DELAY OF JUSTICE IS INJUSTICE: DECODING THE FLAWED JUSTICE DELIVERY SYSTEM IN INDIA WITH PARTICULAR REFERENCE TO PENDING CASES

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ABSTRACT

More than two crore cases are pending across trial courts in India today, and a majority of these are criminal trials. Despite legislative innovation in 1973 designed to achieve speedy case disposition and the introduction of plea-bargaining in 2005, the rise in case pendency has continued unabated. This paper argues that while reform efforts have primarily focused on enhancing supply-side factors—more judges, more courts, more time—it is clear that such an approach has proved insufficient for dealing with the problem. Together with this, a closer look must be had at how the Indian criminal process is designed. This helps us appreciate how various facets of the system engender, if not promote, delays. For the State to realistically hope to contain delays in the trial courts, appreciating and resolving these design flaws is necessary—if not more—as increased government spending on the judiciary and imposing time limits on litigants.

I. INTRODUCTION

After extensive study by the Law Commission of India,1 a revised Code of Criminal Procedure was introduced for India in 1973.2 Crucially, it chose not to fashion an entirely new system than India inherited from the colonial regime. Like the colonial codes, the heart of the 1973 Code was the criminal trial, the bulk of provisions addressing its various aspects. The changes brought about by the CrPC were primarily geared towards oiling the various cogs in the trial machinery: resolving legal ambiguities, ensuring greater fairness for all parties, and making “every effort ... to avoid delay” in the conclusion of trials.3 Today, one can safely state that the CrPC has failed in realizing that last objective of making criminal trials go faster. If anything, the problem has only grown worse in the decades since 1973. From around 3,00,000 cases completed in 1971 for offences under the Indian Penal Code 1860,4 there were 12,00,000 completed cases in 2016.5 But in that same time, pending IPC cases went up from around 6,40,000 to 97,00,000.6 Add to this the data on pending cases for offences under other laws,7, and it suggests that nearly two crores (two hundred million) criminal cases are pending in trial courts across India today.8

Because of this damning statistic, India’s criminal process is most commonly described as “broken.”9 The standard narrative suggests that the system is messaged mainly because of poor infrastructure, not enough judges, and the absence of strictly enforced timelines.10 Since successive governments have not done much to change any of this, the standard narrative has persisted for decades and stymied research examining why India’s criminal process remains wedded to slow, and slow, and lengthy criminal. This paper contributes to that marginalized stream of work operating outside the standard narrative. It offers a close appreciation of how the criminal process works at the trial court level, explaining the incentives of key actors to argue that delays are the natural outcome of severe design flaws that the process suffers from. If governments hope to curb delays, resolving these flaws is necessary—if not more—as increased government spending on the judiciary and imposing time limits on litigants.

The paper is divided into four parts. Part I describes the steel frame of the Indian criminal process architecture. Part II explains how the architecture shapes incentives of key actors and engenders delays in criminal trials. Part III argues that these systemic factors have caused plea-bargaining to fail in India. Part IV suggests changes to the architecture that can gradually help reduce the burden on courts.11
II. THE ARCHITECTURE OF THE INDIAN CRIMINAL PROCESS

This part provides a descriptive account of the Indian criminal process, answering questions such as how conduct is made criminal, how it is investigated, and what happens in court? Most of this account is based on my experience of the process in action as a practicing attorney in the trial courts of Delhi. Since the process is similar mainly across India,12 a limitation that this section does not cover nuances in states across India does not prove fatal.13

A. Offences and Investigations

Criminal conduct in India is defined and punished through the Indian Penal Code14 and a host of other statutes, described as “Special and Local Laws (SLL)” in government records. The IPC contains 511 provisions and creates over three hundred offences divided across categories such as bodily harm, harm to property, public welfare, obstruction of justice; SLL offences also cover a wide range of conduct, spanning tax evasion to terrorism. The same conduct can be covered by the IPC or by SLL, possibly falling within multiple offence heads in either of those, and both charges can be tried together. For instance, unlawful deprivation of property could be theft, misappropriation, criminal breach of trust, or cheating under the IPC (depending on how the associated State of mind is described). It could also be an SLL offense depending on the kind of property involved.15 Since all these offences carry different possible punishments, 16 creates scope for broad charging discretion with police. Police can describe the same conduct in different legal terms to make a case under different offences, with one scenario carrying significantly different consequences than another.

“Investigation” is a technical term in Indian criminal procedure, referring to all proceedings involved with collecting evidence.17 It begins with filing an information report (First Information Report). It ends with filing a Final Report by the police regarding the allegations, which recommends whether or not the case should go to trial.18 While police officers are ordinarily responsible for investigations; some SLL offences require that designated officers perform specific actions.19 Even so, what remains common is that the investigative agencies remain fully invested in a case till the Final Report is filed: prosecutors and judges become representatives of state interests hereafter. 20 Possible punishments for offences affect how investigations proceed. Usually, offences with at least three-year sentences are categorised as cognizable,21 which permits police to begin investigations without any judicial imprimatur and arrest suspects without warrants.22 If the alleged offence is “bailable,” arrested persons have a right to be released upon posting a bond either before police or the Magistrate before whom they must be produced within 24 hours.23 The vast exception to this rule exists in the form of several “non-bailable” offences.24 Persons may be detained in custody during an investigation into non-bailable offences for up to sixty or ninety days, again depending upon the possible sentence of the alleged offense.25 and detention can even continue through trial.26

B. Criminal Courts and Criminal Trials

India has a unified legal system at the federal and state levels, with criminal courts organized at four levels: Magistrate Courts, Courts of Session, statewide High Courts, and finally, the Supreme Court. Except for the Magistrates, all other courts possess a combination of original and appellate jurisdiction.27 But Magistrates have several other responsibilities due to their position as courts of the first instance. Most importantly, they are responsible for beginning the judicial phase of a case. This happens once the police submit a Final Report or the litigant files a Criminal Complaint. At this stage, called taking cognizance, the Magistrate has minimal discretion to reject a Final Report/Complaint and takes cognizance unless there are basic legal infirmities such as errors of jurisdiction.28 Following which the allegations are examined on a relaxed reasonableness standard to see if an offence is made out, for summoning the defendant to face trial.29

Trials themselves are of four kinds,30 with punishments often a reliable guide to the kind of trial a defendant might face.31 For offences punishable with more than two years, the case proceeds to a charge hearing. While at the summoning stage, the judge only looks at allegations and basic materials, charge hearings involve greater scrutiny. The judge hears the prosecutor and takes a prima facie view of the evidence proposed to be relied upon by the State, hears arguments for discharge by the defendant, and if convinced that the allegations are not groundless, the judge frames charges or commits the case and presides over the trial.32 These charges seldom differ from those suggested by the police in the Final Report/individual in the private complaint. Thus, charging discretion is shared between judges and police in the Indian criminal process, and the ultimate exercise of that discretion only occurs after hearing arguments by both sides.
Indian criminal trials do not have juries: charges are proved beyond a reasonable doubt before a judge, generally by the prosecution.33 Like previous stages, judges retain enormous discretionary powers during the trial itself: the judge can alter charges, allow parties to introduce new evidence, and add new defendants if any of it seems necessary for the proper disposal of a case.34 Again, the exercise of discretion at any of these stages occurs after arguments at the bar. Since a standard IPC or SLL offence carries an indeterminate sentence without a prescribed mandatory minimum term, it confers judges with broad sentencing discretion.35 Multiple sentence terms ordinarily run consecutively under the CrPC, although judges can order them to run concurrently.36 Lastly, a conviction may not result in prison time: probation is possible for offences with a maximum two-year sentence (and a few others),37 and courts have the discretion to suspend execution of a sentence when the defendant prefers an appeal.38

III. WHY TRIAL? UNDERSTANDING THE PRE-EMINENCE OF TRIALS IN THE INDIAN CRIMINAL PROCESS

This part suggests that what renders this criminal process architecture prone to delays are design flaws: the incentives of various actors are shaped so that none of them is rewarded in pursuing speedy disposal of cases. It helps to work with a hypothetical criminal case to advance the claim, and we take theft as the underlying crime, one of most everyday offences that the Indian criminal process deals with.39

A. The Only Logical Outcome

Anu is accused of taking Rs.10,000/- from a cupboard in Radha’s house without her consent. Theft is a cognizable, non-bailable offence, punishable with up to three years’ imprisonment: the police can arrest Anu without a warrant, and she has no right to bail.40 As mentioned before, the police are fully invested in completing investigations but not affected by what happens after that: Departmental policies across states are such that police officers are not incentivized to care about the consequences of cases being filed in court.41

Further, recall that the police do not decide to prosecute and begin judicial proceedings. That power rests with a judge, and since India follows a model of near-mandatory prosecution, judges have minimal discretion to stop proceedings at the outset even if they think the case is based on insufficient evidence or involves a dispute not worth utilization of limited judicial resources. So, all this makes it far from impossible that the police pursue the case and that it goes ahead for trial, even though Rs.10,000/- is not a significant sum of money.

Once the Final Report is filed, and cognizance was taken, Anu will be summoned to face trial unless she is already in custody. This filing of the Final Report, taking cognizance, and issuing summons typically make for the first judicial hearing.42 At the second hearing, the defendant will appear and get a copy of the case papers.43 At the third hearing, the judge will consider any deficiencies in copies supplied to her. At the fourth hearing, the judge will consider arguments on charge by the prosecution and defence. Only by the fifth hearing, usually, will the judge decide whether charges are to be framed or not and ask the defendant to state her plea. Hearings ordinarily take place within two months between each consecutive hearing, pegging the time to begin trial at a year after the first hearing. This, though, is the ideal scenario. Daily management of heavy dockets often means a court never reaches some cases on the list, thus prolonging a particular stage.44 Then there are adjournments. While the CrPC mandates that cases not be adjourned without sufficient cause, courts routinely ignore this rule to defer cases without such cause or any cost to litigants.45 In the clogged docket, such administrative issues mean the gap between hearings often becomes one of several months.46

Defendants are central to the criminal process. However, the difficulty in navigating a complex legal system renders it uncommon for a defendant in India to exercise her right of self-representation. Thus, the defence counsel typically calls the shots. So how might our defendant be advised to plead? Anu’s lawyer will advise her that the prosecution often flounders at proving its case in India if she does not have an idea already. Conviction rates for IPC offences hover around 46%.47 These averages mask the variance for specific offences, which hints at even better chances of securing an acquittal.48 Anu will have already invested a significant amount of time in the case, and the trial will still go on for some years as evidence is recorded, and arguments are heard. Her lawyer will inform her that this delay worsens the prosecution’s ability to call witnesses, who will then be unable to provide a consistent account of events. Lastly, private lawyers in India typically earn on a per appearance basis. In fact, besides a paltry monthly retainer, state-appointed lawyers also commonly earn based on appearances and stand to earn more through trials than settlements.49
To put it bluntly, pleading not guilty and going to trial seems to come with a good shot of winning for the defendant and best aligns her interests with those of her counsel. On the other hand, pleading guilty brings an immediate loss and possible sentence, the associated stigma and collateral consequences of a criminal conviction, and potential loss of earnings for counsel. No wonder defendants overwhelmingly plead not guilty and claim trial.

**B. The Haves and Have-Nots**

This rational model suffers from limitations that all models suffer from: it is premised on rational actors’ behavior and available data. One significant gap in the current data limiting this model is the absence of qualitative studies about defendants with legal-aid counsel (or no counsel at all) perform in the system. Having acknowledged this limitation, let us return to the model being constructed.

However, the model suggests that this scenario should play out regardless of whether Anu is an indigent defendant or a person with means. However, there is a set of considerations that only applies to persons with the means to afford counsel. It would not be an exaggeration to suggest that more money often secures better legal advice. More significantly, those with means can fully exploit the right to be heard that the criminal process affords defendants at the several stages during a trial when judges exercise discretion. That is not all. Statutorily, litigants have two avenues to challenge the judicial exercise of discretion before a verdict: revision petitions against any proceedings not of an “interim” nature, and petitions before a High Court against any proceedings constituting an “abuse of process.” But similar to how trial courts allow defendants to contest exercise of judicial discretion at various stages, appellate courts have also affirmed a right to challenge the eventual decision reached many of those stages. In these efforts to ensure procedural propriety, appellate courts have created avenues for several collateral proceedings which defendants with means can exploit after having tried their luck before the trial court:

(i) Defendants can challenge an investigation itself. This can be at any stage once it begins and can be a challenge against the Final Report filed, even before the trial court has had a chance to consider the allegations;

(ii) Defendants in custody during trial can challenge their detention during the pendency of the trial before superior courts;

(iii) Defendants can file for a transfer of proceedings at any stage of the trial;

(iv) Defendants can challenge the order taking cognizance, i.e., the stage when the police report / criminal complaint is taken on the judicial record;

(v) Defendants can challenge an order summoning them to face trial;

(vi) Defendants can challenge disclosures made during the discovery stage, i.e., handing over of material that the prosecution proposes to rely upon, which must be satisfied before the trial can proceed;

(vii) Defendants can challenge orders to conduct joint trials or to try different offenses jointly;

(viii) Defendants can challenge orders framing charges after having an opportunity to argue for discharge before trial courts;

(ix) Defendants can challenge orders passed during the recording of evidence at trial that either exclude or include certain materials.

Winning these challenges can either result in setting the clock back or quashing the entire case proceedings, ultimately prolonging the affair. Moreover, delays can also occur because appellate courts grant injunctions against trial court proceedings that subsist until appellate hearings conclude. In a system plagued by delays, this can send cases into cold storage. All these factors make pursuing collateral proceedings very attractive. As more proceedings and more extended hearings bring more potential remuneration for counsel, there is again an alignment in the defendant’s interests and counsel. As one would expect, such challenges often form the bulk of work
before appellate courts across the country, and the issue of injunction-based delays is today severe enough for the Indian Supreme Court to regularly intervene in.

C. Other Actors: Prosecutors, Judges, and Victims

Defendants/Defence Counsel is decisive actors in the criminal process once the case reaches court, and the previous discussion shows how a trial ends up being the logical outcome of how their choice architecture is framed. The positions of the remaining actors -prosecutors, judges, and victim-can help explain why this choice goes relatively uncontested. Let us first consider prosecutors. The Cr.P.C. creates an office of a “Public Prosecutor” and a ‘Directorate of Prosecutions”.69 Considered a “limb of the judicial process,”70 prosecutors are picked by the government either from a cadre of officers akin to bureaucrats or in consultation with the local judiciary71 with different states having their own specific rules for selection.72 Unlike private lawyers who usually earn on a per- appearance basis, prosecutors are paid a relatively low monthly salary, with increments pegged to promotions that take quite a while.73 Besides low salaries, trial court prosecutors across India often function on extremely meager resources, commonly working out of space reserved inside the courtroom without a separate office or computer. And their work-load is enormous. Though they rarely participate (prosecutors get access to case papers once a Final Report is filed in court),74 is part of everything else. A regular day brings a docket with more than thirty items consisting of bail hearings, charge hearings, recording evidence, and final arguments.75 Since the average lifespan of cases is over two years,76; it is uncommon for prosecutors to see the more complex cases to the end as they often get transferred before a case concludes.77 Thus, prosecutors end up having relatively little riding on the resolution of individual cases, so it makes sense that they adopt a passive role in that respect by not pushing for quick resolutions. Transfers of judges are more frequent, ordinarily than those of prosecutors.78 Accepting this reality, judicial career advancement is not pegged solely on the final disposal of cases; instead, the performance-evaluations metric considers how judges manage the entire docket and discharge their administrative responsibilities.79 The problems of this dysfunctional setup are reflected in the persistently low rates for IPC cases being withdrawn by the prosecution: a process that requires consideration of a case by prosecutors and approval by judges.80 Average acquittal rates for IPC offences are above 50%,81 making it reasonable to assume that several weak cases end up being taken ahead along with strong ones. But because of these design flaws, the inbuilt filtering process of withdrawal is underutilized, with only 883 cases concluded through this route in 2016.82

Victims have comparatively more skin in the game than prosecutors. The criminal process provides for an expansive right of private prosecution,83, and though the Cr.P.C. itself was only amended in 2009 to recognize a slew of victims ’ rights measures,84 the judiciary has historically been quite sympathetic to their cause.85 Outside the trial itself, victims are crucial for effecting another statutory method of case disposal: compounding.86 This allows for a case to end if both victim and defendant agree to do so. Compounding IPC cases are far higher than rates for withdrawal, reflecting the more invested role of victims.87 But compounding provisions do not provide for any compensation to be made to victims. Since the statutory victim compensation scheme requires a conviction, it does not bring any money in compounding either as compounding results in an acquittal for defendants.88 Thus, to return to our example, the law does not require that Anu give Radha the Rs.10,000/- while compounding the case. Unless they can strike an out-of-court deal with defend- ants, victims like Radha stand to gain little by ending a case quickly, making them more amenable to letting a case go to trial.

IV. PLEA BARGAINING ‘S FAILURE

The last part of the paper presented a description of the criminal process in action and explained how choosing lengthy trial proceedings was the natural outcome of how all the cogs in the machine interact with each other. This part focuses on plea-bargaining.89 India ‘s most recent federal legislative attempt to shift criminal cases away from trials and reduce pendency.90 In this part, we argue that it failed to dislodge criminal trials from their pre-eminent position because of how the plea-bargaining model was conceived and how it interacts with India’s overall criminal process architecture.

A. Plea-Bargaining in India: Judicial Beginnings to Statutory Recognition

We know that rising pendency on the criminal docket in the 1970 ‘s attracted legislative attention in India in reforming the CrPC.91 What has not been dis-cussed is how trial courts were also innovating to make the process go faster by awarding sentences below the statutory mandatory minimums to facili-tate quick guilty pleas.92 One such case of a discounted sentence made it to the Supreme Court, which did not kindly take this practice.93 An
irate Court issued a scathing critique to discourage this illegal bargaining between parties and chided magistrates for subverting clear legislative mandates.94 Again, we know that pendency has continued to mount unabated since 1973.95 The prob­lems it caused were exacerbated by a judicial tendency to keep defendants in jail during the case, which swelled prison populations.96 Facing dire straits, the government was forced to re­think the issue and nudged the Law Commission to examine the potential for introducing plea-based sentencing discounts in India.97

In its 1991 report, the Commission - headed by retired Supreme Court justices - also opposed negotiated justice, instead suggesting a scheme of offering sentencing discounts to defendants voluntarily pleading guilty.98 These develop­ments in New Delhi seem not to have reached some parts of India, where plea negotiations continued apace in trial courts for precisely the kind of situations that they were prohibited, i.e., to award punishments below the statutory man­datory minimum terms. 99 Perhaps because of this, subsequent reports by the Law Commission on criminal procedure issues eased up in their assessment of plea­bargaining,100 albeit without any analysis of the concept after 1991. These reports were cited as legislation passed in 2005 101to bring plea­bargaining on the statute book by 2006. The model, which remains unchanged since was conceived as follows:

(i) Plea bargaining is possible for all offences carrying a maximum sentence of up to seven years, except offences affecting the national socio-economic condition or when victims are women and children.102

(ii) Plea bargaining can only be initiated by the defendant after the case reaches the judicial stage, and defendants with a prior conviction for the same offence are barred from using the process.103

(iii) The Magistrate needs to satisfy herself that the defendant opted for plea bargaining voluntarily. Only after this the public prosecutor, investigating officer, and victim are called to court (when cases do not involve a police investigation, only the victim is called).104 A defendant can be released on bail during this time as well.105

(iv) All parties must work together to enter a ‘Mutually Satisfactory Disposition. ‘The court ensures the process is completed voluntarily. The Disposition does not involve negotiations on sentence but on fixing compensation for a victim.106

(v) If a Disposition is reached, the court hears all parties on the sentence. It retains the discretion to release a defendant on probation as per law, but there is little discretion besides this avenue.

(vi) When offences have a mandatory minimum, the court awards half that sentence. Where no minimum exists, the court awards one-fourth of the maximum possible sentence. 107Since nearly all maximum sentences in this range are pegged at three or seven-year terms, defendants expect sentences of either nine months or twenty-one months (time spent in custody is set off against this).108

(vii) The order cannot be appealed, with the only possible avenue of challenge through writ remedies or special appeals to the Supreme Court.109

B. Plea Bargaining ‘s Failure: What Went Wrong?

Every sector of the legal system garlanded plea­bargaining.110 Prominent lawyers billed it as a game­changer;111 judges went to prisons to preach its merits;112 legislators pointed to it as fulfilling election promises.113 In all this proselytizing, no data was being collected on how many cases were being resolved through plea­bargaining.114 The government only began collecting data from 2015 onwards, which suggested that in 2014 plea bargaining had been used for 34,931 cases under the IPC.115 A lot of these were cases for which plea bargaining was prohibited.116 These were excluded in subsequent reports, which presented a steep decline: 4,816 cases resolved through plea bar­gaining in 2015,117 and 4,887 in 2016, a mere 0.34% of total completed cases.118

From 2005 to 2015, pendency kept rising, and the number of under­trial prisoners also increased.119 It seems clear, then, that plea­bargaining failed to either reduce the pendency of criminal cases or empty the prisons. Why? A closer look at the design of the Indian model helps understand this failure.120
Plea-bargaining suffers from a natural handicap in India since conviction rates are low, trials take long to complete, and the option is only available for offences punishable up to seven years in prison. To redress this and make plea-bargaining popular, it would need to offer defendants serious benefits is for them to eschew all that they stand to gain by opting for trial. One could imagine defendants pleading guilty if the severity of charges and punishment is reduced: take probation and save on litigation expenses. However, no charge-bargaining is permitted. Furthermore, even though judges rarely award the statutory maximum term after a conviction at trial, sentencing discounts in plea-bargaining are calculated based on that maximum, significantly reducing the actual pay-off for a defendant. Thus, choosing to accelerate adverse consequences through plea-bargaining brings no real benefits for defendants to forego all they stand to gain through the trial. Moreover, the same goes for cases where a defendant wants to settle. Here, plea-bargaining contests with compounding.121 parties moving the High Court,122 or (rarely) prosecutors withdrawing the case.123 All of which are more favorable to defendants as they do not end in a conviction or sentence, unlike plea-bargaining.

In cases where defendants might agree to move for plea-bargaining, the design flaws in that model itself make it difficult to reach any agreement. India adopted tri-partite bargaining under the watchful eye of a judge. For victims, plea-bargaining is better than compounding since it ensures some financial compensation. The only negotiation in the process concerns this aspect, making victims critical for the success or failure of plea negotiations. However, giving victims such a veto can make negotiations tenuous: the likely retributive interests of a victim may never be met because of inaccuracies in translating injury into monetary terms or may not always find expression in what other parties are willing to agree upon (for instance, property crimes where defend­ants cannot afford restitution).124 In this stalemate, one might assume the other parties can push for a bargain. However, do prosecutors have sufficient incentives to make that push?

Hardly. Indian prosecutors have very little skin in the game for each case, as discussed, and engaging in protracted negotiations cuts down on their limited time to handle the many other items on the docket.125 What about judges? They do have incentives to dispose of cases quickly. However, recall how judges are not only working towards ending cases: their incentives are spread more widely, with final disposals being one parameter for evaluating performance.126 Further, judges remain constrained from engaging in plea-bargaining too eagerly due to the possibility of defendants claiming they were coerced, for when judges overstep that line, they continue to run a risk of guilty pleas being vacated by a superior court.127

This account would remain incomplete without considering a puzzling part of plea-bargaining remaining a non-starter: the case of defendants without means and in custody for whom plea bargaining became a new option where previously there was none. How large is this category? Available data for 2015 suggests that at least 18% of the prison population could have availed of this process.128 That is not a small number, so why have they stayed away from plea-bargaining even though it might bring immediate release?129 We suspect there are two reasons beyond the obvious response that a guilty plea carries stigma and collateral consequences.130 First, the absence of a victim grinds plea-bargaining to a halt, and since most defendants in custody are suspected of theft,131 likely, victim's do not remain interested in the case once the question of recovering property is solved either way during the investigation. Even if victims were interested, indigent defendants could not compensate for the loss. The second reason is that defendants are simply unaware of this process or are discouraged from choosing it. Out of 282,076 persons detained in prisons and awaiting trial across India, 80,528 were illiterate, and 119,082 had not finished High School.132 These defendants are often without legal representation or have state-appointed counsel who might be unaware or might not be keen to end cases quickly and sacrifice potential earnings.133 As judges’ hands are somewhat tied, it is difficult for them to enthusiastically encourage defendants to use the process, worrying how a superior court might construe facts.134 There would undoubtedly be other unique factors affecting the decisions of individual defendants, but these systemic factors tilt the scales against them, considering plea bargaining as an option in their decision-making calculus.

V. SUGGESTED INTERVENTIONS FOR SUSTAINABLE BENEFITS

This paper has argued that a significant reason behind the staggering numbers of pending criminal cases in the trial courts of India is poor system design: there are many long trials not because the system is broken, but because it is working as it should. In this last section of the paper, we now consider what can be done to change the status quo.

Since 1973 - when the Cr.P.C. was introduced - the Law Commission and various other bodies have considered the pendency problem. By and large, their reports have offered three solutions: invest more in the judiciary, compel
more efficient use of time by all actors concerned, and the use of alternate dispute resolution methods such as plea bargaining. The last part considered the last suggestion in some detail—let us consider the other two proposals. Between 1973 and 2016, more money was spent on the judiciary almost every year. However, pendency kept rising because, ultimately, no government can devote the money needed to match and then reduce pendency by hiring more judges alone. This is where the twin solution of time-limits comes in, one might argue. However, as this paper suggests, the introduction of time limits is likely to face significant backlash from private lawyers whose payment structures are based on the length of a case, and incentives for prosecutors and judges are such that they cannot ensure time limits are adhered to. Some support for this inference can be drawn from the futile attempts to introduce stricter time limits in civil litigation. Ultimately, there are just too many variables that throw cases off-track, and soon the statutorily mandated time-limit gets reduced to a good-natured suggestion. To be clear, hiring more judges and enforcing time limits by curbing easy adjournments are essential factors in reducing pendency. However, we suggest their currency as viable solutions have proved limited till now.

Acknowledging these limitations, we argue for tweaks to the criminal process architecture that will not require a considerable financial burden on the State or consent from private lawyers to successfully arrest the continued rise of pending cases. These are:

- demolishing the silos in which police and courts function and using prosecutors to function as effective gateways, and
- limiting appellate challenges to enhance the finality of trial court decisions.

A. Police and Courts: Moving Beyond Silos

As mentioned above, significant attention has been spent evaluating how the judiciary has been chronically underfunded in India. However, the judiciary is one part of the criminal process, so considering it alone cannot tell us why the pendency problem has become as bad as it is. Consider the courts together with how the police have been discharging its investigative role between 1973 to 2016. The data suggests that as courts become slower, the police remained relentlessly efficient in finishing investigations and kept sending more cases for trial despite the courts struggling to keep up the pace. Data suggests that it is not as if the police do not exercise discretion: trials are not recommended in around 27% of completed investigations. But the persistently high acquittal rates suggest that this filtering can be better, and too many weak cases are going to trial, the consequences of which are manifold and work in a feedback loop. Poor filtering means many acquittals. Many acquittals dilute the deterrent message of criminal sanctions. This encourages defendants to opt for trials, which overburdens the courts and creates delays, ultimately further enhancing acquittal rates, diluting the deterrent message of the law, and encouraging more defendants to opt for what are now lengthier trials. Repeat that process for forty years in the Indian setting, and you have a pendency crisis.

Recall the architecture of the criminal process. The police file cases with- without being encouraged to bother about how they fare in court, and a system of minimal checks for starting judicial proceedings means courts almost always register the case. Data suggests that is not as if the police do not exercise discretion: trials are not recommended in around 27% of completed investigations. But the persistently high acquittal rates suggest that this filtering can be better, and too many weak cases are going to trial, the consequences of which are manifold and work in a feedback loop. Poor filtering means many acquittals. Many acquittals dilute the deterrent message of criminal sanctions. This encourages defendants to opt for trials, which overburdens the courts and creates delays, ultimately further enhancing acquittal rates, diluting the deterrent message of the law, and encouraging more defendants to opt for what are now lengthier trials. Repeat that process for forty years in the Indian setting, and you have a pendency crisis.

There are many ways police and courts can be better connected and can have a better filtering process to help stem the flow of bad cases. Even though it is not statutorily prescribed, we have seen Magistrates innovate by asking the investigating officer to explain the case upon filing the Final Report. This scrutiny at the outset plays an influential role in sifting through cases and catching obvious problems of proof that might arise at the trial. However, this was rare, mainly because Magistrates are hard-pressed to hurry along their dock-ets. Instead, we suggest that both these functions can be better performed through prosecutors. Few methods would be simpler and more effective than using prosecutors to perform both functions by incentivizing them to explore the statutory process of withdrawals. Upon the filing of the Final Report, judges could mandate that prosecutors consider the merits for a withdrawal application right at the outset or file a memo offering a consideration of the viability of proceeding to trial. In this manner, we can change the default setting for cases. Rather than let them meander on until an aggrieved litigant or active judge applies her mind to the record, under this default setting, cases will not proceed until a memo from the prosecution is filed suggesting there is merit in doing so. Since the decision to withdraw is judicially reviewable and must be signed-off by the court, there is an in-built safety valve to protect against mala fide decisions. This clear scope for judicial oversight is also the reason.
why we prefer this model over the recent innovation by the Delhi High Court of directing police to seek prior prosecution “approval” before filing a Final Report self.146

B. Enhancing Finality at the Trial Courts

Consider the Statement of Objects and Reasons appended to the Cr.P.C. 1973. It states how the government then wanted to reduce the potential for collateral proceedings during the trial by restricting the scope of revision petitions, which is restricted to proceedings, not of a temporary nature.147 Unfortunately, the legislative intent was upended by superior courts, which jumped on ambiguous language. Not only did they read “interim” very broadly,148, but they also construed the inherent powers of High Courts (recognized under Section 482 Cr.P.C.) as being wide enough to consider any claim of an abuse of process.149 Too much of a good thing can be a problem, however. Superior courts were enthusiastic about respecting the defendants’ right to be heard in the criminal process. However, as discussed in Part II, in their enthusiasm, courts have created countless opportunities for defendants to trigger collateral proceedings during the trial.150 Further, due to the architecture of the Indian criminal process, defendants have every reason to pursue as many of these collateral proceedings as possible.

Procedural propriety and finality are both critical to a criminal process, and any workable model needs to strike a balance rather than function on either extreme. A direct result of the Indian model’s preoccupation with procedural propriety is delayed naturally in trial courts, but also appellate courts by causing an unproductive ballooning of appellate court dockets which have lesser time to deal with appeals.151 But there is more. By rendering nearly every exercise of discretion by trial court judges as immediately reviewable, the system sends various signals.152 It sends a clear signal that trial court pro­ceedings at every stage are inconsequential because they can and will be modified very soon.153 Ultimately, defendants with means know that the battle will quickly shift to the appellate courts and are less concerned with trial courts. Equally important is the signal sent to trial court judges. How would you respond to the knowledge that all of your work is subject to immediate review? You might be pushed to do your best, or you might make mistakes and pass the buck, or you might be content in not making any decisions, to begin with fearing critique by your superiors. Something similar happens to trial court judges. Many of them work hard, but many also pass the buck or become content with not making any decisions until their transfer comes through.154

Perhaps, having learned a harsh lesson, the legislature can fix the initial error. It can clarify the scope of revision proceedings and Section 482 Cr.P.C. pro­ceedings to reduce the continued stop­starts in criminal trials and strike a new balance between the virtues of finality and safeguarding procedural rights.155 To be clear, we do not suggest eliminating the review of judicial decisions during the trial - all we propose is limiting when those challenges can be filed. If trial courts regained some measure of finality in their exercise of discretion, how would the signals earlier described be affected? Defendants would know they have one bite at the cherry, so they would care that the trial court did a good job and invest more effort in putting forward their best case. If the litigants “increased interest is not met by an increase in effort by trial court judges, they will complain (along with their lawyers) to help raise political pressure until the quality of judicial work at the trial court level improves. Even recalcitrant trial court judges, thus, will slowly be forced to act.156 Appellate courts will have a lighter docket and more time to deal with criminal appeals and help get finality in a case. Moreover, most importantly, limiting the pursuit of collateral proceedings at each stage would make trials go a lot faster.

VI. CONCLUSIONS

Perhaps the main lesson this paper offers for studying and addressing India’s pendency problem is that we need to move beyond addressing it as India’s problem and delve into the specifics to develop workable solutions. Rather than considering the legal system as a whole, policy proposals must begin with the basic fact that there are significant differences in how civil and criminal legal regimes operate and the problems they suffer. That is the point where this paper intervenes. When pendency is at its highest in the trial courts, there is a surprising dearth of debate willing to consider it as a problem more complex than one caused because there are not enough judges and too many adjournments.157 This paper characterized the problem differently: high pendency is not the result of one or two malfunctioning parts but the result of overarching design flaws in the Indian criminal process architecture. To kickstart a debate on these lines, a generic description of that architecture and how it works, focusing on IPC offences, was sketched to be applied to all parts of the country. Again, the focus was on a generic model, and we noted how a lack of data made constructing even this generic model challenging and prevented the making of claims with more certainty. If anything, it shows how rich this field is with issues requiring further research for those with adequate time and funding resources.
Similarly, the reform proposals we offered are far from the real deal but attempt to offer helpful starting points for a much more considered discussion in the future. What might those discussions be like? Within the criminal process, special attention will have to be paid to the several SLL offences to dis-cern any patterns unique to certain kinds of cases that make them prone to delays. 158 Ultimately, only the bare minimum can be done at the national level: the effects of changes will have to be studied on the ground to understand how the process shapes exercise of discretion by the key actors. The limited data available already tells us that crime and criminal law problems are not the same in Delhi and Kerala. However, Delhi and Kerala are themselves vast regions, and much more can be learned by analyzing data to examine the effects of rural and urban settings on the pendency problem. Would different concep-tions of the criminal process for rural and urban settings be a better means for providing the justice that our courts are reportedly concerned about? 159 Similarly, examining how reform efforts cause different effects in regions will help better understand what each region might need, besides thinking about the macro-level solutions. The pendency problem is not a creature of crisis but the fruit of poor design. It took quite a while for India to get to here, and by fixing those design problems with rigorous analysis and research, slowly pendency rates will reflect more acceptable rates once again.

REFERENCES
2 Code of Criminal Procedure, 1973 (Act No. 2 of 1974) [CrPC].
4 Government estimates suggest that this was nearly 60,000 more completed cases than 1961. National Crime Records Bureau, Crime in India 1961, 19; Nation al Crime Records Bureau, Crime in India 1971, 31.
5 National Crime Records Bureau, Crime in India 2016, (Table 18A.1).
7 Data for cases involving offences under Special and Local Laws suggests a similar story. The share of completed cases in trial courts came down from 72% in 1974 to around 18% in 2016 with almost 60,00,000 cases pending. See, National Crime Records Bureau, Crime in India 1974-49-51 (Table 17); National Crime Records Bureau, Crime in India 2016, (Table 18A.3).
8 As of July 31, 2018, Government data suggests 1,92,29,097 criminal cases are pending in the trial courts across India. See, National Judicial Data Grid, http://njdg.ecourts.gov.in/ njdg public main.php (accessed July 31, 2018). According to the Chief Justice of India, pendency figures for the Indian legal system are at their highest ever. See, 3.3 Crore Cases Pending in Indian Courts, Pendency Figure at its Highest: CJ Dipak Misra (June 28, 2018), BUSINESS TODAY, https://www.businesstoday.in/current/economy-politic/5-3-3-crore-cases-pending-indian-courts-pendency-figure-ighest-ej-dipak-misra/story/279664.html.
10 See, infra notes 135-138 and accompanying text. The most recent intervention of the Supreme Court in how the trial courts function focused on improving the infrastructure and also tangentially considered the problem of delays. See All India Judges Assn. v. Union of India, 2018 SCC Online SC 971 (Supreme Court of India, Three Judges’ Bench).
11 There are a few necessary caveats to be issued before proceeding Further. First, this paper only addresses the Indian criminal process and not civil litigation. This is important, as most reports and law review articles on the pendency problem that I accessed begin by addressing the Indian “legal system” but then shift into solely talking about the civil process and not civil litiga-tion. This is important, as most reports and law review articles on the pendency problem that I accessed begin by addressing the Indian “legal system” but then shift into solely talking about the civil process. See, O.P. Jindal Global University Centre on Public Law and Jurisprudence, “Justice without Delay: Recommendations for Legal and Institutional Reform”, 33–49 (Discussion and recommendations for the “legal system” but solely discussing plaintiffs and damages). While even the civil side suffers from serious problems of delays, the two systems have significant differences in design and the discussion here does not directly apply to the civil litigation context, and vice versa. Second, this paper relies on data collected and published by the National Crime Records Bureau [NCRB], a federal agency in India. Unfortunately, the reliability of that data is cir-cumspect since the NCRB relies on the information supplied by local police stations and other agencies rather than conducting its own checks. Because of these limitations, I have kept my reliance on NCRB data to a minimum and have been forced to abandon arguments based on a trend-analysis of the data. But since the NCRB is the only source for the data which I rely upon, I have been unable to entirely eschew reliance on it altogether.
12 Third, and flowing from the previous caveat, note that this paper is not attempting to analyses and explain the stratospheric rise in the number of cases being handled by the trial courts. There are too many gaps in available data for me to attempt that task. Rather, this paper argues that one of the factors contributing to cases going to trial, and taking longer to finish, is the peculiar design of the Indian criminal process.
13 Readers familiar with the Indian setting might find this section too basic in parts and might consider skipping ahead but are nonetheless encouraged to read through the following paragraphs. For an account that considers both the civil and criminal sides of the legal system, see, Nick Robinson, Judicial Architecture and Capacit y in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTI ON 330 (Khosla et al. (eds.) 2016).
14 Act No. 45 of 1860 [IP C].
15 If the property involved is sand, for instance, then it comes within the ambit of S. 21, Mines and Minerals (Development and Regulation) Act, 1957 which punishes theft of mines and minerals. See, State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772 (Supreme Court of India, Two Judges’ Bench).
16 Ss. 378-379 IPC [Definition and punishment of theft]. S. 403 IPC [Definition and punishment for dishonest misappropriation of property]. Ss. 405-409 IPC [Definition and punishments for criminal breach of trust]. Ss. 415-420 IPC [Definition and punishments for different kinds of cheating]. S. 21, Mines and Minerals (Development and Regulation) Act, 1957 [Punishment for unlicensed excavation and transfer of minerals].

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The lack of a well-identified promotions policy has contributed to police officers across India stagnating at the same level at which they joined, ultimately adversely affecting police functioning and investigative capabilities. See, Common Cause, Status of Policing in India Report (1991) 15 (Table A.1); Young Adult Police Officer Project, Report to the Ministry of Home Affairs, Government of India (2002). See also, Mandeep Tiwana, Independent Institutional Evaluation of Police Performance, COMMONW EALTH HUMAN RIGHTS INITIATIVE, http://www.humanrightsinitiative.org/projects/apolicelaw/papers/inddpt_inst_eval_pol_perf.pdf (Calling for the introduction of clear performance evaluation schemes that also account for case disposal).

The lack of a well-identified promotions policy has contributed to police officers across India stagnating at the same level at which they joined, ultimately adversely affecting police functioning and investigative capabilities. See, Common Cause, Status of Policing in India Report 2018, 16 (2018).

There are exceptions where judges might take the Final Report and consider the matter before a Magistrate has pronounced a judgment. See, M. Bisht v. Gopal, (1998) 5 SCC 124 (Supreme Court of India).

The maximum can also be death. See e.g., S. 302, IPC. Offences punishable with a sentence of life imprisonment are categorized as cognizable offences. See, e.g., Section 196, CrPC.

The Investigating Officer will come as a witness at trial, and otherwise comes to court only to assist the court and prosecutor if need arises in complex cases.

Schedule I, CrPC, 1973. Part A provides the classification for every offence under the Indian Penal Code. While there are some cognizable offences carrying a maximum sentence of less than three years, they are exceptional.

The provisions for the record of a case are not only for the purpose of satisfying the legal rights of the parties, but also for the benefit of the public at large. See, e.g., S. 302, IPC.

The maximum can also be death. See, e.g., Section 304, IPC. These offences are typically tried before the High Court, Sessions Court, and Magistrates’ Court. Appeals and Revisions to the Sessions Court and the High Court are provided for under the CrPC itself. See, Ss. 391, CrPC, 1973. Appeals to the Supreme Court and its original jurisdiction are part of the Constitution. See, Arts. 32, 134 and 136, Constitution of India.

See, e.g., Section 304, IPC. These provisions are not without controversy. See, e.g., S. 305, IPC.


46 National Crime Records Bureau, Crime in India 2016, 567 (Table 18A.1). The conviction rate is 82% for SLL offences. See, National Crime Records Bureau, Crime in India 2016, 567 (Table 18A.3).

47 For instance, while the conviction rate for theft is 35.2%, conviction rates for causes involving injury are as high as 77%, and conviction rates for the offence of cheating are 20%. See, National Crime Records Bureau, Crime in India 2016, 567 (Table 18A.1).

48 The National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010 provide for minimal monthly retainer fees, See, Notification F. No. L.61/10/INALSA (September 9, 2010). Beyond this, State Governments fix appearance-based payment schedules for State-appointed counsel. For instance, in Delhi, they earn on a per-appearance basis but can only claim their bills on completing certain stages. Further, they only stand to get paid in settlement proceedings if it takes more than two hearings. Further, for suggesting that "no case is made out", the lawyer only stands to gain a one-time fee barely higher than regular appearance-based fees. Rs.1,200 as opposed to Rs.720 in warrant trials before Magistrates. See, Delhi State Legal Services Authority, Fee Schedule 2017, http://dslsa.org/wp-content/uploads/2017/07/TEE-SCHEDULE-2017.pdf (accessed July 31, 2018). See also, Tamil Nadu State Legal Services Authority, Fees and Honoraria Payable to Panel Lawyers (2016) http://www.inlegalservices.tn.gov.in/fees.pdf (accessed July 31, 2018) (Providing for appearance-based pay scales in criminal cases); Government of Kerala, Notification No. 373/D/17/KELSA (March 6, 2017), http://www.egeaze.te.kerala.gov.in/pdf/2017/12/part_4/Legal%20Services%20Authority.pdf (accessed July 31, 2018) (Providing for appearance-based pay scales in criminal cases).

50 In 2016, only around 5% of the total IPC cases completed had taken the non-trial route. See, National Crime Records Bureau, Crime in India 2016, 566-67 (Table 18A.1).

51 Although the Indian Constitution has guaranteed free legal aid since 1976, there is no constitutional right to effective assistance of counsel. See, Art. 39-A, Constitution of India; Legal Services Authorities Act, 1987 (Act No. 39 of 1987), however, the Supreme Court of India has in some instances recognized this right. See, Mohd.Hussain v. State (NCT of Delhi), (2012) 2 SCC 584 (Supreme Court of India, Two Judges’ Bench).

52 Furthermore, the constitutionally sanctioned minimum right to counsel is only applicable to proceedings within the courtroom and not the police station. But those able to afford private counsel can seek legal advice during the investigative stage as well and avoid court altogether.

53 S. 397, CrPC, 1973 [Parties can challenge orders through a "revision petition" before the superior court]. While the provision prohibits challenging 'interlocutory orders', the Indian Supreme Court has interpreted this broadly rather than excluding every order except the final acquittal or conviction. See, Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551 (Supreme Court of India, Three Judges’ Bench).


55 Note that nearly all of these are open to both defendants and prosecution/complainant ants and can be fought up the appellate ladder and end up before the Supreme Court.


59 See e.g., Krishna Lulla v. Shyam Vithalrao Devka tta, (2016) 2 SCC 521 (Supreme Court of India, Two Judges’ Bench).

60 See e.g., Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 (Supreme Court of India, Three Judges’ Bench).

61 See, Sr. 207, CrPC, 1973. See also, Ashutosh Verma v. CBI, 2014 SCC Online Del 6931 (Delhi High Court, Single Judge Bench).

62 See e.g., Essar Teleholdings Ltd. v. CBI, (2015) 10 SCC 562 (Supreme Court of India, Three Judges’ Bench).

63 See e.g., Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18 (Supreme Court of India, Two Judges’ Bench). Even in Simmons Cases where no charge is preferred, defendants seek to argue before providing "Notice" against them and challenge such orders. See, Anirban Bhattacharya and Bharat Ch Gh, India: To Discharge , or Not to Discharge: That is the Question March 22, 2017, MoNDAQ, http://www.mondaq.com/india/s/579124/court+procedure+to+Discharge+Or+Not+To+Discharge+That+Is+The+Question.

64 See e.g., Suresh Kalmndi v. CBI, 2015 SCC online Del 9639 (Delhi High Court, Single Judge Bench).

65 The power to grant an injunction is impliedly part of the powers exercisable by a court in revision petitions. Such powers are natural incidents of the broad extraordinary jurisdiction vested in the High Courts and the Supreme Court.

66 See, Pradeep Chakraborty, Stays Delay Court Cases by up to 6 to 5 yrs, Study (June 22, 2016), THE TM EOS OF 11 D A, htt ps://timesofindia.indiatimes.com/india/Stays-delay-court-cases-by-up-to-6-5-yrs/Study/articleshow/52860273.cms

67 The same can also be said for State-appointed counsel to a certain extent. In Delhi, they get paid at higher rates in revision proceedings (Rs.1,500 for effective hearings) than in a trial before Magistrates (Rs.720 for effective hearings). See, http://dslsa.org/wp-content/uploads/2017/07/TEE-SCHEDULE-2017.pdf (accessed July 31, 2018). But, arguably they refrain from exploring these courses because the costs still outweigh the earnings.


69 S. 24, CrPC, 1973 [Requiring the State Government to appoint "Public Prosecutors", who function on a territorial basis , but does not detail their powers]; Ss. 25-26, CpPC, 1973 [Creating posts of "Additional Public Prosecutor" and "Special Public Prosecutor" who are also appointed by the government]; Ss. 301-302, CpPC, 1973 [Public Prosecutors have the exclusive right to prosecute cases only in Court of Session, and not the other tiers]. Although not codified in statute, public prosecutors also have the exclusive right to argue on behalf of the State when a defendant files a bail application. See, Law Commission of India, 1979 Report on Public Prosecutor ‘s Appointment t ms, 16 (2006). See also , Sagar, Role of Public Prosecutor in Indian Criminal Justice System , 208- 266 (Unpublished Ph D Dissertation), http://hidhogan.gas.in/flbhn.et.ac.in/ bitstream/10603/8115/17/7_chapter62010.pdf


71 S. 24, Code of Criminal Procedure. See, Shrilkeha Vidyarthi v. State of U.P., (1991) 1 SCC 212 (Supreme Court of India, Two Judges’ Bench) [Supreme Court deprecating polarization of appointments to the post]. The CrPC was amended in 2006 and provisions were inserted for creating statutory structure for a Directorate of Public Prosecutions that States could adopt (several had similar setups). S. 25-A, CrPC. However, several States did not create Directorates or staff them unless compelled to. See, Directorate of Prosecutions Post Filled Thank s to Court Order (August 29, 2013), THE HT Nou, http://www.thenihdu .com/news/national/tamil- nadu/di rectorate-of-prosecution-posts-filled-thanks-to-co urt-order 1 art icle 5068813.ece (accessed July 31, 2018) [Narrating how the post was filled by the govern- ment for the State of Tamil Nadu after judicial orders].

72 See e.g., Delhi High Court Rules - Chapter 29, Public Prosecutors, http://delhighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_lKNTY10.JPDF

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74 The limited statutory exception being Special Public Prosecutors which can be appointed for specific cases. S. 2(8), CrPC, 1973. Comments from a seminar in New Delhi suggested that in that city, the police do often take prosecutorial advice “informally”, and often ignore this advice as well. Another recent exception was orders passed by the High Court of Delhi directing the police to also seek approval from the “Prosecution Branch” before filing a Final Report in court. See, Apoorva Mandhani, Ensure That No Charge Sheet is Filed without Written Consent and Approval of the Prosecution Branch: Delhi HC to Police (April 14, 2018), L1VELAW.http://www.livelaw.in/ensure-no-charge-sheet-filed-without-writ-ten-consent-app- royal-prosecution-branch-delhi-hc-po-lcie-read-order/! have been informed that this Order has since been stayed by a higher bench of the same court, but I could not locate a copy of the subsequent order online.

75 The author can attest to the prevalence of these conditions in the criminal courts of New Delhi (India’s capital) , where he regularly appeared in criminal trials. See also, Vrinda Bhandari, On Trial, The Criminal Justice System (September 25, 2014), THE I NDIAN EXPRESS, htt p://www.indi anexpress.com/article/india/centre-revises-pay-scales-of-prosecutors-in-delhi-ic-told-5123594/

76 See, National Judicial Data Grid, http://njdg.ecourts.gov.in/njdg_public /tn.in.php # (accessed July 31, 2018) [The database is updated daily based on data provided by districts across the country, and as of July 31, 2018 shows 46.74% cases were pending for less than two years from the available data].

77 Transfers for prosecutors are a decision made by the government, while judges are transferred based on orders issued by the concerned High Court for the district. No formal system governs how either of these transfer processes occur. On transfers of prosecutors, see, Delhi High Court Rules-Chapter 29, Public Prosecutors, http://delhigovernment.nic.in/writereaddata /upload/CourtRules/CourtRuleFi le_LKNTYIOJ.PDF (accessed July 31, 2018), On transfers of judges, see, Sujata Kohli v. High Court of Delhi, 2007 SCC Online Del 1702 : (2008) 148 DLT 17 (Delhi High Court, Two Judges’ Bench).

78 Frequent judicial transfers are an administrative legacy of the colonial era originally intended to function as an anticorruption measure, to prevent judges becoming too familiar with their surroundings. See, Robert S. Moog, Delays in the Indian Courts: Why the Judges Don’t Take Control,16 JusT. SY’S. J. 19, 22-23 (1992) (Written in context of civil litigation in the district courts of Uttar Pradesh). There is no clear policy today on how frequent transfers must be. But in Delhi itself, the High Court has issued transfer orders at least four times in 2018 till July 31, 2018. See, https://delhisetits.com/ippocket/public/tvcr/cr/cr/5141271.html


81 National Crime Records Bureau, Crime in India 2016, 567 (Table 18.A.1).

82 National Crime Records Bureau, Crime in India 2016, 566 (Table 18.A.1).

83 There are no limits on private persons initiating the criminal process. While the CrPC does limit the ability of private litigants to initiate the criminal process, for example, the Code prescribes for first time offenders. Some of these clauses allowed judges to go below the minimum upon giving “adequate and special reasons”. Prevention of Food Adulteration Act, 1954, http://lawmin.nic.in/lid/P- ACT/1954/Act1954/1954-37.pdf.

84 Ibid., at para 13-17.

85 National Crime Records Bureau, Crime in India 1994, 120.

86 Law Commission of India, 142nd Report on Concessional Treatment for Offenders Who on Their Own Initiative Choose to Plead Guilty without Any Bargaining, 3-5 (1991). The problem had received intense scrutiny in the 1980s, due to intervention by the Supreme Court in a string of decisions called the Hussainara Khatoon cases. See e.g., Hussainara Khatoon (1) v. State of Bihar, (1980) 1 SCC 81 (Supreme Court of India in a string of decisions called the Hussainara Khatoon cases). The problem suggested that the State Government might find it best to grant clemency as the alleged conduct no longer remained criminal.

87 Ibid., at para 13-17.

88 See, S. 357357-A, CrPC.


90 This approach of shifting cases out of the trial court to an alternate dispute-resolution mode is, rather than addressing the problems with the trial courts itself, is one that first captured the legislative imagination in the civil litigation space between the late 1980s and 2000s, i.e. the period when the pendency rates rose very rapidly. See, Robert S. Moog, Elite-Court Relations in India: An Unsatisfactory Arrangement, 38(4) ASIAN S SURVEY 410, 415-17 (April 1994). For a critique of one of these methods, see, Marc Galanter and Jayanth K. Krishnan, Bread and Justice as We Know It, 23(1) 37 (1991). The problem had received intense scrutiny in the 1980s, due to intervention by the Supreme Court in a string of decisions called the Hussainara Khatoon cases. See e.g., Hussainara Khatoon (1) v. State of Bihar, (1980) 1 SCC 81 (Supreme Court of India in a string of decisions called the Hussainara Khatoon cases). The problem suggested that the State Government might find it best to grant clemency as the alleged conduct no longer remained criminal.

91 Supra notes 1-3 and accompanying text.

92 For instance, S. 16 of the erstwhile Food adulteration Prevention Act, 1954 was amended in 1976 and a mandatory minimum sentences was prescribed for first time offend- ers. Some of these clauses allowed judges to go below the minimum upon giving “adequate and special reasons”. Prevention of Food Adulteration Act, 1954, http://lawmin.nic.in/lid/P- ACT/1954/Act1954/1954-37.pdf.

93 Murliidhar Meghraj Loya v. State of Maharashtra, (1976) 3 SCC 684 (Supreme Court of India, Two Judges’ Bench). The case had been supposedly “bargained” at the trial court with the defendants being let-off with a fine on having pleaded guilty. The government challenged this in the State High Court. The High Court imposed the statutory minimum punishment, which in turn was challenged before the Supreme Court. The defendants’ petitions were dismissed. Interestingly though, the Supreme Court suggested that the State Government might find it best to grant clemency as the alleged conduct no longer remained criminal.

94 Ibid., at para 13-17.

95 National Crime Records Bureau, Crime in India 1994, 120.

96 Law Commission of India, 142nd Report on Concessional Treatment for Offenders Who on Their Own Initiative Choose to Plead Guilty without Any Bargaining, 3-5 (1991). The problem had received intense scrutiny in the 1980s, due to intervention by the Supreme Court in a string of decisions called the Hussainara Khatoon cases. See e.g., Hussainara Khatoon (1) v. State of Bihar, (1980) 1 SCC 81 (Supreme Court of India in a string of decisions called the Hussainara Khatoon cases).

97 Law Commission of India, 142nd Report, at 15.

98 Law Commission of India, 142nd Report, at 24-37.

99 See e.g. State of Gujarat v. Ishwarbhai Harkubbhai Patel, 1993 SCC OnLine Guj 131: (1994) 2 LLN 1234 (Gujarat High Court, Single Judge Bench). The judge likened plea bargaining to a “growing chronic disease” (J4), and in a subsequent decision the same judge threatened dire consequences against magistrates in lower courts for failing to “eradicate” this disease [Vania Silk Mills (P) Ltd. v. Provident Fund Inspector, 1994 SCC Online.
Act, 1992, (vii)

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To end one decision was as a author of that decision was as a using to approve plea-bargaining in the State of Uttar Pradesh. See, State of U. P. v. Nasruddin, (2000) 10 SCC 336 (Supreme Court of India, Two Judges’ Bench).


101 The same amendments also carried an ambitious provision on professionalizing the prosecutor service, and another to release prisoners on bail where they had undergone detention for half the possible maximum sentence they could be awarded upon conviction.


110 Popular newspapers continued to link it to the American model without explaining the sub-titles. See e.g., Swati Deshpande, “Plead Guilty, Forget Trials”, The Times of India, June 25, 2006; Editorial, “Under Trial”, The Times of India, Jul 7, 2006.


114 A few newspaper reports claimed the process was popular in large cities when int introduced. See e.g., Kart ik e, Jailbirds Readily Admit Guilt for Faster Freedom (December 29, 2008), THE TIMES OF INDIA; Speedy Justice: Delhi Court Decides 51 Cases in a Day(June 11, 2007), THE TIMES OF INDIA.

115 National Crime Records Bureau. Crime in India 2014 (Table 4.5).


117 National Crime Records Bureau, Crime in India 2015 (Table 4.5).

118 National Crime Records Bureau, Crime in India 2016, 566 (Table 18A.1).


120 See also, K.V.K. Santhy, Plea Bargaining in US and Indian Criminal Law Confessions for Concessions,7(1) NALSAR L.REv.85(2013) [Docu-mentation development and use of plea bar- gaining in India till 2013]; Sonam Kathuria , The Bargain Has Been Struck : A Case for Plea Bargaining in India , 19 STUDET B. REV. 55 (2007) [Student note, arguing the Indian model was reasonable and within constitutional limits]; Sulabi Rewari and Tanya Aggarwal I, Wanna Make a Deal? The Introduction of Plea-Bargaining in India, (2006) 2 SCC (Cri) J-12 [Student note, arguing Indian model demonstrated minimal bargaining, and is insufficient to tackle the problem of delay].


122 Which can terminate cases under its broad jurisdiction of exercising inherent powers. See e.g., Gian Singh v. State of Punjab, (2012) 10 SCC 303 (Supreme Court of India, Three Judges’ Bench).


125 Supra notes 69-77 and accompanying text. It could be argued that the police could coerce a defendant in custody to plead and then press for lesser offenses in the Final Report filed with the court. Although plausible, this is unlikely because police consider their work complete with the investigation and officers’ performances do not seem linked to case disposal from available material, creating no such incentive to bargain. Supra note 41.

126 Supra notes 77-83.

127 See, Shibu Thomas, Courts Must be Careful on Guilty Plea (November 24, 2015),THE TIMES O F INDIA, July 22, 2008. It must be noted that superior court intervention has been rendered extremely rare, owing to the increasing rarity with which the plea-bargaining process is used in the system. Thus, the threat of such intervention has probably dissipated as well.

128 Total prisoners awaiting trial for offenses under the IPC across the country were 2,31,340. Government data classifies these according to offense heads, out of which the following offenses potentially fall within the plea-bargaining model Theft (S. 378, IPC), Burglary (S. 448, IPC, labeling it “house trespass”) Riots (Ss. 147-148, IPC), Criminal Breach of Trust (Ss. 406-409, IPC), Cheating (Ss. 416-420, IPC). Some categories such as “Extortion” and “Criminal Breach of Trust” include offenses both within and beyond the scope of plea bar- gaining. For the estimate, I exclude all extortion cases and include all breach of trust cases. The extortion offenses outside the range are any cases accompanied by violence, probably a higher number than breach of trust cases by public servants, agents and bankers, that fall beyond the plea-bargaining limit. See, National Crime Records Bureau, Prison Statistics India 2015, at 85-87. Ibid , at 2.

129 Prisoners who have completed more than half the possible maximum sentence while awaiting trial can be released on bail [S. 436-A, CrPC, 1973], but, it seems that this measure has also not achieved any great success. In 2014, the Indian Supreme Court ordered judges to hold sessions every week in
prisons to identify prisoners eligible for release and facilitate the pro- cess. See, Bhum Singh v. Union of India, (2015) 13 SCC 605 (Supreme Court of India, Three Judges’ Bench).

130 The stigma argument loses some force since judges retain the option of ending the case with an “admonition” under S. 3, Probation of Offenders Act, 1960. In any event, there is surprisingly little public discussion on issues of stigma and collateral consequences for those convicted of crimes in India, which suggests that while certainly foretells persons from pleading, an uncritical acceptance of the notion might not be suited to the Indian context.

131 26-49 theft cases accounted for 11.5% of the persons awaiting trial and eligible for plea-bar- gaining. See, National Crime Records Bureau, Prison Statistics 2015, at 85-87.


134 This has not stopped some courts form taking an initiative however. An interview with an erstwhile magistrate in the criminal courts of New Delhi suggested that new judges sitting on the bench were encouraged to divert cases to plea bargaining where possible [on file with author].


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138 See, Amit Sachdeva, Delay in Filing of the Written Statement: An Analysis o...sacrificed all sense of procedural propriety at the altar of efficiency and quick resolution of cases through plea bargaining at present.


141 Again, why did the police remain so efficient? Was it because, relatively, the police forces of various States and the central investigative agencies were receiving more resources and better funding than the courts? Or did they become more efficient? These are questions that must be pursued, but limited time and resources at my disposal prevented me from undertaking the task.

142 supra note 41.

143 This is based on the average “Chargesheeting Rate” of 72.9% for 2016, i.e. the percentage of completed investigations where police recommend the case proceed for trial. See, National Crime Records Bureau, Crime in India 2016, 542-43 (Table 17A.1). Again, there is much var­ iance in Chargesheeting Rates for different IPC crimes. For instance, the average chargesheeting Rate of 28.5%.

144 For a discussion of how such administrative procedures helped improve screening of cases in some parts of the U.S., See, Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice, 1950-1990, 82-104 (1993).


146 supra note 74.

147 Statement of Objects and Reasons, Ss. 3-6, CrPC 1973.


151 For instance, a persistent critique of the criminal justice system in the United States, more pronounce


154 This has not stopped some courts form taking an initiative however. An interview with an erstwhile magistrate in the criminal courts of New Delhi suggested that new judges sitting on the bench were encouraged to divert cases to plea bargaining where possible [on file with author].


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159 For a detailed consideration of this argument, see, DARRYLK. BROWN, FREE MARKET CR
Withdraw 41% Direct Tax Cases & 18% Indirect Tax Cases (July 12, 2018), LIVELaw, http://www.livelaw.in/govt-to-withdraw-41-direct-tax-cases-18-indirect-tax-cases/ (accessed July 31, 2018). Similarly, convinced that criminal cases for bad cheques under Section 138 of the Negotiable Instruments Act, 1881 are delayed purely as a litigation tactic by defendants who have no valid defence, the federal government has proposed a measure mandating that defendants deposit 20% of the disputed amount in advance to increase the cost of mounting a defence. See, Manu Sebastian, Lok Sabha Passes Amendments to Negotiable Instruments Act: Provision for Interim Compensation to Payee Introduced (July 24, 2018), LIVELaw, http://www.livelaw.in/lok-sabha-passes-amendment-to-negotiable-instruments-act-provision-for-interim-compensation-to-payee-introduced/