

# PENDENCY IN THE INDIAN CRIMINAL PROCESS: A CREATURE OF CRISIS OR FLAWED DESIGN?

—Abhinav Sekhri\*

*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 as necessary – if not more – as increased government spending on the judiciary and imposing time-limits on litigants.*

Introduction . . . . .	2	Why Trial? Understanding the Pre-	
The Architecture of the Indian Criminal		Eminence of Trials in the Indian	
Process . . . . .	4	Criminal Process . . . . .	8
Offences and Investigations . . . . .	4	The Only Logical Outcome . . . . .	8
Criminal Courts and Criminal Trials . . . .	6	The Haves and Have-Nots . . . . .	11

---

\* Advocate, BA LLB (Hons.), 2014 (NLSIU); LLM, 2018 (Harvard Law School). Parts of the research for this paper were done as coursework pursuing the LLM, and during a Summer Academic Fellowship, both at Harvard Law School. I am grateful to Prof. Jonathan Wroblewski who forced me to think about systemic issues differently and gave valuable comments on the draft. I am also grateful to Shri Singh, Ankit Agarwal, Gautam Bhatia, and Utkarsh Saxena with whom I've had conversations about the paper. Nishant Gokhale and Mansi Binjrajka gave valuable feedback and read drafts on multiple occasions, and Mansvini Jain offered excellent research assistance. All errors are mine.

Other Actors: Prosecutors, Judges, and Victims . . . . .	13	Suggested Interventions for Sustainable Benefits . . . . .	23
Plea Bargaining's Failure . . . . .	16	Police and Courts: Moving Beyond Silos . . . . .	24
Plea-Bargaining in India: Judicial Beginnings to Statutory Recognition . . . . .	17	Enhancing Finality at the Trial Courts . . . . .	26
Plea Bargaining's Failure: What Went Wrong? . . . . .	19	Conclusions . . . . .	28

## I. INTRODUCTION

After extensive study by the Law Commission of India,<sup>1</sup> a revised Code of Criminal Procedure was introduced for India in 1973.<sup>2</sup> Crucially, it chose not to fashion an entirely new system than the one 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.<sup>3</sup> Today, one can safely state that the CrPC has failed in realising 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,<sup>4</sup> there were 12,00,000 completed cases in 2016.<sup>5</sup> But in that same time, pending IPC cases went up from around 6,40,000 to 97,00,000.<sup>6</sup> Add to this the data on pending cases for offences under other laws,<sup>7</sup> and it suggests that nearly two crore (two hundred million) criminal cases are pending in trial courts across India today.<sup>8</sup>

<sup>1</sup> The Law Commission of India is a federal body constituted under the Ministry of Law and Justice. See, <http://www.lawcommissionofindia.nic.in/> (accessed July 31, 2018). Between 1958 and 1973, the Law Commission considered issues of criminal procedures on seven separate occasions, in its 14th, 32nd, 33rd, 36th, 37th, 40th and 41st Reports. See, <http://lawcommissionofindia.nic.in/1-50/index1-50.htm> (accessed July 31, 2018). The last of these, the 41st Report, is acknowledged as laying the foundations for the new statute passed in 1974. See, Statement of Objects and Reasons, ¶ 2, Code of Criminal Procedure, 1973.

<sup>2</sup> Code of Criminal Procedure, 1973 (Act No. 2 of 1974) [CrPC].

<sup>3</sup> Statement of Objects and Reasons, S. 3, CrPC, 1973. For an overview of the changes, see, Statement of Objects and Reasons, Ss. 3-6, CrPC, 1973.

<sup>4</sup> Government estimates suggest that this was nearly 60,000 more completed cases than 1961. National Crime Records Bureau, Crime in India 1961, 19; National Crime Records Bureau, Crime in India 1971, 31.

<sup>5</sup> National Crime Records Bureau, Crime in India 2016, (Table 18A.1).

<sup>6</sup> National Crime Records Bureau, Crime in India 1971, 31; National Crime Records Bureau, Crime in India 2016, (Table 18A.1).

<sup>7</sup> 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).

<sup>8</sup> 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/>

Largely because of this damning statistic, India's criminal process is most commonly described as "broken".<sup>9</sup> The standard narrative suggests that the system is in a mess largely because of poor infrastructure, not enough judges, and absence of strictly-enforced time lines.<sup>10</sup> 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 marginalised 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 serious design-flaws that the process suffers from. If governments hope to curb delays, resolving these flaws is as 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.<sup>11</sup>

---

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: CJI Dipak Misra* (June 28, 2018), BUSINESS TODAY, <https://www.businesstoday.in/current/economy-politics/3-3-crore-cases-pending-indian-courts-pendency-figure-highest-cji-dipak-misra/story/279664.html> (accessed July 31, 2018).

<sup>9</sup> *See, Sriparna Ganguly Chaudhuri, The Winding Road to Justice in India* (January 24, 2018), LITEMINT, <https://www.livemint.com/Opinion/pPyGzS0Y7PXMqI9CBIaMJ/The-winding-road-to-justice-in-India.html> (accessed July 31, 2018) (Discussing a recent report on access to justice and calling the legal system "broken at various levels."); Vidhi Joshi, *India's Long Wait for Justice: 27m Court Cases Trapped in Legal Logjam* (May 5, 2016), THE GUARDIAN, <https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam> (accessed July 31, 2018); Mayank Jain, *Justice Denied: Two Charts Show the Enormity of the Crisis of India's Justice Delayed System* (September 21, 2015), SCROLL, <https://scroll.in/article/756787/justice-denied-two-charts-show-the-enormity-of-the-crisis-of-indias-justice-delayed-system> (accessed July 31, 2018).

<sup>10</sup> *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).

<sup>11</sup> 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. *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

## 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 largely similar across India,<sup>12</sup> a limitation that this section does not cover nuances in states across India does not prove fatal.<sup>13</sup>

### A. Offences and Investigations

Criminal conduct in India is defined and punished through the Indian Penal Code<sup>14</sup> 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 etc. 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 offence depending on the kind of property involved.<sup>15</sup> Since all these offences carry

---

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 circumspect as 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.

Third, and flowing from the previous caveat, note that this paper is not attempting to analyse 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.

<sup>12</sup> See, *infra* notes 27-38 and accompanying text explaining the nature of this process.

<sup>13</sup> 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 Capacity in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 330 (Khosla et al. (eds.) 2016).

<sup>14</sup> Act No. 45 of 1860 [IPC].

<sup>15</sup> 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).

different possible punishments,<sup>16</sup> it creates scope for wide *charging discretion* with police. Basically, 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 collection of evidence.<sup>17</sup> It begins with filing an information report (First Information Report), and ends with the filing of a Final Report by the police regarding the allegations which contains a recommendation on whether or not the case should go to trial.<sup>18</sup> While police officers are ordinarily responsible for investigations, some SLL offences require that certain actions be performed by designated officers.<sup>19</sup> 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.<sup>20</sup> Possible punishments for offences affect how investigations proceed. Usually, offences with at least three-year sentences are categorized as *cognizable*,<sup>21</sup> which permits police to begin investigations without any judicial imprimatur and arrest suspects without warrants.<sup>22</sup> 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.<sup>23</sup> The vast exception to this rule exists in the form of several “non-bailable” offences.<sup>24</sup> Persons may be detained in custody during investigation into non-bailable offences for up to sixty or ninety days, again

<sup>16</sup> 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].

<sup>17</sup> S. 2(h), CrPC, 1973 (Investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf).

<sup>18</sup> Chapter XII, CrPC, 1973. The Chapter is titled “Investigation” and covers Ss. 154 (First Information Report) to 173 (Final Report).

<sup>19</sup> See, e.g. S. 22, Mines and Minerals (Development and Regulation) Act, 1957 (Requiring that complaints in court can only be filed by persons authorized by the Central Government).

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> S. 2(c), CrPC, 1973 [Defining cognizable offence]; S. 156, CrPC, 1973 [Authorizing police officers to conduct an investigation into alleged commission of cognizable offences]; S. 15, CrPC, 1973 [Requiring police to obtain prior judicial permission to begin investigating allegations of non-cognizable offences].

<sup>23</sup> S. 57, CrPC, 1973. The right to be produced before a Magistrate has constitutional standing as well. Art. 22, Constitution of India.

<sup>24</sup> S. 2(a), CrPC, 1973 [Defining “bailable” and “non-bailable offence”]; S. 437, CrPC, 1973 [Explaining limits placed on granting bail for allegations of a “non-bailable offence”]. The police also have some preventive powers to arrest, i.e. before any offence is alleged to have been committed. See, S. 151, CrPC, 1973.

depending upon the possible sentence of the alleged offence,<sup>25</sup> and detention can even continue through trial.<sup>26</sup>

## 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, state-wide High Courts, and finally the Supreme Court. Except the Magistrates, all other courts possess a combination of original and appellate jurisdiction.<sup>27</sup> But Magistrates have several other responsibilities due to their position as courts of first instance. Most importantly, they are responsible for beginning the judicial phase of a case. This happens once police submits 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.<sup>28</sup> 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.<sup>29</sup>

---

<sup>25</sup> S. 167(2), CrPC, 1973 [Outlining judicial power to detain persons in pre-trial custody during an investigation and permit release upon investigation remaining pending despite expiration of fixed periods].

<sup>26</sup> S. 309(2), CrPC, 1973. Acknowledging the possibility of lengthy detention owing to slow case disposal, the CrPC allows for release on bail when persons have suffered more than half the maximum possible sentence before conclusion of trial. See, S. 436-A, CrPC, 1973. This period of pre-trial detention is included in calculating the period of incarceration suffered by a convict to determine release. See, S. 428, CrPC, 1973.

<sup>27</sup> S. 6, CrPC, 1973. [Delineating classes of criminal courts in India]; S. 26, CrPC, 1973. [Listing powers of different courts, stating that offences can be 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. 372-405, 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.

<sup>28</sup> Ss. 190-199, CrPC, 1973.

<sup>29</sup> S. 204, CrPC, 1973. If the Magistrate is considering a case arising out of private prosecution, the level of scrutiny is higher as opposed to cases where allegations are made by public officials like the police or otherwise. See, Ss. 200-202, CrPC. For an elaboration of what the standard of reasonableness is this stage, see, e.g., *Dhariwal Tobacco Products Ltd. v. State of Maharashtra*, (2009) 2 SCC 370 (Supreme Court of India, Two Judges' Bench); *Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609 (Supreme Court of India, Three Judges' Bench).

Trials itself are of four kinds,<sup>30</sup> with punishments often a reliable guide to the kind of trial a defendant might face.<sup>31</sup> 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.<sup>32</sup> 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 ultimate exercise of that discretion only occurs after hearing arguments by both sides.

Indian criminal trials do not have juries: charges are proved beyond reasonable doubt before a judge, normally by the prosecution.<sup>33</sup> 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 proper disposal of a case.<sup>34</sup> Again, 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 wide sentencing

---

<sup>30</sup> Serious offences, usually falling in the third category, are tried as “Sessions Cases” and involve several levels of scrutiny at trial. Ss. 225-237, CrPC, 1973. Less serious offences are tried as “Warrant Cases” with nearly the same procedure. Ss. 238-250, CrPC, 1973. Offences punishable with up to two years’ imprisonment are tried as “Summons Cases”, a quicker process with only one level of pre-charge consideration. Ss. 251-259, CrPC, 1973. “Summary Trials” are the fastest mode of trial, allowing quick disposal of cases with punishment terms of less than three months which cannot be appealed against Ss. 260-265, CrPC, 1973. The primary difference being that trials for more serious offences involve greater levels of scrutiny to prevent miscarriages of justice.

<sup>31</sup> The CrPC suggests a threefold-grouping based on punishment terms: (i) offences punishable between zero to three years, (ii) those punishable between three to seven years, and (iii) those punishable with above seven years. Different procedural rules apply to trials for offences that are punishable with longer terms of imprisonment. This classification, of which procedure applies to which offence, is provided under the First Schedule to the CrPC, Schedule I Part A, CrPC, 1973, [http://ecourts.gov.in/sites/default/files/classification\\_2.pdf](http://ecourts.gov.in/sites/default/files/classification_2.pdf) (accessed July 31, 2018).

<sup>32</sup> See, Ss. 227-228, CrPC, 1973 (Sessions Trial); Ss. 239-240, CrPC, 1973 (Warrant Trial on Final Report); Ss. 245-246 CrPC, 1973 (Warrant Trial on Private Complaint). Defendants have a very minimal right to rely on materials not introduced by the prosecution during arguments on charge. See, *Nitya Dharmananda v. Gopal Sheelum Reddy*, (2018) 2 SCC 93 (Supreme Court of India, Two Judges’ Bench).

<sup>33</sup> Jury trials were abolished by the CrPC, 1973. On the prosecution’s burden, see, Ss. 3, 101 and 102, Indian Evidence Act, 1872. Some statutes place a burden upon the accused to disprove a presumption of guilt. See, e.g., Section 304-B, IPC 1860.

<sup>34</sup> See, Ss. 215-217, CrPC, 1973 (Alteration of Charges); S. 311, CrPC, 1973 (New Evidence); S. 319, CrPC, 1973 (New Accused). Beyond this, judicial precedent has also expanded their powers at the pre-trial stage. Judicial power to order police to investigate allegations today includes a power to monitor investigations. See, *Sakiri Vasu v. State of U.P.*, (2008) 2 SCC 409 (Supreme Court of India, Two Judges’ Bench).

discretion.<sup>35</sup> Multiple sentence terms ordinarily run consecutively under the CrPC, although judges can order them to run concurrently.<sup>36</sup> Lastly, a conviction may not result in prison time: probation is a possibility for offences with a maximum two-year sentence (and a few others),<sup>37</sup> and courts have the discretion to suspend execution of a sentence when the defendant prefers an appeal.<sup>38</sup>

### 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 in such a manner 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 I take theft as the underlying crime, one of commonest offences that the Indian criminal process deals with.<sup>39</sup>

#### 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.<sup>40</sup> As mentioned before, the police is fully invested in completing investigations but not affected by what happens *thereafter*: Departmental policies across states are such that police officers are not incentivised to care about the consequences of cases being filed in court.<sup>41</sup>

<sup>35</sup> The maximum can also be death. *See e.g.*, S. 302, IPC. Offences outside the IPC, relating to protecting social or economic interests, often contain mandatory minimums. For instance, *see*, S. 13, Prevention of Corruption Act, 1988.

<sup>36</sup> S. 31, CrPC, 1973.

<sup>37</sup> S. 360, CrPC, 1973. *See*, Probation of Offenders Act, 1960, for the probation regime in India.

<sup>38</sup> S. 389, CrPC, 1973. Moreover, if the alleged offence is not proven, but another offence of a less severe sentence stands proven, courts have the power to record a conviction for that less serious offence. This principle does not permit convictions for *more* serious offences, however.

<sup>39</sup> According to NCRB data, theft was one of the commonest IPC offence for police investigations and court cases in 2016. The police sent 1,30,069 theft cases for trial, and a total of 9,22,665 theft cases were in trial courts. *See*, National Crime Records Bureau, Crime in India 2016, 543 (Table 17A.1), 566-567 (Table 18A.1).

<sup>40</sup> S. 379, IPC. Since this is a non-bailable offence, Anu has no legal *right* to be released, and so this becomes a question of judicial discretion.

<sup>41</sup> Promotion policies in State police for officers involved in investigative tasks (not all of them are involved with this) generally involve considering merit and seniority, and the evaluation of merit is naturally highly subjective with States not routinely adopting well-defined parameters. None of the publicly available information I accessed suggested that ultimate case disposals explicitly constitute a parameter for performance evaluation in the States. *See, e.g.*, R. 17, U.P. Sub-Inspector and Inspector (Civil Police) Services Rules, 2015, <http://upbpb.gov.in/Rules/Main%20Rules-%20English.pdf> (accessed July 31, 2018); Karnataka State Police



Further, recall that the decision to prosecute and begin judicial proceedings is not made by the police. That power vests 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 poor 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 big sum of money.

Once the Final Report is filed and cognizance taken, Anu will be summoned to face trial unless she is already in custody. This filing of the Final Report, taking cognizance, and issuing of summons normally makes for the first judicial hearing.<sup>42</sup> At the second hearing, the defendant will appear and get a copy of the case papers.<sup>43</sup> 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, normally, will the judge decide whether charges are to be framed or not and ask the defendant to state her plea. Hearings ordinarily take place with a span of 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.<sup>44</sup> 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

---

Manual, Chapter 3, <https://ksp.gov.in/Page.aspx?page=Police%20Manual%20Chapter%203> (accessed July 31, 2018). See also, Mandeep Tiwana, *Independent Institutional Evaluation of Police Performance*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, [http://www.humanrightsinitiative.org/programs/aj/police/papers/indepdt\\_inst\\_eval\\_pol\\_perf.pdf](http://www.humanrightsinitiative.org/programs/aj/police/papers/indepdt_inst_eval_pol_perf.pdf) (accessed July 31, 2018) (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).

<sup>42</sup> There are exceptions where judges might take the Final Report and consider the matter for longer if facts are complex (very rare). More commonly a gap between filing of Final Report and taking cognizance is occasioned if the Report is filed without clearing technical problems that prevent taking cognizance, such as obtaining prior permission from the government in prosecuting public officials.

<sup>43</sup> Ss. 207-209, CrPC, 1973. If she is not on bail already, then she must necessarily take bail to assure the court that she will not abscond during the case. See, Ss. 436-440, CrPC, 1973.

<sup>44</sup> See, Amrita Pillai et al., *Steering Reform in Clogged Courts* (May 21, 2018), THE HINDU, <https://www.thehindu.com/opinion/op-ed/steering-reform-in-clogged-courts/article23944126.ece> (accessed July 31, 2018).

cost to litigants.<sup>45</sup> In the clogged docket, such administrative issues mean the gap between hearings often becomes one of several months.<sup>46</sup>

Defendants are central to the criminal process. But 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 normally calls the shots. So how might our defendant be advised to plead? Anu's lawyer will advise her, if she does not have an idea already, that the prosecution often flounders at proving its case in India. Conviction rates for IPC offences hover around 46%.<sup>47</sup> These averages mask the variance for specific offences, which hints at even better chances of securing acquittal.<sup>48</sup> 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 normally 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.<sup>49</sup>

---

<sup>45</sup> S. 309, CrPC, 1973. See, Vidhi Centre for Legal Policy, *Inefficiency and Judicial Delay: New Insights from the Delhi High Court* (2017) [Study restricted to the High Court of Delhi]. See also, Daksh, *Time-and-Motion Study of Four District and Sessions Courts in Bangalore, Karnataka* (November 2016), <http://dakshindia.org/wp-content/uploads/2016/11/DAKSH-TIME-AND-MOTION-STUDY-OF-FOUR-DISTRICT-AND-SESSIONS-COURTS-3.pdf> (accessed July 31, 2018).

<sup>46</sup> Bhadra Sinha et al., *A System that Drags and Traps: How Courts Can Speed up the Process of Justice* (November 17, 2016), HINDUSTAN TIMES, <http://www.hindustantimes.com/india-news/a-system-that-drags-and-traps-how-courts-can-speed-up-the-process-of-justice/story-Fc5R80NT1DKu8toOtGPyTL.html> (accessed July 31, 2018).

<sup>47</sup> 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*, 573 (Table 18A.3).

<sup>48</sup> For instance, while the conviction rate for theft is 35.2%, conviction rates for causing injuries while driving rashly 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).

<sup>49</sup> 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//NALSA (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://dlsa.org/wp-content/uploads/2017/07/FEE-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.tnlegalservices.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.egazette.kerala.gov.in/pdf/2017/12/part\\_4/Legal%20Services%20Authority.pdf](http://www.egazette.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).

To put it bluntly, pleading not guilty and going to trial seems to come with a good shot of winning for the defendant and also best aligns her interests with those of her counsel. Pleading guilty, on the other hand, 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.<sup>50</sup>

## B. The Haves and Have-Nots

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

The model, though, suggests that this scenario should play out regardless of whether Anu is an indigent defendant or a person with means. But 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.<sup>51</sup> More significantly, those with means can fully exploit the right to be heard that the criminal process affords to defendants at the several stages during a trial when judges exercise discretion.<sup>52</sup> That's not all. Statutorily, litigants have two avenues to challenge judicial exercise of discretion before a verdict: revision petitions against any proceedings not of an "interim" nature,<sup>53</sup> and petitions before a High Court against any proceedings constituting an "abuse of process".<sup>54</sup> 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 at many of those stages. In these efforts to ensure procedural propriety, appellate courts have created avenues for several collateral proceedings which

---

<sup>50</sup> 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).

<sup>51</sup> 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 decisions recognised this right. See, *Mohd. Hussain v. State (NCT of Delhi)*, (2012) 2 SCC 584 (Supreme Court of India, Two Judges' Bench).

<sup>52</sup> 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.

<sup>53</sup> 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).

<sup>54</sup> S. 482, CrPC, 1973.

defendants with means can exploit after having tried their luck before the trial court:<sup>55</sup>

- (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;<sup>56</sup>
- (ii) Defendants in custody during trial can challenge their detention during pendency of the trial before superior courts;<sup>57</sup>
- (iii) Defendants can file for a transfer of proceedings at any stage of the trial;<sup>58</sup>
- (iv) Defendants can challenge the order taking cognizance, i.e. the stage when the police report / criminal complaint is taken on the judicial record;<sup>59</sup>
- (v) Defendants can challenge an order summoning them to face trial;<sup>60</sup>
- (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;<sup>61</sup>
- (vii) Defendants can challenge orders to conduct joint trials or to try different offences jointly;<sup>62</sup>
- (viii) Defendants can challenge orders framing charges, after having an opportunity to argue for discharge before trial courts;<sup>63</sup>

---

<sup>55</sup> Note that nearly all of these are open to both defendants and prosecution/complainants and can be fought up the appellate ladder and end up before the Supreme Court of India.

<sup>56</sup> See e.g., *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : AIR 1992 SC 604 (Supreme Court of India, Two Judges' Bench).

<sup>57</sup> S. 439, CrPC, 1973.

<sup>58</sup> Ss. 406-408, CrPC, 1973.

<sup>59</sup> See e.g., *Krishika Lulla v. Shyam Vithalrao Devkatta*, (2016) 2 SCC 521 (Supreme Court of India, Two Judges' Bench).

<sup>60</sup> See e.g., *Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609 (Supreme Court of India, Three Judges' Bench).

<sup>61</sup> See, Ss. 207, 238, CrPC, 1973. See also, *Ashutosh Verma v. CBI*, 2014 SCC OnLine Del 6931 (Delhi High Court, Single Judge Bench).

<sup>62</sup> See e.g., *Essar Teleholdings Ltd. v. CBI*, (2015) 10 SCC 562 (Supreme Court of India, Three Judges' Bench).

<sup>63</sup> See e.g., *Sharat Babu Digumarti v. State (NCT of Delhi)*, (2017) 2 SCC 18 (Supreme Court of India, Two Judges' Bench). Even in Summons Cases where no arguments on charge are statutorily provided, defendants seek to argue before framing of "Notice" against them and challenge such orders. See, Anirban Bhattacharya and Bharat Chugh, *India: To Discharge, or Not to Discharge: That is the Question* March 22, 2017, MONDAQ, <http://www.mondaq.com/india/x/579124/court+procedure/To+Discharge+Or+Not+To+Discharge+That+Is+The+Question> (accessed July 31, 2018).

- (ix) Defendants can challenge orders passed during the recording of evidence at trial that either exclude or include certain materials.<sup>64</sup>

Winning these challenges can either result in setting the clock back or quashing of the entire case proceedings, ultimately further prolonging the affair. Moreover, delays can also occur because of appellate courts granting injunctions against trial court proceedings that subsist till appellate hearings conclude.<sup>65</sup> In a system plagued by delays this can send cases into cold storage.<sup>66</sup> All these factors make pursuing collateral proceedings very attractive. As more proceedings and longer hearings bring more potential remuneration for counsel, thus there is again an alignment in the interests of defendant and counsel.<sup>67</sup> 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 serious enough for the Indian Supreme Court to regularly intervene in.<sup>68</sup>

### C. Other Actors: Prosecutors, Judges, and Victims

Defendants/Defence Counsel are 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 the way their choice-architecture is framed. The positions of the remaining actors – prosecutors, judges and victims – can help explain why this choice goes relatively uncontested. Let's first consider prosecutors. The Cr.P.C. creates an office of a "Public Prosecutor" and

---

<sup>64</sup> See e.g., *Suresh Kalmadi v. CBI*, 2015 SCC OnLine Del 9639 (Delhi High Court, Single Judge Bench).

<sup>65</sup> 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.

<sup>66</sup> See, Pradeep Thakur, *Stays Delay Court Cases by up to 6.5 yrs: Study* (June 22, 2016), THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/Stays-delay-court-cases-by-up-to-6-5-yrs-Study/articleshow/52860273.cms> (accessed July 31, 2018).

<sup>67</sup> 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://dlsa.org/wp-content/uploads/2017/07/FEE-SCHEDULE-2017.pdf> (accessed July 31, 2018). But, arguably they refrain from exploring these courses because the costs still outweigh the earnings.

<sup>68</sup> See, *Supreme Court Orders Expiry Date for Stay Orders in Criminal and Civil Trial Proceedings* (March 28, 2018), SCROLL, <https://scroll.in/latest/873649/supreme-court-orders-expiry-date-for-stay-orders-in-criminal-and-civil-trial-proceedings> (accessed July 31, 2018).

a “Directorate of Prosecutions”.<sup>69</sup> Considered a “limb of the judicial process”,<sup>70</sup> prosecutors are picked by the government either from a cadre of officers akin to bureaucracies or in consultation with the local judiciary<sup>71</sup> with different states having their own specific rules for selection etc.<sup>72</sup> 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.<sup>73</sup> Besides low salaries, trial court prosecutors across India often function on extremely meagre resources, commonly working out of space reserved inside the courtroom without a separate office or computer. And their workload is enormous. Though they are very rarely part of investigations (prosecutors get access to case papers once a Final Report is filed in court),<sup>74</sup> they are part of everything else. A regular day brings a docket with more than

<sup>69</sup> 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, CrPC, 1973 [Creating posts of “Additional Public Prosecutor” and “Special Public Prosecutor” who are also appointed by the government]; Ss. 301-302, CrPC, 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, 197th Report on Public Prosecutor’s Appointments, 16 (2006). *See also*, Sagar, *Role of Public Prosecutor in Indian Criminal Justice System*, 208–266 (Unpublished PhD Dissertation), [http://shodhganga.inflibnet.ac.in/bitstream/10603/8115/17/17\\_chapter%2010.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/8115/17/17_chapter%2010.pdf) (accessed July 31, 2018).

<sup>70</sup> Law Commission of India, 197th Report on Public Prosecutor’s Appointments, 16 (2006).

<sup>71</sup> S. 24, Code of Criminal Procedure. *See*, *Shrilekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212 (Supreme Court of India, Two Judges’ Bench) [Supreme Court deprecating politicization 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 States already 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 Thanks to Court Order* (August 29, 2013), THE HINDU, , <http://www.thehindu.com/news/national/tamil-nadu/directorate-of-prosecution-posts-filled-thanks-to-court-order/article5068813.ece> (accessed July 31, 2018) [Narrating how the post was filled by the government for the State of Tamil Nadu after judicial orders].

<sup>72</sup> *See e.g.*, Delhi High Court Rules – Chapter 29, Public Prosecutors, [http://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile\\_LKNTYIOJ.PDF](http://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_LKNTYIOJ.PDF) (accessed July 31, 2018).

<sup>73</sup> *See*, *Delhi Prosecutors Challenge Their ‘Peanuts’ Salary and Harrowing Work-Life Balance before Delhi HC* (October 17, 2014), LEGALLY INDIA, , <https://www.legallyindia.com/the-bench-and-the-bar/delhi-prosecutors-challenge-abysmal-pay-before-delhi-high-court-20141017-5204> (accessed July 31, 2018). As of July 31, 2018, the most recent development was the Government stating that pay scales had been revised. *See*, *Centre Revises Pay Scales of Prosecutors in Delhi: HC Told* (April 4, 2018), THE INDIAN EXPRESS, <https://indianexpress.com/article/india/centre-revises-pay-scales-of-prosecutors-in-delhi-hc-told-5123594/> (accessed July 31, 2018).

<sup>74</sup> The limited statutory exception being Special Public Prosecutors which can be appointed for specific cases. S. 24(8), CrPC, 1973. Comments from a serving public prosecutor 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), LIVE LAW, <http://www.livelaw.in/ensure-no-charge-sheet-filed-without-written-consent-approval-prosecution-branch-delhi-hc-police-read-order/> (accessed July 31, 2018).

thirty items consisting of bail hearings, charge hearings, recording evidence, and final arguments.<sup>75</sup> Since the average lifespan of cases is over two years,<sup>76</sup> it is uncommon for prosecutors to see the more complex cases to the end as they often get transferred before a case concludes.<sup>77</sup> Thus, prosecutors end up having relatively little riding on resolution of individual cases, and 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.<sup>78</sup> Accepting this reality, judicial career-advancement is not pegged solely on final disposal of cases; rather, the performance-evaluations metric considers how judges manage the entire docket and discharge their administrative responsibilities.<sup>79</sup> The problems of this dysfunctional setup are reflected in the persistently low rates for IPC cases being withdrawn by prosecution: a process that requires consideration of a case by prosecutors and approval by judges.<sup>80</sup> Average acquittal rates for IPC offences are above 50%,<sup>81</sup> 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

---

I 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.

<sup>75</sup> 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 INDIAN EXPRESS, <http://indianexpress.com/article/opinion/columns/on-trial-the-criminal-justice-system/> (accessed July 31, 2018); Joby Kattakayam, *Public Prosecutors Demand a Better Deal* (January 17, 2013), THE HINDU, , <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/public-prosecutors-demand-a-better-deal/article4314826.ece> (accessed July 31, 2018).

<sup>76</sup> *See*, National Judicial Data Grid, [http://njdg.ecourts.gov.in/njdg\\_public/main.php#](http://njdg.ecourts.gov.in/njdg_public/main.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].

<sup>77</sup> 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://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile\\_LKNTYI0J.PDF](http://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_LKNTYI0J.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).

<sup>78</sup> 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. SYS. 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://delhidistrictcourts.nic.in/circular\\_new.htm](https://delhidistrictcourts.nic.in/circular_new.htm) (accessed July 31, 2018).

<sup>79</sup> National Judicial Academy, Report on Annual Confidential Reports (2015-16) (Describing how judges are evaluated for "work" done on the judicial side and administrative side). *See also*, *High Court of Rajasthan, Confidential Report of Judicial Officer*, <http://hcraj.nic.in/latestupdates/ACRPROFORA-2016.pdf> (accessed July 31, 2018).

<sup>80</sup> S. 321, CrPC, 1973.

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

process of withdrawal is underutilized, with only 883 cases concluded through this route in 2016.<sup>82</sup>

Victims have comparatively more skin in the game than prosecutors. The criminal process provides for an expansive right of private prosecution,<sup>83</sup> and though the Cr.P.C. itself was only amended in 2009 to recognise a slew of victims' rights measures,<sup>84</sup> the judiciary has historically been quite sympathetic to their cause.<sup>85</sup> Outside the trial itself, victims are crucial for effecting another statutory method of case disposal: compounding.<sup>86</sup> This allows for a case to end if both victim and defendant agree to do so. Compounding rates for IPC cases are far higher than rates for withdrawal, reflecting the more invested role of victims.<sup>87</sup> But compounding provisions do not provide for any compensation 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.<sup>88</sup> 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 defendants, victims like Radha stand to gain little by ending a case quickly which makes them more amenable to letting a case go to trial.

#### IV. PLEA BARGAINING'S FAILURE

The previous 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,<sup>89</sup> India's most recent federal legislative

---

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

<sup>83</sup> There are no limits on private persons *initiating* the criminal process. While the CrPC does limit the ability of private litigants to plead their own cases in Sessions Trials, they still have a right to assist the public prosecutor making her case. *See*, Ss. 301-304, CrPC.

<sup>84</sup> *See*, Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009), in force w.e.f. 31.12.2009 and 1.11.2010.

<sup>85</sup> For instance, since the 1980s courts have required that victims must be heard before a case is closed at the cognizance stage where it arose out of a police investigation. *See, Bhagwant Singh v. Commr. of Police*, (1985) 2 SCC 537 (Supreme Court of India, Three Judges' Bench). Courts have also been sympathetic to granting victims a right to be heard during bail hearings. *See, R. Rathinam v. State*, (2000) 2 SCC 391 (Supreme Court of India, Two Judges' Bench).

<sup>86</sup> S. 320, CrPC, 1973. When we look at offences under special laws, these are primarily victimless crimes or those where the right of private prosecution is taken away and no compounding is permitted. Therefore, victims play a negligible role in defining the outcomes of those processes.

<sup>87</sup> As opposed to 883 cases withdrawn by prosecution, 1,23,872 cases ended because of compounding. *See*, National Crime Records Bureau, Crime in India 2016, 566 (Table 18A.1).

<sup>88</sup> *See*, Ss. 357-357-A, CrPC.

<sup>89</sup> For a lengthier discussion of plea-bargaining in India, *see*, Abhinav Sekhri, *Plea Bargaining's Resounding Defeat? The Indian Experiment with Plea Bargaining*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3085659](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085659) (accessed July 31, 2018).



attempt to shift criminal cases away from trials and reduce pendency.<sup>90</sup> In this part, I 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 the overall criminal process architecture in India.

### 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.<sup>91</sup> What has not been discussed is how trial courts were also innovating to make the process go faster by awarding sentences below the statutory mandatory minimums to facilitate quick guilty pleas.<sup>92</sup> One such case of a discounted sentence made it to the Supreme Court which did not take kindly to this practice.<sup>93</sup> An irate Court issued a scathing critique to discourage this illegal bargaining between parties, and chided magistrates for subverting clear legislative mandates.<sup>94</sup> Again, we know that pendency has continued to mount unabated since 1973.<sup>95</sup> The problems it caused were exacerbated by a judicial tendency to keep defendants in jail during the case, which swelled prison populations.<sup>96</sup> Facing dire straits, the government was forced to re-think the issue and nudged the Law Commission

---

<sup>90</sup> This approach of shifting cases out of the trial court to an alternate dispute-resolution model, 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 SURVEY 410, 415-17 (April 1998). For a critique of one of these methods, the Lok Adalat, see, Marc Galanter and Jayanth K. Krishnan, *Bread for the Poor': Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789 (2004).

<sup>91</sup> *Supra* notes 1-3 and accompanying text.

<sup>92</sup> For instance, S. 16 of the erstwhile Prevention of Food Adulteration Act, 1954 was amended in 1976 and a variety of mandatory minimum sentences was prescribed 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/ld/P-ACT/1954/A1954-37.pdf> (accessed July 31, 2018).

<sup>93</sup> *Murlidhar 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 pled 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.

<sup>94</sup> *Ibid*, at ¶¶ 13-17.

<sup>95</sup> National Crime Records Bureau, *Crime in India 1994*, 120.

<sup>96</sup> 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, Three Judges' Bench).

to examine the potential for introducing plea based sentencing discounts in India.<sup>97</sup>

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.<sup>98</sup> These developments in New Delhi seem not to have reached some parts of India, where plea negotiations continued apace in trial courts for exactly the kind of situations that they were prohibited, i.e. to award punishments below the statutory mandatory minimum terms.<sup>99</sup> Perhaps because of this, subsequent reports by the Law Commission on criminal procedure issues eased up in their assessment of plea-bargaining,<sup>100</sup> albeit without any analysis of the concept after 1991. These reports were cited as legislation was passed in 2005<sup>101</sup> to bring plea-bargaining 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.<sup>102</sup>

<sup>97</sup> Law Commission of India, 142nd Report, at 15.

<sup>98</sup> Law Commission of India, 142nd Report, at 24-37.

<sup>99</sup> See e.g. *State of Gujarat v. Ishwarbhai Harkhabhai 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” (¶4), 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 Guj 170 : (1995) 2 GLH 223, at ¶ 9 (Gujarat High Court, Single Judge Bench)]. The Supreme Court remained concerned as well, as can be seen through an extraordinary order denuding one decision of the Allahabad High Court of the position of precedent, as the author of that decision was using it 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).

<sup>100</sup> Law Commission of India, 144th Report on the Code of Criminal Procedure, 1973 (Vol. I), 51-54 (1996); Law Commission of India, One Hundredth and Seventy Seventh Report on Law Relating to Arrest, 110-111 (2001); Justice V.S. Malimath et. al., Committee on Reforms of Criminal Justice System – Report, 178-180 (2003).

<sup>101</sup> 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.

<sup>102</sup> S. 265-A, CrPC, 1973. A list of offences under nineteen statutes affecting the “socio-economic condition” was notified by the federal government in 2006 and has not been updated since. These are: (i) Dowry Prohibition Act, 1961, (ii) Commission of Sati (Prevention) Act, 1987, (iii) Indecent Representation of Women (Prohibition) Act, 1986, (iv) Immoral Traffic (Prevention) Act, 1956, (v) Protection of Women from Domestic Violence Act, 2005, (vi) Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992, (vii) Provisions of Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955), (viii) Provisions of Meat Food Products Orders 1973 (issued under the Essential Commodities Act, 1955), (ix) Wildlife (Protection) Act, 1972 (only certain offences), (x) Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, (xi) Protection of Civil Rights Act, 1955, (xii) Juvenile Justice (Care and Protection of Children) Act, 2000 (Ss. 23-28), (xiii) Army Act, 1950, (xiv) Air Force Act, 1950, (xv) Navy Act, 1957, (xvi) Delhi Metro Railway (Operation and Maintenance) Act, 2002 (Ss. 59-81, 83), (xvii) Explosives Act, 1884, (xviii) Cable Television Networks (Regulation) Act,

- (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.<sup>103</sup>
- (iii) The Magistrate needs to satisfy herself that the defendant opted for plea bargaining voluntarily, and 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).<sup>104</sup> A defendant can be released on bail during this time as well.<sup>105</sup>
- (iv) All parties must work together to enter a ‘Mutually Satisfactory Disposition’, and the court ensures the process is completed voluntarily. The Disposition does not involve negotiations on sentence but on fixing compensation for a victim.<sup>106</sup>
- (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.<sup>107</sup> Since nearly all maximum sentences in this range are either 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).<sup>108</sup>
- (vii) The order cannot be appealed, with the only possible avenue of challenge through writ remedies or special appeals to the Supreme Court.<sup>109</sup>

## B. Plea Bargaining’s Failure: What Went Wrong?

Plea-bargaining was garlanded by every sector of the legal system.<sup>110</sup> Prominent lawyers billed it as a game changer;<sup>111</sup> judges went to prisons to

---

1995 (Ss. 11-18), (xix) Cinematograph Act, 1952. See, Ministry of Home Affairs, Notification S.O. 1042 (E), Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (II) (July 11, 2016).

<sup>103</sup> Ss. 265-A, 265-B(2), CrPC, 1973.

<sup>104</sup> S 265-B, CrPC, 1973.

<sup>105</sup> S 265-H, CrPC, 1973.

<sup>106</sup> Ss. 265-D, 265-E, CrPC, 1973.

<sup>107</sup> S. 265-E, CrPC, 1973. This interpretation of the sentence reduction provisions only conferring fixed discounts was confirmed by the Bombay High Court. See, *Guerrero Lugo Elvia Grissel v. State of Maharashtra*, 2012 SCC OnLine Bom 6 : (2012) 2 Mah LJ 369 (Bombay High Court, Two Judges’ Bench).

<sup>108</sup> S. 265-I, CrPC, 1973

<sup>109</sup> S. 265-G, CrPC, 1973

<sup>110</sup> Popular newspapers continued to link it to the American model without explaining the subtleties. 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.

<sup>111</sup> Dr. Abhishek M. Singhvi, “Beating the Backlog: Less Talk, More Action”, (2007) 2 SCC J-9.

preach its merits;<sup>112</sup> legislators pointed to it as fulfilment of election promises.<sup>113</sup> In all this proselytizing, no data was being collected on how many cases were being resolved through plea-bargaining.<sup>114</sup> 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.<sup>115</sup> A lot of these were cases for which plea bargaining was prohibited.<sup>116</sup> These were excluded in subsequent reports which presented a steep decline: 4,816 cases resolved through plea bargaining in 2015,<sup>117</sup> and 4887 in 2016, a mere 0.34% of total completed cases.<sup>118</sup> In this decade of 2005 to 2015, pendency kept rising, and the number of under-trial prisoners also increased.<sup>119</sup> It seems clear, then, that plea-bargaining failed to either reduce pendency of criminal cases or empty out the prisons. Why? A closer look at the design of the Indian model helps understand this failure.<sup>120</sup>

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 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. But 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, which greatly reduces

<sup>112</sup> Kartikeya, *Judge Gives Prisoners Tips on Early Release* (November 24, 2008), THE TIMES OF INDIA, [https://timesofindia.indiatimes.com/Mumbai/Judge\\_gives\\_prisoners\\_tips\\_on\\_early\\_release/articleshow/3749191.cms](https://timesofindia.indiatimes.com/Mumbai/Judge_gives_prisoners_tips_on_early_release/articleshow/3749191.cms) (accessed July 31, 2018).

<sup>113</sup> Dr. Manmohan Singh, *Administration of Justice on Fast Track*, (2007) 4 SCC J-9.

<sup>114</sup> A few newspaper reports claimed the process was popular in large cities when introduced. See e.g., Kartikeya, *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,.

<sup>115</sup> National Crime Records Bureau, *Crime in India 2014* (Table 4.5).

<sup>116</sup> *Ibid* [showing cases for murder, attempt to murder, rape, kidnapping, etc. being settled]. See, Alope Tikku, *Crime Records Show Widespread Abuse of Plea Bargain Law* (November 24, 2015), HINDUSTAN TIMES, <http://www.hindustantimes.com/india/crime-records-show-widespread-abuse-of-plea-bargain-law/story-rcq9UCrMeD13fbnJjGZffN.html> (accessed July 31, 2018).

<sup>117</sup> National Crime Records Bureau, *Crime in India 2015* (Table 4.5).

<sup>118</sup> National Crime Records Bureau, *Crime in India 2016*, 566 (Table 18A.1).

<sup>119</sup> The number of defendants awaiting trial for IPC offences was 1,92,391 in 2006, and 2,31,340 in 2015. See, National Crime Records Bureau, *Prison Statistics India 2006*, 72 (2007); National Crime Records Bureau, *Prison Statistics India 2015*, 73 (2016).

<sup>120</sup> See also, K.V.K. Santhy, *Plea Bargaining in US and Indian Criminal Law Confessions for Concessions*, 7(1) NALSAR L. REV. 85 (2013) [Documenting development and use of plea bargaining in India till 2013]; Sonam Kathuria, *The Bargain Has Been Struck: A Case for Plea Bargaining in India*, 19 STUDENT B. REV. 55 (2007) [Student note, arguing the Indian model was reasonable and within constitutional limits]; Sulabh Rewari and Tanya Aggarwal, *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].

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 that they stand to gain through the trial. And the same goes for cases where a defendant wants to settle. Here, plea-bargaining contests with compounding,<sup>121</sup> parties moving the High Court,<sup>122</sup> or (rarely) prosecutors withdrawing the case.<sup>123</sup> All of which are more favourable 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. But 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).<sup>124</sup> In this stalemate, one might assume the other parties can push for a bargain. But 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.<sup>125</sup> What about judges? They do have incentives to quickly dispose cases. But 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.<sup>126</sup> 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.<sup>127</sup>

---

<sup>121</sup> S. 320, CrPC, 1973.

<sup>122</sup> 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).

<sup>123</sup> S. 321, CrPC, 1973.

<sup>124</sup> Nuno Garoupa and Frank H. Stephen, *Why Plea-Bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment*, 15 MAASTRICHT J. EUR. & COMP. L. 323, 327, 353-55 (2008).

<sup>125</sup> *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 offences 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.

<sup>126</sup> *Supra* notes 77-83.

<sup>127</sup> See, Shibu Thomas, *Courts Must be Careful on Guilty Plea* (November 24, 2015), THE TIMES OF 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.

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 at least 18% of the prison population could potentially have availed of this process.<sup>128</sup> That is not a small number, so why have they stayed away from plea-bargaining even though it might bring immediate release?<sup>129</sup> I suspect there are two reasons beyond the obvious response that a guilty plea carries stigma and collateral consequences.<sup>130</sup> *First*, absence of a victim grinds plea-bargaining to a halt, and since most defendants in custody are suspected of theft<sup>131</sup> it is likely that victims do not remain interested in the case once the question of recovering property is solved either way during investigation. Even if victims were interested, poor defendants cannot compensate loss. The *second* reason is that defendants are simply unaware of this process or are discouraged from choosing it. Out of the entire 282,076 persons detained in prisons and awaiting trial across India, 80,528 were illiterate and 119,082 had not finished High School.<sup>132</sup> These defendants are often without legal representation or have state-appointed counsel who might be unaware themselves, or might not be keen to end cases quickly and sacrifice potential earnings.<sup>133</sup> As judges' hands are somewhat tied, it is difficult for them to enthusiastically encourage

---

<sup>128</sup> Total prisoners awaiting trial for offences under the IPC across the country were 2,31,340. Government data classifies these according to offence heads, out of which the following offences potentially fall within the plea-bargaining model: Theft (S. 378, IPC), Burglary (S. 448, IPC, labelling 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 offences both within and beyond the scope of plea bargaining. For the estimate, I exclude all extortion cases and include all breach of trust cases. The extortion offences 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 2015, at 85-87. *Ibid*, at 2.

<sup>129</sup> 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 process. *See*, *Bhim Singh v. Union of India*, (2015) 13 SCC 605 (Supreme Court of India, Three Judges' Bench).

<sup>130</sup> 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 forestalls persons from pleading, an uncritical acceptance of the notion might not be suited to the Indian context.

<sup>131</sup> 26,949 theft cases accounted for 11.5% of the persons awaiting trial and eligible for plea-bargaining. *See*, National Crime Records Bureau, Prison Statistics 2015, at 85-87.

<sup>132</sup> National Crime Records Bureau, Prison Statistics 2015, at 95.

<sup>133</sup> *See*, Amnesty International, *Justice Under Trial: A Study of Pre-Trial Detention in India*, 13-16 (2017), [https://www.amnesty.org.in/images/uploads/articles/UT\\_Final.pdf](https://www.amnesty.org.in/images/uploads/articles/UT_Final.pdf) (accessed July 31, 2018). *See also*, N.R. Madhava Menon, *Serving the Justice Needs of the Poor* (December 3, 2013), THE HINDU, , <http://www.thehindu.com/opinion/lead/serving-the-justice-needs-of-the-poor/article5415018.ece> (accessed November 22, 2017).

defendants to use the process worrying how a superior court might construe facts.<sup>134</sup> There would certainly 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 major 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, I now consider what can be done to change 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,<sup>135</sup> and the use of alternate dispute-resolution methods such as plea bargaining. The previous part considered the last suggestion in some detail- let's consider the other two proposals. Between 1973 and 2016, more money was actually spent on the judiciary almost every year. But pendency kept rising, because ultimately, no government is able to devote the kind of money needed to match and then reduce pendency, by hiring more judges alone.<sup>136</sup> This is where the twin solution of time-limits comes in, one might argue. But 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.<sup>137</sup> Some support for this inference can be drawn

---

<sup>134</sup> This has not stopped some courts from 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].

<sup>135</sup> See, e.g., Law Commission of India, 245th Report on Arrears and Backlog: Creating Additional (Wo)manpower, 5-7, 47 (2014) [Discussing possibility of timeframes for specific trial stages and appointment of additional judges on a priority basis]; Report of the Committee on Draft National Policy on Criminal Justice, 29, 56 (2007). For a useful summary of reports before 2010, See, O.P. Jindal Global University Centre on Public Law and Jurisprudence, *Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts*, 3-24.

<sup>136</sup> See, Surya Prakash B.S., *Examining the Funding Deficit of the Judiciary* (December 15, 2016), LIVEMINT, <https://www.livemint.com/Opinion/b1DNafTIUNGtzY3IR8gtbl/Examining-the-funding-deficit-of-the-judiciary.html> (accessed July 31, 2018). See also, Maja B. Micevska and Arnab K. Hazra, *The Problem of Court Congestion: Evidence from Indian Lower Courts*, ZEF Discussion Papers on Development Policy (July, 2004) (Examining data between 1995-1999 to suggest that the problem of insufficient judges was seemingly overstated).

<sup>137</sup> *Supra* notes 47-50 and accompanying text.

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.<sup>138</sup> To be clear, hiring more judges and enforcing time-limits by curbing easy adjournments are both important factors to reduce pendency. But I suggest their currency as viable solutions has proved limited till now.

Acknowledging these limitations, I 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 be successful in arresting the continued rise of pending cases. These are (i) demolishing the silos in which police and courts function and using prosecutors to function as effective gateways, and (ii) limiting appellate challenges to enhance finality of trial court decisions.<sup>139</sup>

### A. Police and Courts: Moving Beyond Silos

As mentioned above, significant attention has been spent on evaluating how the judiciary has been chronically underfunded in India. But 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 has 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 case for trial, in spite of the courts struggling to keep up the pace.<sup>140</sup>

Recall the architecture of the criminal process. The police file cases 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.<sup>141</sup> Data suggests that it is not as if police do not exercise any discretion: trials are not recommended in around 27% of completed

---

<sup>138</sup> See, Amit Sachdeva, Delay in Filing of the Written Statement: An Analysis of Order VIII, Rule 1 of CPC, <https://vaishlaw.com/homeimage/International%20Investment%20-%20A%20Developing%20Country%20Perspective.pdf> (accessed July 31, 2018).

<sup>139</sup> Note that I do not suggest making tweaks to the plea-bargaining regime just yet, because as argued above, the prevalence of high acquittal rates will continue to keep that process unpopular at a general level. On the more specific level, the government could certainly profit by aggressively pushing for plea-bargaining in those cases where conviction rates have historically remained high, i.e. socio-economic offences. Unfortunately, the entire category of such offences remains outside the scope of plea-bargaining at present.

<sup>140</sup> For a graphical representation from 1961 till 2014, see, National Crime Records Bureau 2014, 70-71.

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.

<sup>141</sup> *Supra* note 41.



investigations.<sup>142</sup> 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 in which 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, I 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 effective role in sifting through cases and catching obvious problems of proof that might arise at the trial. But this was rare, especially because Magistrates are hard pressed to hurry along their dockets. Instead, I suggest 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 incentivising them to explore the statutory process of withdrawals. Upon filing of the Final Report, judges could *mandate* that prosecutors consider the merits for a withdrawal application right at the outset, or simply file a memo offering a consideration of the viability of proceeding to trial.<sup>143</sup> In this manner we can change the default setting for cases.<sup>144</sup> 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

---

<sup>142</sup> 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 variance in Chargesheeting Rates for different IPC crimes. For instance, theft (basis of the earlier hypothetical) has a very low Chargesheeting Rate of 28.5%. Cases regarding allegations of bodily offences usually have Chargesheeting Rates of above 70% (except cases of kidnapping and abduction). The Chargesheeting Rate for SLL offences is extremely high, averaging at 94.5%. *See*, National Crime Records Bureau, Crime in India 2016, 542-43 (Table 17A.1), 54649 (Table 17A.2).

<sup>143</sup> Discussing the subject with a serving public prosecutor, who requested anonymity, suggested a serious hurdle is that the other actors in the system – police and judges – as well as the government itself are not supportive of prosecutors discharging a more independent and active role, especially in context of withdrawals. Nevertheless, the prosecutor agreed that pendency can be significantly curbed if prosecutors and judges worked together towards screening cases.

<sup>144</sup> 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).

*mala fide* decisions.<sup>145</sup> This clear scope for judicial oversight is also the reason why I 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 itself.<sup>146</sup>

## 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 trial by restricting the scope of revision petitions, which it restricted to proceedings *not* of an interim nature.<sup>147</sup> Unfortunately, legislative intent was upended by superior courts which jumped on ambiguous language. Not only did they read “interim” very broadly,<sup>148</sup> but also construed the inherent powers of High Courts (recognised under Section 482 Cr.P.C.) as being wide enough to consider *any* claim of an abuse of process.<sup>149</sup> Too much of a good thing can be a problem though. Superior courts were clearly enthusiastic about respecting the defendants’ right to be heard in the criminal process. But as discussed in Part II, in their enthusiasm courts have created countless opportunities for defendants to trigger collateral proceedings during a trial.<sup>150</sup> 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 important to a criminal process, and any workable model needs to strike a balance rather than function on either extreme.<sup>151</sup> A direct result of the Indian model’s preoccupation with procedural propriety is delays naturally in trial courts, but also in appellate courts by causing an unproductive ballooning of appellate court dockets which have lesser time to deal with appeals.<sup>152</sup> But there is more. By rendering nearly every exercise of discretion by trial court judges as immediately reviewable,

<sup>145</sup> See, *Govt. Can’t Withdraw Criminal Cases in Whimsical, Arbitrary Manner: Allahabad HC (FB)* [Read Judgment] (February 22, 2017), LIVE LAW, <http://www.livelaw.in/govt-cant-withdraw-criminal-cases-whimsical-arbitrary-manner-allahabad-hc-fb-read-judgment/> (accessed July 31, 2018).

<sup>146</sup> *Supra* note 74.

<sup>147</sup> Statement of Objects and Reasons, Ss. 3-6, CrPC 1973.

<sup>148</sup> See, *Madhu Limaye*, (1977) 4 SCC 551. (Supreme Court of India, Three Judges’ Bench).

<sup>149</sup> See, *Prabhu Chawla v. State of Rajasthan*, (2016) 16 SCC 30 (Supreme Court of India, Three Judges’ Bench).

<sup>150</sup> See, Robert S. Moog, *The Significance of Lower Courts in the Judicial Process*, in THE OXFORD INDIA COMPANION TO SOCIOLOGY AND SOCIAL ANTHROPOLOGY, 1389, 1400 (Veena Das ed., 2003) (Discussing civil litigation).

<sup>151</sup> For instance, a persistent critique of the criminal justice system in the United States, more pronounced at the federal level, is that the system has sacrificed all sense of procedural propriety at the altar of efficiency and quick resolution of cases through plea bargaining. For a detailed consideration of this argument, see, DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2016).

<sup>152</sup> See, *Imtiyaz Ahmad v. State of U.P.*, (2012) 2 SCC 688 (Supreme Court of India, Three Judges’ Bench).

the system sends various signals. It sends a clear signal that trial court proceedings at every stage are inconsequential because they can, and will be, modified very soon.<sup>153</sup> 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 simply be content in not taking many 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.<sup>154</sup>

Perhaps, having learnt 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 as well, to reduce the continued stop-starts in criminal trials and strike a new balance between the virtues of finality and safeguarding procedural rights.<sup>155</sup> To be clear, I do not suggest *eliminating* review of judicial decisions during trial – all I 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 would care about the trial court doing 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.<sup>156</sup> Appellate courts will have a lighter docket and more time to deal with criminal appeals and help get finality in a case. And, most importantly, limiting the pursuit of collateral proceedings at each stage would make trials go a lot faster.

---

<sup>153</sup> See, Nick Robinson, *Judicial Architecture and Capacity in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 330, 337 (Khosla et al. eds., 2016). See also, Moog, *Delays in the Indian Courts: Why the Judges Don't Take Control*, at 30; See, Moog, *supra* note 150 at 1400.

<sup>154</sup> Moog, *supra* note 150 at 1400-01.

<sup>155</sup> Moog, *supra* note 150 at, 1402. The Law Commission of India, in its 221st Report, also spoke about the need for clarity on the scope of revision proceedings to help reduce delays. Interestingly though, the Commission also suggested opening up new avenues for appellate litigation on behalf of victims to further a sense of accountability, suggesting that perhaps the Commission was perhaps blind to the causes behind that expansion of the scope of revision proceedings. See, Law Commission of India, 221st Report on Need for Speedy Justice – Some Suggestions, 19-22 (2009).

<sup>156</sup> What about a right to challenge decisions to withdraw prosecutions, the other approach posited in this paper? Those decisions would remain subject to challenge, considering they are *final* as cases end if the court approves withdrawal. But, even so, it is unlikely for such decisions to be challenged except in the minority of cases where police handle sensitive investigations and complainants have a lot riding on the case.

## VI. CONCLUSIONS

Perhaps the main lesson that 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 come up with workable solutions. Rather than considering the legal system as a whole, policy proposals must begin with the basic fact that there are serious differences in how civil and criminal legal regimes operate, and the problems they suffer. That is the point where this paper makes an intervention. At a time when pendency is at its highest in the trial courts, there is a surprising dearth of debate that is willing to consider it as a problem more complex than one simply caused because there are not enough judges and too many adjournments.<sup>157</sup> This paper characterised 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 debate on these lines, a generic description of that architecture and how it works, with a focus on IPC offences, was sketched that could be applied to all parts of the country. Again, the focus was on a generic model and I noted how a lack of data made constructing even this generic model a very difficult task 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 I offered are far from the real deal but are attempts to offer useful 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 discern any patterns unique to certain kinds of cases which make them prone to delays.<sup>158</sup> 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

---

<sup>157</sup> Robert S. Moog shared this lament nearly two decades ago while talking about civil litigation. He also suggested that perhaps it is not so surprising that there is a lack of debate surrounding the trial courts with all the attention focused on the appellate courts. *See*, Moog, *supra* note 150 at 1391-95; Robert S. Moog, *Elite-Court Relations in India: An Unsatisfactory Arrangement*, 38(4) *ASIAN SURVEY* 410, 412-417 (April, 1998).

<sup>158</sup> For instance, convinced by studies suggesting that a significant measure of government litigation under taxation laws was arguably not worth the time or money, the federal government recently agreed to withdraw over 50% of the cases it had filed in courts. *See*, Apoorva Mandhani, *Govt. to Withdraw 41% Direct Tax Cases & 18% Indirect Tax Cases* (July 12, 2018), *LIVE LAW*, <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/> (accessed July 31, 2018).

how the process shapes exercise of discretion by the key actors. The limited data available already tells us that problems of crime and criminal law are not the same in Delhi and Kerala. But Delhi and Kerala are themselves vast regions, and much more can be learnt by analysing data to examine the effects of rural and urban settings on the pendency problem. Would different conceptions of the criminal process for rural and urban settings be a better means for providing the justice that our courts are professedly concerned about?<sup>159</sup> Similarly, examining how reform efforts cause different effects in regions will help better understand what each particular 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 here, and by fixing those design problems with rigorous analysis and research, slowly pendency rates will reflect more acceptable rates once again.

---

<sup>159</sup> Many thanks to Mr. Nishant Gokhale for discussions on the point.