PART II

# The delay disaster: Are there solutions to the pendency pandemic?

Our legal system is heading for disaster, with undertrial numbers increasing and civil case pendency rising to levels that make the system of contract enforcement untenable.

OPINION

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The first part of this article concerning the backlog of cases pending in Indian courts was published in *The Daily Guardian* on 26 September. The backlog is euphemistically described simply as "pendency". For those of you who missed this statistic in part – I, about 20,000 cases have been added to the "*pendency*" every day in the past few months. That aside, since 2009 the number of cases pending in the District and High Courts has actually increased even before the pandemic hit us leading to tremendous injustice for those who happen to be denied bail and remain under trial, the lockdown did not help this situation at all.

Pendency delays further complicate old and new civil cases that require even more judicial time and attention to unravel the mess caused by delayed adjudication. It may be worth mentioning that our courts seem to have adopted what may be called a deontological approach dealing not only with the consequences of their adjudication, but with its conformity to a highly anthropomorphic and ideal concept of justice that assumes the luxury of unlimited time and resources as if judicial time was purely incidental. Adjudication may proceed blind-folded, but it still should not be blinkered and unconscious of the surrounding circumstances as also the consequences of delay simply because our judges would (eventually) like to deliver a perfect judgement.

On the criminal side, our courts are understandably reluctant to grant bail and release a murder, terror or sexual offender back into civilized society where s/he may pose a threat even though an initial appraisal of basic evidence can hardly warrant a finding of guilt, leave alone one beyond reasonable doubt. From the prisoner's point-of-view, an arrest can be a horrid tragedy, one compounded by poverty if the accused happens to lack the means to engage a decent lawyer to get released on bail. Worse still, compensatory mechanisms for wrongful imprisonment and falsely implicated undertrials are patently lacking. In 2018, the Supreme Court granted Rs 50 lakh compensation to the ISRO scientist Mr. Nambi Narayanan who had been falsely implicated in an espionage case in 1994, he had been found not guilty by the Supreme Court in 1998. He was relatively lucky, most serious offence cases take much longer and most released detainees don't get compensated. The positive outcome award of compensation 20 years after the adjudication still demonstrates our nonchalant approach to the passage of time.

An accused is found innocent or adjudicated as guilty after exhaustive procedures and a prolonged trial. Long procedures, delayed decision-making and acceptance of this pendency pandemic seem to have been inalienably assimilated into the DNA of our legal system. The real problem lies in the imbalance between the accused's well-recognised right to a fair trial and the statements about substantive justice enunciated by our Supreme Court in the 70s, 80s and even in the early 90s often justifying unending opportunities for documents to be filed (by both sides). The much misused Latin phrase "*audi alteram partem*" is thrown-in for good measure by courts to indicate that we should allow further opportunities both for hearing, responses to allegations, rejoinders to such responses and in rare cases something called a "*sur-rejoinder*" which is occasionally permitted in response to a rejoinder. *Audi alteram partem* continues *ad nauseam* to interfere with fair and speedy civil trials and more importantly it even interferes with the accused's right to a speedy and conclusive judicial process. Unfortunately, this right to a fair hearing has been extended in India even to cover circumstances arising from a party or lawyer's bona fide mistakes - the Courts generously permit amendment of pleadings, supplementary affidavits, re-opening of a lost right to cross-examine, setting aside of *ex parte* orders or decrees when the party or his lawyer simply failed to show-up subject to nominal costs. Appeals are filed long after the statutory time-limit has expired and this is also permitted (especially for a government appellant) in the name of ensuring substantive justice regardless of any "procedural" law such as the Limitation Act.

Taking words well-adumbrated by the Supreme Court in A. R. Anthulay's case, "*Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in the public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible...*" and in Akhtari Bi's case (2001) 4 SCC 355 "*It is incumbent upon the high courts to find ways and means by taking steps to ensure the disposal of criminal appeals, particularly such appeals where the accused are in jails, that the matters are disposed of within the specified period not exceeding 5 years in any case*". From these cases, one can appreciate that the problem has been well recognized for over two decades. In 2016, the Supreme Court referring to an affidavit of 24th April 2015 recorded that "*67% of all the prisoners in jails are under trial prisoners*" as on 31st December 2013. Seven years later this statistic has worsened to 69%. The world median rests between 30 and 40% placing India ingloriously at the 16th position out of 217 countries/jurisdictions. In the 2012 case of *Imtiyaz Ahmed v. State of U.P. (2012) 2 SCC 688*, the Supreme Court observed "*Unduly long delay has the effect of bringing about blatant violation of the Rule of law and adverse impact on the common man's access to justice. A person's access to justice is a guaranteed fundamental right under the Constitution and particularly under Article 21. Denial of the right undermines public confidence in the justice delivery system and incentivizes people to look for short cuts and other ways where they feel that justice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to the Rule of Law*". Despite all these recognitions of the problem and even a decision of the Supreme court regarding inhuman conditions in 1382 Prisons AIR (2016) SC 999, the situation seems to have only worsened as far as pendency is concerned underscoring the need for serious reform.

From my 28 years of practice, I would opine that our judiciary is full of generous and accommodating judges (and I do mean this to be true without any underlying message or sarcasm). The judges have been trained to demonstrate patience by their own years of practice and by previous generations of the judicial fraternity to allow for human and documentary imperfection. While the limits of that generosity are yet to be identified, we need to decide whether the courts should jettison some of that generosity and indulgence in exchange for faster adjudication. After writing this article, I might rightfully be denied indulgences based on these very generous principles and ideology, but unless there is a change of mindset, I strongly believe that our legal system is heading for disaster, absolute saturation of our jails with undertrial numbers increasing and civil case pendency rising to levels that make the system of contract enforcement untenable (we are presently in 163rd place for contract enforcement). At this rate, the pendency of civil cases without an excuse to be heard on an urgent basis will also grow leaving injustice in its wake.

> *The Law Commission of India reports and several policy papers, when read together suggest that we must look for somewhat radical steps and novel approaches to achieve even reasonable targets for pendency to reduce rather than for it to grow at a healthy rate exceeding our current GDP growth. Numerous documents in the public domain identify the problem and commentators have suggested dozens of possible solutions.*

As I mentioned in "*The delay disaster, Part 1*", we also have a problem on the commercial or civil side. That disaster only seems less serious because it is not a noticeable human-rights catastrophe. The litigation indicators require us to re-examine the issues and evolve solutions from a long list of possibilities. There are numerous instances of Suits not being listed for hearing for over 15 years in certain courts. Colleagues in a certain western state who have been in practice for over 20 years have never seen an original suit filed by them reach the stage of trial let alone its final stage of hearing. Many are unfamiliar with the original side practice except when it comes to interim relief – it is assiduously folded in half, tied with a string and sent off to the bowels of the court registry where it may suffer termites, rats and other destructive forces. It will of course suddenly emerge onto the active cause list for trial after a decade (sometimes even two decades) and an intrepid judge undaunted by the state of the records will ask the party/ies who managed to notice its existence whether s/he or they still want to pursue the matter (if he is the plaintiff) or, if he is the Defendant whether he has the evidence ready to pursue a proper defence. In both cases, the result is usually unfair to the concerned litigant, his original grievance as a plaintiff has been lost in years of delay and often the litigation balance struck at the interim stages would be seriously disturbed once the court steps-in to decide the matter one way or the other. At this stage defendants express shock that the case has actually come-up for trial or hearing and scramble to derail its progress so as to continue the *status quo* unless the Plaintiff had secured an injunction, some sensibly go for mediation. These realities affect ordinary commercial cases, property disputes, tenancy matters and other types of dispute, each one has its own nuances and calls for careful dispute resolution.

Having identified the pendency problem in India, one has to move towards solutions. A debate that may be initiated is whether the current legal system, mostly borrowed and adapted from English Common Law, is good enough for India, or does it call for a somewhat radical overhaul. Alternatively, does India need something totally fresh, in the new form of legislation preferred by the Government – do we need a new Code on Justice Delivery? Is there a need for legislation to achieve newer solutions, to accommodate for the march of technology and to achieve targeted reduction of the pending cases? Alternatively, can we find solutions within our present system using fast-track procedures, better government policies for avoiding government-initiated litigation, approaches to rethink corruption and so on?

The Law Commission of India reports and several policy papers, when read together suggest that we must look for somewhat radical steps and novel approaches to achieve even reasonable targets for pendency to reduce rather than for it to grow at a healthy rate exceeding our current GDP growth. Numerous documents in the public domain identify the problem and commentators have suggested dozens of possible solutions. Sadly, this process of identification has not led to serious effective action by the judiciary or the government. Even an annual reduction of 10% would suggest progress, but this is yet to be seen.

In a webinar hosted by the PHD Chamber of Commerce and Industry on the topic of "Unclogging the Indian Legal System" on 26 September 2020, two Hon'ble Delhi High Court judges acknowledged that pendency was increasing, but they pointed out that the judiciary has already been quite conscious of the problem and the entire court was taking steps to improve the situation. This approach is reflected in the Delhi High Court report on a pilot project report optimistically titled "*The Zero Pendency Courts Project*". There is no doubt that the Delhi High Court, several other High Courts as the Supreme Court are all reconsidering their approach to technology and virtual hearings so the old, obvious and inadequate solutions may give way to effective technology-driven approaches that could be game changers if pursued effectively. These and some of the solutions suggested by the Delhi High Court in the report call for immediate assessment and implementation. The solutions offered in the report depart from the common refrain (more judges and resources) offering better practices and procedures. Clearly India needs more by way of resources (human and financial) to be ploughed into justice delivery, but we also need to suggest some other new and novel approaches as a foundation for discussions to arrive at new solutions. We have discussed some solutions with the Learned Judges in the webinar, but they require more detailed consideration and are presently offered "without prejudice" simply to enhance the list of available solutions for courts and judges going beyond the identified resources requirement:

All High Courts and District Courts must have live-streaming arrangements for parties and the public to observe the court's dispensation of justice and to participate virtually if needed. Proceedings should be recorded at the option and cost of the parties. Once the system is set up, it should enable judges to offer parties an option to participate virtually or in person and even for evidence to be recorded online.

The Civil Courts should adopt and require uniformly formatted pleadings that are based on templates with specified portions limiting the number of characters (such as a field for a synopsis), standard paragraphs for limitation, territorial and pecuniary jurisdiction, ordinary check-box style and special prayers, identification of relief and classification by statute, specific formats for pleadings that reflect urgency, special circumstances, etc. These formats should be evolved to help judges to identify issues faster before a hearing and to determine if a case is rightly filed in the correct forum.

The High Courts rules should set out automatically determined time-lines for various stages of litigation operating as a default minimum standard with automatically imposed costs for delay determined by judicial order or by reference to the disputed amount (say 0.05% of the disputed amount for every day's delay) and limits on the possible extension that may be available to a party even after payment of such costs (if we understand a "slow-over rate" for cricket matches, we should be able to understand the same in this context!).

The judges should specify traffic-light styled periods for argument by counsel or parties in-person so that hearings are predictable and arguments restricted to necessary points that require oral explanation. Written Submissions also based on a set template not exceeding 7 to 10 pages but supplemented by a document containing extracts of case-law must be submitted automatically before every argument hearing.

Old measures for prevention of corruption like transfers and rotation of roasters should be discontinued and replaced with alternative technological approaches involving transparency and monitoring. Eventually no court should function unless the proceedings are recorded and the recordings should be publicly available online for atleast a year.

Session trials should resume, and courts must arrange to schedule a trial from start to finish within the same month so that evidence is recorded quickly, witnesses are not inconvenienced and the judges deliver their judgements expeditiously as mandated by the Supreme Court in the 2001 matter of *Anil Rai v. State of Bihar*.

Summons and other court communications may be issued by e-mail, WhatsApp or other digital media. Litigants who ignore the summons then may do so at their own peril.

Government officers should be encouraged to follow standard procedures that prevent unnecessary appeals and references to the courts especially for tax cases; separately for criminal cases:

Where an accused is falsely implicated and is honourably discharged, the courts must compensate such persons based on a fixed formula referencing their income, period of incarceration plus damages for loss of reputation, etc. where appropriate payable by the false complainant, the State or such other person as the court finds to be responsible, grossly negligent or complicit (this will take care of many false cross-FIRs and cases of complaints for "wreaking vengeance" consequent to genuine complaints).

Trials must be conducted by strict reference to a single-session trial before the same judge who will also decide the matter (this will avoid delays arising from partial adjudication).

A single cause-of-action giving rise to multiple complaints in different State jurisdictions must be investigated and tried through a unified mechanism.

Prosecutors must be monitored through standardised systems and provided with better resources and incentives to assist the courts effectively for reduced pendency. Provisions for proper case assessment by the prosecutor, discharge at the initial stages and plea-bargaining must be automatically pursued at the early stages.

It would appear that many of the above measures can be implemented immediately without increasing the number of judges or expending a much larger percentage of GDP on dispute resolution, but there is nothing to signify that such investment of resources and augmentation of the courts should not be a priority. The above steps and many others proposed by the Law Commission and the Delhi High Court in the 'Zero Pendency Courts Project' must be implemented as quickly as possible and outside the cliched concept of 'phased implementation'. We need radical solutions and we need them now. The pandemic has worsened the situation, but the consequent lessons, advent of virtual hearings and the new-found comfort of both judges and litigants with online solutions and technology should be exploited.

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