Courts and Tribunals

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How to Modernise the Working of Courts and Tribunals in India

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Abstract

Indian courts are clogged with large backlogs. Part of the reason for the problem is that cases take a very long time to move through the courts. The slow progress of court cases is harmful for Indian democracy and economy.

We suggest that part of the reason for the backlog is the poor administrative support available to judges. Following several Supreme Court judgements, we propose that a separate organisation (The Indian Courts and Tribunals Services, ICTS) be set up to facilitate administrative functions.

Care needs to be taken while designing ICTS to ensure the protection of judicial independence. The functions of ICTS would also involve a re-engineering of the business processes of the courts to take full advantage of modern technology.

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Acronyms

BIT	Bilateral Investment Treaty.
FSAT	Financial Sector Appellate Tribunal.
FSLRC	Financial Sector Legislative Reforms Commission.
HMCTS	Her Majesty's Courts and Tribunals Service.
ICTS	Indian Courts and Tribunals Services.
SAT	Securities Appellate Tribunal.
UIDAI	Unique Identity Authority of India.

1 Introduction

One of the great strengths of the Indian state is the independence of its judiciary. Judges have generally not been hesitant to strike down actions of the executive or the legislature when these actions have been in violation of the constitution. This is a remarkable achievement of Indian liberal democracy.

However, there are major problems in the judiciary as well. Courts are clogged with enormous backlogs, and cases take very long from start to finish. The slow progress of court cases has important adverse consequences for Indian democracy and economy. Citizens lose faith in the functioning of key state institutions; individuals and firms become comfortable reneging on contracts, knowing that contract enforcement is weak.

This issue cannot be fixed merely by improvements in laws; good laws are not a substitute for weak institutions. One big problem has been that of judicial vacancies. But appointing additional judges in itself is not a solution. The productivity of judges needs to be increased. For this, it is important to separate the administrative functions of courts from their judicial functions, and hive these administrative functions off into a separate agency.

This agency should also be given the task of re-engineering court processes to achieve greater efficiencies. This re-engineering should not be just a sprinkling of technology on top of existing processes. Instead, it should involve a thorough re-conceptualisation of court processes, using technology wherever appropriate to drastically reduce delays and achieve better judicial outcomes.

In this document, we propose that the government create a dedicated administrative agency to —

1. Redesign court procedures, bringing in best practices;
2. Administer courts and tribunals efficiently; and
3. Advise the legislature and judiciary on legal reforms.

This proposal is not novel. Many other common-law countries such as UK, USA, Australia and Canada have such court administration agencies. In India, the Supreme Court has repeatedly suggested the creation of an agency to support tribunal administration. Great care needs to be taken in the design of this agency. Institutionally, it should be independent of the executive and the legislature. It should be under the control of, and accountable to, the judiciary.

2 The Problem

2.1 Judicial Inefficiency

Indian courts are clogged with enormous backlogs, and cases take very long from start to finish. According to the latest data, there are more than 2.2 crore cases pending in the lower courts across India,[1] about 39 lakh cases pending in High Courts,[2] and about 60,000 cases in the Supreme Court.[3] In many courts, the rate of institution of new cases is higher than the rate of disposal, meaning that the number of pending cases is increasing.

[1] National Judicial Data Grid, *Summary Report of India as on Date 19/07/2016*, URL: http://164.100.78.168/njdg_public/main.php (visited on 07/19/2016).

[2] Supreme Court, "Court News October 2015 - December 2015", in: 10.4 (2016), URL: http://supremecourtofindia.nic.in/courtnews/Supreme%20Court%20News%20Oct-Dec%202016.pdf (visited on 07/19/2016).

[3] Ministry of Law and Justice, Government of India, *Pending Court Cases*, URL: http://pib.nic.in/newsite/PrintRelease.aspx?relid=137291 (visited on 07/19/2016).

Box 1: India pays $4 million in damages because of non-functioning judiciary

India and Australia have a Bilateral Investment Treaty (BIT) to promote international investments. One of the clauses of the BIT is that the host nation provide investors with "*effective means of asserting claims and enforcing rights*".

One of the Australian companies investing in India under this treaty was called White Industries. It later had a commercial dispute with Coal India. The dispute was resolved through an international commercial arbitration in Paris. The arbitrator ruled in favour of White Industries in May 2002. In September 2002, Coal India applied in the High Court of Calcutta to set aside the arbitration order. White Industries applied for the enforcement of the international arbitration order, also in September 2002. This led to confusion about who had jurisdiction: the Delhi High Court or the Calcutta High Court? The matter went up to the Supreme Court and was not resolved till June 2010, eight years after the arbitration award.

In 2010 White Industries initiated arbitration against the Republic of India for not providing the *"effective means of asserting claims and enforcing rights"* required by the India-Australia BIT. The treaty arbitrator held in favour of White Industries and ordered India to pay A$ 4,085,180 with interest. India was also required to pay litigation expenses of USD 84,000 with interest.

This case highlights how a company could not even *enforce* an arbitration order after *winning* an arbitration.[a]

[a] *UNCITRAL Arbitration between White Industries Australia and The Republic of India*, Singapore, Nov. 3, 2011, URL: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (visited on 05/09/2016).

The slow progress of court cases has important adverse consequences for Indian democracy, and also for the working of the economy. Important constitutional questions are left unanswered for long periods because of the inability of the Supreme Court to constitute adequate Constitutional Benches;[4] meanwhile, firms and individuals may feel comfortable reneging on contracts knowing that contract enforcement is weak. As an example, slow enforcement encourages bad behaviour by borrowers which may detrimentally impact credit markets.[5] The consequence is that there may be immense numbers of contracts that are beneficial, but not entered into because of lack of trust in the enforcement mechanisms of the state. These losses can be immensely harmful to the economy.

The World Bank's *Ease of Doing Business Report 2016* index measures judicial performance (among other related matters) under the heading 'Enforcing Contracts'. Of the 190 countries in the index, India ranks amongst the very worst, just 12 ranks from the bottom. Our neighbours Nepal, Pakistan, and even war-torn Afghanistan rank above us. Malfunctioning Indian courts has become an international problem and caused embarrassment to the country, as the example in Box 1 shows.

2.2 Solutions

Most judicial reforms focus on enhancement of quality of judicial functions (disposal, pendency, judges' appointment), the more visible aspects of a court's functioning. Inadequate attention is given to enhancing the quality of administrative functions — the back-end administrative functions that facilitate efficient performance of the judicial functions.

[4] Nick Robinson et al., "Interpreting the Constitution: Supreme Court Constitution Benches since Independence", in: *Economic and Political Weekly* Vol. 46.Issue No. 09 (Feb. 26, 2011).

[5] Matthieu Chemin, "Does Court Speed Shape Economic Activity? Evidence from a Court Reform in India", in: *Journal of Law, Economics, and Organization* 28.3 (2012), pp. 460–485, DOI: 10.1093/jleo/ewq014, URL: http://jleo.oxfordjournals.org/content/28/3/460.full.pdf+html (visited on 01/20/2016).

In the public discourse, there is a great emphasis upon increasing the *number of judges*. It is, indeed, possible to sharply increase the number of judges, and increase the rate at which cases are processed, while holding all else unchanged. However, it is important to ask whether the environment in which judges are placed is conducive to productivity. The Law Commission has expressed a concern that increasing the number of judges without adequate infrastructure may not reduce delay.[6] The main argument that we present ahead is that there are opportunities for substantial productivity enhancement of courts.

The most useful indicator of judges' productivity is the ratio of judges to disposals per year. A study commissioned by the Law Ministry found that in 2004 the Delhi District Court judges had 654 disposals per judge. As an international comparison, the comparable figure for Australian judges is 1,336 disposals per judge — around double the level of Delhi disposals. The evidence suggests that Australian judges have double the disposal capacity of Delhi judges.[7] If this problem is to be solved only by appointing additional judges, then India has to achieve twice the judge to population ratio of Australia. Appointing so many judges may not be feasible.

Thus the problem of judicial delays may not be solved by just increasing the number of judges. Instead, the productivity of Indian judges should be improved by streamlining the administrative functioning of the Indian judiciary. This note focuses on this aspect. It explains the need for institutional reforms through a clear separation between judicial and administrative functions of the Indian judiciary.

3 Separating the Judicial and Administrative Functions

3.1 Judicial versus Administrative Functions of Courts

Judicial performance has various dimensions: independence, fairness, quality of justice delivered etc. However, for the present purpose, we focus on the time elapsed, and the transactions costs experienced, over the time period of the judicial proceeding. It is useful to decompose the working of the judiciary into judicial versus administrative aspects:

Judicial function The core judicial function of judges is allocating, listing and deciding of cases. Judges have to perform these functions in a time bound manner and in compliance with applicable procedures. Judicial time is precious and should be sharply focused on completing the core judicial function.

Administrative function For effective functioning, courts require competent administration to ensure that processes are followed, documents are submitted and stored, facilities are maintained, and human resources are managed. Court administration must support the judges in performing their core judicial function efficiently. Efficient administrative function is a pre-requisite for efficient judicial function.

As an analogy, consider how a senior surgeon works. Box 2 shows how the time of a master heart surgeon is utilised, with an array of support functions being performed by teams surrounding the surgeon. In terms of demands on intellectual capability, judges are exactly like a surgeon. In Indian courts, the responsibility for administration is assigned to the chief judicial officer of the court. However, judges are not given adequate support teams or adequate administrative support. This places significant demands on their time. Their focus is repeatedly interrupted, which hampers the process of imbibing the facts and legal arguments about the case in front of them.

[6] See Law Commission of India, *Report No. 245, Arrears and Backlog: Creating Additional Judicial (wo)manpower*, 2014, URL: http://lawcommissionofindia.nic.in/reports/Report245.pdf (visited on 05/10/2016).

[7] See India Development Foundation, *Judicial Impact Assessment: An Approach Paper*, May 2008, URL: http://lawmin.nic.in/doj/justice/judicialimpactassessmentreportvol2.pdf (visited on 05/14/2016), at pg.46.

Box 2: Surgeon and Judge

Consider a super-specialist senior heart surgeon. Before the senior surgeon enters the operation theatre, the anaesthetist would have administered anaesthesia to the patient; the nurses would have kept the necessary equipment ready; junior doctors would have done the basic preparatory work before the senior surgeon starts his work. The senior surgeon would come into the operation theatre, perform the surgery at a stretch, finish it and leave. The junior doctors and other staff members would finish the rest of the procedure. In other words, the senior surgeon's task is more focused since he is able to operate with a team, which is supported by the hospital administration.

The entire surgery may run for many hours, but the time utilised of the senior heart surgeon may be as little as 20 minutes. One heart surgeon is able to do much more work by focusing on the most critical function, while an array of juniors surrounding the surgeon perform support functions. If the heart surgeon had to do all other work (e.g. administering anaesthesia, setting up a heart-lung machine, collecting up instruments, preparatory work, cleaning up, etc) then this would be a poor use of his time. The number of surgeries that he could do per day would go down substantially.

If, in addition, the heart surgeon is given the responsibility of managing the hospital administration, this would have further negative effects. It would hamper the *focus* of the heart surgeon, which runs against the requirement of extreme concentration in doing heart surgery.

Nation	Office
UK	Her Majesty's Courts and Tribunals Service
USA	Administrative Office of US Courts
Canada	Court Administration Service
Australia	Court Services, Victoria

Table 2: Dedicated court management offices in other nations

Just like a senior surgeon does not have to worry about hospital administration, a judge should not have to worry about day-to-day court administration. Like the surgeon, judges need to work in a team supported by a specialised company for administrative support functions. Many other nations with a common law background have created dedicated organisations to support the judiciary. Table 2 is an illustrative list which names a few.

India, too, needs to separate the judicial functions of its courts and tribunals from their administrative functions. These administrative functions should be performed by a dedicated company (with majority board level representation from the judiciary). This will free up judicial time, which can be used only for judicial work.

3.2 A well accepted idea in India

The idea of a separate administrative agency for Indian judiciary owes its origin to multiple judgements of the Indian Supreme Court. The Supreme Court in *L. Chandra Kumar vs Union Of India*, while recommending reforms to the Indian tribunal system, observed that 'one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements'. The Court found the current framework where different tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments to be unsatisfactory since there was no uniformity in admin-

istration. Therefore, taking into account the Indian context, the Court suggested creation of a single umbrella organisation:[8]

> We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set-up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal Ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. [...] The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system.

Again, in *Union of India v. R. Gandhi*, the Supreme Court extensively referred to Sir Leggatt's review of UK tribunals,[9] based on which Her Majesty's Courts and Tribunals Service (HMCTS) was set up. The Court held that 'unless wide-ranging reforms as were implemented in United Kingdom and as were suggested in *L. Chandra Kumar vs Union Of India* are brought about, tribunals in India will not be considered as independent'.[10]

Recently, in an interim order in *Madras Bar Association v. Union of India*, the Supreme Court has again instructed the Central Government to consider the observations made in *Union of India v. R. Gandhi* (in paras 64 to 70) dealing with the recommendation of creating an independent agency, like UK HMCTS, to provide administrative support services to Indian tribunals.[11]

After originating in the Supreme Court, the idea has found proponents even within the Parliament. Mr Rangasayee Ramakrishna MP, in his speech before the Rajya Sabha, proposed the setting up of a public sector organisation to support the administrative functions of the Indian judiciary. He stated:[12]

> [...] there are very good experiments in UK and in the State of Victoria, in Australia, where all the procedures and formalities, pre-hearing formalities, have been converted into a corporatised structure. This, in the United Kingdom, is called Her Majesty's Courts and Tribunal Services. I think we should study this procedure and introduce a system by which all the back office formalities are taken over by a public sector organisation and the Judges will be left only for hearing the cases.

Recently, the Financial Sector Appellate Tribunal (FSAT) Task Force chaired by Justice Sodhi made an extensive study of this issue. It reviewed international practice in this regard and observed that many advanced jurisdictions usually have a specialised court administration agency to support administrative functions. The Task Force took note of the National Information Utilities model which was proposed in the *Report of the Technology Advisory Group for Unique Projects* to run technology intensive projects within the Government.[13] Accordingly, it suggested setting up of a company — Financial Sector Tribunal Services — to provide administrative support to all financial sector tribunals. This work is described in more detail in section 4.5.

Clearly, the idea of setting up an administrative services entity to assist Indian courts and tribunals is already well accepted across a broad set of institutions, including, most importantly, the Supreme

[8] Supreme Court, *L. Chandra Kumar vs Union Of India*, Mar. 18, 1997, URL: https://indiankanoon.org/doc/1152518/ (visited on 05/09/2016).

[9] Andrew Leggatt, *Tribunal for Users: One System, One Service*, Mar. 2001, URL: http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-fw.htm.

[10] Supreme Court, *Union of India v. R. Gandhi*, May 11, 2010, URL: https://indiankanoon.org/doc/748977/ (visited on 07/20/2016), paragraph 23.

[11] Supreme Court, *Madras Bar Association v. Union of India*, Jan. 18, 2016, URL: http://www.mayin.org/ajayshah/lfs/sc20160118_madBarAssn.pdf.

[12] Rajya Sabha Session 235, *Official Debates Part 2, Discussion on Working of Ministry of Law and Justice*, Apr. 29, 2015, URL: http://rsdebate.nic.in/bitstream/123456789/649313/2/PD_235_29042015_p408_p484_35.pdf, pp. 464.

[13] See chapter 1.2 at pg 10 of Technology Advisory Group for Unique Projects, *Report of the Technology Advisory Group for Unique Projects*, Jan. 31, 2011, URL: http://finmin.nic.in/reports/tagup_report.pdf (visited on 05/15/2016).

Court of India. Such an entity will be well placed to redesign court processes and to administer them effectively.

3.3 Process re-engineering

The most scarce resources in the working of courts are the time and the attention of the judges. Court processes should be re-engineered to encourage efficient judicial proceedings by optimising the use of these key resources.

One element of this lies in effective use of the attention of the judges, thus reducing the cognitive challenges faced by them. Suppose a case requires, in total, 20 hours or 1200 minutes of judge time. If this time is fragmented as 120 sessions of 10 minutes each, judges find it difficult to keep track of the issues and form a good judgement. In many Indian courts, a judge may handle as many as 60 matters in a day. Each new matter requires understanding the progress of the case so far before the judge can issue further orders. Such a large number of cases lead to extreme levels of cognitive burdens on judges.

The other element of process re-engineering should be to use the court's time better. Existing court processes do not encourage the efficient use of judicial time. For instance:

- Judicial proceedings are often initiated before the judge without complete pleadings or evidence.
- Pre-hearing conferences are not held to pre-fix the time schedule for carrying out the hearing. Lawyers are uncertain of their schedule till the last moment, leading to higher absenteeism and thereby compelling the judges to adjourn cases often.
- Oral hearings spill over across days and months, causing immense delays in disposing of cases.

These lead to huge delays and backlogs, tremendous waste of time of litigants, and fragmented attention of judges. Thorough and careful improvements in the processes will present judges with an environment where it is easier to fully master each case, and write high quality rulings, while ensuring that less time is wasted.

A key element in the process re-engineering will be the use of information technology. Computer and telecom technology has made possible dramatic improvements in process efficiency in all domains. However, the mere use of computers does not imply that process efficiencies will arise. These gains are obtained through deeper process improvements.

Aadhaar would not have been possible by hiring thousands of registrars of births and deaths and computerising them. It was possible by radically redesigning the method of identity document creation. Similarly, we need to move beyond 'computerising' the judiciary and instead focus on process re-engineering.

The entire process starting from filing to disposal and archiving of cases can be digitised using available technology. However, presently this is either not being done, or is being done without adequate thinking about business process re-engineering. To illustrate, there is an online e-filing mechanism in the Supreme Court of India. The Advocate-on-Record doing the e-filing is notified online of the defects. He is supposed to rectify the defects and ultimately submit a *hard copy*. The requirement of a physical document defeats the very purpose of e-filing. It is not surprising that e-filing never took off. This system has not improved the Supreme Court's efficiency.

Instead of such superficial sprinkling of technology over old processes, what is needed is an institutional reform to enable full business process redesign of Indian judiciary based on contemporary technology. This leads us to the deeper issue: Indian court administration has not adequately engaged the right professional talent necessary to improve court functioning through technology solutions. Most court automation committees usually comprise of judges, lawyers and registrars. All these persons —

Box 3: Income Tax e-filing

The 2006 Budget Speech envisaged that the income tax department will undergo process re-engineering. Accordingly, a global tender was floated and a management consultant firm was appointed as external consultant for the project.

This was not a mere reimplementation of the paper based system using computers. The system was completely moved online. This even required statutory changes which did away with the requirement to send a physically signed confirmation of filing of records. It is because of this extensive project that today income tax returns can be easily filed online.

Today *no physical documents* have to be submitted for tax return filing.

1. Lack knowledge on business process engineering. They may be experts in law but not in the specialised discipline of systems design;
2. Are invested in the present ways. They are experienced practitioners who have risen to the top of the profession under the present arrangements, and they may tend to treat the present system as broadly sound.

While judges and lawyers may regularly experience the problem of judicial delays in courts, they may not be in a position to solve them. This requires external help in *systems design* of computerisation of court processes. Consequently, although the Law Commission envisaged e-filing in Indian courts way back in 1988,[14] till now there are very few successful examples of e-filings in Indian courts.[15] For contrast, Box 3 shows the approach used by the Income Tax Department to computerise the filing of tax return. A similar, ground-up redesign is required in the judiciary.

4 The proposal: Establishment of Indian Courts and Tribunal Services (ICTS)

4.1 Objectives

The Indian Courts and Tribunals Services (ICTS) shall be an entity that provides high quality administrative support services to a court or tribunal. ICTS should not in any way perform any judicial function — listing, allocating or deciding cases. It would enter into service level agreements with different courts or tribunals based on which it would charge fees for the services it provides.

The major roles to be fulfilled by the ICTS would be:

1. Providing leadership to the task of re-engineering court procedures;
2. Providing administrative support to courts and tribunals by implementing these procedures.
3. Advising the legislature and judiciary on legal reforms.

4.2 Corporate Structure

The following options are available for setting up ICTS:

[14] Law Commission of India, *The Supreme Court - A Fresh Look*, 125, 1988, URL: http://lawcommissionofindia.nic.in/101-169/report125.pdf (visited on 07/20/2017).

[15] The Delhi High Court is a notable exception.

Company ICTS could be set up as a profit making but not profit maximising company limited by shares under the Companies Act, 2013. However, the ICTS must not have any private shareholder neither should it be listed at any point of time. Instead, the shares of ICTS should be held by the Central Government, subject to the Board composition being encoded into the Memorandum of Association.

Executive Order Agency A Government Order could also set up ICTS in the same way as Unique Identity Authority of India (UIDAI).

National Trust A trust settled by the Government of India.

Statutory Corporation Under appropriate legislation.

If necessary, a phased approach could be adopted, where a body is first made under an executive order, then turned into a company.

4.3 Governance

Whatever be the structure, the top governing body of the ICTS (referred to as the "ICTS Board" here) should comprise of judicial members, a chief executive officer and independent members. The judicial members must always be more than half of the total number of Board members - this is necessary to ensure judicial independence. They should ideally be senior puisne judges of Supreme Court or such other judges as may be nominated by the Supreme Court. The chief executive officer should be a professional manager and need not necessarily have any legal qualifications.

The independent members should be nominated by the Central Government and should bring in technical knowledge in non-legal disciplines like finance, accounting, and public administration, which would be needed in running this agency. The technical legal knowledge will naturally be provided by the judicial members. Based on the Board's decisions in the form of board resolutions by majority vote, the CEO will execute the necessary actions required to provide the relevant administrative support services to the courts or tribunals. This corporate board model will allow the ICTS to scale up its services and support more judicial institutions if required in the future.

The ICTS should incorporate the best features of corporate governance. It should follow the Companies Act 2013 wherever it is not in conflict with its functioning and has obtained a specific exemption from the government. This will automatically bring a level of transparency in the functioning of the ICTS.

The overarching principles of the organisation (such as supporting the independence of the judiciary, being responsive to the needs of the judiciary, providing professional and efficient support for the administration of justice) should be codified in the Memorandum of Association of the organisation.[16]

4.4 Functioning

ICTS should be a very lean body, that provides intellectual leadership in re-designing court processes, and implements these processes through contractors. Accordingly, it should have very few permanent staff. An indicative list of its functions is given below:

- Providing leadership to the task of re-engineering court procedures;
  - Act as a centre for discussion, debate, and analysis of court-process redesign;
  - Create an overall plan for the redesign of court processes;

[16] See, as an example, *HM Courts & Tribunals Service: Framework document*, Framework Document, Official Policy Document, July 2014, URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf (visited on 05/15/2016).

  - Procure high-quality management consultants to create a detailed design;
  - Procure IT, HR, and other consultants to implement the design;
  - Supervise the work of these consultants and ensure successful implementation.
- Providing administrative support on an ongoing basis to courts and tribunals by implementing these redesigned procedures.
  - Arrange for systems and manpower to implement these processes.
  - Ensure smooth and continuous operation of the court procedures, including maintenance of systems.
  - Facilitate incidental processes such as real estate management, facility management, etc, again through contractors.
- Advising the legislature and judiciary on legal reforms.
  - Act as a public think-tank in the area of judicial and legal reforms;
  - Analyse reform proposals, conduct (in coordination with the judiciary and the legislature) experiments to try out these proposals, and evaluate their results;
  - Promote reform by providing proposals and draft laws to the government.

To begin with, the ICTS could provide these services to tribunals, high courts, and district courts located in Union Territories. It could also provide these services to state courts if approached by them.

4.5 Developmental work which has taken place

Some work has already been done in India towards thinking through the detailed design and implementation of an administrative service company for courts and tribunals. This work is described below.

The Ministry of Finance, Government of India, constituted the Financial Sector Legislative Reforms Commission (FSLRC) on March 24, 2011, with a view to rewriting and cleaning up the financial sector laws to bring them in tune with the current requirements. The Terms of Reference required FSLRC to 'examine a combined appellate oversight over all issues concerning users of financial sector'. Accordingly, FSLRC suggested expansion of the Securities Appellate Tribunal (SAT) to FSAT, which would hear appeals from all financial regulators. It was envisaged as a modern tribunal with a well-designed registry following international best practices in court management. The key outputs of the FSLRC were:

1. The Report of the Commission, which suggested, among other things, the creation of a combined financial appellate tribunal, FSAT. It also contained recommendations to ensure the efficiency of the administration of the tribunal. These recommendations related to standardisation of procedures, the use of information technology, and requirements for accountability.[17]
2. The Indian Financial Code, which creates an institutional architecture for the financial sector in India. It devotes an entire chapter to the administration of FSAT, and casts a duty on the Tribunal to develop efficient systems to enable submission of documents, schedule hearings, record evidence, etc. The Code also provides for the possibility of an agency such as ICTS:[18]

[17] Financial Sector Legislative Reforms Commission, *Report of the Financial Sector Legislative Reforms Commission*, Mar. 2013, URL: http://finmin.nic.in/fslrc/fslrc_report_vol1.pdf.

[18] Financial Sector Legislative Reforms Commission, *Indian Financial Code*, Mar. 2013, URL: http://finmin.nic.in/suggestion_comments/Revised_Draft_IFC.pdf.

> The administrative functions of the Tribunal may be supported by a separate agency or body corporate approved by the Central Government in consultation with the Presiding Officer pursuant to an agreement.

Subsequently, the Ministry of Finance constituted a Task Force on FSAT to support the Ministry in the preparatory work for FSAT. In June 2015, the FSAT Task Force submitted its deliverables to the Ministry of Finance. These deliverables include:

1. Vision Statement, describing the front-end features of the FSAT and the back-end support services that are required to achieve them;
2. Background Note, detailing the proposed structure of the Tribunal Services Agency, drawing from UK HMCTS;
3. Draft Request for Expression of Interest, as well as a draft Request for Proposal, to hire a primary consultant through which consulting and IT companies would be utilised to build the Tribunal Services Agency; and
4. Draft Procedure Rules for the FSAT, to ensure efficient functioning of the Tribunal.

The work done by the FSLRC and by the FSAT Task Force represent an important body of knowledge that can be used to create ICTS.

5 Way forward

1. Department of Justice, Ministry of Law and Justice, should get Cabinet approval on setting up ICTS. The knowledge developed by FSLRC and by the FSAT Task Force should be used to build the ICTS. The Cabinet should also identify an eminent person with experience in large project execution to lead the ICTS.
2. Once a minimal staff is recruited into ICTS, it should procure a management consultant to help build the capacity within the ICTS by developing relevant job profiles and organisation design. The management consultant should hand hold the ICTS for a reasonable period of time.
3. There should be a phased approach to functioning of ICTS. In the first few years, only a limited number of courts and tribunals can be served by ICTS. As it gains experience and expertise its remit can be increased.

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Estimating the potential number of personal insolvency cases at the DRT

ajayshahblog.blogspot.in /2017/12/estimating-potential-number-of-personal.html

by Renuka Sane.

The Insolvency and Bankruptcy Board of India (IBBI) has recently proposed regulations that would bring into effect the personal insolvency sections in the Insolvency and Bankruptcy Code (IBC). These are to be initially applicable for guarantors and small businesses, and over the next few years, be applicable to all individuals. Under the IBC, Debt Recovery Tribunals (DRTs), that were established for adjudication and recovery of debts due to banks and financial institutions, are designated to be the adjudicating authority for personal insolvency.

This article examines the likely load on DRTs due to the notification of personal insolvency sections of the IBC by asking
three questions with respect to personal loans from the banking channel in India:

- What is the spread of personal loans across districts in India?
- How many cases are likely to emerge on account of defaults?
- How well prepared are the DRTs to handle these cases?

The article focuses only on personal loans for two reasons. First, data on bank loans is one of the only reliable sources of public data on individual borrowing. Data on borrowing from other sources is not easily available. Second, there is no ambiguity about personal loans being taken by individuals. Other categories of loans (such as retailers, industry, transport operators etc) may or may not be individuals. The estimates, therefore, are conservative. They exclude loans given by banks to individuals which are not classified as personal loans. They also exclude other formal and informal loans that individuals may have taken from sources such as NBFCs, micro-finance and others.

The question on DRT preparedness also narrowly focuses on the presence of the DRT in a particular district, and the expected case-load where DRTs are present. Questions on procedural efficiency at DRTs, as well as optimal judge strength will also be important, as will be the interaction between the resolution professionals and the DRTs.

Data

Data on credit outstanding is sourced from Table 5.9, Basic Statistical Returns of Scheduled Commercial Banks in India - Volume 45, March 2016, Reserve Bank of India. Personal loans are divided into three categories - loans used for housing, loans used for the purchase of consumer durables and loans for other reasons. Among these, it is likely that loans for housing and consumer durables are secured loans. Table 1 shows the summary statistics for the district-wise spread of outstanding personal loans and the number of accounts as of March, 2016.

Table 1: District wise outstanding accounts for personal loans (RBI, 2016)

	Min	Median	Mean	Max
Outstanding personal loans (in Rs. billions)	0.062	5.2	21.2	953.8
Outstanding personal loans accounts (in 000)	0.27	23.9	85.7	3949.6

The maximum credit outstanding in a district was INR 954 billion in 3.9 million accounts. The data also suggests that the spread of loans is not normally distributed, that is, there exist a few districts with very high outstanding personal loans (in terms of both, value and number of accounts).

Personal loans across India

An understanding of total credit outstanding in each district would be extremely important from the point of view of the impact of personal loans (and defaults on these loans) on the banking system. However, the question of interest is the number of potential insolvencies from the point of view of the DRTs. It is, therefore, more important to focus on the number of loan accounts, than the value of credit outstanding.

For example, if we have two districts with the same value of credit outstanding, but one district has twice as many loan accounts as the other district, the number of default cases are likely to be higher in the first district if one assumes similar rates of default. While it is true that if one DRT sees fewer cases of higher value, while the other sees larger number of cases of lower value, then the staffing, technology and expertise required in the two DRTs is likely to be different. However, from a pure case-load point of view, the number of potential defaults is the statistic of first-order importance.

Figure 1 shows the total number of personal loans outstanding by districts. The darker shaded districts have higher number of personal loan accounts. The yellow dots represent DRT locations.

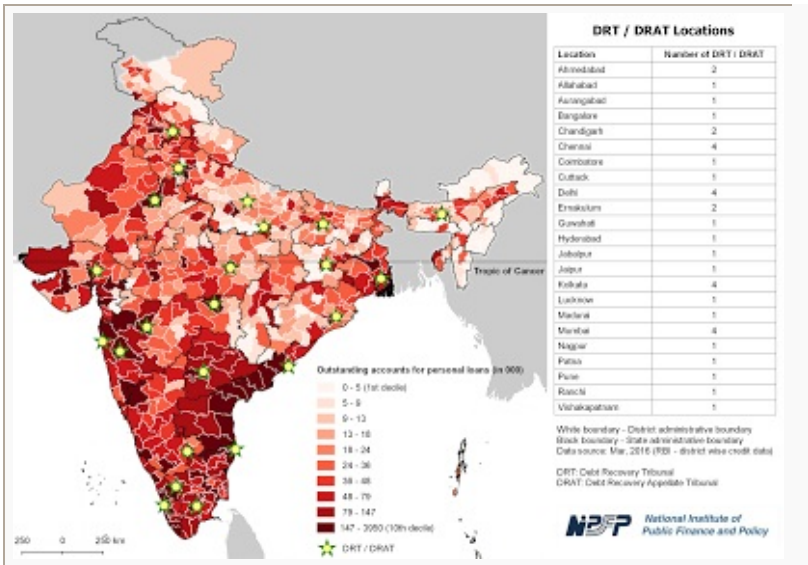

Figure 1: Number of accounts - outstanding personal loans

There is wide variation in the distribution of number of accounts across India. Though the map for credit outstanding is not presented, the variation is similar to that of number of accounts. The DRTs are located in regions with high number of personal loans. However, there are several districts in South and East India that have a large number of loan accounts, but do not have a DRT in their district. Similarly districts in Kutch, Rajasthan, Punjab also do not have a DRT.

If we focus only on the top 10% of districts by total number of personal loans, we end up with 63 districts. The median number of loan accounts in these 63 districts is 233,807 while the average number of accounts is 561,436. Of the 63 districts, almost 70% districts do not have a DRT. However, the top 10 districts in these 63 account for 62% of the total number of accounts, while the top 20 account for 74% of the total accounts. Of the top 10, two districts do not have a DRT. Of the top 20, seven do not have a DRT. From the narrow point of view of presence of DRTs, the situation is perhaps not that bad, as districts with a high concentration of loan accounts (barring the seven in the top 20) do have a DRT.

The absence of DRTs becomes prominent as we move to districts in the lower deciles. Even though the number of loan accounts in these districts may be low, borrowers will need some mechanism to be able to access the DRTs if they are to avail the provisions of the IBC.

Expected case load

Total number of accounts give us a stock of debt at a particular point in time. Not all loans will undergo default, and not all loans that undergo default will come to the IBC to get resolved. To arrive at a number of potential cases, we have to make assumptions about number of defaults, and the number of cases that may come through the IBC route.

Information on defaults on personal loans is sparse. Delinquency on education and housing loans is estimated to be around 8-9%, and 1% respectively. We, therefore, calculate the likely number of accounts that will default in

each district, under assumptions of a default rate of 1%, 5%, and 10%. This analysis assumes that the default rate is uniform across the country, though in reality, this will differ by district. The analysis further assumes that 10% of the cases that default will come to the IBC. This is a purely arbitrary number. Ex-ante we do not know how many cases will come to the IBC, and in fact, the efficiency of the IBC will drive this number over time.

Table 2 provides the potential number of accounts (in '000) that will default if the default rate were 1%, 5% and 10%.

Table 2: Number of potential defaults (in 000) in top 20 districts

State	District	1% of accounts	5% of accounts	10% of accounts	DRT present
NCT of Delhi	Delhi	39.50	197.48	394.97	Yes
Karnataka	Bangalore urban	34.13	170.63	341.27	Yes
Maharashtra	Mumbai Suburban	31.80	159.02	318.04	Yes
Maharashtra	Mumbai	27.47	137.33	274.66	Yes
Tamil Nadu	Chennai	24.78	123.88	247.76	Yes
Telangana	Hyderabad	17.37	86.85	173.71	Yes
Maharashtra	Pune	16.77	83.83	167.66	Yes
West Bengal	Kolkata	10.69	53.47	106.93	Yes
Maharashtra	Thane	8.14	40.71	81.41	No
Telangana	Rangareddy	7.84	39.19	78.37	No
Gujarat	Ahmedabad	7.25	36.23	72.47	Yes
Haryana	Gurgaon	5.06	25.28	50.57	No
Tamil Nadu	Coimbatore	4.77	23.86	47.73	Yes
Kerala	Ernakulam	4.63	23.13	46.25	Yes
Uttar Pradesh	Gautam Buddha Nagar	4.25	21.24	42.49	No
Gujarat	Vadodara	3.97	19.84	39.68	No
Rajasthan	Jaipur	3.87	19.36	38.71	Yes
Kerala	Thiruvananthapuram	3.87	19.35	38.70	No
Andhra Pradesh	Vishakhapatnam	3.51	17.56	35.13	Yes
Gujarat	Surat	3.39	16.95	33.91	No

As discussed earlier, several of the districts even in the top 20 districts by number of loan accounts, do not have a DRT presence. With a 1% default rate, and 10% of default cases going to the IBC, the following number of cases will not have an obvious choice of DRT in the district.

Table 3: Number of potential default cases in districts without a DRT

District	1% accounts	10% defaults

without DRT	default	go through IBC
Thane	8140	814
Rangareddy	7840	784
Gurgaon	5060	506
Gautam Buddha Nagar	4250	425
Vadodara	3970	397
Thiruvananthapuram	3870	387
Surat	3390	339

In the districts, where there is a DRT presence, the case-load may become too large. For example, if we assume a default rate of 1%, then Delhi should see 39,000 defaults. If the default rate is assumed to be 10%, then Delhi should see almost four lakh defaults. One could argue that several of these cases are housing or consumer loan cases which may not come to the IBC. While this is true, the number of loan accounts on housing and consumer durables are much smaller - for example after removing these two loans, Delhi would still see 37,000 defaults if 1% of accounts were to undergo default. Even if only 10% of these, i.e. 3,700 cases, were to make it to the IBC, it still adds up to a sizable number of cases.

Challenges

Currently, the DRTs deal with bank loans above INR 10 lakh. However, there are only 65 lakh loan accounts in this size threshold in the entire banking system. In contrast, there are 14 crore household loan accounts, and their average size is INR 2.3 lakhs. The logistics, procedures and skills required to deal with cases stemming from defaults on small personal loans will be very different from what the DRTs are typically used to dealing with. The analysis suggests two challenges for the DRTs in dealing with personal insolvency:

1. There are at least seven districts where the number of loan accounts is high, but there is no DRT presence. As one moves to districts with fewer loan accounts, the DRT presence becomes negligible. While it is true that defaults in these districts will not be as high as in the districts with a larger number of loan accounts, a mechanism for these borrowers to reach out to the DRTs needs to be designed and implemented.

2. The case load on existing DRTs will rise significantly even if 1% of personal loan accounts in a district were to default, and just under 10% of these were to be brought under the IBC. This is a concern as there were already a 109,518 cases pending at the DRTs as of 30 June 2017 . One way to deal with this issue is to have a larger role for the resolution professional combined with simplified forms and procedures to reduce the flow of cases to the DRTs.

Even conservative estimates of defaults only on personal loans from the banking channel, suggest that the DRTs have to increase their preparedness before they handle personal insolvency cases. The current functioning of the DRTs leave a lot to be desired. One issue that has been raised is that of low productivity of judges at the DRTs, where productivity is measured as the low disposal rate per judge. Low disposals also result in delays in cases. However, the delays are often a result of trial failures, on account of incompetence by the concerned parties to the case.

If these issues are not resolved, then the the DRTs will get overwhelmed with cases from individual insolvency. To effectively deal with resolution of such loans, there will need to be an increase in the presence of DRTs across India. The DRT rules of procedure, reach, infrastructure, as well as their use of technology for case management, will require a comprehensive re-think.

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Understanding Judicial Delay at the Income Tax Appellate Tribunal in India

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Understanding judicial delay at the Income Tax Appellate Tribunal in India

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Abstract

Most performance statistics using aggregate level data about courts in India show delays. There is limited analysis of the actual duration and trajectories of cases. In this paper, we create a de novo data-set using publicly available data on cases at the Indian Income Tax Appellate Tribunal (ITAT). We apply statistical techniques of hazard models to address questions around case duration at the Income Tax Appellate Tribunal (ITAT). We describe patterns in case life-span, compare these patterns among groups, and build statistical models of the risk of case completion over time. We find differences in the probability of case completion between the ITAT benches in Mumbai and Delhi. We also find that probability of case completion differs by case type. Our results point to the need to study case trajectories to better understand the causes of delays in order to design appropriate policy solutions to improve the performance of courts and tribunals.

Keywords: hazard models; tribunals; India
JEL: K49

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1 Introduction

The rule of law requires effective enforcement of laws. A sound judiciary is key to such enforcement (Dam, 2006). Slow judiciaries that delay enforcement have adverse consequences on structure and efficiency of markets, as well as quality of life of citizens (The World Bank, 2004; Chemin, 2007). Therefore, minimising unnecessary judicial delay could help improve enforcement and enhance the overall rule of law.

Globally, India ranks 66th in the rule of law (World Justice Projects, 2016) and 172nd in enforcing contracts as well as paying taxes (The World Bank, 2016). It is estimated that judicial delays cost India around 1.5% of its GDP annually (Dey, 2016). In this backdrop, it is hardly surprising that tackling judicial delay has increasingly become a top priority for Indian judges and policymakers.

Policy solutions need to be anchored in sound diagnosis of the problem. Analysis should inform us about the extent of judicial delay, the causes of judicial delay, the solutions to judicial delay, and finally the efficacy of the solutions as they get implemented. The literature in India is lacking on these questions. One reason is the paucity of granular datasets that allow for studying the life-span of a case as it travels through court.[1] Research has also not exploited sophisticated statistical methods of analysis.

In this paper, we inform policy discussions on judicial delays in India by showing how standard statistical techniques of hazard models (or survival analysis) could be used to address questions around case duration: How long do cases take to get resolved? How does the probability of case completion vary with case type and city?

Survival analysis allows us to describe patterns in case life-span, compare these patterns among groups, and build statistical models of the risk of case completion over time. This advantage of survival analysis makes it particularly suitable to examine judicial delays. First, a comparison between similar cases might help address questions around why time to resolution may be different in different courts. Second, any careful evaluation of an intervention to reduce delays, requires accurate and precise information on the duration of the case. Third, estimates on case duration, and probability of resolution may help litigants organise their resources more efficiently. All these are possible using survival analysis.

We sourced the case-related data from the website of the Income Tax Appellate Tribunal

[1]Technically, courts are different from tribunals in India. However, for the purpose of determining useful statistical tools for analysing judicial delays, courts and tribunals could both be broadly viewed as judicial institutions. Therefore, this paper uses both these terms synonymously.

(ITAT)[2] for the period January 2013 to March 2016. The date of pronouncements were sourced from Indian Kanoon,[3] a free online repository of orders and judgments of courts and tribunals across India. By merging these two data sources, we obtained data on a total of 55,261 unique cases that were listed after January 2013 for the ITATs in Delhi and Mumbai. A large number of these cases, however, pertain to earlier years, and we do not have the exact start date of these cases. For the survival analysis regressions, therefore, we use data on 25,858 cases that pertain to 2013 or after so as to avoid issues of "left censoring" of data. More complex models that deal with such data limitations can be developed in future work.

We find that the ITAT in Mumbai is on average slightly more efficient than in Delhi, especially on matters pertaining to re-opening of the case by tax-officers. On matters of transfer pricing, Delhi performs better. Overall, there is a 85% lower probability of a transfer pricing case being closed relative to an Assessment case. Similarly, case-completion probability is higher for non-firms relative to firms. These findings may have policy implications in terms of allocation of resources across types of cases, and organisation of tribunal benches in different cities.

We contribute to the literature in two ways - first, by demonstrating how data from court websites can be used to create datasets worthy of analysis. Second, by bringing tools of multivariate analysis to the problem of understanding the determinants of delay. To the best of our knowledge, we are the first to use survival analysis to analyse the problem of judicial delay in India.[4] Our methodology can have applications on judicial institutions anywhere in the world. Our analysis is limited to the extent that we do not have more details of the cases, and hence, can only model the effects of characteristics that we see. However, it sets the stage for further analysis that can at some point move from understanding co-relations between case and court characteristics and delay to *causation*.

The paper proceeds as follows: section 2 presents a short overview of the literature on judicial delays in India. Section 3 describes the setting of the ITAT, while Section 4 describes the data. Section 5 describes the methodology of survival analysis. Results are presented in Section 6. Section 7 concludes by explaining the advantages of survival curves in designing policy strategies for judicial institutions.

[2]See `www.itat.nic.in`

[3]See `www.indiankanoon.org`

[4]Survival analysis and Cox Proportional Hazard duration model have been used in some studies in the empirical literature on American judicial institutions (Kesan and Ball, 2011; Falkoff, 2012; Choi, Gulati, and Posner, 2013)

2 Literature on judicial delays

The lack of reliable, granular structured datasets for courts and tribunals in India has emerged as a critical challenge to understanding the problem of judicial delays in India. Even the Law Commission has admitted that it could not gather reliable data (Justice A.P. Shah, 2014).

The paucity of granular data has meant that Indian researchers have had to rely on aggregate data reported by state institutions(Justice A.P. Shah, 2014; Hazra and Micevska, 2004; Robinson, 2013), and mostly followed the normative approach to studying judicial delays as proposed by the Malimath Committee (Justice V.S. Malimath, 2003).[5] This has led to the criticism that existing strategies for legal system reform in India are based on little or no empirical evidence relating to institutions, their performances and the disposal of cases (Krishnaswamy, Sivakumar, and Bail, 2014).

In recent times, researchers have adopted a new approach to data collection, pioneered by organisations such as DAKSH[6] and Vidhi Centre for Legal Policy.[7] These organisations have started scraping data from online sources like the official website and cause-lists and building structured datasets which are more reliable. This has allowed researchers to go beyond aggregate data and analyse various underlying trends including the text of orders to better determine the causes of delay.

This has led to some innovative approaches in the study of delays. For instance, Regy and Roy (2017) hand-collected dataset built by manually studying all the orders in 22 cases in the Delhi Debt Recovery Tribunals. They defined delay more precisely to mean delay due to a failed hearing and find that trial failures account for more than half the time taken by the cases. The largest cause of failure in this analysis are requests from the parties for more time to submit documents. Similarly, Khaitan, Seetharam, and Chandrashekharan (2017) study the Delhi High Court and find that trial failures either by counsels or the court result in delayed cases.

There is also an emergence of a literature where the orders of courts are analysed to understand the economic effect of laws. For example, Chatterjee, Shaikh, and Zaveri (2017)

[5]This Committee recommended that cases which are pending for more than two years be treated as arrears.

[6]DAKSH has created India's first public judicial database that enables analysis and discussion regarding the functioning of the courts. With this database, it is possible to sort the pending cases according to case types, duration, court, court hall, and many other parameters. The database has been put together using causelists and information regarding status of cases on court websites. Lack of standardisation of fields, poor quality of data, converting the many case types into meaningful categories are some of the challenges in this process. See, `http://dakshindia.org/`.

[7]See `https://vidhilegalpolicy.in/`.

build and analyse a dataset of orders passed by the National Company Law Tribunal (NCLT) in the insolvency cases under the Insolvency and Bankruptcy Code (IBC). The paper evalutes questions such as who are the initial users of the insolvency process under the IBC, what kind of evidence are they using to support their claims before the NCLT, what is the average time taken by the NCLT to dispose off insolvency cases, what is the outcome of the proceedings and is there variation between the benches.

However, despite the innovations in data collection, and the detailed analysis of individual orders, research so far has used elementary statistical tools to analyse court functioning. For example, even research that has analysed text of individual orders, or used the average duration (in days) of different types of cases, has not taken a more statistical approach to jointly model the determinants of delay, or the distribution of time to case completion. When analysing the causes of delay, it is useful to jointly model the impact of various covariates on the delay, and evaluate the impact of one covariate controlling for other factors that might also impact the outcome. In this paper, we use these advanced statistical techniques to analyse judicial delay in India using a unique dataset that we created for ITAT.

3 The setting: Income Tax Appellate Tribunal

The ITAT is a quasi judicial institution set up in January, 1941. It specializes in dealing with appeals under the direct taxes statutes like Income Tax Act, 1961 (Income Tax Act), Wealth Tax Act, 1957 (Wealth Tax Act), Gift Tax Act, 1958 (Gift Tax Act) and Interest Tax Act, 1974 (Interest Tax Act).[8] The orders passed by the ITAT are final. An appeal lies to the High Court only if a substantial question of law arises for determination.[9]

The ITAT carries on adjudicatory function similar to that of courts where appeals are filed, arguments are heard in an open court and judgments delivered. They also share similar attributes and suffer from common problems such as inadequate number of members (judges), mounting pendency and bureaucratic process of the registry. However, they are separate from the mainstream judicial bodies with the higher judiciary (Supreme Court and High Courts) not being involved in their day to day operations or staffing decisions.

The ITAT is headquartered in Mumbai. Pursuant to the Standing Order dated September, 16, 1997 (as amended subsequently from time-to-time) under Rule 4(1) of the Income

[8]The current legal basis for ITAT is section 252 of the Income Tax Act, 1961. See, *Income Tax Act, 1961* 1961.

[9]See section 260A, *Income Tax Act, 1961* 1961.

Tax (Appellate Tribunal) Rules, 1963 (ITAT Rules), the ITAT presently has 63 sanctioned benches operating out of 27 locations, divided into 9 zones (*Office Manual, 2008* 2008). The zone-wise details of the benches are presented in the Appendix.

Each bench of the ITAT comprises of both judicial and accountant members. Each bench consists of two members - one judicial and one accountant member.[10] The administrative head of the ITAT is the President. Functions relating to the ITAT's appellate filing procedures, such as record-keeping, scrutiny of appeals, fixing the date of hearings, etc. are handled by the Registrar/ Deputy Registrar/ Assistant Registrar, in accordance with the general or special orders of the President of ITAT.[11] The Registrar at the headquarters and the Deputy Registrars at zonal headquarters provide assistance respectively to the President, the Senior Vice-President and the Vice-Presidents in discharging their functions. The Registrar also exercises supervisory jurisdiction over the Deputy Registrars and the Assistant Registrars of all the Benches.[12]

On January, 24, 2016, ITAT celebrated the completion of its 75th year. Speaking on the occasion, the President of India highlighted the need for speedy disposal of cases in ITAT to help improve India's investment potential. Speaking to the ITAT members he mentioned[13]

> "The tax disputes resolution system is an integral component of the eco-system for promoting investments and attracting business. As India looks forward to be an attractive investment destination, you all have to play a very important role in this eco-system. As per World Bank Group 2016 Report, India is ranked at 130 in the Ease of Doing Business. This status must be improved. Through speedy justice, consistent orders, fair approach and business oriented litigation management system, you can contribute to the growth story of India, which is unfolding itself."

In this backdrop, this paper tries to provide a better statistical methodology for policy-makers and ITAT members to better understand the performance of ITAT at a granular

[10] To be eligible for the position of a judicial member a person must have held a judicial office in the territory of India for at least 10 years, or been a member of the Central Legal Service and has held a post in Grade 1 of that Service or any equivalent or higher post for at least three years or who has been an advocate for at least ten years. To be eligible for the position of an accountant member a person must have for at least 10 years been in the practice of accountancy as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949), or as a registered accountant under any law formerly in force or partly as a registered accountant and partly as a chartered accountant, or has been a member of the Indian Income Tax Service, Group A, and has held the post of Commissioner of Income Tax or any equivalent or higher post for at least three years. See section 252, *Income Tax Act, 1961* 1961.

[11] See, *Income-Tax (Appellate Tribunal) Rules, 1963* 1963, Rule 4A.

[12] See, *Office Manual, 2008* 2008.

[13] Mukherjee (2016)

level and design policy solutions to help enhance the performance of ITAT.

4 Data

The case-related data has been sourced from the website of the ITAT[14] for the period January 2013 to March 2016. Thus, we do not see cases disposed of prior to 2013 or hearings prior to 2013 of any pending case.

The website puts up the causelist on each date which includes the details about the case number, name of the party, assessment year, date of hearing and the section number under which the appeal was filed. While the causelists on the premises of the ITATs have more information on stage, authorised representative and bench composition, we do not see these details on the online causelists. We also do not see any data on socio-economic-legal profile of non-corporate taxpayers. We also cannot distinguish between a listing and a hearing. While several cases may get listed every day, it is likely that very few of them are actually heard.

The date of pronouncements has been sourced from Indian Kanoon,[15] a free, online repository of orders and judgments of courts and tribunals across India. The two datasets were matched using the 'case number' field using textual parsing. At the end of the mapping process, about 2% of the judgments had multiple ITA numbers - such ITAs were excluded from any further analysis. This combined dataset gave us comprehensive information about each listing of a case, and for those cases that got disposed, the disposal date.

We have data on case listings between 1 January 2013 and 6 April 2016 across 18 ITATs in the country. Each ITAT consists of "benches" where cases are heard. We restrict our analysis to the ITATs in Mumbai and Delhi which constitute 51% of the total listings across all ITATs. This leaves us with a total of 244,144 listing between the two cities. Delhi has 127,051 listings in the period, while Mumbai has 117,093. Of these listings, we find that 5% were pronounced in the time period of the study.

We next, present the data in each of the two cities. We calculate the average "daily" listings and disposals in both the cities in Table 1. Delhi and Mumbai have 14 benches each. Delhi lists more cases, an average of 12 cases daily per bench than Mumbai which lists an average of 10 cases daily per bench. There is also a large difference in the daily disposal rate between the two cities - on an average, Mumbai sees 10 cases disposed

[14] See: `www.itat.nic.in`
[15] See `www.indiankanoon.org`

everyday, while Delhi sees 4 cases disposed everyday. The differences in listing as well as disposal are statistically significant at the 1% level.

Table 1 City-wise listings and disposals

The table shows the average daily listings and disposals in both cities.

City	Average daily listings	Average daily disposals	Number Benches
Mumbai	135.06	10.36	14
Delhi	165.65***	4.27***	14

*** significant at the 1% level

The analysis of this table suggests that Mumbai disposes more cases than Delhi, and hence, is more efficient than Delhi. However, univariate analysis such as this can mask the differences in the cases that show up in front of the tribunals in the two cities.

Table 2 shows the top 5 types of cases (based on section numbers) that are heard across ITATs in both cities. These are as follows:

1. *Assessment after draft assessment order*: These cases involve assessment order in cases where transfer pricing adjustment is made or in cases involving foreign companies. The assessing officer finalises a draft order which can then be appealed against to the Dispute Resolution Panel (DRP). The DRP disposes of the appeal by confirming or altering the draft assessment order. These orders are passed under section 143(3) read with Section 144C and are appealable to ITAT under section 253 of the *Income Tax Act, 1961.*

2. *Assessment on searched person*: These cases involve assessment done on a person consequent to search carried out, which results in undisclosed income coming to light. These orders are passed under section 143(3) read with sections 153A & 153C and are appealable to ITAT under section 253 of the *Income Tax Act, 1961.*

3. *Re-opening by tax officer*: These cases involve a tax officer re-opening an already concluded or time-barred assessment on coming to know of new materials to show that some income had not been taxed. These orders are passed under section 143(3) read with sections 147 & 148 and are appealable to ITAT under section 253 of the *Income Tax Act, 1961.*

4. *Penalty for non-compliance*: These cases involve orders under section 271 imposing penalty for failure to comply with information request, furnishing returns, concealing income, furnishing inaccurate particulars etc. These orders are appealable to ITAT under section 253 of the *Income Tax Act, 1961.*

5. *Assessment*: These cases involve orders of assessment passed under section 143(3) by a tax officer in the normal course. These orders are appealable to ITAT under section 253 of the *Income Tax Act, 1961*.

We find that the maximum number of cases pertain to IT-Assessment. These are Assessment orders passed in regular course. Cases where the tax officer revisited a matter that was previously concluded constituted 8% of the cases in Delhi, and 7% of cases in Mumbai. Cases where penalty was levied for not producing or filing requisite information were 6.2% in Delhi while the number was higher at 8.7% in Mumbai, whereas cases where tax demanded consequent to search by tax officers was higher in Delhi 8.34%. Thus, we find that the case composition in the two cities varies, and this might explain the differences in average disposal rate seen earlier.

Table 2 Type of cases at ITATs

The shows the top 5 types of cases (as % of all cases) that are listed across ITATs in both cities. The case categorisation is based on section numbers.

Case	Delhi (%)	Mumbai (%)
IT-Assessment after draft assessment order	7.46	4.19
IT-Assessment on searched person	8.34	5.38
IT-Re-opening by tax officer	7.87	6.71
IT-Penalty for non-compliance	6.22	8.76
IT-Assessment	46.76	54.77

5 Methodology: Survival analysis

Case completion is a binary event – either a case has been completed, or is ongoing at the time of analysis. There can be several factors that affect the probability of case completion. For example, it is possible that cases pertaining to a particular section have a higher probability of completion than cases pertaining to other sections. Cases relating to individuals might get resolved faster than cases relating to firms.

These are typically modeled using generalized linear models (GLM) such as the "probit" or the "logit" model. In these models, the dependent variable would be whether the case was completed or not, and the explanatory variables are the factors that might affect the probability of case completion. The analysis provides us with coefficients which show how a particular explanatory variable is correlated with case completion.

Our interest, however, is not just in the completion of the case, but the time taken for the case to get completed (or closed), as well as the probability of case completion at a point in time. When the variable of interest is time until the occurrence of the event

(here, case closure), 'survival models' are the appropriate tool for analysis (Nicholas M. Kiefer, 1988).

In such models, subjects are usually followed over a specified time period and the focus is on the time at which the event of interest occurs. This is most common in the literature on clinical trials where the effect of an intervention is assessed by measuring the number of subjects that survived after an intervention over a period of time. For example, researchers may be interested in understanding the time from completion of chemotherapy to the re-occurrence of cancer. In criminology, the outcome of interest could be recidivism. In finance, the occurrence of bankruptcy, or exit out of unemployment is an example of an event of interest.[16]

In any analysis of such kind, there will always be observations for which the event has not occurred. This does not mean that the event can never occur, just that it has not occurred within the period of the study. This is known as "censoring of observations". In our example, ongoing cases will get closed at some point in the future, even if they haven't closed when our data ends. These observations are called right censored.

Thus, there are three main characteristics that we must contend with:

1. Our dependent variable is the time until the occurrence of case completion;
2. Several of our observations are right censored, that is, for some entities the event of interest (case closure) has not occurred at the time of data analysis, and;
3. There are explanatory variables which may have a differential effect on the waiting time.

Let T represent the time to completion of a case. The event, that is case completion, is typically referred to as "death", and the waiting time as "survival time". The origin of T i.e. survival time, is the time at which the case first got listed.

We assume that T is a random variable with a cumulative distribution function $F(t) = Pr(T \leq t)$, and probability density function $f(t) = dF(t)/dt$. In our dataset, T can be censored where the study period ends before we observe whether the case got closed. What we observe is $T = min(T, C)$ where C is an indication of whether the observation is censored.

$S(t)$ is the survival function, $P(T > t) = 1 - F(t)$. This is the probability of being alive just before duration t, or more generally, the probability that the event of interest (case closure) has not occurred by duration t.

[16] See, Machin and Manning, 1999; Bauer and Agarwal, 2014.

We are interested in *probability of completion of the case, conditional on it not having been completed until that time.* This is also known as the instantaneous rate of occurrence of the event. It is defined as:

$$h(t) = \lim_{h->0} \frac{P(t \leq T < t + h | T \geq t)}{h}$$

The numerator of this expression is the conditional probability that the event will occur in the interval $[t, t + h)$ given that it has not occurred before, and the denominator is the width of the interval. This can be further written as

$$h(t) = \frac{f(t)}{S(t)}$$

The hazard function thus shows us that the rate of occurrence of the event (case closure) at duration t equals the density of events at t, divided by the probability of surviving to that duration without experiencing the event.

5.1 Kaplan-Meier statistics

How do we depict the survival curve? A non-parametric depiction of survival curves come from the Kaplan Meier statistic.

A survival probability is calculated for each interval as follows: number of observations that survived (that is did not face the event), divided by the number of observations who were at the risk of facing the event.[17]

In our case, this will be the number of cases that did not get closed divided by the number of cases that could have been closed. The Kaplan Meier plots, thus, depict the estimated probability of survival at each point in time, or the probability of the case not getting completed at each point in time.

5.2 Cox-proportional hazard model

Kaplan-Meier statistics are useful to depict the survival probabilities. But they are not useful to model the determinants of time to an event. That is, there might be a number of explanatory variables, or covariates that may affect survival time. In fact, our main

[17] See, Rich et al., 2010.

interest is the investigation of the influence of the covariates on the probability of case completion.

The model most frequently used for such analysis is the Cox-proportional hazard model.[18] In these models, the hazard at time t for an individual with covariates x (not including a constant) is assumed to be:

$$h_i(t|x_i) = h_0(t)exp(\beta_k x_{ik})$$

In these models, $h_0(t)$ is called the "baseline hazard". This describes the risk of occurrence of an event for individuals with $x_i = 0$. Any covariate x_i affects the relative (to the baseline) risk. The baseline hazard, $h_0(t)$, is not specified and can take any form. This model assumes proportional hazards i.e. there is an underlying hazard rate over time, and differences in the covariates simply lead to differences in the relative hazard rate at a point in time.

Taking logs, we find that the proportional hazards model is a simple additive model for the log of the hazard, with

$$\log h_i(t|x_i) = \alpha_0(t) + x_{ik}\beta_k$$

where, $\alpha_0(t) = \log h_0(t)$ is the log of the baseline hazard. We assume that the effect of the covariates x is the same at all times or ages t. That is the effect of a unit increase in a covariate is multiplicative with respect to the hazard rate. In other words, the effect of a unit change in a covariate is to produce a constant proportional change in the hazard rate. The model is estimated using maximum likelihood technique.

6 Results

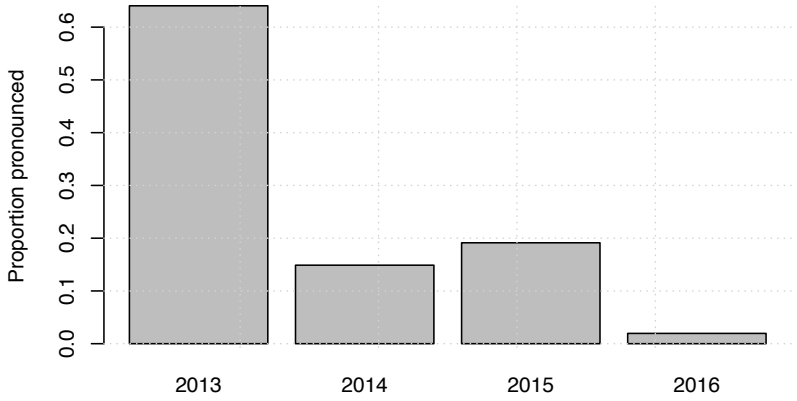
We have information on a total of 244,144 listings, for 55,261 unique cases filed between 1 January 2013 and 14 March 2016. However, a large proportion of these, about 55%, pertain to cases that "began" before 2013. That is, they were first listed before 2013. Since we do not have the date on which they were first listed, we drop all such observations. In the survival methodology literature, these are known as "left-censored" observations. This leaves us with a total of 23,858 cases that pertain to 2013 or after.

[18] See, Cox, 1972.

Of all the 23,858 cases, 4,492 or 17% of the cases were closed in the time period of our study. This seems to be a low completion rate over a three year period. For the cases that got completed, the average time to completion was 8 months. The maximum time to completion (for the set of completed cases) was 3.3 years.

Figure 1 shows the distribution of the cases that have been resolved in less than six months, between six months and one year, between one year and two years, and greater than two years. The analysis suggests that a large proportion of the cases were solved within the first six months. However, such an inference would be misleading. This is because the figure only pertains to cases that were completed. It completely misses the cases that *did not* get resolved.

Figure 1 Time taken to resolve cases



Standard summary statistics which show the proportion of cases that got resolved within a period of time (say six months, or a year) will miss the variation in time to resolution between the years. We cannot assess variation in completion of cases (for example, by either location, or type of case) based on aggregate statistics. Often, the various determinants will affect case completion jointly. This is missed in univariate statistics.

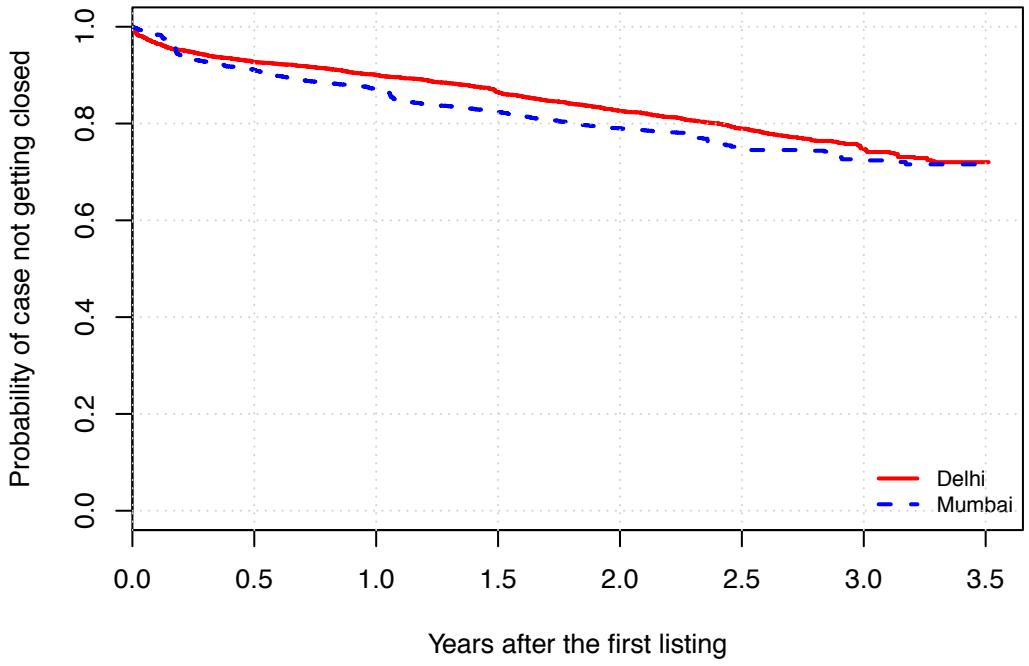
6.1 The Kaplan Meier (KM) statistic

We are interested in understanding the probability of case being resolved within a defined period of time. We first plot the Kaplan-Meier (KM) statistic described in Section 5.1 to see the variation in completion of cases across cities and across case types.

Figure 2 shows the probability of case not being resolved by city. Mumbai has a slightly higher case completion efficiency - at the end of 1 year, the probability of a case getting closed is 20% relative to about 10% in Delhi. Similarly, at the end of 2 years, the probability of a case getting closed in Mumbai is about 25%, relative to 15% in Delhi. The log-rank statistic rejects the null of the two groups having the same survival distribution. This finding is interesting since both Mumbai and Delhi benches of the ITAT had the same number of tribunal members.

Although this finding itself may not have policy implications, recent literature has focused on the need to reform court processes instead of increasing the number of judges alone (Datta and Shah, 2015; Kumar and Datta, 2016; Damle and Regy, 2017).

Figure 2 Time taken to complete cases by city



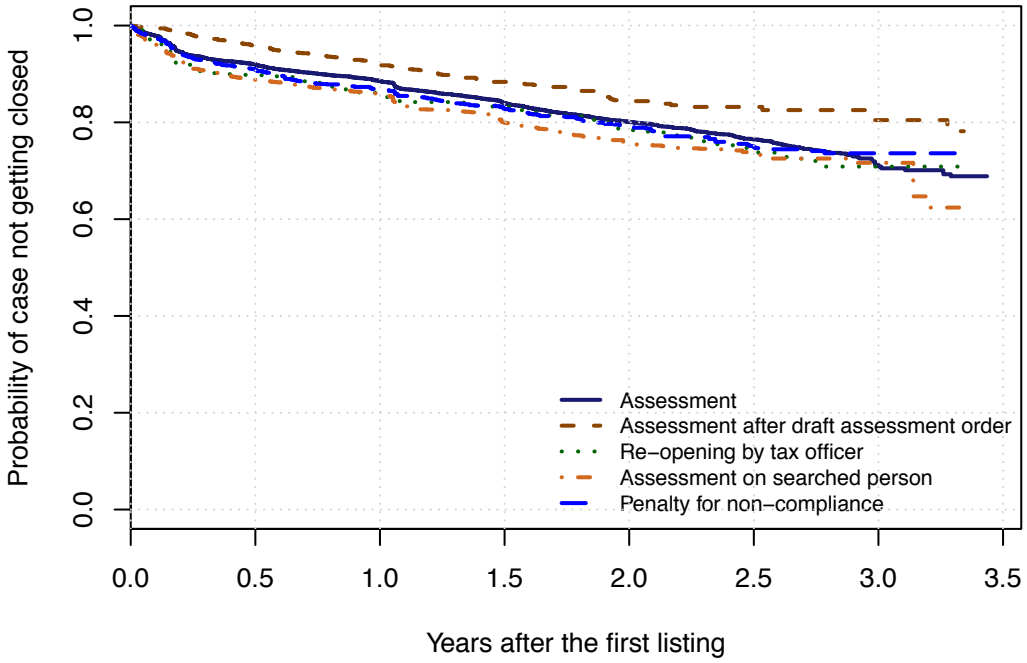
One of the factors that is likely to affect the lifespan of cases is the type of cases heard. Figure 3 shows the probability of case not being resolved by the type of case. We see variation in the time taken to resolve a case. The cases that pertain to "assessment on searched person", get resolved fastest. The cases that pertain to "assessment after draft assessment order" take longer.[19]

The "assessment after draft assessment order" cases pertain to transfer pricing matters and assessment of foreign companies. These cases require the bench members to go into

[19]The log-rank statistic rejects the null of the cases having the same survival distribution.

considerable detail and voluminous evidence. This also requires the lawyers (for the taxpayer as well as the tax department) to set apart considerable time. This is unlike other types of cases before ITAT which are based only on legal arguments and therefore, require lesser time of judges, registry officials and lawyers. However, whether this is indeed the actual reason for the difference in performance between "Assessment after draft assessment order" and "Re-opening by tax officer" requires further research.

Figure 3 Time taken to complete cases by Section



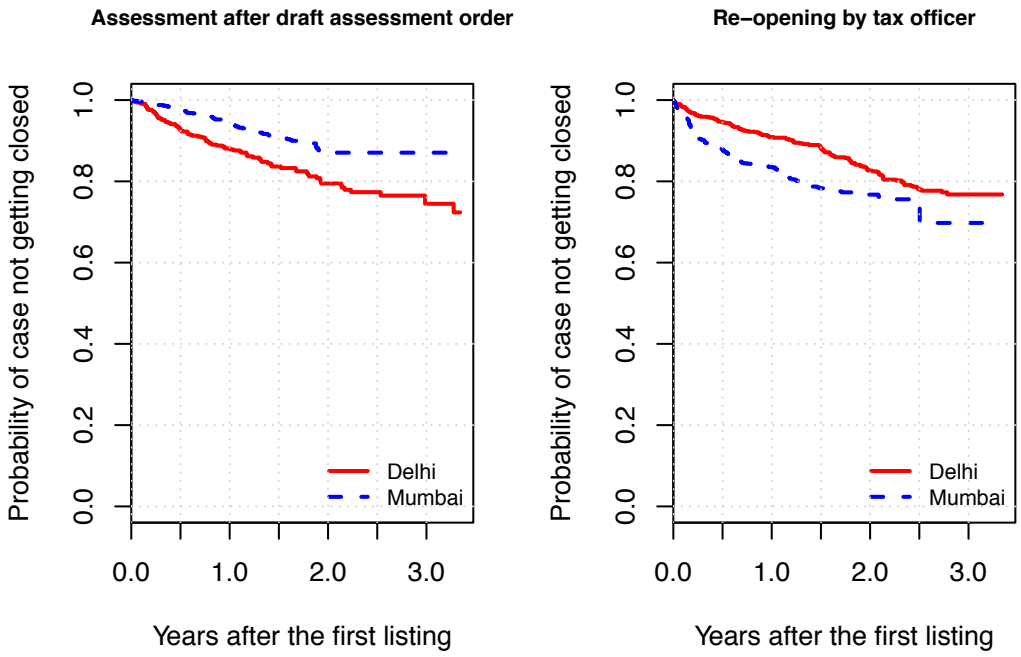
The analysis so far suggests that case closure is a function of the type of case, and also the court in which the case is lodged. It builds a case for understanding why there exist such differences. It is possible that some cases are more complex and therefore require more time. Such an analysis is presented in Figure 4.

The left hand panel of the graph shows the KM curves for the "Assessment after draft assessment order" cases, while the right hand panel shows the curves for "Re-opening by tax officer" cases. In the case of the former, we see that Delhi is much better at case closure than Mumbai. At the end of 3 years, there is almost a 30% probability of a transfer pricing case being closed in Delhi, relative to a 10% probability in Mumbai. However, Mumbai fares better on the "re-opening" cases.[20]

The fact that Delhi performed better than Mumbai in handling "Assessment after draft assessment order" could be due to various reasons: benches at Delhi could have been

[20]The log rank statistic rejects the null of the groups having the same survival distribution.

Figure 4 Time taken to complete cases by Section in City



asked to take up these cases on priority; members could have been assigned only such cases to ensure specialisation; the tax department's lawyer in Delhi could have been more cooperative in disposing off such cases; cases could have been similar in nature allowing benches to decide the matters faster. Identifying the exact reasons would need further research. Our study has revealed the underlying performance of ITAT for future research to focus on.

6.2 Cox proportional hazard model

Table 3 presents the results of the Cox-proportional hazards model. The regression controls for the year the case was first lodged in. The base for the case type variable are the IT-Assessment cases, while the base for the city variable is Delhi, for type of entity is individual, or non-firm.

A positive sign for a coefficient indicates that an increase in the relevant variable is associated with an increase in the failure hazard (case completion) while a negative sign indicates that an increase in the relevant variable is associated with a decrease in the failure hazard. This allows us to study the effect of various factor on case completion.

There is significant variation in probability of case completion for the different types of

cases that are heard at ITAT. The coefficient for the transfer pricing cases (Assessment after draft assessment order) relative to the Assessment cases is negative. This implies a lower hazard, or a lower probability of a transfer pricing case being closed relative to an Assessment case. In fact, the transfer pricing cases reduce the probability of case completion by 85%, statistically significant at the 1% level. On the other hand, relative to the Assessment cases, the Assessment on searched person and penalty for non-compliance cases increase the probability of case completion by 11% and 19% respectively.

Table 3 Regression: Probability of case completion

This table presents the coefficients from the Cox-proportional hazards model. The base for the case type variable are the IT-Assessment cases, while the base for the city variable is Delhi, for type of entity is individual, or non-firm.

	Coefficient
Case: Assessment after draft assessment order	−0.856***
	(0.078)
Case: Assessment on searched person	0.114*
	(0.064)
Case: Penalty for non-compliance	0.192***
	(0.046)
Case: Re-opening by tax officer	−0.008
	(0.059)
Case: Other	−0.321***
	(0.038)
Firm	−0.249***
	(0.042)
Mumbai	0.174***
	(0.032)
Observations	25,828
Log Likelihood	−43,371.000
Note:	The regression controls for the year the case pertains to.
Note:	*p<0.1; **p<0.05; ***p<0.01

The coefficient for Mumbai relative to Delhi is positive. This implies a higher hazard or a higher probability (almost 17% higher) of a case being closed in Mumbai compared to Delhi. This disparity could be due to various factors: differences in complexities of the matters, judicial administration etc. It would therefore be useful to study the processes being followed by ITAT benches in Mumbai and Delhi and analyse their differences. Future researchers could potentially use time and motion studies to examine the impact of such procedural differences on life span of cases across these two benches.

Again, a negative coefficient on firm indicator shows a lower probability of a case for a firm being closed relative to an individual case. In our data, being a firm reduces the probability by almost 25%. This disparity could be because cases pertaining to firms involve more complicated legal issues or involve a higher disputed amount. Future research could potentially use natural language processing tools to analyse these orders of ITAT to better understand the reasons for such systematic differences between cases involving firms and individuals.

It is evident from our methodology that different types of cases have different trajectories. Most performance statistics about the ITAT show aggregate level data and hence do not reveal these trajectories across case types.[21] This calls for a deeper granular data-analysis of ITAT's performance. Our methodology provides a starting point for policymakers, and even for the ITAT itself, to take stock of whether the current case completion trajectories are desirable or if there is any scope for improvement. Such regular and consistent review could help create a positive feedback loop. For instance, the Registrar could use his powers under the Income Tax (Appellate Tribunal) Rules, 1963 to prioritise different types of cases.[22]

7 Conclusion

In this paper we create a de novo dataset using publicly available data. We then apply statistical techniques of hazard models (or survival analysis) to address questions around case duration at the ITAT. The Cox proportional hazard model allows us to describe patterns in life-span of cases, compare these patterns among groups, and build statistical models of the risk of case completion over time.

We find significant differences in the probability of case completion between the ITAT benches in Mumbai and Delhi. We also find that different types of cases have different trajectories. Our findings are novel in the Indian context since the current aggregate level data about ITAT does not reveal these inner dynamics of its performance. Our methodology is useful in identifying the potential areas of relative delay, which in turn could be useful in designing appropriate policy solutions to improve the performance of courts and tribunals. This paper leaves open a wide array of possibilities for future researchers to pursue.

To precisely pin-point the reasons for disparity across the ITAT benches in Delhi and Mumbai, a richer dataset, advanced technologies and an inter-disciplinary approach to research are necessary. Such a holistic approach is essential for designing effective policy solutions to help improve the performance of the benches of ITAT. Although this approach is beyond the scope of this paper, such research would be immensely useful for policymakers and ITAT members.

[21] For example, see, Tax Practitioners, 2015.

[22] See Rule 4A(2)(xiv), *Income-Tax (Appellate Tribunal) Rules, 1963* 1963.

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Appendix

Division of ITAT Zones

Sl. No.	**Administrative Zone**	**Benches within Administrative Zones**[23]
1.	Mumbai Zone	Mumbai, Nagpur, Panaji and Pune Benches
2.	Delhi Zone	Delhi, Agra and Bilaspur Benches
3.	Chennai Zone	Chennai Benches
4.	Kolkata Zone	Kolkata, Patna, Cuttack, Guwahati and Ranchi Benches
5.	Ahmedabad Zone	Ahmedabad, Indore and Rajkot Benches
6.	Bangalore Zone	Bangalore and Cochin Benches
7.	Hyderabad Zone	Hyderabad and Visakhapatnam Benches
8.	Chandigarh Zone	Chandigarh, Amritsar, Jaipur and Jodhpur Benches
9.	Lucknow Zone	Lucknow, Allahabad and Jabalpur Benches

[23]See, *Income-Tax (Appellate Tribunal) Rules, 1963* 1963.

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Understanding Judicial Delays in Debt Tribunals

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Understanding Judicial Delays in Debt Tribunals

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We argue that the judicial statistics that are currently collected are inadequate for understanding and solving the problem of judicial delay. We propose a new approach to collecting data, which will lead to useful insights about delays. We apply this approach to a dataset, and find that about half the time taken by cases is lost to delays. Most delays are due to the petitioners asking for more time to file documents.

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1 Introduction

Over the last few decades, economic research has focused on the quality of institutions to explain differences in economic outcomes among nations. The judiciary is one of the three branches of the government of a nation. The functioning of the judiciary has profound consequences for the development of a country. In particular, judicial delays cause harm to the growth and the development of the country.

While there has been research showing that improving functioning of courts has broader economic consequences, there has been little research which can help policy makers on how to improve judicial performance. A key reason for this is that judicial delays are not measured in India. The existing systems only measure the total number of pending cases, or the total amount of time taken by various judicial processes. While these numbers may give an idea of the total time taken for judicial processes, it does not provide any information about delays or about the reasons for the delays. Without scientific evidence there is divergence of opinion about the cause of judicial delays, different branches of the government have diagnosed the cause of delay differently. This impedes clear action on solving the problem.

We posit that any system of measurement which can help in solving the problem of judicial delays has to: first, be able to define *judicial delay*; identify the cause of the delay; and finally, identify the party which caused the delay. In this paper we propose a novel approach to judicial statistics which can help policymakers identify the cause of judicial delays in India. This, in turn, can create legal and administrative changes driven by concrete and actionable evidence about judicial delays.

Our framework for identifying the causes of judicial delay follows three steps of identification. First, we identify hearings which are failures. Then we identify the party which caused the failure. Finally, we identify the recorded reason for the failure.

Failure of a hearing is defined as when the planned judicial step as per procedural law did not happen on the day of the hearing. To make this determination, we utilised the interim orders of a case. Interim orders are generated each time a case is presented before a judicial officer in a hearing. These interim orders are recorded in the *case file* of each individual case and kept with the court. While a case will have one final order/judgment determining the dispute, it will have multiple interim orders which reflect all the proceedings which constitute a case. Therefore, interim orders can be considered as the constituents of a case. Each

order records what happened in each hearing of the case as it proceeds towards the final order. Based on this analysis, we define judicial delay due to a failed hearing as *the time between the failed hearing and the next time the case was presented for hearing*. Total judicial delay in a *particular case* can be calculated by summing up the delays caused by all the failed hearings in that case. We believe that this system provides a scientific and value neutral method of establishing judicial delay.

After identifying hearings which were failures, we identify the party causing the delay. A judicial process is a tripartite process comprising of the plaintiff, defendant and the judicial officer. If the plaintiff was expected to produce a document to prove something and is unable to do it in time, the delay can be attributed to the plaintiff and not the judiciary. If the judicial officer goes on leave and the court does not work on a given day, the delay can be ascribed to the judicial officer.

Most interim orders record the 'reason for delay'. We find that the reasons recorded in the orders can be classified into some standard categories.

Using this framework, we study 22 cases of the Debt Recovery Tribunal (DRT) III of Delhi, which had a total of 474 orders between them. Analysing these orders, we find that as many as half of the hearings result in failures. Contrary to commonly held notions, the majority of delays are caused by the petitioner. We also find that the lawyers and the tribunal itself cause a significant part of the delay.

The majority of delays are because of requests from the parties for more time to submit documents. Other common reasons include the absence of the lawyers or of tribunal officers. We also find that the judicial delays may not be the result of high workload of Indian courts but the cause of the high workload.

Our method of study highlights the need for evidence based reforms in tackling the problem of judicial delays. Based on our findings, we indicate some policy and legal changes which can be used to tackle this problem.

The rest of this paper is organised as follows. Section 2 discusses why judicial delays are a problem, and highlights the persistence of the problem in India. Section 3 relates the persistence of the problem to the measurement of judicial delays. In section 4, we present our approach to measuring these delays, and section 5 presents the results of applying this methodology to data from the DRT. We discuss the results in Section 6, and section 7 concludes.

2 The problem of judicial delays

The problem of judicial delays in India has been a persistent one. As shown in Table 1, the premier law reform body of the country seems to be repeating the same concerns about a slow judiciary over a period of 36 years. Even when it made the first statement in 1978, it was "not a recent phenomenon", but one which had already assumed "gigantic proportions".

Table 1: Judicial delays, a persistent problem.

Law Commission, 1978	**Law Commission, 2014**
The problem of delay in the disposal of cases pending in law Courts is not a recent phenomenon. It has been with us since a long time. A number of Commissions and Committees have dealt with the problem, and given their reports. ...[T]he problem has persisted. Of late, it has assumed gigantic proportions. This has subjected our judicial system, as it must, to severe strain. It has also shaken in some measure the confidence of the people in the capacity of the Courts to redress their grievances and to grant adequate and timely relief.[a]	*...the judicial system is unable to deliver timely justice because of huge backlog of cases for which the current judge strength is completely inadequate. Further, in addition to the already backlogged cases, the system is not being able to keep pace with the new cases being instituted, and is not being able to dispose of a comparable number of cases. The already severe problem of backlogs is, therefore, getting exacerbated by the day, leading to a dilution of the Constitutional guarantee of access to timely justice and erosion of the rule of law.*[b]

[a] See Chapter 1, paragraph 1.1 of the Law Commission of India. *Report No. 77. Delay and Arrears in Trial Courts.* 1978

[b] See Chapter I, paragraph 1 of the Law Commission of India. *Report No. 245. Arrears and Backlog: Creating Additional Judicial (wo)manpower.* 2014

There are many ways in which the poor functioning of the judiciary can harm a country. Hay and Shleifer explore the reasons why East European countries grew faster than Russia after the collapse of the Soviet Union.[1] They posit that East European countries were able to implement institutional reforms better than Russia. One key institution they looked at was courts and their efficiency. The authors note that public methods of dispute resolution, i.e. using courts have higher benefits in an emerging economy. They argue that:

> *...in an emerging economy the coordination benefits of public rules*

[1] See, Jonathan R. Hay and Andrei Shleifer. "Private Enforcement of Public Laws: A Theory of Legal Reform". In: *The American Economic Review* 88.2 (May 1998): *Papers and Proceedings of the Hundred and Tenth Annual Meeting of the American Economic Association*, pp. 398–403.

may be enormous.

One effect which has been well studied is the harm these delays do to contracts. When parties know that contracts will not be enforced by courts, or will be enforced after long delays, there is a strong incentive to breach contracts with impunity. As Hobbes said:[2]

> "…he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power …"

Another consequence is that in the presence of judicial delay, parties refrain from entering into contracts unless they have other means to enforce them, such as social pressure. This leads to lost opportunities for carrying out economically productive activities. Bianco, Jappelli, and Pagano show that improvements in judicial efficiency in judicial districts of Italy increased the amount of financial activity.[3] Chemin studied the effect of changes in procedural law in India on the economy. The author found that certain amendments to the main law governing court procedure, the Civil Procedure Code, had an effect of slightly speeding up court processes. In turn this led to a decrease in the likelihood of breach of contract, and an increase in investment as well as in access to credit markets.[4] Burkart, Panunzi, and Shleifer argue that the concentration of family owned firms in developing countries is a function of lower levels of investor protection.[5] This may explain why, in India, many firms are family firms: they are able to use non-legal enforcement mechanisms.

The political and social consequences of an inefficient judiciary are less easy to quantify, but they are probably far more significant. Fundamental rights like the right to life and liberty, the right to freedom of speech, or the right to equality may not be enforced because of court delays. Citizens lose faith in the rule of law and in the capacity of the state to act in their interest.

[2]Chapter XIV, paragraph 18 of Thomas Hobbes. *Of Man, Being the First Part of Leviathan.* The Harvard Classics. Bartleby.com, 2001.

[3]Magda Bianco, Tullio Jappelli, and Marco Pagano. *Courts and Banks: Effects of Judicial Enforcement on Credit Markets.* CSEF Working Papers 58. Centre for Studies in Economics and Finance (CSEF), University of Naples, Italy, June 2001.

[4]Matthieu Chemin. "Does Court Speed Shape Economic Activity? Evidence from a Court Reform in India". In: *Journal of Law, Economics, and Organization* 28.3 (2012), pp. 460–485.

[5]Mike Burkart, Fausto Panunzi, and Andrei Shleifer. "Family Firms". In: *The Journal of Finance* 58.5 (Oct. 2003), pp. 2167–2201.

Table 2: How the Supreme Court measures pendency

Pendency As on 31.12.2015	Institution 01.01.2016–30.09.2016	Disposal 01.01.2016–30.09.2016	Pendency As on 30.09.2016
59,272	59,386	57,720	60,938

Source: Table VII, Institution, Disposal, and Pendency of Cases in the Supreme Court (01.01.2016 to 30.09.2016): Cumulative Statistics of the *Indian Judiciary: Annual Report 2015–2016*

3 Solving the problem

3.1 A problem of measurement

Judicial *delays* are not measured in India. Judicial statistics in India only measures *stock* and the *flow* of cases at the end of each year. Judicial statistics focus heavily on *pendency* (i.e., pending cases), which is calculated by adding up cases at the beginning of the year with the new cases instituted in the year and subtracting the cases finished during the year. As an illustration, table 2 is a reproduction of the way the Supreme Court reports statistics about judicial work.[6] Most other courts in India which track judicial work use the same method for reporting judicial work.

Recently, some courts have started reporting age-wise data on cases. Such information is available for the High Courts and the subordinate courts. For example, Allahabad High Court had 309,634 cases more than 10 years old.[7] While this may give a good idea of the workload of the judiciary, it does not provide any information about the reason for delays.

The World Bank's *Ease of Doing Business Report 2016* measures contract enforcement (and thus, indirectly, the performance of the courts) using a different approach. It conducts opinion surveys by sending questionnaires to local litigation lawyers and judges. It also claims to study the procedural law, but it appears that it is used only to identify the steps in a judicial proceeding.[8] This approach is useful in enabling a relative evaluation of the India in comparison to other countries, but it is of limited help in understanding the reason for the delays.

[6]The Supreme Court has a two step process: admitting, i.e. agreeing to hear the case, and then actually hearing the case. The table provides the total.

[7]Supreme Court of India. *Indian Judiciary: Annual Report 2015–2016.* 2016, at p.116.

[8]World Bank. *Ease of Doing Business Report 2016.* Enforcing Contracts Methodology. 2016.

In contrast to these approaches, our analysis is based on granular data about court proceedings. Our preliminary results were published previously.[9] A recent paper by Khaitan, Seetharam, and Chandrashekaran has also taken a similar approach.[10]

3.2 What is wrong with the current approaches?

The approaches mentioned above suffer from three deficiencies, which prevent them from providing meaningful insights into judicial delays. First, there is no clear definition of what constitutes *delay*. Measurement of pendency may reveal shocking numbers, but it is not clear how we can determine that a particular figure for pendency is 'bad'. Similarly, the approach adopted by the Ease of Doing Business Report enables comparison with other countries, but it cannot answer the question of how much of the time taken for contract enforcement is delay.

Second, the statistical information collected/reported by the courts are not useful in identifying the *causes* of delay. So we do not know what delay was caused due to the litigants asking for adjournments, the lawyers being absent, or the court administration being slow.

The third issue is that the present system of measurement of judicial delays ignores the fact that there are multiple parties to every judicial proceeding: the plaintiff, the defendant and the judge. Any of the three parties may cause delays, and concentrating only on the judicial officer alone may not be helpful.

3.3 Diverging diagnoses

Without scientific research to inform public policy, the consequence has been that there is no clear diagnosis of the reason for judicial delays. Even within the government, there are several opinions among the various wings (judiciary, executive and legislature) about the cause for judicial delay.

The judiciary sees this problem mainly as a result of lack of adequate number of judges. The *Resolutions Adopted in the Chief Justices' Conference, 2016* identifies the need to fill up vacant positions in lower judiciary and the High Courts. The

[9] Prasanth Regy, Shubho Roy, and Renuka Sane. "Understanding judicial delays in India: Evidence from Debt Recovery Tribunals". In: *Ajay Shah's Blog* (May 16, 2016).

[10] Nitika Khaitan, Shalini Seetharam, and Sumathi Chandrashekaran. *Inefficiency and Judicial Delay. New Insights from the Delhi High Court.* Vidhi Centre for Legal Policy, 2017.

Chief Justice of India stated that the nation needs 70,000 more judges to solve the problem.[11]

The executive identifies the following causes for the problem: excessive litigation and appeals by the government, re-engineering procedures, need for more judges and trained support staff, lack of use of technology.[12] A study for the government pointed out that judges in Australia dispose double the number of cases per year, compared to judges in Delhi.[13]

The legislature has favoured the creation of alternate mechanisms (such as Tribunals and Lok Adalats) that minimise procedural formalism. Procedural formalism is the theory that the functioning of courts (thereby efficiency) is determined by the laws which govern the courts: procedural law. It has been contended that procedural formalism can lead to longer duration of dispute resolution and does not improve justice.[14] This approach of the legislature is evinced from language found in almost all laws which have set up tribunals:[15]

> *The Tribunal and the Appellate Tribunal shall not be bound the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, …*

Without a clear diagnosis of the *cause* of judicial delay, public policy falls back to *treating the symptoms* of the problem: that a lot of cases are pending (the pendency measurement approach of Indian courts) or that cases take a long time to be resolved (the *Ease of Doing Business Report 2016* approach). An example of this can be found in the resolutions adopted at the last Chief Justices Judicial Conference. It was resolved that courts should give *top priority* to cases which are more than five years old.[16] The judiciary is trying to solve the problem that has already arisen. However, there is no discussion or proposed actions for preventing this problem from arising in the future.

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[11]Binita Jaiswal. "India needs more than 70,000 judges to clear pending cases". In: *The Times of India* (May 8, 2016).

[12]The National Mission for Delivery of Justice and Legal Reform. *Towards Timely Delivery of Justice to All: A Blueprint for Judicial Reforms.* Sept. 2009, is a special government scheme to speed up judicial work, the scheme identifies these as the areas of concern.

[13]See India Development Foundation. *Judicial Impact Assessment: An Approach Paper.* May 2008, at pp 49–50.

[14]See Simeon Djankov et al. "Courts". In: *The Quarterly Journal of Economics* 118.2 (May 2003), pp. 453–517, at pg 456.

[15]See Section 22, "RDDBFI Act". Similar provisions are found in the other legislations governing specialised tribunals as well.

[16]See, resolution 8 of the *Resolutions Adopted in the Chief Justices' Conference, 2016.* Apr. 23, 2016.

4 Methodology

In this section, we describe our methodology and our dataset. We have taken an empirical approach based on granular data for determining the reasons for delays. We find that this approach is very productive, and analysis of the data has revealed many important findings.

We approach the issue of measurement of judicial performance from the point of view of diagnosing and suggesting solutions to the problems contributing to such delay. We contend that in order to be useful in diagnosing and solving the problem of judicial delay, a framework for measurement should:

1. Define delays clearly in an objective and rigorous manner;
2. Identify the causes of the delay.
3. Apportion blame for the delay among the parties to the case.

Our hypothesis was: studying a few court cases in detail will provide a better understanding of the reasons of judicial delay and ways to reduce the delay. So we collected highly granular data for a *few* cases rather than macro-level statistics for *all* cases. For each of those few cases, we asked these questions: what happened in that case? By how long was that case delayed? Why was there delay in that case? Who caused the delay in that case?

In this section, we describe how we gathered the answers to these questions for a number of DRT cases. But first we describe why we selected DRTs for this work, and how we define failure and delay.

4.1 Debt Recovery Tribunals

For our study we selected the proceedings in the DRT III at New Delhi. DRTs were set up in 1994 *"...for expeditious adjudication and recovery of debts due to banks and financial institutions."*[17] We decided to use a DRT for our study for the following reasons:

Location We proposed to go into details of individual cases. This required a number of researchers to visit the court on a daily bases. So we chose a court near our place of work, New Delhi.

Standardisation Normal courts deal with many different types of cases. They can be broadly divided into civil and criminal cases, but the judicial processes are far more varied and depend on the exact legislation under which

[17] See the Statement of Objects and Reasons, "Recovery of Debts Due to Banks and Financial Institutions Act". In: *Text of Central Acts* 51 of 1993 (1993), pp. 299–312.

the dispute is adjudged. Since we proposed to map the cases to the procedural law, tribunals were attractive. This is because tribunals in India are specialised courts dealing with a few laws. At the time the data was collected, DRTs dealt with only two laws: the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI), and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI).[18] The procedural law for both types of cases is the same: "Debts Recovery Tribunal (Procedure) Rules, 1993". This simplifies both the types of cases and the procedural laws which applied to them.

Delays The problem of judicial delays in DRTs is well recognised.[19] In 1990 there were 1.5 million cases filed by public sector banks to recover ₹56.22 billion.[20] In spite of setting up the DRTs, the number had risen to ₹500 billion by 2016.[21] Studying judicial processes in DRTs would provide us with insight into the causes of judicial delay.

In a DRT, the cases are generally of these three types:

Original Application (OA): These are cases under the "RDDBFI Act" where the lender files a case against the borrower to recover money. If the tribunal finds in favour of the lender, it passes a final order directing the borrower to pay the amount. These proceedings happen before the Presiding Officer (PO) of the Tribunal.

SARFAESI Application (SA): These are cases under the "SARFAESI Act". This law allows institutional lenders to sell mortgaged assets after giving a notice to the borrower. It is unique in the Indian legal system where the lender does not have to get a court order to enforce his security interest. In these types of cases, usually, the borrower approaches the tribunal trying to restrain the lender from auctioning his/her mortgaged property. These proceedings also happen before the PO.

Recovery Certificate (RC): These are a sub-set of cases under "RDDBFI Act" and usually follows from the OA cases. These cases are similar to enforcement or execution proceedings. After winning an OA case, if the borrower has still not paid the lender, the lender may approach the court to execute

[18]Later, the Insolvency and Bankruptcy Code designated them as the Adjudicating Authority for individual insolvency resolution.

[19]Mukund P. Unny. *A Study on the Effectiveness of Remedies Available For Banks in a Debt Recovery Tribunal: A Case Study on Ernakulam DRT*. CPPR Working Papers. Feb. 2011; Remya Nair. "Debt recovery tribunals' overhaul on the cards to tackle pendency". In: *Live Mint* (Dec. 24, 2015).

[20]The Statement of Objects and Reasons of the "RDDBFI Act".

[21]Sayan Ghosh. "Debt recovery tribunals fail to clear cases on time; outstanding debts stand at Rs 4,50,000 crore". In: *The Financial Express* (May 17, 2016).

the RC issued by the PO. This involves the sale of mortgaged properties or even other properties of the borrower. These proceedings are held before a special court officer called the Recovery Officer (RO) who acts in a quasi-judicial capacity. The RO is responsible for ensuring that the properties of the borrower are identified and sold in a fair manner.

Apart from the officials mentioned above, another important official of the tribunal is the Registrar. This official assists the PO in the administration of the tribunal. The Registrar is responsible for ensuring the completeness of filings prior to listing a case before the PO.

4.2 Failed hearings and delay

As we have mentioned earlier, most official statistics do not define or track delay. The Malimath Committee suggested that a dividing line be drawn at two years: cases longer than that would be considered arrears, and should be disposed through a special scheme.[22] However, this number seems to be arbitrary. A complex case may reasonably take longer than two years, and these should not necessarily be considered delayed. On the other hand, consider a trivial case which can be disposed of within a week, but took a year. It ought to be considered delayed, but it would not be considered a delay by this criterion.

In general, this problem exists whenever we choose any particular duration as the criterion for which case is delayed. Here, we differ from other work in this area. We propose a new definition for delays that is based on whether judicial progress was made in a case or not.

Once a case is admitted in a DRT, it goes through several hearings. We classified the hearings as *failures* if they met all three of these conditions:

1. The hearing resulted in an adjournment without transacting judicial business;
2. The adjournment was avoidable; and
3. The adjournment was not penalised.

For instance, adjournment due to bomb blasts was not considered a failure. Adjournment due to lawyers being absent were considered failures if no penalty was imposed.

We define *delay* as the time that elapsed between a failed hearing and the next hearing in that case. This avoids the problem of using an arbitrary duration as a

[22] Ministry of Home Affairs. *Committee on Reforms of the Criminal Justice System.* 2003.

norm for determining delay. This definition may not be useful in all jurisdictions, but it serves the purpose well in situations such as India's, where most delays are due to adjournments.

4.3 Collecting Data

Court and tribunal proceedings in India are recorded in "case files". A case file is a complete record of the case, kept in the registry of the court or tribunal. The case file provides a step by step account of the case, recording the proceedings on each date the case came up for hearing before the judicial officer.

A case file usually has copies of the following documents:

1. The application of the plaintiff which started the case.
2. All the interim orders of the court, starting with the order allowing the plaintiff to issue a notice to the defendant.[23] Each interim order usually states the proceedings that were held on the date of the order and the proposed next date of hearing the case.
3. Any response filed by the defendant, including the preliminary response called the "Written Submission (WS)"
4. All interim applications filed by the defendant or plaintiffs.[24]
5. All notices issued by all the parties.
6. The final judgment of the case.

We got approvals to study the case files of the DRT-III, Delhi, from 11th to 21st of April 2014. The research team spent the first week understanding the processes followed in the DRT and interviewing the officers of the DRT: the PO, the registrar, and RO. The team spent the second week reading the case files of 22 decided cases of the DRT. It went through each hearing and each interim order for all the cases. This has given us granular data about a total of 474 interim orders over these 22 cases.

4.4 The collected information

We studied each case file, and recorded information about:

[23] This is usually the formal legal notice alerting the defendant that a judicial proceeding has been initiated against him and the court has found valid grounds to require the defendant to present his case.

[24] Interim applications are applications for temporary orders pending the final judgment deciding the case. For example, the creditor may ask the court to restrain the borrower from selling any mortgaged property.

1. The case name;
2. The type of the case: OA, SA, or RC (these types are described in section 4.1);
3. The parties including who filed the case, the lender or the borrower;
4. Date of filing;
5. Date of final order;
6. Decision of the tribunal, which was standardised into: dismissed (withdrawn or otherwise), disposed, closed (as fully satisfied or with liberty to revive later);
7. Date for each hearing of the case;
8. Brief subject for the hearing;
9. Next date of hearing;
10. If the hearing was a failure (as per the criteria mentioned in section 4.2), then which party was responsible for it; and
11. If the hearing was a failure, a standardised reason for failure.

Using the criteria in section 4.2, we determined that of the 474 orders about which information was collected, 274 were failures.

5 Results

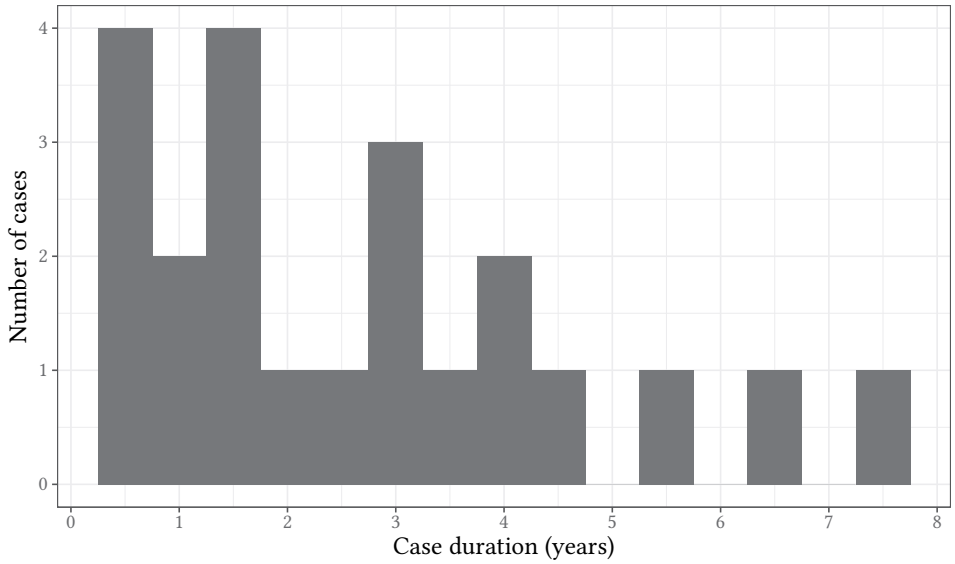
5.1 Delays

Our study shows that each failure delays the case by about 40 more calendar days.

The cases we examined went on for about 2.7 years on average. This aggregate conceals a lot of variance — the duration varied from as few as 5 months to as many as seven and a half years (Figure 1).

How much of this was necessary? In other words, if the system had functioned well, how much delay could have been avoided? It turns out that of these 474 hearings, 274 hearings (about 58%) were failures. These failures accounted for more than half the time taken by the cases. So, to a first approximation, we could reduce the duration of the average case by half if we were able to avoid trial failures. But that is not all — if there were fewer trial failures, cases would finish sooner, freeing up slots on the judicial dockets. This would let the remaining cases have more frequent hearings. So the delay would decrease by more than half if these failures were avoided.

Figure 1: Histogram of case durations.
Duration varies from five months to eight years.



5.2 Who causes delays?

The failed hearings can be caused by one or more of three parties: the plaintiff, the defendant, and the tribunal itself. In general, one would expect that the borrower would have an incentive to extend the case — it already has the use of the money, and it would like some time to repay. This expectation is borne out by the data. Looking at the cases filed by the borrower, adjournments due to the borrower-plaintiff account for 46% of the total time lost, while about 21% is lost due to the lender, and about 16% due to the tribunal (see Figure 2).

Now consider the cases filed by the lender. In these cases, one would expect that the lender-plaintiff would want a quick disposal of the case. After all, it has lent the money, and would presumably like it back as soon as possible.

Interestingly, in these cases, it turns out that the largest reason for delays is the plaintiff. The lender-plaintiff accounts for 40% of the delay, compared to 21% caused by the defendant and 26% by the tribunal (Figure 3). Many of these delays are because the lender asks for adjournments while it locates and files documents. This violates our expectation that the lender would want his money back quickly.

These lenders are sophisticated financial institutions that, we expect, maintain complete documentation of their debts. They have lawyers on retainer, and have standard processes in place to deal with defaults. Given all this, it is not clear

Figure 2: Breakup of delays for the cases filed by the borrower. Predictably, the borrower-plaintiff accounts for most of the delay.

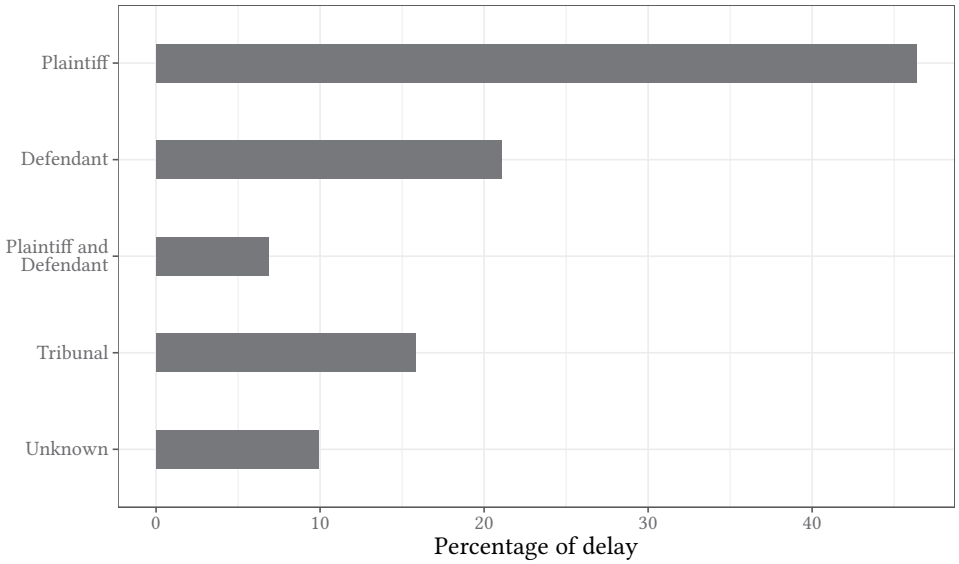
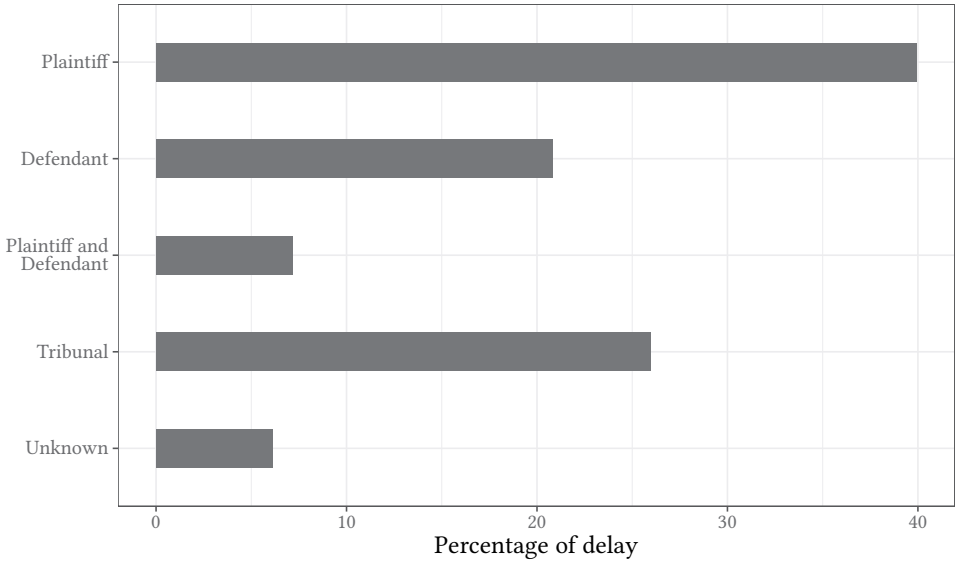


Figure 3: Breakup of delays for the cases filed by the lender. Surprisingly, the lender-plaintiff accounts for most of the delays!

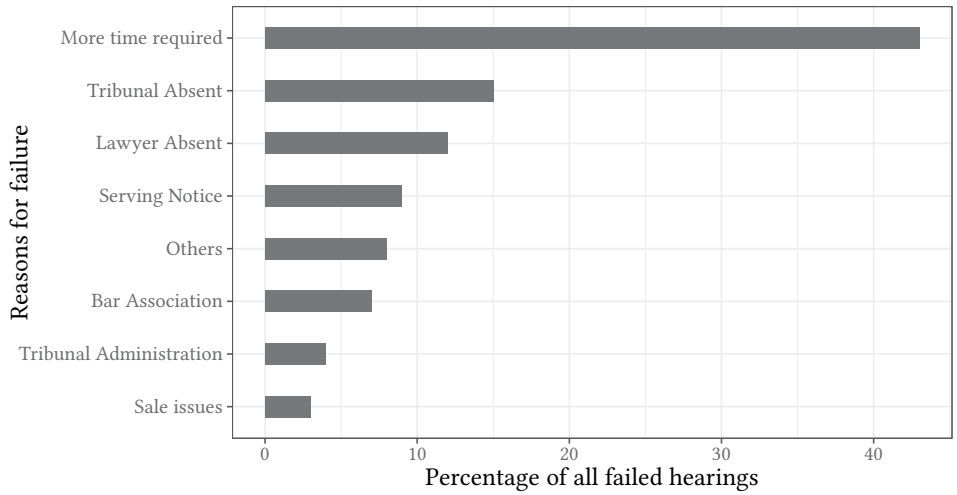


why they would take such a long time to perform tasks that lie well within their control.

5.3 Why are delays caused?

We examined the stated reasons for the failure of the hearing (see Figure 4).

Figure 4: Why do hearings fail?
The major reason is that parties ask for more time to file documents.



This analysis reveals that 43% of the adjournments are because of requests by the lawyers for more time, so that they can submit documents or seek client instructions. This is by far the largest reason for seeking adjournments. About 15% of the adjournments are due to the absence of the PO or the RO of the tribunal. An almost equal amount of delay (12%) is due to the absence of one (sometimes, both) of the lawyers. Service of notice and conducting sale together account for about 12%. An interesting category of delay is the one caused by the Bar Associations: about 7% of the time, the Bar Association calls for holidays (usually for Bar elections, festivals, etc.), and the tribunal obliges.

Consider the single largest reason for these requests for adjournments: more time required for submitting documents. In the vast majority of cases, the documents ought to be easily available, given that the creditors are financial institutions. This suggests that the request for adjournment could have been avoided, had the parties wished to. In this sense, these delays are deliberate. In Table 3, we consider the breakup of this type of adjournment, by the party requesting the adjournment. We can see that in each type of case, it is the plaintiffs who cause this type of delay more frequently.

Table 3: Percentage of 'More time required' requests, by party and case type. Plaintiffs cause more delay in each case.

Party	OA	RC	SA
Defendant	25	34	38
Plaintiff	75	66	62
Total	100	100	100

Another factor that could affect delay is the nature of the lender. In our sample, all the lenders are banks. Some of these banks are private banks and the others Public Sector Banks (PSBs).[25] An independent-samples t-test was conducted to compare 'Lawyer Absent' and 'More time required' failures caused by banks. There were significantly fewer of these failures per case in the case of private banks ($M = 2, SD = .5$) as compared to PSBs ($M = 5.5, SD = 1.32$), $t(14.8) = 2.96, p = .01$. Thus, the time lost in these adjournments is much greater if the lender is a PSB than if it is a private bank.

6 Discussion

In this section, we discuss some questions that arise in the light of the information presented above in Section 5. Our discussion is based on the idea that those asking for repeated adjournments are imposing a cost on the judiciary and on all its users. Judicial time and capacity are scarce public resources, and procedural delays represent a waste of these resources.

6.1 Incentives of the parties

We have seen above (Sections 5.2 and 5.3) that most adjournments are because plaintiffs (especially lenders) request more time to submit documents. Why do lenders file cases in courts, and then ask for so many adjournments? One possibility is that their objective in filing the case is not to obtain a judicial mandate in their favour, but to exert pressure on the borrower to come to a negotiated settlement. This behaviour imposes a cost on the judiciary and on the public.

It also appears (see section 5.3) that there are systematic differences between public and private sector banks with regards to their ability to produce documents

[25] PSBs are banks that are majority-owned by the government. They account for about 70% of the deposits and 66% of the bank credit in India (Reserve Bank of India. *Quarterly Statistics on Deposits and Credit of Scheduled Commercial Banks: December 2016.* 2017).

on time and to ensure that their lawyers appear in court. Perhaps the business processes involved in storing and retrieving documents, and the design of incentive structures within PSBs and private banks, are different. It is likely that poor processes in lenders is only a reflection of the processes in the tribunals. If the lenders are confident of getting as many adjournments as they desire, they have no incentive to be respectful of the tribunal's time.

6.2 Incentives of the lawyers

Figure 4 indicates that about 12% of the time, the delay was because of the absence of the lawyers. The many instances where one or the other (often both) lawyers are absent, or both lawyers request adjournments, suggests the possibility that some lawyers may be in no hurry to finish the case. If the incentives of the lawyers are perverse — for instance, if they get paid not on the basis of prompt resolution of the case in favour of their client, but on the basis of the number of hearings — then it is reasonable to expect that they would prefer to have more hearings.

6.3 Culture of the judicial system

One of the most striking aspects of the DRTs is the forbearance of the tribunal when dealing with repeated adjournments. Whether it is parties asking for more time to file documents that they ought to have easy access to, or requests by the Bar Association for holidays, or outright absences by lawyers, the POs seem to be very obliging. This points to a general culture in which such seemingly unprofessional behaviour is tolerated in DRTs. In spite of the significant negative externalities created by such behaviour, we see very little evidence of the tribunal acting to dis-incentivise such behaviour, for instance, by imposing penalties on the parties for causing delays.

6.4 Judicial Processes

The single largest reason for adjournments (43%, see Figure 4) was that more time was required to file documents. Some of these proceedings were before the Registrar, and others before the PO. An additional 4% of the adjournments were due to issues with tribunal administration. Together, these two account for almost half of all the adjournments.

The Registrar of the tribunal is supposed to ensure that all the requisite documents have been filed before the case goes to the PO. The literature suggests that the Registrar is a point of delay: cases are stuck there for several months before they are listed before the PO.[26] Part of the reason this process takes so long is that the parties repeatedly request the Registrar for adjournments while they file the documents.

It is not clear why the Registrar tolerates such delays. If the hearings were delayed repeatedly due to this reason, the party could have been penalised for the violation of the tribunal's deadlines. If the plaintiff keeps delaying the submission of essential documents, the case could have been dismissed for the lack of intent to prosecute.

Often, the 'more time to file documents' adjournments happen before the PO. These cases were clearly not ready for more hearings till the documents were filed. The tribunal's time should not be taken up unless the case requires, and is ready for, the application of judicial mind.

This points out an issue with the efficiency of the processes in the tribunal. One possible solution to this problem of inefficient processes is to entrust the processes to an agency that specialises in redesigning, implementing, and administering judicial processes. This is the process followed in most common-law countries, including UK, USA, Canada, and Australia.

6.5 Tribunal capacity

Figure 4 shows that about a fifth of the adjournments are attributable to the tribunal administration or due to the absence of tribunal officers. In other organisations (such as hospitals, railway stations, airports, hotels, or customer-facing private offices), when a key employee is absent, alternate arrangements are made so that customer work is not held up. Why are similar arrangements not possible in DRTs?

A possible reason is that POs are overloaded, and there is no extra capacity available to be used in the case of absences.[27] One solution for this is to increase the number of POs.

[26] Unny, *A Study on the Effectiveness of Remedies Available For Banks in a Debt Recovery Tribunal: A Case Study on Ernakulam DRT*.

[27] An example we saw during data collection: Delhi has three DRTs, but one DRT did not have any PO for months. The PO for one of the DRTs would sit in as the PO for the other DRT too.

7 Conclusion

In this paper, we have suggested a new method for understanding judicial delays. We believe that such a rigorous study of the judicial process using fine-grained data will help to obtain new and useful insights about judicial delay. We believe that this can provide the basis for a more informed debate about this problem and the possible solutions to it. Such investigations hold out the promise that a procedural redesign of the conduct of court cases could help reduce delays. Any reform would need to be informed by a sophisticated understanding of the value and the cost of judicial delays, as well as by the principles of economics and public administration.

* * * * * * *

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Judicial Procedures will make or break the Insolvency and Bankruptcy Code

ajayshahblog.blogspot.in /2017/01/judicial-procedures-will-make-or-break.html

by Pratik Datta and Prasanth Regy.

The key test of any default resolution process is: how much value is recovered by the lender? The most important factor that determines this amount is the time taken to complete the resolution. India has set up many recovery mechanisms that have given us long delays and low recovery rates. Most of the delay in the resolution is due to poor judicial processes that enable parties to obtain repeated adjournments.

The Insolvency and Bankruptcy Code (IBC) offers us a new beginning to fix the problem of low recovery. It imposes several timelines on its Adjudicating Authorities (National Company Law Tribunal (NCLT) for corporate defaults and Debt Recovery Tribunals (DRT) for individuals). For instance, it requires these tribunals to complete insolvency resolution in 180 days. It also requires NCLT to ascertain the existence of corporate default within 14 days of an application. Commentators have pointed out that without digitised credit data from Information Utilities (IUs), it will be difficult to adhere to these timelines. In this article, we argue that even with the IUs in place, it will be difficult to meet the timelines unless NCLT's procedures are redesigned.

1 Triggering Insolvency Resolution

As an example of an IBC time-limit, consider the process laid out by the Code in the case of a corporate default. A creditor can apply to NCLT to initiate an Insolvency Resolution Process (IRP) against the debtor. Along with the application, the creditor needs to do two things: furnish evidence of default recorded in an IU (or other evidence of default); and propose the name of a resolution professional (RP).

On receipt of the application for IRP, NCLT has 14 days to accept or reject it. The application is accepted only if NCLT is satisfied that default has occurred, and that the proposed RP has no disciplinary proceedings pending against him. Now let's see how this process will actually work out under the current NCLT rules.

2 Current procedure

Matters filed in NCLT under IBC are governed by the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under this, the procedure for making an application under IBC is the same as that for company matters before NCLT. These rules require applications to be:

> *type-written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form.*

E-filing is promised eventually: "the application ... shall be filed in electronic form, as and when such facility is made available". Online payment of fees is not allowed: fees can be paid only "by means of a bank draft".

NCLT has to make a reference to IBBI to check if there are any disciplinary proceedings pending against the proposed RP. This reference will be sent by post, and the reply from IBBI will likewise come by post. It is not clear how IU records are to be submitted to NCLT: if the Tribunal requires that all IU records need to be certified by a senior officer of the IU (like in the case of bank records) it will lead to more delays.

All these have to be done while the NCLT is dealing with its workload under the Companies Act. On top of these,

it is estimated that under the IBC, about 25000 cases will be transferred to NCLT from Company Law Board, the Board for Industrial and Financial Reconstruction (BIFR), the High Courts, and DRTs. This combination — a gargantuan workload, and slow processes to deal with it — makes it unlikely that the NCLT will be able to respect the IBC timelines.

3 Redesigning procedures

The Bankruptcy Law Reforms Committee recognised this problem and suggested the extensive use of technology by NCLT and DRTs to achieve efficiency. If we are serious about meeting the IBC timelines, NCLT's procedures will have to be designed anew.

Let us revisit the previous example in this light. Submission of the application for initiating IRP should be electronic: all documents, including IU records, should be submitted online. This will make it easy to verify the evidence of default. The tribunal must not require any certification from IU officials that the IU record is authentic — the digital signature on the IU record should suffice. Verifying the RP's antecedents with the IBBI should be automated: it should only involve a computer at the NCLT querying another computer at IBBI. With these processes, the tribunal stands a far better chance of meeting the 14-day timeline.

Of course, meeting this deadline in and of itself is no fix to the issue of delayed recoveries. However, this deadline is crucial for two reasons: firstly, because insolvency resolution cannot begin till the application is accepted, so any delay in this process delays the eventual resolution as well; and secondly, once a precedent of ignoring IBC timelines is established, there is no reason to respect the sanctity of any other timelines in the Code, including the 180-day limit on resolution. The Code will lose one of its most compelling features.

4 Conclusion

India has been here before. We have created a long list of mechanisms to facilitate the recovery of debts. This includes the BIFR set up in 1987, the Company Law Board set up in 1991, the Recovery of Debts Due to Banks and Financial Institutions Act passed in 1993, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act passed in 2002. The RBI also has tried several schemes, including Corporate Debt Restructuring (2001), Joint Lenders' Forum (2014), Strategic Debt Restructuring (2015), and the Scheme for Sustainable Structuring of Stressed Assets (2016). None of these have been successful in resolving defaults efficiently.

We have another list of laws (including the IBC) that seek to impose deadlines on the judiciary. In the absence of rigorous process design, such attempts to eliminate judicial delays through legislative fiat have not worked either. Instead, there is ample precedent of ignoring these deadlines.

Now the IBC affords us yet another opportunity to achieve the goal of prompt recovery of debts. High-quality intellectual work is required to design and implement good judicial procedures for NCLT and DRT. If we do not make this investment now, IBC will also be a failure.

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Understanding judicial delays in India: Evidence from Debt Recovery Tribunals

ajayshahblog.blogspot.in /2016/05/understanding-judicial-delays-in-india.html

by Prasanth Regy, Shubho Roy and Renuka Sane

The Insolvency and Bankruptcy Code passed by the Lok Sabha last week envisages Debt Recovery Tribunals (DRTs) as the adjudicating authority for individuals and partnership firms. When originally set up, DRTs were expected to resolve cases within a limit of 180 days. But experience tells us that judicial delay is as much of a problem in the DRTs as with other courts.

There is a great uproar about judicial delays in India today. We are now a country where it is widely felt that we know how to run elections but we don't know how to run courts. A commonly touted solution is to hire more judges. However, if the institutional arrangements in which judges operate is faulty, adding more judges is not likely to help.

In fact, little is known about why delays occur. The present approach of collecting information about judicial delays concentrates on a few macro-level statistics of pendency and disposal rates. There is very limited information or research that uses micro data about the time taken for judicial proceedings, and the reasons for the delay. In this article, we bring a novel research strategy to bear on understanding the issue of judicial delays. While this strategy is general, we apply it to Debt Recovery Tribunals (DRTs), and present our findings.

1 Debt recovery tribunals

Debt Recovery Tribunals (DRTs) are statutory bodies established under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. They were created because the existing mechanisms of debt recovery were ineffective. DRTs were expected to enable the "expeditious adjudication and recovery of debts" within one hundred and eighty days of filing the case. Subsequently, DRTs have also been tasked with enforcing some provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), and of the Insolvency and Bankruptcy Code, 2015.

DRTs have not been successful in realising the objective of efficient disposal of debt-related disputes. We knew, at the time of the creation of DRTs, that the previous debt-resolution mechanisms were slow and ineffective. The DRTs were meant to be an antidote to this problem. But now, more than 20 years after DRTs were set up, we know (Committee on Financial Reforms, 2009) that the DRTs have not been any faster than other courts in resolving issues.

2 Questions

If DRTs suffer from long delays, they will not be able to fulfil the new Insolvency and Bankruptcy Code-related responsibilities placed on them. So how can DRTs work better and faster? An answer to this question depends upon the answers to many other questions: Who causes delays at DRTs? What is the immediate cause of these delays, and what is their root cause? What is the role of the tribunal in enabling delays? And importantly, what are the incentives of the different stakeholders that lead to delays? Answering these questions is key to designing and implementing reforms to make our courts work better.

3 A dataset about the working of debt recovery tribunals

We hand-constructed micro data for a sample of cases disposed by the Debt Recovery Tribunal (DRT) in Delhi. We obtained complete information for 22 cases disposed between February and April 2014. The earliest of these

cases had been instituted in 2006, and the last in 2013. We captured information about who filed the case, against whom, and the key issue at stake. At the end of each hearing, an order is passed. We analysed each hearing and each order. This yielded observations of 474 orders over these 22 cases, an average of 21.5 orders per case. We captured data about the date of the order, the content of the order and the date of the next order. If there was an adjournment, we noted who asked for it and why.

The data files have been released here.

4 How large are the delays

When a hearing resulted in an avoidable and unpenalised adjournment, we classified it as a failure. Most often, these adjournments were requested by one of the parties, but sometimes they are caused by the tribunal itself. On average, each failure adds about a month of delay to the case.

The cases we examined went on for about 2.7 years on average. This conceals a lot of variance — the duration varied from as few as 5 months to as many as seven and a half years. See Figure 1 below:

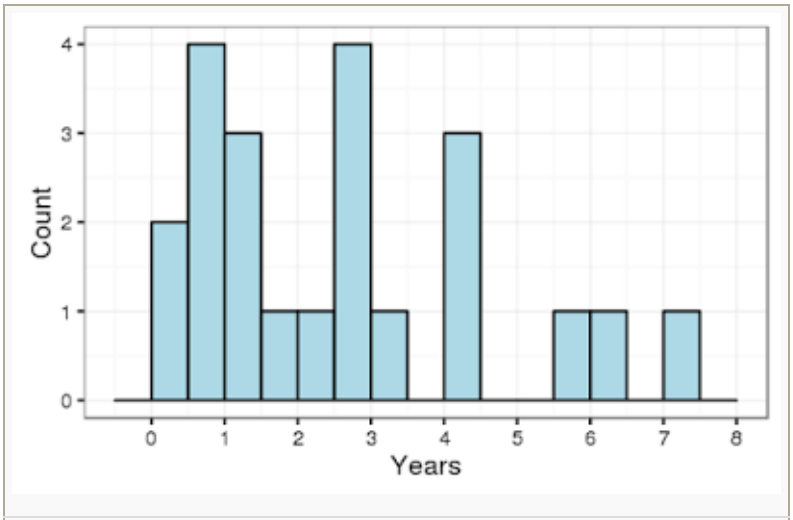

Figure 1: Histogram of the case duration

How much of this was necessary? In other words, if the system had functioned well, how much delay could have been avoided? It turns out that of these 474 hearings, 279 hearings (about 60%) were failures. These failures induced half the delay.

Can we envision a world where trial failures are eliminated? At first blush, it seems that we could reduce the duration of the average case by roughly half if we are able to eliminate trial failures. The full gain is, however, larger than this. If there were fewer trial failures, cases would finish sooner, freeing up slots on the judicial dockets. This would let other cases have more frequent hearings. So the delay would drop by more than half if these failures were avoided.

5 Who causes delays: borrower or lender?

At DRTs, there are broadly two kinds of cases: those filed by the lender, and those filed by the borrower. The cases filed by borrowers typically ask the tribunal to stop action taken by the lenders under SARFAESI. In these cases, one would expect that the borrowers would have an incentive to delay: they already have use of the money, and they would like to repay as late as possible. This is indeed what's seen in the data. For the cases filed by borrowers, adjournments due to the borrower account for 46% of the total time lost, while about 21% is lost due to the lender, and about 17% due to the tribunal (see Figure 2).

In the cases filed by the lender, one would expect that the lender-petitioner would want a quick disposal of the case. After all, it has lent the money, and would presumably like it back as soon as possible. Besides, these lenders are sophisticated institutions that maintain proper documentation and have expensive lawyers in their service.

Remarkably enough, in these cases, the *petitioner* is the major cause of delays. The lender-petitioner accounts for 37% of the delay, compared to 20% caused by the defendant and 26% by the tribunal. Many of these delays are because the lender asks for adjournments while it locates and files documents. This clearly violates our

expectation that the lender would want his money back quickly. Given that they have good documentation and good quality legal counsel, it is not clear why they would take so long to perform tasks that lie well within their control.

6 Looking deeper into the delays

This raises several questions. Why do lenders file cases in courts, and then ask for so many adjournments? Is it possible that their objective in filing the case is not to obtain a judicial mandate in their favour, but to exert pressure on the borrower to come to a negotiated settlement? The large number of cases that seem to be settled outside the court-room (about half of the cases we studied) would seem to indicate so.

Figure 2: Who delayed?

It is likely that the cost of prolonging a legal fight is lower for a financial institution than for most borrowers. Financial institutions have legal departments and lawyers on retainers, while for most small borrowers, the legal system is a source of anxiety and expense. Perhaps banks delay, in the expectation that the borrower would wilt under the pressure and would be willing to come to a negotiated agreement.

But if we look at Figure 2, about 70% of the delays are due to the lawyers. The large number of times the lawyers (on both sides) ask for more time to file documents, as well as the many instances where one or the other (often both) lawyers are absent, or both lawyers request adjournments, suggests another possibility: that the lawyers are in no hurry to finish the case. If the incentives of the lawyers are perverse — for instance, if they get paid not on the basis of prompt resolution of the case in favour of their client, but on the basis of the number of hearings — then it is reasonable to expect that they would prefer to have more hearings.

An important weak link is the behaviour of the court. Those asking for repeated adjournments are imposing a cost on the judiciary. Judicial time and capacity are scarce public resources, and repeated delays are a waste of these precious resources. In spite of this, we have seen very little evidence of the court imposing penalties on the parties for causing delays. There is emotion about hiring more judges, but not about cracking down on delaying tactics.

Another facet of the data is how often the tribunal itself causes delays. Figure 2 shows that more than a quarter of the time lost is attributable to the court. The reasons are many: the registrar might be on leave, the judge may be attending a conference, or the bar association might have requested a holiday. Most other institutions find ways to ensure that work is not held up due to such reasons. As an example, a railway station or a stock exchange or a bank branch works all the time.

7 Conclusions

To summarise, our study has shown that more than half the time of a case is lost in avoidable and unpenalised adjournments. The parties to the case, the lawyers, and the tribunals, all participate in this delay. The study

indicates that lenders may use court delays as a strategy to pressure the borrower to come to a negotiated agreement. Lawyers may have perverse incentives to draw out cases, and tribunals often contribute to delay themselves due to administrative reasons.

These results suggest two clear directions for reform:

1. Laws must provide incentives for litigants, lawyers, and judges to reduce litigation time. For an example, see here on how *smart drafting* of rules can create incentives to quickly resolve disputes.
2. Poor administrative processes also contribute to delays. Judicial time gets wasted because the administrative functions of a case (like serving notices) have not been completed. The solution to this is better administration, through investment in the court infrastructure, as well as through the separation of administrative and judicial functions of the tribunal.

This approach differs from the commonly advocated solution of increasing the number of judges. If the incentives of judges and lawyers do not change, it is unlikely that more judges will reduce delays. In fact, it may be counter-productive: more judges might lead to a greater willingness on their part to grant adjournments. If judges have discretion in admitting cases (as in the Supreme Court), more judges might also mean the admission of more cases, leading to even greater delay. The approach to reforms we have presented here also differs from that of other authors (for instance, Levin 1975, and Posner 1973) in that we focus on administrative inefficiencies as much as on the behaviour of the actors. This is because the business processes around administering justice in our country are primitive. Fixing incentives alone will not solve the problem --- administration needs to be revamped as well. There is a wide consensus in India that courts work badly, and that deep reform is required.

Such reform should be grounded in a sophisticated understanding of the value (to a protagonist) and the cost (to society) of judicial delays, and it should be guided by the principles of law, economics, and public administration. The work we have presented above is a step in this direction. Future work will aim to derive rigorous inferences about the causes of delay, the incentives of the various stakeholders, and how these incentives could be modified.

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Reducing delays in litigation by reshaping the incentives of litigants

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by Shubho Roy.

Judicial delays are a major problem in India. There have been a number of attempts to solve these through introducing new legislation or tweaking existing laws. The tweaks usually involve putting ad-hoc numerical limits on the number of proceedings or delays. This approach has failed. A different approach is to create *incentives* for parties to not delay legal proceedings. This approach has been used worldwide with success. One example we show here, from the US, is Rule 68 of the Federal Rules of Procedure which sets up an interesting *game* to speed up litigation.

The problem

In enforcing contracts, India ranks 186 out of 189 countries. Judicial delays in criminal cases probably cause even more harm. To solve this problem the government has tried quite a few things. Amongst them are:

1. The Arbitration Act and Conciliation Act, 1996 was made with the objective of providing litigating parties (mostly in commercial disputes) a system *outside* the court system through arbitrators, but within a legal system of the Arbitration Act. This law succeeded an older law of 1940 and was supposed to make India's law aligned with international law of arbitration.
2. The Code of Civil Procedure which governs court proceedings in civil disputes was amended in 1999 (effective from 2002) requiring courts provide a maximum of three adjournments to a party in a case (times a party can delay a court proceeding for the day). This rule appears to be followed more in its breach. Similarly the costs imposed on parties for adjournments are puny compared to the actual costs in an adjournment. E.g. Bombay caps costs for each days proceeding at Rs.100.

These attempts have not resulted in improved arbitration *or* reduced court delays. As a recent arbitration order against *India* in an arbitration under a bilateral investment treaty notes: An international investor could not enforce the arbitration award (i.e. legally collect the award) after *winning* the arbitration for a period of 8 years.

The government proposed an ordinance to amend the Arbitration Act, 1996 to speed up the process of arbitration. Amongst other changes, two key proposals are:

1. A time of limit of 9 months for arbitrators to finish proceedings. If the time for proceedings exceeds the limit, the arbitrator will have to apply to the High Court to get an extension. The High Court may prevent arbitrators with long delays from taking up new proceedings.
2. The government will cap total fees payable to an arbitrator.

These *quantitative restrictions* and *price controls* have three features:

1. They are not new, and have been tried multiple number of times before.
2. They have been a resounding failure in the past.
3. They have many unintended consequences.

While speeding up arbitration is a step in the right direction, at the end if the losing party does not cooperate, the coercive power of the state has to be exercised. The Ease of Doing Business report notes that a contract

enforcement in India involves 46 steps. Arbitration proceedings constitute only a fraction of those steps.

This award is symptomatic of what is wrong with squeezing the balloon in one place. We just create incentives for parties who want to litigate and delay to move their delaying tactics to other areas including:

1. *Appointment of arbitrators*: When parties disagree whether an arbitration is required or who should be an arbitrator, the courts have to step in to start arbitration proceedings or appoint arbitrators. Parties unwilling to cooperate, will just use the same old delaying tactics in Indian courts to delay the appointment of arbitrators.
2. *Execution of arbitration awards*: After winning an arbitration, the winning party still has to go to the court to *force* an unwilling losing party to pay up. Only a court order can block and transfer money out of a bank account or hold auction for a property of the loser. Again, this requires the winning party to go file an application before the court to get court official to assist in forcible takeover of properties, or get bank account records changed (usually called *execution proceedings*). The losing party can again use time tested delaying tactics in execution proceedings to lengthen out the suffering of the winning party.

Emphasising a single bad metric may have many bad unintended consequences. Arbitration proceedings should not be judged solely on the basis of time taken for the award. The quality of the award is also an important desirable feature of an arbitration. Arbitrary limits on time and fees work against the quality of the awards.

With the nine month deadline in the mind of arbitrators and a probable reduction of fees, the arbitrator will have the incentive to:

1. Hurriedly finish arbitrations and push out a low quality award. Which will then be challenged in appeal before courts, thereby burdening the judiciary again.
2. Take up more number of arbitrations to have the same level of income as before. This will have the same effect of pushing down the time and effort an arbitrator allocates to each case.

A single cost cap for arbitrator fees also ignores the complexity of modern arbitrations. Arbitrations today are not just limited to legal questions, complicated contracts in engineering, construction, high end services require specialist arbitrators with technical knowledge. Capping costs has a high risk of driving out competent and therefore expensive aribtrators outside India.

Reshaping incentives

In order to make progress, we should look deeper. We should understand the incentives of the parties to a litigation and then use policy interventions to modify these incentives. One useful example is from the US: Rule 68 of the Federal Rules of Civil Procedure. This is a more nuanced approach which discourages parties to litigate.

Rule 68: Winner beware

Rule 68 involves civil cases where the plaintiff (the suing party) is seeking monetary damages against the defendant (the party being sued). The rule has the following proposition:

At any time before the trial starts, the defendant can make an offer to the plaintiff to settle the case. Two copies of the offer terms are made. The plaintiff can accept or reject the offer. If the plaintiff accepts the offer, the cost of the trial is eliminated.

If the plaintiff rejects the offer, the judge is informed about the rejection but not the terms of the offer that was rejected (this is kept in a sealed copy with the court). If the plaintiff wins, there can be two scenarios at this point:

1. The sum awarded in the judgment is *higher* than the sum offered by the defendant before the trial started.
2. The sum awarded in the judgment is *lower* than the sum offered by the defendant before the trial started.

In the second case, the plaintiff has to bear the entire litigation costs incurred by the defendant from the date the offer was made by the defendant. The offer is not seen by the judge before the trial to prevent the judge's final determination from getting coloured by the offer of the defendant. The judge comes to the determination of judgment amount through the independent judicial process.

This rule is an elegant way to reduce litigation. At the beginning of a case, the judge has very little information about the merits of the case: In contrast, the parties know much more, having *lived* through the dispute. They are also in a better position to understand the true value of their economic loss. However, every plaintiff (who believes she will win) has an incentive to ask for more damages than actually suffered. Conversely, every defendant who knows that he has a weak case still has some incentive in *drawing out* a litigation, thereby delaying the eventual payout she has to make.

When an offer is made to settle, every plaintiff takes it as a signal about what the defendant thinks about the merits of her case. A high offer is interpreted by the plaintiff as that the defendant considers that the plaintiff is on strong legal grounds to win. This may push the plaintiff to continue with the trial, with the hope of getting a higher award in judgment rather than the settlement. However, by transferring the trial costs in case of a lower judgment value, a good counter incentive is created for the plaintiff. The plaintiff has to think hard about the offer and cannot reject it summarily.

Similarly, defendants have an incentive to offer lower settlement amounts because it may be used as a *signal* that the defendant has a good case. However, this rule gives an incentive to the defendant to make a *fair and generous* offer, knowing that if the court gives a lower amount the defendant will make significant savings in litigation costs.

The rule thus sets up an *economic game* where there is a strong incentive for both parties to avoid judicial systems *without* doing injustice and reducing the burden on the state.

Conclusion

Few problems are as important to India's emergence as a mature market economy and successful liberal democracy, as the problem of making courts work better. One element of this is a fresh approach to the administrative aspects of how courts work. The second element is to rethink rules in a way that is grounded in thinking about incentives. Compare and contrast the sophistication of Rule 68 with the 9 month and price capping rules that we are proposing in our arbitration law.

How to make courts work?

ajayshahblog.blogspot.in/2015/02/how-to-make-courts-work.html

by Pratik Datta, Ajay Shah.

We in India are proud of the way elections are conducted. We are ashamed of the way our courts work. The problem of judicial delays in Indian courts is well-known. Delays are a significant contributor to India ranking 186th in "Enforcing Contracts" in the Doing Business Report. Studies have shown that court efficiency has a bearing on economic activity, making our record on delays a serious cause for concern.

There are many initiatives presently underway, which seek to do `court modernisation' using computer technology. We argue that most present initiatives are poorly designed. Simply computerising the existing processes of courts will not give us better functioning courts.

A recent example: Computerisation of court records

One example of superficial application of technology to courts is the Supreme Court's e-filing process. This has a few problems.

The Advocate-on-Record (AoR) doing the e-filing is notified online of the defects. He is supposed to rectify the defects and ultimately submit a hard copy. The requirement of a physical document defeats the very purpose of e-filing.

Physical filings cost less than electronic filings. This should be reversed.

Most important, the e-filing system merely injected some computers into existing court processes without fundamentally rethinking the design of the existing processes. This yields low, zero or negative gains.

Business process engineering

A court is an organisation made up of various components: judges, advocates, registry, IT team, accounts department and so on. Each component interacts with the other in a consistent pattern: each gets an input from another, processes it and delivers an output. Failure of one component to deliver the right output results in delay. For example, when a matter is filed, the advocate provides an input in the form of a petition. The registry processes the petition, reviews it and fills a checklist and delivers an output - often a checklist of filing defects. From this perspective, a court is just like any other firm. The experiences of firms in business process re-engineering from the world of firms are relevant to the objective of building better courts.

There is enormous global experience with business process re-engineering in firms. Three main lessons can be identified:

1. The superficial sprinkling of technology on top of legacy processes yields low, zero or negative gains.
2. What is required is comprehensive redesign of processes, utilising the possibilities of contemporary technology.
3. Rolling out such comprehensive transformation is difficult. It will be resisted by erstwhile staff who are set in their ways. These initiatives have to be owned and championed by the top leadership.

Business process re-engineering of Indian courts should start with time and motion studies, to look at how air time of courts is used, and abused. This should then lead to a brand-new design of how the court room functions. There are many global initiatives which can give ideas in this regard. Indian IT and consulting teams

have done a lot of overseas work, and have global state of the art expertise in process engineering. We should tap into this talent pool for building world class courts in India.

In the mind of a BPR person, the foundations of the thinking are the work load (how many customers show up per month) and the capacity which is required to serve them. This is simple division: How many man-hours of a court room does it take to serve one customer, and hence how many court rooms do we need? This also leads to the question: How can the man-hours used by one customer be reduced? These elementary sizing calculations do not take place in the judiciary today. Courts are built with no regard for the anticipated case load, nobody knows how many cases will show up, and all that happens when queues build up is hand-wringing. No Indian IT/consulting professional would accept such lassitude, but the legal fraternity has become used to treating delays like death and taxes.

Integral to the new system should be an instrumentation mechanism, through which fine grained data is made available about the working of the new processes. This can then be used to kick off a continuous spiral of process improvement. In other words, a brand new process should not be seen as a one time reform. Integral to the one time reform should be a process of continual measurement and refinement.

This kind of thinking has been used with courts before, elsewhere in the world. Here are some examples. The National Center for State Courts in the US has done extensive research on this. Software have been developed to manage court business processes across jurisdictions (some examples are here and here).

Why do our courts work badly?

Expert committees have played an important role in policy making in India. However, in the past, court automation committees have usually comprise of judges, lawyers and registrars. All these persons (a) Lack knowledge on business process engineering (example: the composition of the Supreme Court e-committee) and (b) Are invested in the present ways. They have succeeded and risen to the top of the profession under the present arrangements, and tend to treat the present system as broadly sound.

Contrast this with an example of a successful re-engineering of business processes in another wing of the government - the Income Tax department. In his 2006 Budget Speech, the then Finance Minister declared that the IT department will undergo process re-engineering. Accordingly, a global tender was floated and a management consultant firm was appointed as external consultant for the project. It is because of this extensive project that today income tax returns can be easily filed online.

Projects must start with the mandate of building a world class court, not a mandate of computerising the court. Computerisation committees are typically not given the mandate of redrafting the procedural rules of the courts. For example, the terms of reference of the Supreme Court's e-committee does not clearly specify that it should produce new draft procedural rules. However, the Supreme Court e-committee itself in its Policy and Action Plan Document (2014) instructed all High Courts to take up process re-engineering. Accordingly, some High Courts set up their own process re-engineering committees (see here, here). Reportedly, the High Courts have submitted these reports to the Supreme Court and these have been forwarded to the Law Commission for identifying the best practices. It is unclear whether the result of this exercise will be a fresh set of procedural rules. Moreover, this approach is inefficient as it requires every High Court to reinvent the wheel and leads to the possibility of a differential response from High Courts.

The way forward

We think three ingredients are essential:

1. The dominant flavour of new projects should be to do fundamental, ground-up process re-engineering, drawing on the tremendous talent pool found in India in the consulting and IT industries. The flavour of the teams should be consulting and IT, and not legal practitioners.

2. Since we have started out at the bottom of the world, too often, our aspirations are too low. International experiences should be used much more than is presently the case. E.g. consider the example of Dubai. The attitude should be to jump to the top 10 in the world, not go up from rank 186 to rank 166.
3. We should build scalable systems and institutional arrangements which, once proven in one or two courts, can be rapidly re-applied all across the country.

Some important developments are now taking place in building better courts:

1. Justice Srikrishna's Financial Sector Legislative Reforms Commission has drafted primary law governing the `Financial Sector Appellate Tribunal' with strong provisions forcing world class functioning.
2. The Ministry of Finance has setup a `Task Force' to build this Financial Sector Appellate Tribunal.
3. We may be at the early stages of important new developments in finance with the rise of `Finance SEZs'. The NIPFP concept note on this subject recommends that the agency design for FSAT be applied to commercial courts which would do dispute resolution between firms.

Conclusion

As Fareed Zakaria says:

> *...when we think about democracy, we should really think about not simply the electoral process but the inner stuffing of democracy, which is the institutions that produce liberty, separation of powers, the rule of law, courts and constitutions and that that inner stuffing is in many ways more important than elections.*

The Constitution requires elections. We would be outraged if elections were marred by delays, corrupt staff, etc. The Constitution also requires courts. We should bring that same level of outrage to the failures of courts in India. The organisational capabilities which are used to run elections properly need to be brought into the field of running courts properly. As with free and fair elections, there is no contradiction between efficient management and fairness. All that is required is obtaining a quantum jump in processes. India has made this jump with the working of elections; now we need to do this with the working of courts.