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CONTENTS

LEGAL AND JUDICIAL REFORM IN INDIA: A CALL FOR SYSTEMIC AND EMPIRICAL APPROACHES

Sudhir Krishnaswamy, Sindhu K Sivakumar** & Shishir Bail****

Judicial delays and high pendency is a serious problem that has rule of law and fundamental rights implications. Law and judicial reform in India aimed at reducing judicial delays and pendency have met with limited success since they have been almost solely focused on increasing the number of courts and such other supply-driven mechanisms without ascertaining the causes of delay. This paper argues for re-orienting law and judicial reform by engaging in empirical methods. In so arguing, this paper also exposes the difficulties in using empirical methods in India owing to the unavailability of crucial data. It also suggests some non-conventional solutions for more effective and efficient civil and criminal justice systems.

It is argued by many that the General Election 2014 was a vote for development.[1] The election campaign witnessed heated rhetorical debates

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[1] Prakash Kaswan, *India's Elections and the Politics of Development,* THE WASHINGTON POST (May 20, 2014), *available at* http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/05/20/indias-elections-and-the-politics-of-development/; Frank Jack Daniel & Rajesh Kumar Singh, *The great Indian election: it's about jobs,* REUTERS (Mar. 28, 2014), http://in.reuters.com/article/2014/03/27/india-election-2014-youth-jobs-idINDEEA2Q0HT20140327.

about the appropriate model of economic development for India.[2] Despite the deeply divisive tenor of these debates, there was, and continues to be, a surprising alignment between the major parties on the place of legal and judicial reform as a critical ingredient of the development process. The 2014 Bharatiya Janata Party manifesto had a few overarching objectives in this regard: one, increasing access to justice; two, reducing delays and pendencies at the formal courts; and three, making the law more accessible to the common man. It proposes to achieve this objective through a predictable list of strategies: increase the number of judges; create more courts, including special courts for intellectual property and commercial matters, and fast track courts; encourage ADR, particularly arbitration, Lok Adalats and tribunals; and in relation to making the law more accessible, do away with old, unnecessary laws, simplify existing procedures and language, and increase legal awareness.[3] By contrast, the Congress Manifesto confined itself to broad and general principles: the 'protection of human rights', increasing diversity in judicial appointments, improving judicial accountability, increasing Gram Nyayalayas and legal aid.[4]

For those familiar with the thinking and policy debates on legal and judicial system reform, what is striking is how unchanging and unimaginative the strategies proposed to 'reform' the system are. Indian policy makers have over the years increased the supply of judges, diverted and dispersed cases to Alternative Dispute Resolution forums, special courts and tribunals with little or no improvement of the overall health of the legal system. Despite the litany of failures, our political and bureaucratic

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[2] V.Sambandan & Bhagwati, *Sen and India's fight against poverty,* THE HINDU CENTRE FOR PUBLIC POLICY (Aug. 19, 2013), http://www.thehinducentre.com/the-arena/article5038021.ece; Lalita Panicker, *Two States: Kerala, Gujarat and their development,* HINDUSTAN TIMES, (Apr. 21, 2014), *available at* http://www.hindustantimes.com/elections2014/opinion/while-gujarat-is-investor-friendly-kerala-triumphs-in-social-indices/article1-1210341.aspx.

[3] In substance, the BJP's proposals on legal system reform for 2014 are mostly identical to what it proposed in 2009. *See* Bharatiya Janata Party, *Lok Sabha Election 2009 Manifesto*, *available at* http://www.bjp.org/images/pdf/election_manifesto_english.pdf (last visited Aug. 1, 2014). The only major additions we see in 2014 are one, the focus on making India into a global arbitration and legal process outsourcing hub, and two, the objectives related making legal information more accessible, including the popular promise to "undertake a comprehensive review of the legal system to simplify complex legislations – converge overlapping legislation, as well as remove contradictory and redundant laws."

[4] Indian National Congress, *Lok Sabha Election Manifesto 2014,* 45-46, *available at* http://inc.in/images/Pages/English%20Manifesto%20for%20Web.pdf (last visited Aug. 1, 2014).

discourse is unable to move beyond these 'tried and failed' strategies that are unsystematic or fragmented, unempirical and without a nuanced normative foundation. Moreover, there is no effort to develop any critical insight into the causes of failure. In this essay, we show why the current approach must be replaced with an empirically grounded, theoretically nuanced and systemic approach to legal and judicial system reform and demonstrate innovative solutions based on such an approach.

I. The Current Approach

Most current proposals for legal reform in India lack a *systemic* perspective. Isolated, disparate and potentially contradictory initiatives founded on inarticulate motivations and principles are assumed to add up to a program of reform for the legal system. For example, the proposal for "*...doubling the number of courts and judges in the subordinate judiciary*...."[5] may potentially reduce backlogs in the lower courts. However, there is no evidence that previous increases in judicial strength by themselves have indeed reduced backlog. Further, as the disposal of cases in the lower courts is intricately tied to the ease with which interlocutory orders may be reviewed and appealed in the High Court and Supreme Court, an expedient lower court may not improve the overall throughput of the system.

In 2002, the Bharatiya Janata Party led National Democratic Alliance central government made a number of amendments to the Civil Procedure Code, 1908 with a view to reducing delays in civil litigation. In particular they focused on the procedural rules set out in the Code that gave discretion to the court to condone delays and other excesses of the parties in conducting litigation. The court's discretion to grant extensions beyond 90 days for the filing of the statement of defence was removed (Order 8, Rule 1); the court's discretion to allow the late production of evidence was also removed (deletion of Order 18, Rule 17A); and in relation to adjournments, it was mandated that no more than three adjournments were to be granted to a party over the course of an individual suit (Order 17, Rule 1(1), Proviso), and that the court awards costs occasioned by the adjournment or such higher cost as the court may deem fit (Order 17, Rule 1(2)). In relation to

[5]Bharatiya Janata Party, *Election Manifesto 2014,* 12, http://www.bjp.org/images/pdf_2014/full_manifesto_english_07.04.2014.pdf (last visited Jul. 30, 2014).

adjournments, the amendment left intact the Proviso at Rule 1(2) which prescribed the conditions under which a court could grant adjournments; this proviso provides for day-to-day hearing and also considerably limits the latitude granted to courts for this purpose.[6]

These amendments were extremely unpopular with the Bar and provoked public protests[7] and legal challenges. One of these legal challenges to the constitutional validity of these amendments came before the Supreme Court in *Salem Advocates Bar Association v. Union of India*[8] which upheld the validity of these amendments. However, in a follow-up decision in *Salem Advocates Bar Association (II) v. Union of India*,[9] the Supreme Court read down virtually all of these amendments: the proviso of Order 8, Rule 1 providing for the upper limit of 90 days to file written statement is now only directory, not mandatory, and courts are allowed to grant extensions beyond this time-limit; the deletion of Order 18, Rule 17A was made redundant as the power of the court to allow late evidence pre-dated Rule 17A; and with respect to adjournments, the 3-adjournment per hearing rule did not extend to circumstances where one of the conditions specified in the Proviso to Rule 1(2) were met.[10]

What can we learn from this legislative amendment and judicial rollback? It appears that the motivations of the legislators were not aligned with those of the various participants of the litigation system (i.e., parties, counsel and judges). We need to understand the incentives at play that might be behind the courts' reluctance to actively manage cases and hold lawyers to account. Significantly, even though the Code gave the courts the power to use costs sanctions (even before 2002), it is well known that courts hardly

[6] For an extensive overview of the problems with and attempts to reform civil litigation in India, *see* Hiram E. Chodosh *et al.*, *Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process,* 30 N.Y.U J. INT'L L. & POL. 1 (1997-1998).

[7] J. Venkatesan, *SC Judge to head panel on CPC amendments,* THE HINDU, (Oct. 26, 2002), *available at* http://hindu.com/2002/10/26/stories/2002102603161300.htm; Janardan Singh, *Mixed Response to CPC amendments,* THE TIMES OF INDIA, (Jul. 22, 2002), *available at* http://timesofindia.indiatimes.com/city/lucknow/Mixed-response-to-CPC-amendments/articleshow/16706122.cms.

[8] Salem Advocates Bar Association v. Union of India, A.I.R. 2003 S.C. 189.

[9] Salem Advocates Bar Association (II) v. Union of India, A.I.R. 2005 S.C. 3353.

[10] It is a rather counter-intuitive interpretation of the Supreme Court that the Proviso was a limitation or exception to the three-adjournment rule in Rule 1(1); rather, the better interpretation would have been to say that the 2002 amendment left the Proviso intact in order to guide the court as to when it should exercise its discretion to grant any one of the three allowed adjournments to a party.

ever used this measure to urge litigants and lawyers to stick to a reasonable schedule. Moog explains that the courts' reluctance is due to the frequency of transfer of the judges, particularly in the subordinate judiciary, which means that a trial does not stay with a single judge over the course of its lifetime. Judges therefore do not have enough time in a court-room to plan and manage dockets, and the frequent transfer often makes judges 'outsiders' in a given court, making them practically unable to exercise sanction over the more entrenched lawyer community.[11]

Further, we need to understand the incentive structures within which litigating lawyers and clients operate and what they gain by seeking so many adjournments. Here again, Moog highlights how the litigation profession in India is quite starkly unequal in terms of work-loads – a small minority of lawyers attract large volumes of work, and these lawyers cannot manage their work-loads without being able to get adjournments when needed; further, the practice in the legal profession of charging 'per hearing' or 'per filing' incentivises them to file many (arguably) unnecessary applications and seek hearings on minor, frivolous points – essentially, the more applications and hearings there are in a single case, the more their financial rewards.

The point here is simple: symptomatic, piecemeal reforms will not work unless we pay attention to the incentives and motivations of all participants in the litigation system. An accurate sociology of the legal system is essential to inform and shape legal reform that corrects incentives and aligns motivations. For root and branch systemic reform, we need an empirically rigorous knowledge platform that allows for analytically sharp and theoretically nuanced reform measures to be designed.

Our second issue with the existing strategies for legal system reform in India is that they are advanced on little or no *empirical evidence* relating to institutions, their performances and the disposal of cases. Where any evidence is offered, it is far from rigorous, such as the evidence set out in the Annual Reports of the High Courts and Supreme Court,[12] or evidence that is personal and anecdotal in character. Unlike other areas of economic and

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[11] Moog & Robert, *Delays in the Indian Courts: Why the Judges Don't Take Control,* 16 JUST. SYS J. 19 (1992-1994).

[12] The foremost sources of data on the performance of the judiciary are the reports provided

government policy, the legal and judicial system is still nested in an empirical black hole. As administrative control over the courts is divided between the executive and the judiciary,[13] there is no coherent centralised approach to data collection and dissemination. There is widespread variation in the quality and quantity of accessible court data across the different states in India, especially at the district level. Basic measures of court performance and of the state of litigation, such as institution rates, disposal rates, and pendency rates, are not easily available for several districts in India, leading one to wonder how policy makers even define the scope of the delay and pendency problems, let alone find ways to tackle them.[14]

Recent academic work has partially compensated for this administrative failure, through rigorous analysis of limited data sets. For example, Hazra and Micevska have[15] measured congestion rates for lower courts in India in the period 1995-99, and Nick Robinson's study of the Supreme Court suggests that there are major state-level variations in their contribution to the Supreme Court's case-load.[16] Nevertheless, both the major political parties, bureaucrats and senior judges continue to advocate

by the Supreme Court through the *Court News* publication. The data contained in this publication is no doubt useful but suffers from a few major problems. Firstly, it is released erratically; there has not been a single edition of this publication in the year 2014 till date. Second, the data is not presented in sufficient detail; we only receive a breakup of the institution, disposal and pendency of civil and criminal cases, without further details on what kinds of cases these are. This is more of a problem in the case of civil litigation, as the National Crime Records Bureau does a fair job of releasing data on the various stages of the criminal process. For a sample *Court News* publication, *see Court News,* SUPREME COURT OF INDIA (Oct.-Dec. 2013), *available at* http://www.supremecourtofindia.nic.in/courtnews/2013_issue_4.pdf.

[13] This division of administrative and financial control has long been a source of tension between the two branches of government. *See* Moog &Robert, *Elite-Court Relations in India: An Unsatisfactory Arrangement,* 38 ASIAN SURVEY 410 (1998).

[14] *E.g.*, while Karnataka's e-courts website (http://ecourts.gov.in/karnataka) allows users to access the "case status" of an individual case pending or disposed in any district court in Karnataka, it does not contain any useful aggregate information on institution, disposal or pendency rates by district that can be used by academics and policy analysts in understanding the litigation trends and judicial performance in these districts. The other available website, causelist.kar.nic.in/districtportal/dashboard.asp, does contain institutional performance data, but on a "per day" basis, leaving the user to make more meaningful monthly or yearly aggregations on their own. This is also available for a limited period of time, from late August 2009, to the third week of January 2014.

[15] Arnab Kumar Hazra & Maja B. Micevska, *The Problem of Court Congestion: Evidence from Indian Lower Courts, in* JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS (Arnab Hazra & Bibek Debroy, ed. 2007).

[16] Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload*, 10 J. EMPIRICAL LEGAL STUD. 570 (Sept. 2013).

'all India' reforms instead of 'localised' reform initiatives. No serious legal and judicial system reform is likely unless we take the facts seriously and engage in statistically sophisticated empirical analyses.

Apart from the need for a systemic perspective and empirical knowledge, advocates for legal and judicial system reform must tackle the *normative argument* for a strong, functional legal system. In India, there are certain common arguments that persist in public policy and intellectual discourse that push against a full-fledged effort to reform the Indian legal system. First, it is sometimes suggested that the central problem of the legal system in India is a cultural one; that the colonial origins of our legal system run against the grain of our cultural traditions and hence it is beyond reform and must be replaced.[17] The argument is misleading insofar as it suggests that there existed a functional legal 'system' before colonial times (historical evidence does not fully support this).[18] Further, the global academic literature on the relationship between the origin of a legal system and development suggests that one of India's biggest competitive advantage is its adoption of a common law legal system.[19] Perhaps it is relevant that our historical efforts to revitalize and revive so-called traditional and indigenous dispute resolution systems have met with little success,[20] and deliver a questionable quality of justice.[21] In this paper we do not review the argument of colonial origin comprehensively as both national parties embrace a modern economy at the centre of the development project and a modern legal system is essential to shape and regulate this economy.

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[17] For an early analysis of this manner of criticism, *see* Marc Galanter, *The Displacement of Traditional Law in Modern India,* 24 J. SOC. ISSUES 65 (1968). The debate between the 'traditional' ostensibly consensual modes of dispute resolution and the adversarial formal legal system is still very much a live one. *See* Kalindi Kokal, *Hope for Justice: Importance of Informal Systems,* 68 ECON. & POL. WKLY. 22 (2013).

[18] For a nuanced account of the state of social regulation in India before the arrival of the British and the introduction of the Indian Legal System, *see* Graham Smith & Duncan Derrett, *Hindu Judicial Administration in Pre-British Times and its Lesson for Today,* 95 J. AM. ORIENTAL SOC. 417 (1975); Duncan Derrett, *Law and the Social Order in India Before the Muhamaddan Conquests,* 7 J. ECON. & SOC. HIST. ORIENT 73 (1964).

[19] *See* Rafael La Porta et al., *The Economic Consequences of Legal Origins,* 46 J. ECON. LITERATURE 285-332 (2008).

[20] *See* Catherine Meschievitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution, in* THE POLITICS OF INFORMAL JUSTICE: VOL 2 COMPARATIVE STUDIES 47-77 (Richard Abel ed.,1982).

[21] Lok Adalats are another iteration of an ostensibly traditional mode of dispute resolution. *See* Marc Galanter & Jayanth Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India,* 55 HASTINGS L. J. 789 (2003).

The second normative argument against legal system reform is that a more efficient legal system will merely enhance the oppressive power of the State – that where there is an unjust state with unfair laws, enhancing legal system capabilities will oppress more than it liberates. While there is a grain of truth to this argument, it is manifestly the case in India that a just state with fair laws but an inefficient legal system also oppresses its citizens. Further, legal system reform can itself act as a check against the continuance of an unfair state and unfair laws – as Dworkin argues, a legal system can 'work itself pure'.[22] We must note that legal system reform is not just about increasing state capacity (through recruitment of judges, police, prosecution staff, and the design of improved processes) to secure greater peace and social order; a normatively nuanced approach to legal system reform is also about reinvigorating institutions and making them accountable to the ordinary citizens of the country, thereby *limiting state power* by holding our officials to constitutional standards of probity and conduct.[23] Hence, legal and judicial system reform must create a modern legal system that enhances the capacity of citizens to hold the State to account.

So far in this section we have argued that a systemic, empirical and normatively nuanced approach to legal and judicial system reform is necessary to make a significant impact on development outcomes in India and improve our collective well-being. In the rest of this essay, we demonstrate how such an approach can inform and guide legal reform strategies in three areas: civil litigation; access to legal system information and the criminal process.

II. Civil Litigation Reform: Aligning Incentives

India has grappled with the problem of delays and arrears in its courts for a long time. This is particularly true of the civil side; a Civil Justice Committee (under Justice Rankin) was appointed as early as 1924-25 to tackle the problem of delays and arrears in civil litigation. The Rankin

[22] Ronald Dworkin, Law's Empire 407 (1986).
[23] For a more detailed argument *see* S Krishnaswamy, *Introduction*, *in* Indian Legal System Reform: Empirical Baselines and Normative Frameworks (Sudhir Krishnaswamy ed., forthcoming 2015).

Committee, and every committee and Law Commission subsequently,[24] has focused almost exclusively on increasing the *supply* of dispute resolution services. This is sought to be done by enhancing institutional capacity – augmenting and improving physical infrastructure with new courts, scaling up judicial strength, reducing judicial vacancies, and preventing the diversion of serving judges to other duties. If the new government draws exclusively from the menu set out in the manifesto, it too will persist with this model of reform. In this section of the essay, we argue that a new model of reform is the need of the hour – one that focuses on incentives of various actors in the civil justice system that promotes the *optimal use* of dispute resolution services.

Before we turn to what we mean by optimal use of dispute resolution services, we should acknowledge that the focus on supply (i.e., increasing institutional capacity) has yielded *some* results. The Supreme Court's *Court News* publication, which contains quarterly rates of institution, disposal and pendency of cases at the Supreme Court, High Courts and subordinate courts, shows that current disposal rates are more or less able to keep up with corresponding institution rates.[25] However, the supply-side approach has not been able to contend with the huge volume of "arrears" or "backlogs" of cases that have been pending before the courts for more than a year. The "percentage decrease in pendency", which is a key indicator of whether arrears are being tackled, is consistently low or negative.[26] To tackle the large volume of these arrears, what we need is systemic reform that addresses the skewed incentives driving unsustainably high pendency rates in our civil courts.

Every civil litigation system contains certain built-in incentive structures that impact litigation behaviour (litigant, lawyer and judge

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[24] *E.g.,* Justice S.R. Das' High Courts Arrears Committee (1949); 14th Law Commission Report (1956), Vol. 1; High Court Arrears Committee Report (1972); 77th Law Commission Report (1978); 79th Law Commission Report (1979).

[25] For example, in the last quarter of 2013, the Supreme Court saw 17,036 fresh institutions and 17,920 disposals, the High Courts (in aggregate) saw 560889 institutions and 498202 disposals, and the lower courts 4736967 institutions and 4419310 disposals. *See Court News*, SUPREME COURT OF INDIA (Oct. - Dec. 2013), *available at* http://supremecourtofindia.nic.in/courtnews/2013_issue_4.pdf.

[26] *E.g.*, *Court News*, *supra* note 25. In the last quarter of 2013, the subordinate courts saw 27566425 pending cases and had a 1.17% *increase* in pendency from the previous quarter. Similarly, the High Courts had 4589920 cases pending and a 1.34% *increase* in pendency.

behaviour) in that jurisdiction. Litigation behaviour ultimately has a major impact on the pendency rates in that jurisdiction. For example, settlement rates can have a huge impact on overall pendency rates in civil disputes. In the other Commonwealth jurisdictions (that, like India, are based on an adversarial common law system), it is not uncommon for over 70% of civil cases (and sometimes going up to 90% or more) to settle before going to trial.[27] In India, on the other hand, settlement rates in civil disputes are shockingly low. One survey pegs the rate at around 5%. [28] What this means is that almost all the civil cases that enter the court system in India remain in the court system all the way until the very end, that is, until trial and judgment. It is no wonder that congestion rates in India are far higher than in more developed Commonwealth countries. Thus, a central challenge for civil justice reform in India is to design institutions and processes that incentivise settlement over the course of a case.

To incentivise settlement of cases on or before the first date of trial or at a later stage, we need to address the practice of civil litigation and create institutions that support a culture of settlement. One reason for the low or late settlement rates in India is that, unlike in the UK and other Commonwealth jurisdictions, the practice of having a "continuous trial" [29] is virtually non-existent.[30] "Continuous trial" refers to the practice that once a civil trial begins, it should proceed without interruption until its conclusion. In India, while the Civil Procedure Code 1908, does envisage that trials should proceed continuously once started,[31] in practice, trials typically tend to take place in a fragmented fashion, involving 4-5 fragmented stages, and with as many as 20-40 adjournments granted over the lifetime of a single trial.[32]

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[27] *See* Barry Walsh, *Pursuing Best Practice Levels of Judicial Productivity* in JUDICIAL REFORMS IN INDIA: ISSUES AND ASPECTS 186 (Arnab Hazra & Bibek Debroy eds., 2007). He reports that in Australia, the settlement rate is reported to be at 70%, and in Ontario (Canada), the settlement rate was consistently over 90% between 1978 and 2000.

[28] A listing survey conducted in 2005 placed the settlement rate at 5%. Walsh, *supra* note 27, at 176.

[29] *See generally* Walsh, *supra* note 27, at 181-82 on the continuous trial and its importance in achieving late settlements.

[30] This was pointed out an early as in 1925 by the Rankin Committee Report. *Cf.* Upendra Baxi, CRISIS IN THE INDIAN LEGAL SYSTEM 76 (1982).

[31] *E.g.,* Order 17, Rule 1, The Code of Civil Procedure (1908) ("...when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary...").

As Barry Walsh argues, the lack of a continuous civil trial process in India means that there is no certainty for the parties about the timing of the outcome (i.e., the judgment).[33] When parties cannot predict with reasonable certainty when a particular trial will be completed and the judgment or order given, there is no pressure on them to ever settle their dispute. Typically, in any civil dispute, one party will tend to have a stronger case on merits. This party already has no incentive to settle the case for any sum lesser than what he or she is likely to achieve through a judgment. However, the other side, which is the party with the weaker case, does have the incentive to push for settlement to mitigate the extent of his losses. Studies on litigant behaviour in relation to settlement have shown that litigants with a weaker case are most likely to feel the pressure to settle when they start to believe that the time of loss is not far off.[34] In the Indian context, unfortunately, since parties cannot predict when a trial is likely to conclude or how long it will take, they may never reach that frame of mind. Obviously, this does not impact cases where both sides believe that they have strong claims on merit; however, "outcome date certainty" can encourage settlement in the significant number of civil cases pending before the courts today that are not so finely balanced on merits. Reform promoting the continuous trial, and therefore, "outcome date certainty"[35] can thus positively influence the settlement and therefore reduce a number of cases pending before the courts.

Apart from incentivising settlement, it is also necessary that our court system denies advantages to litigants who procrastinate in reaching settlements and engage in other dilatory behaviours over the course of litigation. Cost sanctions are the most effective tool of the court in this regard. In England, for example, severe cost sanctions are imposed on parties who unreasonably reject settlement offers from the other side and then go on to lose the case; [36] cost sanctions may also be imposed on parties who behave unreasonably over the course of a case, whether they win or lose, and "unreasonable" behaviour could include anything from seeking unnecessary adjournments to unreasonably refusing to mediate where the

[32] Walsh, *supra* note 27, at 180.
[33] *See generally* Walsh, *supra* note 27.
[34] Walsh, *supra* note 27, at 177.
[35] Walsh, *supra* note 27, at 178.
[36] Part 36, Civil Procedure Rules (England and Wales) (1999).

court suggests mediation.[37] In India, while the CPC does give the courts the power to use costs sanctions in cases of adjournments, [38] it is well known that courts hardly ever use this measure to force litigants and lawyers to behave. Unless there is a concerted effort to inform and train the bar and the bench to adapt to these new protocols of practice, there is likely to be stubborn resistance to these changes.

Even with outcome date certainty and cost sanctions, it is unlikely that a settlement culture will develop in India without the support of institutions that promote settlement. The presence of strong ADR structures,[39] such as a strong court-annexed mediation program may encourage litigants to settle their disputes at the early stages of litigation. Mediation-based settlements may be especially appealing to those litigants who wish to preserve their relationships after the dispute, such as in family disputes, or where the case is evenly balanced and neither party is likely to win more in litigation than in settlement. When such disputes are taken out of the court system early, there will be a corresponding decrease in the number of cases pending before the courts.[40] Our research shows that the mediation process can settle up to 45-55% of the disputes referred within a period of 6 months at negligible costs to the parties and to the exchequer. In India, while court-annexed mediation is increasingly used, particularly in the urban centres, it is not widespread enough to have a significant impact on overall early settlement rates.

Similarly, a strong, functional arbitration system (with high quality arbitrators and arbitral institutions) can do much in keeping complex, commercial disputes out of the court system. In India however, it is becoming increasingly clear that *ad hoc* non-institutionalized arbitration has failed to reduce the burden on the courts. In fact, evidence suggests that arbitrations in India regularly break down and seek court assistance or interference at nearly every stage of the arbitration process. The almost

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[37] *See Halsey v. Milton Keynes NHS Trust*, [2004] E.W.C.A. Civ. 576 (where the Court of Appeal said that a winning party (at trial) could be deprived of some or all of its costs on the grounds of any unreasonable refusal to mediate).

[38] Order 17, Rule 1(2), CPC.

[39] *See* Inessa Love, *Settling out of court: How Effective Is Alternative Dispute Resolution?* 4 (2011), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf, for a discussion on different studies that have measured the indirect effect of court-annexed and other ADR programs in reducing case-loads at the courts.

[40] *Id.*

routine manner in which arbitrator appointments (S.11, Arbitration & Conciliation Act, 1996) and arbitral awards (S.34, Arbitration & Conciliation Act, 1996) are challenged before the courts only serves to exacerbate the delays and backlogs at the already overburdened District and High Courts. Hence, what we need is a strong 'institutional' arbitration culturewhere we have institutions that can regulate the conduct of arbitration and disentangle arbitration and the courts.

The discussion in this section highlights only *some* of the many skewed incentives plaguing the civil litigation system in India. We need to correct the various inter-connected rules and infrastructures that constitute these perverse incentives in a holistic, systemic program of reform of the litigation system.We must be willing to experiment with each of these reform measures, iteratively review evidence and engage in a process of continuous reform and improvement based on periodic, reliable, well organized and granular evidence.

III. Access to Legal System Information

Despite some progress with computerisation and online access to court data in recent years, one of the major problems an academic or policy analyst faces is the lack of access to reliable data in usable formats that may be put to analysis. While this is true generally of legal system data, the problem aggravates as we move down from the apex Supreme Court to the Magistrate or District Courts. Access to such data is essential to evaluate reform strategies and review resource allocation through rigorous empirical research on congestion or judicial productivity rates.

Currently,'national-level' or 'all-India' solutions are proposed devoid of empirical foundations. One recent example in the BJP Manifesto is the proposal to double the strength of the courts and judges in the subordinate judiciary *across India.* The problem with such national-level solutions is that the data reveals that High Courts and District Courts across the different Indian states face widely varying rates of institution and pendency (on the civil and criminal side) and have widely varying rates of disposal.[41] What

[41] Arnab Kumar Hazra & Maja B. Micevska, *The Problem of Court Congestion: Evidence from Indian Lower Courts, in* Judicial Reforms in India: Issues and Aspects (Arnab Hazra & Bibek Debroy eds., 2007).

this means is that omnibus national solutions, like doubling the number of judges in *all states,* will have uneven effects on delay and pendency and court congestion across the different states. Accurate publicly available data will allow institutional reform proposals to be localised, built on accurate analysis of the nature and causes of delay and therefore will be more likely to yield results.[42]

The biggest challenge to developing such localised solutions lies in the unavailability of local-level data. For example, while the *Court News* data tells us that there are state-level differences in institution, disposal and pendency rates in the High Courts and subordinate courts, we do not know if there are any district-level differences within a particular state. The e-courts database, which is maintained by the High Courts (with the help of the District Courts) and Supreme Court, in collaboration with the Ministry of Communications and Information Technology's Department of Electronics & Information Technology, does contain information about cases handled by the district courts across India; however, the form in which the data is presented at the front-end (that is, in the website), does not render it useful in academic or policy related research.The motivation for the current Supreme Court, High Court and e-courts websites is to provide information to litigants and lawyers about the status of individual cases. It allows them to access the day's causelist as well as orders relating to a particular case. This case-level data cannot be aggregated to carry out institutional analysis of filing rates, disposal rates, or other indicators of court congestion and judicial productivity. Hence, we suggest that in addition to what is presently available on the e-court website, the government publish periodic (preferably monthly) reports on the courts in a format that allows for the assessment of both judicial productivity and congestion rates. This information will ground empirically driven, locally specific reform initiatives that will yield better results.

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[42] Interestingly, the 120th Report of the Law Commission of India (1987) drew attention to the fact that the Government's setting of judicial strength (at each of the different tiers of the judiciary) did not seem to be based on any publicly articulated norms or principles. This Report goes on to consider the possible principles that the Government could potentially base its calculations on: on the basis of population, on the basis of litigation rates or the institution (of cases) rates. LAW COMMISSION OF INDIA, 120TH REPORT ON MANPOWER PLANNING IN THE JUDICIARY: A BLUEPRINT (1987), *available at* http://lawcommissionofindia.nic.in/101-169/Report120.pdf.

Apart from the lack of reliable local-level data on the performance and efficiency of the courts, there are larger information deficits that result in significant 'rule of law' costs and threaten the common law character of India's legal system. The irregular reporting and the unavailability of court decisions have resulted in the gradual erosion in the controlling power of precedent. A recent study of the Supreme Court[43] found that the number of regular hearing matters disposed by the Court in a year is higher than the number of reported judgments on the court websites as well as Indian law databases such as *Judis* or *Indian Kanoon* in that year. The data gap is significant even if we take into account the practise of clubbing together similar cases or issuing a single opinionfor multiple cases. If there are final judgments of the Supreme Court that effectively create no precedent, this results in significant 'rule of law' costs.[44] The principle of precedent preserves the rule of law as like cases should be decided alike, or consistently with each other. One of the major causes of the unsustainable number of appeals and review petitions in the higher courts is the breakdown of precedent rules. If litigants and lawyers do not know what the law of the land is, they will be likely to institute fresh appeals involving points of law that have already been decided by the higher courts. Further, since unpublished decisions also lead to inconsistent decisions by the higher courts on the same points of law, potential litigants will be tempted to always try their luck at the courts, even if their claims involve settled points of law.

In some ways, the lack of legal information, in relation to both judicial decisions and judicial performance, can be easily fixed. The ongoing computerisation programme of the judiciary already gathers the relevant information for their existing websites. On occasion we have been able to access significant and useful data on request from the backend servers and administrators of this data. We suggest that it should become the express mandate of the project to make all such legal information readily available to the public in a format capable of rigorous analysis. When one considers that taxpayers and litigants have funded this elaborate data gathering

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[43] Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court's Workload*, 10 J. EMPIRICAL L. STUD. 570 (2013).

[44] Although the context of the discussion is different, *see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), for the importance of public litigation and public judgments in furthering the rule of law.

exercise, it is a travesty that such data is locked away in impenetrable data formats and servers. Nowhere is this information more relevant than to address the urgent need to overcome the logjam in our criminal justice system, which we turn to in the next section.

A second significant legal information barrier that imposes rule of law costs is the lack of a comprehensive repository of *the law* (all statutes and regulations) that has been arranged in a way that makes it easy for ordinary citizens, lawyers and judges to work out what the legal rights and obligations are in a given situation. As we have argued elsewhere,[45] what we need in this regard is a 3-step reorganisation of the statutory codes in India, consisting of collection, compilation and consolidation, whereby laws are re-arranged and consolidated by subject-matter, akin to the various Titles in the US Code. This process intrinsically overcomes desuetude and over-regulation, and unlike a plain vanilla repeal exercise of the type proposed by the government, this type of consolidation will resolve inconsistent laws, clarify ambiguities in the law on a particular subject, and restate the law subject using a consistent drafting style and consistent word choices, leaving no 'gaps' in the law.

IV. The Shadowy Figure of Criminal Justice

So far in this paper we have focused on approaches to civil justice reform and the legal system information gaps that make empirically grounded legal system reform proposals impossible. In this section we turn our attention to what is arguably the most critical area of reform: the criminal justice system. The Congress and BJP manifestos, while generally deficient on the subject of legal system reform, inadequately address reform of the criminal justice system. The BJP manifesto addresses the entire subject in a single line with the promise that they will "reform the criminal justice system to make the dispensation of justice simpler, quicker and more effective and after examining the recommendations of the earlier reports on this subject."[46] This is still more than is seen in the Congress manifesto, which does not discuss the issue at all. This perfunctory treatment is all the

[45] Sudhir Krishnaswamy & Sindhu Sivakumar, *Reforming the Statutory Codes*, The Hindu (Jul. 9, 2014), *available at* http://www.thehindu.com/opinion/op-ed/reforming-statutory-codes/article6190534.ece.

[46] Bharatiya Janata Party, *Election Manifesto 2014* 12 (2014), available at http://www.bjp.org/images/pdf_2014/full_manifesto_english_07.04.2014.pdf.

more surprising as the volume of criminal litigation dwarfs civil litigation especially in the lower courts and the gravest threat to the legitimacy of the Indian legal and political system is its persistent inability to put in place a legitimate means of maintaining social peace, law and order.[47] Plainly stated, the only channel through which a majority of Indian citizens interact with the legal system is through the criminal law. As an illustrative example, at the starting of the quarter between July and September 2013, the total number of criminal cases pending before the High Courts and subordinate courts in the country was nearly 2 crores, while the number of civil cases was roughly 1.1 crores. At the end of the same quarter, the number of criminal cases pending was over 2 crores, while the number of civil cases was closer to 1.2 crores.[48] The lower courts of the country, which form the first (and, in most cases, only) point of contact between members of the general public and the judiciary, are almost overwhelmingly stocked with criminal rather than civil cases. The position is slightly different in the higher judiciary, which deals predominantly with civil rather than criminal cases.

There are three main components in the criminal justice machinery of the Indian State: the police, the courts, and the prison system.[49] Each component needs discrete but coordinated reform to enhance peace and security while protecting the liberty of accused persons. The Indian police establishment is still governed by the archaic Indian Police Act of 1861. A lot of ink has been spilt reviewing this legislation,[50] and proposing further changes to the structure of policing. The ineffectiveness of these earlier efforts to induce tangible changes in the structure and practice of policing led the Supreme Court to take the matter into its own hands in *Prakash*

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[47] *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 101 (2014), http://worldjusticeproject.org/ sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf. The 2014 Rule of Law Index released by the World Justice Project places India at the 95th rank among 99 countries in terms of Order and Security.

[48] *Court News,* SUPREME COURT OF INDIA 7-8 (Oct.-Dec. 2013), *available at* http://sci.nic.in/courtnews/2013_issue_4.pdf.

[49] The Criminal Procedure Code (1973) includes prosecutors and defence counsel as distinct functionaries, however we do not mention them separately here.

[50] The National Police Commission established by the Central Government in 1977 submitted eight reports on the subject between 1979 and 1981. Subsequently various other high-powered committees have also revisited the subject of police reforms; notable among these are the Ribeiro Committee on Police Reforms (1998), the Padmanabhaiah Committee on Police Reforms (2000) and the Committee on Reforms of the Criminal Justice System (the Malimath Committee) (2003).

Singh v. Union of India.[51] In this case the Supreme Court issued comprehensive and concrete directions[52] to the State Governments to reform their police establishments by enhancing accountability and effectiveness by reducing political interference. Predictably, the response of the States to these directions has been lukewarm; these directions remain unfulfilled in most States in the country.[53] Moreover, we have increasing evidence that egregious forms of misconduct such as torture and extrajudicial killing by the police and paramilitary forces have only increased in the last decade.[54] While the structure and practice of policing deserves critical academic scrutiny, in this paper we focus our attention on another aspect of the Indian criminal justice system that is intransigent: unduly high levels of undertrial incarceration.

Let us begin with a basic understanding of the prison population in India. The first important point to note is that rates of incarceration in India (an average of 31 persons per 100,000 population between 2001-2010) [55] are exceptionally low by any international standard (the world rate was 144 prisoners per 100,000 in 2013).[56] The low incarceration rate in India is noteworthy but does not by itself suggest a faulty criminal justice system. What is a matter of concern, though, is that of these prisoners, 67 per cent

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[51] Prakash Singh v. Union of India, (2006) 8 S.C.C. 1.

[52] The main objective of the reforms prescribed in *Prakash Singh* was the reduction of political pressure on the police. This was sought to be achieved by creating 'State Security Commissions' consisting of political as well as bureaucratic members to oversee police functions, stabilizing the tenure of senior police officers, separating the investigative and 'law and order' functions of the police *inter alia. See Prakash Singh*, *supra* note 51, at paras 14-16.

[53] The lack of implementation by most States has seen various contempt petitions filed by the original petitioners over the years against non-complying states. The Commonwealth Human Rights Initiative was a party to the original litigation, and has documented the implementation of the Court's orders over the years. For a State-by-State report on compliance with the Court's orders as of June 2010, *see* The Commonwealth Human Rights Initiative, *Police Reforms: State and UT Compliance with Supreme Court Directives* (2010), http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/chri_state_compliance_with_supreme_court_directives_chart.pdf (last visited Jul. 30, 2014).

[54] Jinee Lokaneeta, TRANSNATIONAL TORTURE: LAW, VIOLENCE AND STATE POWER IN INDIA AND THE US (2012); Human Rights Watch; *Broken System: Dysfunction, Abuse and Impunity in the India Police* (2009), http://www.hrw.org/reports/2009/08/04/broken-system (last visited Jul. 30, 2014).

[55] All data on prisons we use is drawn from the National Crime Records Bureau annual publication PRISON STATISTICS INDIA of 2001 to 2010. These reports are available at ncrb.gov.in.

[56] Roy Walmsley, *World Prison Population List* (10th ed.), INTERNATIONAL CENTRE FOR PRISON STUDIES (2011).

were undertrials, which is similar to the undertrial detention rates in neigh bouring countries like Bangladesh (68 per cent in 2007) and Pakistan (66 per cent) but vastly different from those of more developed countries such as the United States (21 per cent) or England and Wales (16.5 per cent).[57] As the latter group of countries have developed well-functioning criminal justice systems, we posit that a high percentage of undertrial incarceration is an indicator of stress in our criminal justice system.

Normatively, a threshold objection to high levels of undertrial incarceration is simply that the criminal justice system should not imprison people who have not been proven guilty by a court of law. Imprisonment involves a complete loss of liberty without the operation of the due process of the law, which no liberal democracy should accept.[58] Secondly, it has long been a concern in penology that undertrial prisoners, who may very well be innocent, run the risk of 'contamination' when placed in close contact with hardened criminals.[59] A third, but in no way less significant concern, is that individual undertrial prisoners lose valuable days and months of their lives and are forever stamped with the taint of being imprisoned, regardless of whether they are subsequently proved guilty. Since its inception, the Indian prison system has failed to separate convicted and undertrial prisoners.[60] Hence, we conclude that such a high percentage of undertrial prisoners in the prison population is a pathological feature of the Indian criminal justice system. Moreover, it is critical that we ensure that the criminal justice system is restored to achieving its primary objective: to punish people *guilty* of crime.

It may be argued that given India's low incarceration rate, we may

[57] This is not to suggest that these countries do not possess sizeable criminal justice concerns themselves. The United States in particular displays an astonishingly high rate of incarceration; close to 740 people per hundred thousand population. This is by a long way the highest rate of incarceration of any country in the world. To convey a sense of scale: in 2013 there were around 249,800 under trials in India – these formed roughly 70 per cent of the prison population. In the United States, in the same year there were 475,692 remand prisoners; these formed only 21.2 per cent of the prison population.

[58] For one of the sharpest analyses of the values inherent in the criminal process, *see* Herbert Packer, *Two Models of the Criminal Process,* 113 U. PENN. L. REV. 1 (1964).

[59] The Prisons Act § 27(2) (1894) prescribing that unconvicted criminal prisoners shall be kept away from convicted prisoners. Till date this is not the case in most prisons in the country.

[60] This problem was noted as early as 1919 by the Indian Jails Committee. *See* REPORT OF THE INDIAN JAILS COMMITTEE 244 (1919-1920).

restore a reasonable balance between undertrial and convict detention rates through a rapid and severe scaling up of the number of convicts in Indian prisons rather than a reduction in the undertrial population. While a comprehensive reform of the criminal justice system to ensure more convictions is urgent and necessary, the high absolute numbers of undertrial incarceration is nevertheless unacceptable for the normative reasons set out above. Moreover, reform that reduces undertrial incarceration may well reorient the criminal justice system to avoid using this as a substitute for incarceration after conviction.

While there are several systemic reasons for the high levels of undertrial incarceration in India, our primary focus must be on the dysfunctional system of bail in the country. Bail is a form of security provided by an accused person in a criminal trial in order for them to secure a release from custody during the trial. It is also the most common way of keeping people out of prison when imprisonment is not strictly necessary. This security is forfeited if the accused person subsequently fails to appear in court. Every decade or so we witness an impassioned criticism of the iniquitous nature of criminal justice in India: Kapila Hingorani in the 1970s, Upendra Baxi in the 1980s[61] and most recently Arvind Kejriwal[62] have argued that the system operates to exclude persons of limited means who, among other things, cannot afford to post bail, and therefore spend undue lengths of time in prison. A close look at data on persons in Indian prisons lends credence to this claim, as we demonstrate below.

Obtaining information regarding bail amounts and the financial means of accused persons is difficult as the Government does not release data on either question. Existing data provided by the National Crime Records Bureau, however, does give us other clues to better understand the prison population. Here we discuss two features of the undertrial population in

[61] For the earlier interventions by the Supreme Court on these matters, *see* Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, A.I.R. 1979 S.C. 1369; Upendra Baxi v. State of Uttar Pradesh, (1983) 2 S.C.C. 308; Kadra Pahadiya & Ors. v. State of Bihar, (1981) 3 S.C.C. 671.

[62] *Defamation case: Kejriwal refuses to give bail bond,* THE HINDU (May 21, 2014), available at http://www.thehindu.com/news/cities/Delhi/defamation-case-kejriwal-refuses-to-give-bail-bond/article6032723.ece; *see also* Rohan Venkataramakrishnan, *How AAP could turn Kejriwal's arrest into an argument for legal reform,* SCROLL.IN (May 23, 2014), http://www.scroll.in/article/665097/How-AAP-could-turn-Kejriwal's-arrest-into-an-argument-for-legal-reform.

India that allow us to place in context claims about dysfunction in the bail system. The first of these relates to the educational qualifications of undertrial prisoners, while the second relates to the composition of offences for which they are arrested. We discuss these features using simple averages (means) taken across the ten year period from 2001 to 2010.

In the absence of data on the financial capacity of undertrial prisoners, educational qualification gives us an alternate measure of their socio-economic condition. The picture painted by the data is not encouraging. On average between 2001 and 2010, 37 per cent of undertrials in the country were illiterate; while close to 42 per cent had not completed class ten. Together these categories formed an overwhelming majority of the prison population- close to 70 per cent. Illiterate people especially are disproportionately represented in the undertrial population. In 2001 the male literacy rate[63] was 75.3 per cent (Census 2001), while in 2011 this had gone up to close to 81 per cent (Census 2011). It is clear, then, that Indian prisoners, especially undertrials, generally possess little or no education and are from some of Indian society's most marginalized groups. These are people whose capacity to negotiate the legal process or access legal aid to vindicate their rights is severely compromised. The fact that our undertrial prisoners are drawn disproportionately from the most vulnerable parts of the Indian population is by itself a reason to rapidly reform the bail process.

Another way of assessing the impact of the bail process is to examine the offences for which undertrial prisoners are in jail. Almost 10 per cent of the under trial population in India was accused of bailable offences during the years under study. Bailable offences such as cheating, or offenses under the Arms[64] and Excise Acts,[65] or criminal defamation as in the Kejriwal case, are those for which bail is granted in the ordinary course unless the accused is unable to pay the price of the bond.[66] To this we may add the fact that the second largest percentage of under trials in the country (9 per cent) were

[63] Given that males formed over 96 per cent of both the convict and under trial population on average between 2001 and 2010, we compare the prison population to the male literacy rate here.

[64] Arms Act § 37 (1959). (All persons arrested under the Act must be brought before a magistrate and released on executing a bond with or without sureties).

[65] Om Prakash v. Union of India, A.I.R. 2012 S.C. 545 (all offences under the Central Excise Act (1944) held to be bailable).

[66] K. N. CHANDRASEKHARAN PILLAI, R.V. KELKAR'S LECTURES ON CRIMINAL PROCEDURE 143 (5th ed. 2013).

accused of 'theft', in many cases an instance of petty or non-serious crime.[67] Given an average annual under trial population during the ten year period of around 2,36,000 individuals, this means that over 23,000 persons were incarcerated each year for bailable offences on average during the period. Though these undertrials constitute a minority of all undertrials in detention, this is a significant number of people in detention despite being entitled to be released on bail as a matter of right.

The Law Commission of India in its 78th Report extensively examined the subject of bail and its relation to the ballooning undertrial population in the Country. It established that as a general rule, the severity of the offence influences both the grant of bail as well as the size of the bond.[68] Persons accused of serious offences (punishable with life imprisonment or death) are in the ordinary course not to be granted bail. Despite these normatively unimpeachable conclusions, it is puzzling why close to 20 per cent of undertrials in India on average between 2001 and 2010 were incarcerated for either bailable or non-serious crimes. As a majority of those detained are either illiterate or have limited educational qualifications it is reasonable to ask whether these persons have received fair treatment from the criminal justice system. Thus, Arvind Kejriwal and others before him have rightly drawn attention to the socially unjust and inequitable character of the bail process and undertrial detention.

The last legislative attempt to reform the bail system was the introduction of Section 436A of the Criminal Procedure Code in 2005. This section mandates that undertrials who have served at least half of the maximum period of imprisonment under the offences they have been accused of are entitled to release on a personal bond.[69] At the time, this provision was hailed as likely to result in a great reduction of the undertrial

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[67] In describing this offence as such we follow the Law Commission of India's approach in its 78th report, of recommending the amendment of the criminal law to make offences punishable with imprisonment for three years or less bailable, as a general rule. *See* LAW COMMISSION OF INDIA, SEVENTY EIGHTH REPORT ON CONGESTION OF UNDER-TRIAL PRISONERS IN JAILS 17 (1979). Currently there are a number of offences under the Indian Penal Code punishable with a maximum sentence of three years or less which are non-bailable.

[68] LAW COMMISSION OF INDIA, *supra* note 67.

[69] As opposed to a bail bond which is a form of financial security, a personal bond is a written assurance by the accused that they will appear before the court during their trial.

population in the country.[70] However, the available data suggests that no such reduction happened. On the contrary, the undertrial population in fact increased, albeit marginally, from 2005 to 2010. The reason for this failure to make a significant dent in the country's undertrial population is best understood to be related to the relatively short average period of detention of most under-trials. Krishnan and Kumar, using prison data from 2007 and 2010, establish that length of detention is not as much of a problem as earlier imagined; most undertrials in Indian prisons spend less than 6 months in prison.[71] Examining data from a longer time period confirms this result. Between 2001 and 2010, on average more than 60 per cent of undertrials were incarcerated for periods of less than 6 months each year. Further, close to 80 per cent of undertrials were incarcerated for less than one year.[72] The often-heard refrain that undertrials in India spend years and years in prison, often longer than the time they would have spent if convicted, appears to be true in a relatively small number of cases. So while Section 436A introduced a valuable safeguard against excessively long undertrial detention it did not reduce numbers of undertrial prisoners significantly, as the law makers misdiagnosed the character of undertrial detention in India.

The failure of this legislative reform should not lead us to the conclusion that it is not possible to restore a healthy balance between convicts and undertrials in Indian prisons. Instead, we must embrace the possibility and potential of new institutional mechanisms and non-legislative modes of intervention. The creation of 'bail funds' at central, state and local levels is a promising institutional option. Bail funds are a relatively recent innovation across the world and provide a state supported, civil society managed mechanism to release undertrials of inadequate means or those whose social bonds do not allow them to post bail. These funds are used to pay the bail amount and secure the release of persons accused of minor offences. Bail funds have met with considerable success

[70] *E.g.,* Ritu Sarin, *Friday: Thousands of Undertrials will get right to walk free,* THE INDIAN EXPRESS (Jun. 21, 2006), *available at* http://archive.indianexpress.com/news/friday-thousands-of-undertrials-will-get-right-to-walk-free--------/7018/.

[71] Krishnan et al., *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trial in Comparative Perspective,* 42 GEO. J. INT'L. L. 764, 764 (2010).

[72] Limitations with the data however prevent us from unearthing the entire story; there might be significant numbers of undertrials accused of minor offences who indeed spend more than half of their potential sentences imprisoned without being convicted. In absolute terms however, the majority of undertrials in India do not appear to remain in prison for as long as is often argued.

in New York in both enabling the release of persons pending trial, as well as securing the attendance of such persons during hearings.[73] Given that the offence composition in Indian prisons reveals that up to 20% of undertrials are incarcerated for petty or non-serious offences, bail funds have the potential to significantly reduce the undertrial population in the country. Additionally, as opposed to legislative or judicial reform, which may take decades, bail funds offer the potential for almost immediately measurable results.[74] Some non-governmental organisations in India have already initiated steps to create funds of this type.[75] In the context of the grotesque imbalance in the pattern of incarceration in India, options such as these require wider exploration and potential adoption. Reforming the bail system will reinforce the fundamental purpose of the criminal justice system: the punishment of the guilty, and reorient policing and prosecution towards securing convictions rather than victimizing the accused through the criminal trial process.

As serious as it is, undertrial incarceration is only one aspect of the Indian criminal justice administration in need of reform. Problems of police accountability,[76] lengths of trial[77] and conditions in prison[78] among others, are all distinct and equally serious. As we have argued in the rest of this piece, the best way to approach these problems is through sustained, empirically driven research and interventions. The criminal justice system

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[73] Between 2007 and 2009, the Bronx Freedom Fund supplied bail for 150 defendants in New York City, 93% of these defendants returned for every court date. *See* Julie Turkewitz, *Helping Poor Defendants Post Bail in Backlogged Bronx,* THE NEW YORK TIMES (Jan. 22, 2014), *available at http:*//nyti.ms/19P0IYV.

[74] There are however other important considerations to keep in mind when thinking of introducing bail funds; these funds depend on a significant level of engagement between the fund and the accused person once they are released in order to ensure that the latter regularly attends hearings. For an analysis of the working of the Bronx Defenders Freedom Fund, *see* Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business,* 19 J. L. & POL'Y. 307 (2010).

[75] Stanley Pinto, *Amnesty India mulls Bail fund to rescue undertrials,* THE TIMES OF INDIA, (Jan. 8, 2014), *available at* http://timesofindia.indiatimes.com/india/Amnesty-India-mulls-bail-fund-to-rescue-undertrials/articleshow/28528191.cms.

[76] National Crime Records Bureau, *supra* note 55; The Prisons Act, *supra* note 59.

[77] *Id.*

[78] *E.g.,* COMMONWEALTH HUMAN RIGHTS INITIATIVE, CONDITIONS OF DETENTION IN THE PRISONS OF KARNATAKA (2010), *available at* http://www.humanrightsinitiative.org/publications/prisons/conditions_of_detention_in_the_prisons_of_karnataka.pdf; PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, BEYOND THE PRISON GATES: A REPORT ON LIVING CONDITIONS IN TIHAR JAIL (2011), *available at* http://www.pudr.org/sites/default/files/Tihar%20final%20report.pdf.

is better off than the rest of the legal system in terms of data on its functioning. The National Crime Records Bureau does a commendable job in publishing national statistics both on crime as well as prisons on an annual basis.[79] There are some major problems with these data sources; cases of crimes against women, in particular, are suspected to be seriously under-reported in official crime statistics.[80] However, these data sources offer us the only credible base on which to evaluate and build strategies for reform. It is high time Indian policy makers took both the problems as well as the data as seriously as they deserve.

V. CONCLUSION

The renewed seriousness with which both major political parties approached the subject of legal and judicial system reform before the 2014 general election is a welcome development. In this article we have highlighted some of the persistent barriers to serious legal and judicial system reform in India: *ad hoc* piece-meal reform without adequate empirical understanding or a nuanced normative analysis of the challenges to such reform. We have proposed that a systemic, empirically grounded and normatively rigorous approach can yield significant and innovative reform. In this article we have sought to demonstrate what such reform would look like in three fields: civil justice system, legal system information and the criminal justice system. Legal system reform that stays close to the best empirical evidence available, and committed to creating state capacity that is at once accountable and limited, is our best chance to go beyond the current stasis in this field.

[79] *E.g., Crime in India 2013* and *Prisons Statistics India 2013*, *available at* http://ncrb.gov.in/ are illustrative examples of these.

[80] REPORT OF THE COMMITTEE ON CRIME STATISTICS (2011), *available at* http://mospi.nic.in/mospi_new/upload/Report_crime_stats_29june11.pdf.