



Wish List for Judiciary

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This editorial is based on the article "[Wish list for judiciary](#)" which appeared in Business Standard on 8th May, 2019. The article talks about the problems of judicial delay and economic growth.

The administration of justice

With the advent of economic liberalization, India has made significant progress in different sectors on the economic front, but somewhere the growth is stymied by the justice dispensation mechanism. Not only the administration of justice has been inefficient for general public but also it has also increased instances of **rent seeking*** in India.

[**Rent-seeking** is a concept in public choice theory as well as in economics, that involves seeking to increase one's share of existing wealth without creating new wealth. Rent-seeking results in reduced economic efficiency through misallocation of resources, reduced wealth-creation, lost government revenue, heightened income inequality, and potential national decline; Dictionary: the fact or practice of manipulating public policy or economic conditions as a strategy for increasing profits.]

The multidimensional contours of justice

John Rawls, an American moral and political philosopher in the liberal tradition, defines Justice as basic fairness in multidimensional interactions between humans and their institutions.

The purpose of such varied interactions, he states is to balance democracy with striving for security. And if security is not provided to both public and commerce, growth will suffer and so will the fate of a developing nation.

Connecting the dots in judicial dispensation and growth

“We want people to come and ‘Make in India’, we want people to come and invest in India, but those whom we are inviting are also concerned about the ability of the judicial system in the country to deal with the cases and disputes that may arise out of such investments.

- Efficacy of the judicial system is therefore vitally connected with the development of the country.
- It is, as such, not only the poor litigants who are languishing in jails, but also the development of the country.

The problem with judicial dispensation in India

- **Pendency and delay**
 - There is a high level of pendency (across the six tribunals, estimated at about 1.8 lakh cases)
 - **Pendency has also risen sharply over time.**
 - Nearly every tribunal started with manageable caseloads, disposing instituted cases every year, but that soon spiralled out of control.
 - Compared to 2012, there is now a 25% increase in the number of unresolved cases.
 - The average age of pending cases across these tribunals is 3.8 years.
 - It is noteworthy that in two cases — telecommunication and electricity — the explosion in pendency resulted from interventions by the Supreme Court.
- **High Courts**
 - Even with the creation of tribunals at different points in time did not alter pendency at the High Courts nor their ability to deal with other economic cases.
 - Their average duration of pendency is arguably the worst in most cases, which is nearly 4.3 years for 5 major High Courts.
 - **The average pendency of tax cases is particularly acute at nearly 6 years per case.**

Reasons for pendency and delay

- **Expansion of Discretionary Jurisdictions**
 - **Though economic cases are complex, in some cases increased overload is due to the expansion of discretionary jurisdictions by Courts,** without any countervailing measures that either balance the scope of other jurisdictions or improve overall administration and efficiency.
The higher judiciary has transformed into Courts of first rather than last resort, and have consistently fused constitutional law and tort law, dissolving traditional distinctions between public and private law.

The immediate fallout of this expansion has been the steady de-legitimization of the capacity of lower courts' private law mechanisms.

- **The possible reason for this is the ever-expanding Writ Petitions under Art. 226.**
- **There are currently more than one million Writ Petitions pending at the High Courts,** constituting between 50-60% of the Court backlog, with average pendency fluctuating between 3-10 years.
- **Burden from Original Side Jurisdiction**

Some High Courts of the country retain a unique original jurisdiction, under which the High Court, and not the relevant lower court, transforms into the Court of first instance for some civil cases.

 - **These cases occupy a significant share of the Court's docket.**
 - **The Delhi and Bombay High Courts have original jurisdictions that occupy nearly 10-15% of their workload.**

In 2014, the share of original side cases was as high as 30% for the Delhi High Court.
- **Supreme Court: Expansion of Special Leave Petition Jurisdiction**

Rising pendency also results from the injunction [a judicial remedy issued in order to prohibit a party from doing or continuing to do a certain activity] of cases by Courts.

For example, in the case of Intellectual Property Rights (IPR) cases, injunctions have led to about 60 percent of cases being stayed, whose average pendency is 4.3 years. The average age of cases waiting for final judgment is inordinately high at 7.9 years.

The cost of delays

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The above table gives a figurative idea about the cost of delay stemming from the periods of judicial delay.

- **The overall impact of rising pendency at Appellate Tribunals, High Courts and the Supreme Court, coupled with the rising use of injunctions and other blunt instruments has led to spiralling legal expenses of Corporate India.**
- **Resultantly, Arbitration is one possible option, but even arbitrations in India has been plagued by high costs and terrible delays, which keeps arbitration out of the reach of common citizen.**

Big corporations therefore prefer to take their arbitration to jurisdictions like Dubai and Singapore as India proves costly and cumbersome.

How slow courts are detrimental to the economy?

Slow courts increase the cost of enforcing contracts by delaying the payoff of taking an agent to court.

If contracts are costly to enforce because cases take years or even decades to resolve, parties may avoid making investments or engaging in potentially surplus-generating transactions.

- **It is proved by many researches that contract-intensive industries grow relatively faster than those in non-contract-intensive industries when they are located in states with efficient courts.**
- In fact, in India, the difference in employment growth rates between contract-intensive vs. non-contract intensive industries is positively associated with having faster courts.

Differential growth rates vs. court efficiency

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This figure displays the difference in average employment growth rates between contract-intensive industries and non contract-intensive industries (vertical axis) plotted against court efficiency (horizontal axis) for major Indian states.

Court efficiency is measured as the fraction of cases that are resolved within one year in district/sessions courts in 1999.

Poor contract enforcement

Uncertain cash flow is a major reason for companies shutting down. Cash flow becomes especially uncertain when contracts are not enforceable.

- India really cannot hope to become a developed economy in the decades to come without resolving the problem of contract enforcement.
- **Poor contract enforcement tends to increase the risk and reduce the returns (increased legal costs), thus affecting the overall risk to return ratio.**
 - As a result, businesses don't engage in economically and socially beneficially activity such as innovation.
 - **Similarly, the failure of legal mechanisms in guaranteeing loan repayment has resulted in banks bearing greater risks.**
 - **The outcome is that interest rates are higher and banks are reluctant to lend to socially beneficial sectors such as agriculture and infrastructure.**
- Another effect of a poor contract enforcement mechanisms is the spurt of informal and often illegal channels of dispute resolution.
 - These make use of local leaders and under-the-table dealings to help settle disputes. Keeping aside the issue of biased and poor-quality decisions, this also brings undue power into the hands of middlemen and facilitators.

This, in turn, creates problems such as increased corruption and the undermining of the rule of law.

A Case Study:

The success of an e-commerce company depends on its ability to retain consumers' trust.

For **Snapdeal and eBay**, this trust has been waning because of frequent reports of fake and poor-quality products sold on their websites.

- A poor contract enforcement system further prevented them from ensuring good quality products from their suppliers.
- On the other hand, Flipkart and Amazon through their hybrid model have been able to maintain the quality of their own products.
- To compete with these products, other sellers also had to improve the quality of their products.
- Thus, the latter two have succeeded while the others have not been able to.

Government effort in improving administration of justice

- The average provision for the judicial sector is only 0.2% of GDP.
- Judges have lamented the condition of infrastructure of courts in judgements as well as in public platforms with little impact on successive governments.
- The problem is further compounded by the continuous tussle between the Judiciary and Executive.

This can be best observed in the changing role of the Supreme Court from being a Constitutional Court to a Court of Appeal.

Why the reluctance on part of the Government?

- Despite the dire need for speeding up and modernising the grossly inefficient justice delivery system, a large chunk of the meagre funds allotted in the Budget remains unused.

Notwithstanding a well over 100% increase in allocation between 2014-15 and 2018-19 from 2,047 crore to 4,386 crore, allocation to judiciary against the total budget has remained between 0.2 percent and 0.4 percent for many decades now.

Concerning utilization efficiency, against a Rs 5000 crore special grant to improve delivery of justice sanctioned by the 13th Finance Commission to the States which was to be used over a 5-year period, only 20% was ultimately utilised.

- The problem is not limited to the inadequacy of resources and inefficiency in utilisation alone, it is much deeper.

- **Since the responsibility of providing resources to the judiciary rests with the executive, the stark difference in perspective of the two institutions, therefore, influences the budgeting for judiciary.**

A World Bank paper, clearly elucidates this point - “the requirements of the executive branch of government—especially for fiscal restraint and accountability in financial management—are often perceived as infringing on the principles of the judicial branch (‘fairness’ and ‘independence’ in the administration of justice).”

According to this paper, the problem is not simply insufficient funds, but a mutual perception that neither branch properly understands, or respects, the other’s mandate and goals.

- **Governments, as such, can use the Fiscal Responsibility function of budget allocation to judiciary as a lever to exercise control over it.**
- **Consequently, delivery of justice, more so timely delivery of justice to citizens in general and marginalised people in particular is among the most outstanding yet least focused issues.**

But on the economic front, it is causing a condition in which players are willing to bypass the system by paying rents to government officials, a system that had become customary during the License Raj.

Officials are also willing to accept quick money since there is little chance of getting caught, making rent-seeking a norm.

Way forward

- **If enforceability problem is to be solved, sufficient number of judges must be recruited and vacancies in courts must be quickly filled.**
- Investments in judicial infrastructure is also needed.
- **Courts may revisit the size and scale of their discretionary jurisdictions** and avoid resorting to them unless necessary (this can help reclaim the Constitutional and Writ stature of the higher judiciary as originally envisaged).
- **Further, it is high time to introduce fully digital systems in the courts.**
 - There are courts like Delhi High Court, which has adopted a high level of digital transformation, while the Supreme Court still functions through manual systems.
 - Lower courts around the country are mostly yet to be introduced to meaningful digitalization.
- **Downsizing or removing original and commercial jurisdiction of High Courts and enabling the lower judiciary to deal with such cases can also speed things up.**

Early results from the Delhi High Court suggest that reducing the size of original jurisdiction in 2016 allowed the court more time to reduce its overall pendency.

Supreme Court’s Successful Management of Tax Litigation

- The Supreme Court's recent experiment with constituting an exclusive bench for taxation produced impressive results, which may be replicated for other subject matters, and emulated by other High Courts that do not have special rosters [roster here refers to a system/record/diary where the allocation of cases for judges is done] for daily hearings.
- This can serve as a good example of how to reduce the specialized cases.

Drishti Input:

The inefficient administration of justice has not only social but also economic costs. Do you agree? Substantiate your answer with arguments.
