

Gist of Economy Survey 2017-18 [Chapter 9]: Ease of Doing Business' Next Frontier: Timely Justice

INTRODUCTION

- **World Bank's Ease of Doing Business:**
 - India jumped thirty places to break into the top 100 for the first time in the World Bank's Ease of Doing Business Report (EODB), 2018.
 - The rankings reflect the government's reform measures on a wide range of indicators.
 - India leaped 53 and 33 spots in the taxation and insolvency indices, respectively, on the back of administrative reforms in taxation and passage of the Insolvency and Bankruptcy Code (IBC), 2016.
 - It made strides on protecting minority investors and obtaining credit.
 - It retained a high rank on getting electricity, after a 70 spot rise in EODB, 2017 due to the government's electricity reforms.
 - This year's report did not cover other measures such as GST, which are expected to further boost India's ranking in the coming years.
 - But India continues to lag on the indicator on enforcing contracts, marginally improving its position from 172 to 164 in the latest report, behind Pakistan, Congo and Sudan.
- A prerequisite for business and commerce is a clear and certain legislative and executive regime backed by an efficient judiciary that
 - - fairly and punctually protects property rights,
 - preserves sanctity of contracts, and
 - enforces the rights and liabilities of parties.
- The government has taken a number of actions to expedite and improve the contract enforcement regime. For example:
 - the government: scrapped over 1000 redundant legislations;
 - rationalized tribunals;
 - amended The Arbitration and Conciliation Act, 2015;
 - passed The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015;
 - reduced intra-government litigation; and
 - expanded the Lok Adalat Programme to reduce the burden on the judiciary.
 - The government has also advanced a prospective legislative regime to ensure legal consistency, reducing chaos due to unpredictable changes in regulations.
- The judiciary has simultaneously expanded the seminal National Judicial Data Grid (NJDG) and is close to ensuring that every High Court of the country is digitized, an endeavor recognized in EODB, 2018.
- However, economic activity is being affected by the realities and long shadow of delays and pendency across the legal landscape.

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- The finds in this chapter are simple and stark:
 - Delays and pendency of economic cases are high and mounting in the Supreme Court, High Courts, Economic Tribunals, and Tax Department, which is taking a severe toll on the economy in terms of
 - stalled projects,
 - mounting legal costs,
 - contested tax revenues, and
 - reduced investment.
 - Delays and pendency stem from the increase in the overall workload of the judiciary, in turn due to expanding jurisdictions and the use of injunctions and stays; in the case of tax litigation, this stems from government persisting with litigation despite high rates of failure at every stage of the appellate process; and
 - Actions by the Courts and government acting together can considerably improve the situation.

PENDENCY AND DELAY: FACTS

Economic Tribunals

- Analysis of six prominent appellate tribunals that deal exclusively with high stakes commercial matters reveal two patterns:
 - First, there is a high level of pendency across the six tribunals, estimated at about 1.8 lakh cases.
 - Second, pendency has risen sharply over time.
- The average age of pending cases across these tribunals is 3.8 years.
- It is noteworthy that in two cases—telecommunications and electricity—the explosion in pendency resulted from interventions by the Supreme Court.

High Courts

- Further, the creation of tribunals at different points in time did not alter pendency at the High Courts of the country nor their ability to deal with other economic cases.
- The overall pendency of the High Courts, and the case-wise pendency of these economic cases at High Courts continue to increase.
- The total backlog in High Courts by the end of 2017 as per the National Judicial Data Grid was close to 3.5 million cases.
- While the volume of economic cases is smaller than other case categories, their average duration of pendency is arguably the worst of most cases, nearly 4.3 years for 5 major High Courts. The average pendency of tax cases is particularly acute at nearly 6 years per case.
- Intervening measures like the setting up of the National Judicial Data Grid and creation of tribunals have helped, but more is needed to improve the situation.

PENDENCY AND DELAY: POSSIBLE REASONS

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High Courts: Burden from Expansion of Discretionary Jurisdictions

- One reason for the rising pendency of economic cases at the High Courts could simply be the generalized overload of cases.
- Further, economic and commercial cases are usually complex, require economic expertise in their handling and disposal, and hence, require more judicial time.
- In some instances, however, this increased overload is due to the expansion of discretionary jurisdictions by Courts, without any countervailing measures that either balance the scope of other jurisdictions or improve overall administration and efficiency.
 - For example, Articles 226 and 227 of the Constitution of India empower High Courts with carefully circumscribed writ jurisdiction.
 - In practice, however, High Courts have permissively and expansively interpreted this provision over a period of time, which has resulted in a substantial increase in Article 226 cases.
 - At the 6 High Courts studied, writ petition constitutes between 50-60% of the Court backlog, with average pendency fluctuating between 3-10 years.
 - Data available for 2008- 2013 for 5 High Courts captures the continued rise in the pendency of Writ Petitions even in recent years, which is crowding out judicial time for other cases.

High Courts: Burden from Original Side Jurisdiction

- Some High Courts of the country retain a unique original jurisdiction, under which the High Court, and not the relevant lower court, transforms into the Court of first instance for some civil cases. These cases occupy a significant share of the Court's docket.
 - The Delhi and Bombay High Courts have original jurisdictions that occupy nearly 10-15% of their workload.
 - In 2014, the share of original side cases was as high as 30% for the Delhi High Court.
- The High Courts take longer to clear civil suits as compared to their district court counterparts. The average pendency of civil suits at the Delhi High Court is 5.84 years, while that at the lower courts of Delhi is 3.66 years.

Supreme Court: Expansion of Special Leave Petition (SLP) Jurisdiction

- The Supreme Court, like the High Courts, has less capacity to deal with mounting economic cases because of rising overall pendency.
- In the case of the SC, the burden derives in part from Special Leave Petitions under Article 136 of the Constitution of India, which empowers any party to approach the Supreme Court directly from any court or tribunal.
 - Initially invoked only in "exceptional circumstances", SLPs are now an overwhelming feature of practice at the Supreme Court.
 - The rate at which the Supreme Court admits Special Leave Petitions under Article 136 of the Constitution increased from around 25% in 2008 to nearly 40% in 2016.

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- In contrast, the Supreme Court of the United States of America and Canada admit 3% and 9% respectively of the cases filed before it.
- This rising tendency to grant special leave has fundamentally altered the nature of the Court and created a high level of pendency, nearly 85% of which are SLP cases.
- The Court's SLP jurisdiction does not include other cases like transfer and review petitions, each of which occupies nearly 4-6% of the Court's docket.
- Simultaneously, the share of writ cases has gone down from 7% in 1993 to under 2% in 2011

Recourse to Injunctions and Stays

- Rising pendency also results from the injunction of cases by Courts.
 - For example, in the case of Intellectual Property Rights (IPR) cases, injunctions have led to about 60 percent of cases being stayed, whose average pendency is 4.3 years.
- Common traits of IPR cases across different High Courts:
 - Lengthy interim orders,
 - ex parte ad interim stays,
 - increasing rate of pendency of cases at final arguments, and
 - few final judgments in IPR cases.
- The average age of cases waiting for final judgment is inordinately high (7.9 years), showing that more attention needs to be given to cases pending at the stage of final disposal.

PENDENCY AND DELAY: COSTS

- Since project costs were predominantly debt-financed, the project costs increase. Among government projects, the Ministries of Power, Roads and Railways have been the hardest hit.
- A similar picture is for private sector infrastructure projects.
- The overall impact of rising pendency at Appellate Tribunals, High Courts and the Supreme Court, coupled with the rising use of injunctions and other blunt instruments has led to spiraling legal expenses of Corporate India.

CENTRAL GOVERNMENT TAXES: A CASE STUDY

- Pendency, arrears and delays are not just a feature of courts and tribunals, but also the Tax Departments and their multi-layered process.
- **Amount and value of pendency in taxation matter:**
 - **Direct taxes:**
 - As of March 2017, there were approximately 1,37,176 direct tax cases under consideration at the level of ITAT, High Courts and Supreme Court.
 - Just 0.2% of these cases constituted nearly 56% of the total demand value; and 66% of pending cases, each less than Rs. 10 lakhs in claim amount, added up to a mere 1.8% of the total locked-up value of pending cases.

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- **Indirect taxes:**
 - As of March 2017, a total of 1.45 lakh appeals were pending with the Commissioner (Appeals), CESTAT, HCs and the SC together, that were valued by the Department at 2.62 lakh crores.
- Together, the claims for indirect and direct tax stuck in litigation (Appellate Tribunal and upwards) by the March, 2017 amounted to nearly 7.58 lakh crores, over 4.7 percent of GDP.
- For the Department, these numbers, especially the value of amounts involved have been rising sharply over time.
- **Success rate:**
 - The success rate of the Department at all three levels of appeal-- Appellate Tribunals, High Courts, and Supreme Court-- and for both direct and indirect tax litigation is under 30%.
 - In some cases it is as low as 12%.
 - The Department unambiguously loses 65% of its cases.
 - Over a period of time, the success rate of the Department has only been declining, while that of the assesseees has been increasing.
- **Department is the largest litigant:**
 - Nonetheless, the Department is the largest litigant. Department's appeals constitute nearly 85% of the total number of appeals filed in the case of direct taxes, though that number seems to have improved in the case of indirect taxes.
 - Of the total number of direct tax cases pending by March, 2017, the Department initiated 88% of the litigation at ITATs and the Supreme Court and 83% of the litigation pending at High Courts.
- **Conclusion:**
 - Even though the Department's strike rate has been falling considerably over a period of time, it is undeterred, and persists in pursuing litigation at every level of the judicial hierarchy.
 - Since tax litigation constitutes a large share of the workload of High Courts and the Supreme Court, Courts and the Department may gain from a reduction in appeals pursued at higher levels of the judiciary.

Supreme Court's Successful Management of Tax Litigation

- When not dealing with substantial questions of law or constitutional issues requiring the constitution of special-sized benches, the Supreme Court sits in benches comprising of two judges to decide cases from High Courts and other forums of the country. The benches are expected to hear and decide cases from a wide range of subject matters inter alia constitutional law, criminal law, civil law, commercial law, and taxation.
- However, the Court's recent experiment with constituting an exclusive bench for taxation produced impressive results, which may be replicated for other subject matters, and emulated by other High Courts that do not have special rosters for daily hearings.
- **Benefits of exclusive bench:**

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- Since the constitution of the tax bench in 2014, the Supreme Court has been able to reverse the trend of burgeoning pendency of tax cases. It is noteworthy that during this period, the SC reduced its reliance on staying claims of the Department, and focused on hearing and disposing cases.
- Besides reducing pendency and backlog, this phase of the Supreme Court saw a large number of judgments on law, and permitted the Court to discharge its envisaged role of clarifying and settling legal questions.
- There are other profound benefits of dedicated subject- matter benches.
 - Such benches ensure that the Supreme Court speaks in one voice, and there is continuity and consistency of legal jurisprudence.
 - They create efficiencies by allowing the judge to focus on the specialized branch of law placed before her.
- The Supreme Court's experience also confirms that Courts can take steps within existing design and capacity constraints to ameliorate pendency, particularly through specialized treatments of cases.
- **Should be replicated:**
 - The model may be replicated for other commercial and economic areas of law as and when necessary at the Supreme Court, and should be replicated by every High Court of the country.
 - For instance, there may be merit in handling different stages of cases also through specialized benches.
 - Currently, most High Court judges hear cases in the following order:
 - supplementary matters (new cases),
 - advanced matters (admitted cases), and
 - regular matters (cases listed for final disposal).
 - Every judge starts the day with fresh cases, and reaches old cases only during the second half of the day, if at all.
 - It may be more prudent to create category-wise benches that exclusively deal with cases at the stage of final hearing for the entire working week, so that they are given the attention that the IPR data show are necessary.

EXPENDITURE ON ADMINISTRATION OF JUSTICE

- Total spending on Administration of Justice by States and the Centre constitutes 0.08-0.09% of GDP which is low when compared to other countries, especially common law countries.
- While general spending on the judiciary may not impact pendency, spending on modernization, computerization and technology leads to shorter average trial lengths.
- The Government may consider including efforts and progress made in alleviating pendency in the lower judiciary as a performance-based incentive for States.
- Expenditure may be prioritized for filing, service and other delivery related issues that tend to cause the maximum delays. Nearly 30% of a case's life is taken up by formal proceedings like service of summons and notices, issues that may be easily resolved through technological upgradation for filing and service mechanisms.

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- However, building additional judicial capacity may not be effective unless existing capacity is fully utilized. The higher judiciary is currently operating at 63.6% of existing capacity.

POLICY IMPLICATIONS

- Pendency, delays and injunctions are overburdening courts and severely impacting the progress of cases, especially economic cases, through the different tiers of the appellate and judicial arenas.
- The Government and the Courts need to both work together for large scale reforms and incremental improvements to combat a problem that is exacting a large toll from the economy.
- Some of the following steps may be considered:
 - (i) Expanding judicial capacity in the lower courts and reducing the existing burden on the High Courts and Supreme Court:
 - For a smooth contract enforcement regime, it may be imperative to build capacity in the lower judiciary to particularly deal with economic and commercial cases and allow the High Courts to focus on streamlining and clarifying questions of law.
 - Amendments to the Code of Civil Procedure, Commercial Courts Act and other related commercial legislations should be considered.
 - These measures must be buttressed by efforts to train judges, particularly in commercial and economic cases by judicial academies;
 - Downsizing or removing original and commercial jurisdiction of High Courts and enabling the lower judiciary to deal with such cases. Early results from the Delhi High Court suggest that reducing the size of original side jurisdiction in 2016 allowed the court more time to reduce its overall pendency
 - Courts may revisit the size and scale of their discretionary jurisdictions and avoid resorting to them unless necessary, to reclaim the envisaged constitutional and writ stature of the higher judiciary;
 - Existing judicial capacity ought to be fully utilized.
 - (ii) The tax department exercising greater self-restraint by limiting appeals, given its low success rate.
 - This could either take the form of ex ante rules limiting appeals, for example, to no more than one in four High Court verdicts or no more than one in three arbitration cases; or,
 - given the long shadow of the 3 Cs (CBI, CVC, and CAG) in inducing bureaucratic risk-aversion, perhaps an independent Panel could be created to decide on further appeals of tax verdicts against the Department.
 - Further, the number of tiers of scrutiny may be limited to three forums for taxation cases.

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- (iii) Substantially increasing state expenditure on the judiciary, particularly on their modernization.
 - Moreover, legislations (and perhaps even judicial decisions that expand or introduce new jurisdictions) should be accompanied by judicial capacity and public expenditure memorandums, which adequately lay out the necessary provisions required to address increasing judicial requirements, and ensure their adequate funding.
- (iv) Creating more subject-matter and stage-specific benches:
 - Building on the success of the Supreme Court in disposing tax cases, creating more subject-matter and stage-specific benches that allow the Court to build internal specializations and efficiencies in combating pendency and delay.
- (v) Reducing reliance on injunctions and stays.
 - Courts may consider prioritizing stayed cases, and impose stricter timelines within which cases with temporary injunctions may be decided, especially when they involve government infrastructure projects.
- (vi) Improving the Courts Case Management and Court Automation Systems.
 - The EODB, 2018 identified specific issues with India's poor Court Management and Court Automation systems, which may be used as a template by Courts and the Government.
 - To free up judicial time, initiatives like the Crown Court Management Services of the UK that are dedicated to the management and handling of administrative duties, may be considered.
- **Law of Mutually Reinforcing Legitimacy and Effectiveness:**
 - Discussions that dominate public discourse about relations between the judiciary and other branches of government are to some extent moot.
 - The point is not which side is right, but that the legitimacy and effectiveness of each depend on the lack thereof of the other.
 - According to public perception, there is some Law of Constant Overall Legitimacy and Effectiveness, with one side's loss being the other's gain.
 - However, this should probably give way to the Law of Mutually Reinforcing Legitimacy and Effectiveness.
 - It is perhaps also true that the judiciary, especially the High Courts and Supreme Court, are still considered fair and final arbiters. The lament of increasing judicialization must contend with that perception.
- **Cooperative Separation of Power:**
 - Recent experience with the GST has shown that vertical cooperation between the center and states--Cooperative Federalism--has brought transformational economic policy changes.
 - Perhaps there is a horizontal variant of that— **Cooperative Separation of Powers**-that could be applied to the relationship between the judiciary and the executive/legislature.
 - There are, of course, clear lines of demarcation and separation of powers between the two to preserve independence and legitimacy. Even while respecting these lines,

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it should be possible and desirable for these branches to come together to ensure speedier justice to help overall economic activity.

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