
Lower Court Police Station																					3
Next Hearing Date																					12
Next Listing Date																					7
Next Listing Purpose																					4
Order Type																					20
Petitioner																					20
Petitioner Advocate																					19
Police Station Name																					1
Posting Stage																					1
Purpose																					1
Respondent																					20
Respondent Advocate																					19
Stage Name																					2
Year																					20
Grand Total	32	31	29	28	28	25	25	25	24	23	23	23	23	21	19	17	16	15	14	14	20



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