Judicial Productivity in India

By Barry Walsh[1]

Unlike some British imperial legacies, such as English literature and the sport of cricket, judicial and court administration in India bears important dissimilarities to its British progenitor. These differences are substantial. Some of them are subtle and seem to gain scant recognition, even to many who practice as judges, advocates or commentators within the Indian court system. The direction for improving the Indian court system is to be found by recognizing those differences and the lessons they may offer.

The essential thesis of this paper is that the practices and associated expectations of participants in the Indian court system are significantly different from most other countries that have inherited their legal systems from the British. An examination of those differences can help to identify strategies that may be pursued in overcoming a significant case backlog and delay problem in Indian courts. International comparisons with courts in other jurisdictions are not only useful and appropriate, but offer new opportunities for reforming the Indian court system that may hitherto have been overlooked. If the reader agrees with the author's arguments and conclusions, then this paper offers a novel range of areas in which reforms may be advanced. If, on the other hand, the effect of this paper is to provoke a contradictory response from Indian commentators by reference to practices in other countries, then it will have achieved its purpose in seeking to gain recognition of the value of international comparisons as a means of identifying court system reform strategies in India and, hopefully, elsewhere.

Differences in practices and expectations

The constitutional and legislative features of the Indian court system suggest that it is very much modeled on the English adversarial common law system. With notable qualifications, such as the abolition of the jury system in 1956, Indian trial and appellate courts follow the English model. The application of that system in India, however, has resulted in practices which are significantly divergent from those of England and other English speaking former British dominions that adopted English law; such as the USA, Canada, Australia and New Zealand. Unlike India, these other court systems have been generally successful over the last 20 years or so, in overcoming endemically large backlogs and delays in case disposals. Through trial and error, and bitter experience in some cases, those other systems have identified the causes of backlog and delay and successfully applied usually similar methods to overcome them.

Judicial Productivity

A view widely shared among judges and commentators on the Indian judicial system is that there are not enough judges for the workload they have to bear. Three arguments are commonly offered in support of this. The first is that high rates of case pendencies[2] across India show that there are not enough judges to dispose of the cases before them. A second argument is that there is a logical and proper numerical relationship between a society's population and the number of judges needed to service that population – and that the proportion of judges relative to population in India is very low by World standards. A third argument, related to the second, is that in those societies which are particularly litigious, possibly India, the proportion of judges relative to population should be even higher, compared with less litigious systems. The evidence that might support each of these arguments is readily at hand. Pendency figures and population statistics are quite accessible. However, one necessary assumption which seems to be implicit in each argument is that Indian judges are efficient in disposing of their caseloads. If, for example, there were good reasons why Indian judges can be expected to be less productive than judges in other countries, then presumably there would be an argument for having more of them, relative to population. Similarly, if for no good reasons, Indian judges are less productive than other systems, then there might be an argument for not increasing their numbers until their productivity is improved by other means. But evidence about the productivity of Indian judges, as distinct from their workloads, is seldom, if ever, raised as a factor in support of the case for increasing judicial numbers. More commonly, it seems to be assumed that judges are sufficiently productive, perhaps as productive as they will ever be.

---

[1] This article is based on a conference paper prepared in October 2005 and first published in an anthology, *Judicial Reforms in India: Issues and Aspects*, Editors: Arnab Kumar Hazra and Bibek Debroy, Academic Foundation with Rajiv Gandhi Institute for Contemporary Studies, New Delhi: 2007. The author is an Australian justice sector development consultant who lived and worked in Delhi during 2004 and 2005, leading studies of the workings of its court system under projects sponsored by the Asian Development Bank.

[2] Pendencies mean the number of pending cases. The terms "pending caseload" and "backlog" are also used to describe such cases.

It is difficult to rationally evaluate judicial productivity without identifying an objective benchmark to indicate just how productive a judge *could* be. If judges across India share common managerial problems, such as low numbers and poor resources, as many believe to be the case, then it is unlikely that an objective benchmark of judicial productivity can be found within India. International comparisons are more likely to be illuminating. The problem in looking to other systems, however, is in finding a system that is sufficiently similar so as to permit reasonable comparison. This is difficult. Civil law systems, for example, are especially unlikely to offer useful comparisons because a large proportion of civil law trial court benches often comprise at least three judges, whereas most trial court benches in common law systems, such as India, are of judges sitting alone. Common law systems, on the other hand, can also offer unhelpful dissimilarities by reason of geographic spread, size of populations and economic and cultural differences. These differences can be compensated for, when data relevant to productivity is available. Often systems which might bear comparison with Indian experience do not necessarily offer accessible data that would permit useful comparison. Data that has been readily accessible to the author by reason of personal experience, however, has been data about court practices in Australia and in the courts of Delhi, in India.[3] As it turns out, comparing the court system of the National Capital Territory of Delhi with all of the courts of Australia can offer some useful insights into the question of judicial productivity in India. Delhi, for instance, has 13.8 million people, whereas Australia's population is not much greater at 20 million. Both are common law systems that rank their courts into generally three levels. Both operate under codified constitutional federal systems and each have jurisdictional ranges that are generally comparable for criminal, civil and appellate jurisdictions. Here are some figures about each system that can be related to judicial productivity.

Judge to population ratios. Allowing for High Court judges in Delhi (the superior court of the national capital region), but excluding Supreme Court judges (the national superior court), there are 30.8 judges in Delhi per million of population[4]. The comparable Australian figure is 44 judges per million of population[5]. This indicates that Australia has half as many judges again than Delhi when compared proportionately to population. This comparison strongly supports the argument for increasing judge numbers in Delhi to match the ratios achieved in Australia – assuming, of course, that the ratios in Australia represent an appropriate benchmark for India[6].

Disposals per judge. A useful indicator of judicial productivity is the ratio of judges to disposals per year. It is better to consider disposals, rather than pendencies, because disposals represent actual productivity, whereas pendencies represent productivity that is yet to happen. Looking at disposals is useful because it gives an insight into judicial productivity in terms of what they do, rather than in terms of the population they serve. It also offers an indicator that can be related individually to each judge. In Delhi courts this ratio was 701 disposals per judge per year.[7] The comparable figure for Australian courts was 1,511 disposals per judge or around double the level of Delhi disposals[8]. This suggests that Delhi judges might have to work twice as hard to dispose of as many cases as Australian judges.

Judges per lakh[9] of disposals. Another indicator of judicial productivity is to measure the number of judges needed to dispose of 100,000 cases in a year. This is useful for the purpose of justifying additional judge appointments in tandem with, or as a consequence of, increases in caseloads. In Delhi district courts 153 judges are needed to dispose of 100,000 cases. The comparable figure for Australian courts, however, is 66 judges; which verifies the point already made that Australian judges have double the disposal capacity of Delhi judges.

---

[3] Very little statistical information about Indian courts is published. Most of the data used in this article was derived directly from the courts themselves from their routine internal reports, few of which are published in their entirety. Some authoritative data on Delhi courts is available via the websites of the Delhi High Court (http://www.delhihighcourt.nic.in/) and the Delhi District Courts (http://www.delhidistrictcourts.nic.in/). Statistics on courts in other countries referred to in this article are derived from published reports, as cited.

[4] Sanctioned rather than working numbers of judges are used to ensure comparability with Australia. The working number of judges in Delhi is closer to 21.5 judges per million of population. The sanctioned numbers used are 33 High Court and 392 district courts judges in Delhi as against a population of 13,782,976 as determined in the 2001census.

[5] Australian judge numbers were 881 as at January 2005 – Source: website of the Australian Institute of Judicial Administration http://www.aija.org.au/JudgesMagistrates.htm. Australian court disposal figures in 2003/04 were 587,900 civil cases and 742,900 criminal cases. Source: Productivity Commission of Australia, Report on Government Services 2005, Chapter 6.

[6] For example, Australia's judges are distributed over a landmass 2.5 times the size of India, whereas Delhi is effectively a city state, a factor which implies that Australia might need more judges than Delhi to cover a more widely dispersed population.

[7] Based on disposals of 79,297 civil & 95,898 criminal in district courts and 32,346 disposals in the High Court in 2004. Judge to disposal ratios are based on working, rather than sanctioned numbers of judges which is taken to be 296 in Delhi in early 2005.

[8] Source: Productivity Commission of Australia, Report on Government Services 2005, Chapter 6.

[9] In India a *lakh* means 100,000 and is more commonly used as a numerical measure than *thousands* or *millions*.

Disposals per lakh of population. A further variation is to look at the number of case disposals per year per lakh of population. In Delhi the number of cases disposed per 100,000 of population is 1,506. The comparable Australian figure, however, is 6,651 or almost four and a half times greater. This suggests that the population of Delhi is, at most, one quarter as litigious as the Australian population. It would seem that the level of litigation is not necessarily a factor affecting the ability of Delhi judges to dispose of cases.

These different ways of examining judicial productivity in India reveal an extraordinary but logical conclusion: If litigation rates in Delhi rose to levels equivalent to Australia, then the average productive capacity of the Delhi courts would need to increase at least eight fold to cater for the additional work. If the working number of judges in Delhi were to be doubled, so as to match the ratio of judges to population in Australia, it would only account for around half of the required increase in productive capacity. Thus it could be said that no practical increase in judicial numbers would overcome the reality that Delhi judges are only half as productive as Australian judges in terms of case disposal capacity. One might question the precision of these figures, being based on the latest available yearly figures, rather than figures compiled over time. However, the degree of difference between judicial productivity of Delhi and Australia is so great that numerical errors are unlikely to affect the basic conclusions.

Why are judges in Delhi, and presumably across India, so much less productive than Australian judges? The answer is that, despite the similarities of each system, Indian courts administer cases in ways that are significantly different from the ways of Australian courts. It is unlikely that Australian judges work harder than Indian judges; nor are they necessarily more learned or experienced. What is different is that they generally use case management and court management methods and practices which Indian courts generally do not use, or are less effective in using. These methods and practices are referred to in this paper as “best practice”. Many courts in England, USA, Canada, Australia and New Zealand use best practice methods; but not all of them. And those that do use best practice methods are not without their problems from time to time. But the judicial leadership of each would vouch for the fact that when those practices are consistently used, they work. So how is it that Indian practices differ from best practice?

Low civil settlement rates

A key reason why Australian judges dispose of more cases per judge than Indian judges is because they conduct fewer trials. Overwhelmingly, the dominant means by which cases are disposed of in Australia is by voluntary settlement by the parties, rather than by a judge-adjudicated verdict. In best practice systems, 70% or more of civil disposals can be expected to settle before a trial begins[10]. In Indian trial courts, the settlement of a case by voluntary agreement between the parties is a rarity. In civil matters the typical proportion of cases that settle is around 5% and most of those settlements reportedly occur after a trial begins[11]. The causes of these low rates in India are not well researched. The main cause may be that the incentives for parties to settle disputes in best practice jurisdictions are either absent in India or are rendered less compelling by other factors.

In systems that apply best practice, and probably in all common law systems, there are two types of cases which are prone to settle. The first kind, which we may call *early settlement* cases, are either cases where all parties are in an ongoing relationship of some kind and want to resolve their dispute quickly; or cases where the cost of settling for both parties is not high and where settlement would allow them to pursue other, more worthy things. In early settlement cases there is a prospect that the parties will settle early in litigation, often without the direct involvement of a judge, by using methods like private arbitration, mediation, court-supervised settlement conferences or old fashioned advocate-to-advocate bargaining.

The second kind of case that is prone to settle, which we can call *late settlement* cases, are cases in which the parties are in sharp dispute but who reach a point in time where one of them starts to believe three things, i.e. that (i) unless they settle, they will lose the case at significant cost to themselves; (ii) the time of loss is imminent or is not far off; and (iii) when they lose, they will quickly be forced to pay a higher price than if they decided to settle. In Australia a high proportion of settlements are both early settlement and late settlement cases. In well managed courts that encourage case settlement, early settlement cases are filtered out of court lists relatively early, sometimes even before the case is listed before a judge. But late settlement cases usually remain in court lists until case preparation is completed and a date for

[10] The proportion of instituted cases that went to trial in the trial courts in the Canadian province of Ontario was consistently below 10% in the period 1978 to 2000. This, of course, is a practical settlement rate of 90%. Source: Ontario Courts Annual Report 2002-2003.

[11] This figure is based on the results of a listing survey conducted in early 2005 which, among other things, measured the means by which cases were disposed in 21 trial courts over a three week period – of all the disposals recorded in that period only 5% were by way of settlement - Source: Listing Survey Report, May 2004, ADB /GOI India Administration of Justice Technical Assistance Project TA4437-IND

trial is set. When a trial date is set in most Australian courts, the psychological pressures on parties to consider compromise begin to coalesce, with the common result that settlements occur, as is often said, "at the door of the court - meaning that a high proportion of cases settle on the morning of the first day of a trial. The psychology of late settlement cases is so reliably predictable that many civil courts in Australia, and in other systems, confidently schedule more trials than there are available judges, in the expectation that a proportion of them will settle before their trial begins.

Undoubtedly there are early settlement and late settlement cases in Indian trial courts. But few of them appear to settle. Why would this be so? In answer, two reasons can be offered. One reason is that voluntary settlement is not the custom in India, the English adversarial system being well ingrained since the British era. It might also be said that concern about corruption in the legal profession and the judiciary make Indian litigants wary of settlement processes. But in answer to this argument, it may be said that customary inhibitions, even concerns about transparency of settlement processes, can be overcome by managerial initiatives in courts, such as the development of formalized court annexed mediation schemes or similar ADR initiatives that assure transparency of settlement negotiations under judicial supervision.[12]

The second reason for low settlement rates, which is considerably more compelling, is that Indian courts do not offer the essential preconditions of late settlement as suggested above, - i.e. they ordinarily do not offer a party in a case the opportunity to reach a point of realization that they will lose the case; that they will lose soon; and that they will soon have to pay for it. Why would those preconditions be absent from Indian courts when they are evidently present in Australian courts and in other systems? The answer to this question is much simpler. It is because most Indian trial courts cannot offer litigants what may be called *outcome date certainty* – i.e. they cannot indicate or direct with reasonable certainty when a particular trial will be completed and when a readily enforceable and final verdict will given in favor of one party. The absence of outcome date certainty in Indian courts is the quintessential difference between most Indian courts and most courts in Australia and other systems which apply best practice methods. Before elaborating on the reasons for the absence of outcome date certainty, however, it is useful to point out an important difference that affects settlement in *criminal* cases in India.

Low criminal plea rates

Plea rates are the proportion of criminal cases in which the accused person pleads guilty and thereby avoids a trial. Sentencing a person who pleads guilty requires fewer resources for a court and the prosecution; and avoids the uncertainty of putting the accused to trial. It also enables the decision on sentencing to take into account factors that may mitigate a sentence, such as contrition of the accused. Accused persons are motivated to plead guilty when they believe that a finding of guilt by trial is likely; and when they believe they will get a lighter sentence by pleading guilty. Best practice criminal justice systems endeavor to give accused persons ample incentive and opportunity to plead guilty. They do this by usually offering efficient prosecutions that have a high probability of a finding of guilt, they provide outcome date certainty and they assure consistency in sentencing. In Australian magistrates courts, over three quarters of criminal cases are disposed by plea or by comparable processes that do not involve a defended hearing[13]. In contrast, rates of guilty pleas are not measured or reported by Delhi sessions courts or magistrates courts. Presumably the same applies to most other Indian criminal courts. However, anecdotal feedback from Indian judges and advocates suggest that pleas are uncommon, if not rare, except possibly in non-custodial matters. The sad reason for this is likely to be that there is no incentive to plead guilty when there is a high probability in Indian criminal courts that the accused will be acquitted, either at trial or on appeal. Conviction rates indeed appear to be low. The 2004 annual report of the Delhi district courts, for example, reported that only 35% of criminal sessions cases and 49% of magistrates cases resulted in a conviction[14]. To date, little information is available on plea rates, let alone research on the causes. What is clear is that in most Australian and other criminal court systems that apply best practice methods, the rates of guilty pleas account for sizable proportions of criminal lists, allowing judges of criminal courts much higher disposal rates than are achieved in Indian criminal courts.

A predominance of contested hearings

Rates of civil case settlement and criminal pleas in any court system are influenced purely by subjective assessments of self interest. If a defendant sees advantage in settling a civil case, rather than wait for a judge to enter a verdict, the defendant will settle. Similarly, if an accused person believes that he or she will be convicted and may suffer a worse

[12] Few Indian courts offer court annexed mediation. In most Indian trial courts, however, there is a court annexed alternative dispute resolution process known as a *lok adalo*t. Lok adalots are tribunals, normally presided over by a judge, to which, usually, small civil claims are referred for conciliation and negotiated settlement. The features of lok adalots which distinguish them from court annexed mediation, is that they are held in open court and usually in large volumes on a single day.

[13] Magistrates Courts in the Australian state of New South Wales disposed of 133,105 criminal cases in 2003. 86% of those cases were disposed of other than by defended hearing. Source: website of the NSW Bureau of Crime Statistics and Research at http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_lc_stats9903.

[14] District Court of Delhi website at http://delhidistrictcourts.nic.in/Annual%20Reports.htm

penalty on a plea of not guilty, then the accused will consider a plea of guilty. These are truisms of human behaviour that apply irrespective of culture or jurisprudential traditions. Settlement and plea rates in India are usually low because there is uncertainty about the likely outcome; about when that outcome will occur; and because defendants thereby perceive advantage in delay or indecision. To reverse this trend, it is necessary to offer more certainty of outcome and to deny advantage to litigants who procrastinate. For courts this means being able to ensure that trials are finished within a certain period that is known to the parties and that the prosecution in a criminal case is well prepared to secure a conviction. Furthermore, civil defendants who go to trial without settling and who then lose, should expect to pay more than they would have been required to pay, had they settled. Similarly, accused persons who plead not guilty and are then found guilty, should expect that their penalty will be worse. Courts have little direct control over the quality of the prosecution. However, they can have control over the timing of a criminal trial, as they do in civil cases. This concept is described as *trial date certainty*[15] in Australia and other systems that endeavor to apply best practice. In India, however, the idea that trials can be given near certain completion dates is peculiar and quite rare.

A propensity to adjourn

Outcome or trial date certainty is difficult to achieve in India courts because most cases are adjourned multiple times and in unpredictable ways, even after a trial begins. In Australian courts the reduction of the average number of case adjournments has been a major managerial priority in backlog and delay reduction for at least the last 20 years. Criminal case attendance rates[16] for most courts in Australian states range from 0.3 to 6.3 adjournments per disposed case[17]. Civil case adjournment rates are in the range of 1 to 5. In India attendance rates appear not to be counted by any court. Estimates offered by individual Indian judges and advocates, however, put the rate of adjournments in Indian trial courts as typically between 20 and 40 times over the life of a case. Some cases are adjourned many more times. An ADB study revealed that on a single randomly selected day in March 2004 the High Court of Delhi had listed before it an average of 100 cases per judge, of which 80% were adjourned to another day[18]. Another ADB study conducted in Delhi *district courts* over a three week period in early 2005 showed that 80% of a much larger sampling of listed cases were adjourned. These figures suggest that while Australian courts devote a lot of effort to minimize case adjournments, Delhi courts depend upon high rates of adjournment to get through their daily cause lists. With almost no exceptions, every Delhi judge's cause list contains at least a dozen cases daily (often several dozen). And each case will typically be called and given some attention, if only for a few minutes, before being adjourned again. It appears that the trends in Delhi are reasonably typical of most Indian courts.

Absence of continuous trials

The propensity of Indian courts to adjourn cases compared to Australian courts can be explained by a fundamental difference of view about how cases should be managed by courts. Australian courts share with many of the intuitional courts in England, the USA, Canada and New Zealand, a convention that a trial should, as far as possible, be conducted continuously. A continuous trial means that ordinarily a judge should conduct a trial in a particular case, and normally no other, from start to closing submissions with minimal interruptions. This convention probably stems from the jury system which demands that evidence be presented to jurors as quickly as possible so that they can deliberate on their verdict and then be discharged. Even in those jurisdictions in which juries are no longer used, the commitment to pursuing continuous trials still remains because of the recognized efficiencies they provide. For reasons unclear, however, continuous trials in India have become largely extinct. While Indian jurists and advocates would agree that continuous trials are desirable, it almost never happens[19].

The tendency of cases to be adjourned in India appear to have two distinct causes. The first is what appears to be a well established practice that there be a separate scheduled hearing for each of the main stages of a prosecution or a civil action. It is an undisputed practice, for example, that once the plaintiff's evidence in a civil case has been given and cross examination is complete, then the case should normally be adjourned to another day for the purpose of hearing the defendant's evidence. Australia does not have this convention – there is normally an expectation that evidence for all

[15] While the expression "trial date certainty" applies in Australia and elsewhere, this paper uses the term "outcome date certainty" in recognition of the fact that setting a date for the commencement of a trial in India does not really indicate when that trial is likely to finish.

[16] The term "attendance" is used in Australia in lieu of "adjournment" when counting the total number of courtroom events - thereby ensuring the first court event is counted. The American term "appearance" has not been adopted in this paper as it can mean something else in other jurisdictions. For example,. in Australia and India "appearance" can refer to whether or not a particular party or legal representative actually attended a scheduled hearing.

[17] Average attendance rates can be less than 1 because many cases are disposed before being listed before a judge.

[18] Final Report of the ADB/GOI Administration of Justice Technical Assistance Project – TA4153 IND 26 May 2004, page 44.

[19] The practice exists under legislative authority that a higher court in India can exceptionally direct a lower court to try a particular case "from day to day". But even in these circumstances such a direction is taken to mean no more than a requirement to hear one case at least for part of the day, each consecutive day, while other cases are also heard.

sides and submissions will occur within a continuous, mostly unbroken, trial. Indian courts, on the other hand, work on the assumption that a trial ought to occur in no less than five stages, each separated by an adjournment, i.e.

- Issues and charges
- Plaintiff's or petitioner's evidence
- Defendant's or respondent's evidence
- Final argument
- Order and judgment.

A second evident cause of high rates of case adjournments in India is the effect of rising backlogs and case delays. Given that courts already routinely fragment trials into separate formal stages, the response to rising caseloads has been to subdivide them even further. Generally, as cause lists have grown, individual cases have been scheduled for hearing no less frequently; but less time is available for them at each hearing by reason of there being more cases in each cause list. There is a commonly held view among judges and advocates alike, for example, that it is better to take the evidence of one available witness and then adjourn, rather than risk that witness not being available on the next occasion. Australian courts, however, would resist this practice. Instead, Australian courts would seek to deal with rising caseloads by maintaining a commitment to continuous trials and by applying other measures to deal with rising caseloads[20].

So why is it better to preserve continuous trials rather than to fragment trials into shorter but regular hearings? The answer is that continuous trials offer outcome date certainty while fragmented trials do not. Once a trial starts under a continuous trial system, the date of the outcome becomes readily predictable and permits the parties to consider settling their case. But when trials are fragmented into multiple adjournments, there is no predictability about the time of a final outcome, thereby reinforcing the reluctance of parties to settle. So it would seem that if Indian courts aimed at more continuous trials, then they could induce more case settlements with consequential reduction in their trial volumes and pendencies.

Fragmented hearings

The advantages of continuous hearings are not limited to encouraging more case settlements. They also reduce the duration of trials overall. Not all Australian court trials are continuous. Many non-jury trials are adjourned "part heard" for various practical reasons. Part heard adjournments, however, are resisted by Australian judges because they are inconvenient and costly. The need to adjourn a trial before evidence is closed usually represents an unscheduled disturbance in a system that assumes all essential evidence will be available at the scheduled time. Thus if an adjournment is sought, then an Australian court will usually consider penalizing the party who seeks it, if that is a practical option. And the prospect of a penalty being imposed is usually an effective deterrent against such things as failing to prepare for a hearing. Regrettably there appears to be little research available on the efficiency of trials in India. So it is not possible to offer certain conclusions about it. However, one might confidently infer that a system which usually fragments the taking of evidence into numerous installments will be less efficient and more time consuming than a system which seeks to assure an unbroken presentation of evidence and submissions by contesting parties.

Deterring misbehaviour

There is a widespread view among Indian judges and advocates that the Indian justice system offers ample opportunity for a litigant to evade court decisions, or to intimidate opposing parties by appealing or by lodging an interlocutory application. A high proportion of pendencies comprise such applications, with the result that delays in disposing of them afford ready opportunities for litigants to evade court decisions. Similarly, it is said that there is a remarkable degree of court tolerance of incompetence in the legal profession and of litigants in general. The ADB survey of court adjournments conducted in early 2005, for example, indicated that 43% of cases listed were adjourned due to the fact that either a litigant or legal representative failed to attend or was not sufficiently prepared for the hearing. High levels of case adjournments also offer opportunities to evade court decisions, often for many years, and also defeat the incentive of either party to settle. While Australian courts also need to deal with unmeritorious appeals, incompetent advocates and ruthless litigants, they are generally effective in discouraging them. The primary way they achieve this is by ensuring that adjournments are minimized and by offering early decisions on interlocutory applications and appeals. But what underlies the success of these methods is the presence of an effective means of punishing those who misuse court processes. Courts achieve this by enforcing cost penalties against misbehaving litigants and by using an effective disciplinary system against misbehaving advocates. India has both a system of party/party cost sanctions and a system for disciplining

[20] In an environment of large trial backlogs, Australian courts will ordinarily list a case for trial whenever there was available time for a continuous trial – effectively resulting in longer waiting lists for a trial date.

misbehaving advocates. However, it seems to be common knowledge that neither system is consistently effective in offering a deterrent to misbehavior. The reasons for this and the likely remedies are necessarily speculative, as little formal research into these problems appears to have been done. Whatever the reasons, it may be said that it is recognized in Australia that effectively deterring behavior which defies or seeks to evade judicial policy and court orders, is a key to assuring judicial productivity. Arguably this connection is yet to be recognized in India.

Slow evidence

Oral evidence in most Indian courts is generally typed in real time by the presiding judge's stenographer using a word processor. In some cases manual typewriters are also used and sometimes the judges themselves record evidence by longhand. In most cases the words typed by a stenographer are dictated by the judge after the judge hears the questions asked by advocates and the answers given by witnesses. Much court time is often spent supervising the typing of testimony in this way, including dealing with arguments from advocates about the accuracy of the words dictated. Oral evidence in Indian courts consequently tends to be taken slowly and incompletely. This is often made more onerous if the language of the witness is not English, in which case the judge must also act as interpreter when dictating in English. No court in Australia uses this method. Instead they use shorthand writers, stenotype machine operators or electronic sound recording with associated verbatim transcript production. Human shorthand or stenotype writers are used sparingly in Australia because of the high cost and the difficulty in finding skilled writers. Voice recognition technology is still unreliable in a court environment. Consequently, the preferred technology in most courts that apply best practices is sound recording of court proceedings and full or partial text transcription from the recordings by typists (transcribers) working outside the courtroom. The introduction of sound recording to Indian courts, however, would not be a simple matter of installing new courtroom hardware. It would presage enormous change in the dynamics of courtroom usage. It would require, for example, that courtrooms become relatively noiseless; something that most Indian judges and advocates are not used to and would probably have trouble adapting to. It is unlikely that any studies have examined the efficiency of present Indian methods of court recording. However, one can speculate fairly confidently that unlike current Indian methods, which necessarily impede the pace at which oral evidence can be taken, sound recorded courts would enable evidence to be taken much faster, possibly at twice the speed. Until that happens, of course, Indian courts will remain less efficient at taking evidence than courts which successfully use sound recording, such as in Australia.

Conclusions

Some key points of comparison explained above are now summarized.

Judicial productivity. If the Australian court system is used as a hypothetical benchmark, (i) there are almost half as many more judges in Australia as a proportion of population than there are in Delhi; (ii) the average case disposal capacity of a Delhi judge is only half that of an Australian judge; and (iii) per lakh of population, the number of cases disposed by Australian judges is eight times greater than Delhi judges.

Settlement rates. Delhi judges, and probably most Indian judges, appear to be less productive because they administer more trials as a proportion of overall disposals than Australian judges. Over 70% of Australian disposals are settled voluntarily without a court verdict, whereas the comparable rate in India is probably around 5%. Around three quarters of Australian criminal cases in magistrates courts are disposed without a defended hearing, usually involving a plea of guilty; whereas most Indian criminal cases are defended. Only around half of criminal cases in India result in a conviction, whereas much higher rates of conviction are typically achieved in Australian courts.

Adjournment rates. Typically a case in an Australian court will be adjourned up to half a dozen times. In India cases are typically adjourned 20 to 40 times before being disposed. The fragmentation of the taking of evidence by frequent adjournments results in reduced efficiency in trial management. This inefficiency is compounded by the method of court recording by dictation, which probably doubles the time taken to record oral evidence, compared with sound recording methods used in Australian courts.

Continuous trials. Most trials in Australia are run continuously, i.e. a judge conducts the trial in one case, and normally no other case, from start to closing submissions, with minimal interruptions. Continuous trials almost never happen in Indian courts, with most trials being adjourned at the conclusions of each of up to five stages of trial. Adherence to continuous trials and minimization of adjournments are key reasons why Australian courts have high settlement rates for civil matters and high rates of undefended hearings in criminal cases with consequent benefits for judicial productivity. Continuous trials and low adjournments are achieved by having effective means of deterring misbehavior by litigants or advocates.

Courts that apply best practices tend to be preoccupied with increasing judicial productivity, minimizing adjournments and increasing certainty of trial scheduling and verdicts. The intended by-product of each of these strategies is to increase overall case settlements rates and to increase the proportion of case settlements that occur early. Discussions about case delay and backlog problems in India, however, seldom invoke these kinds of issues. Not only is the Indian court system

different from other common law systems, but arguably contemporary public debate about the problems that beset Indian courts has not yet recognized those differences. Indian courts need to acknowledge those differences and to act upon them. If this where to happen then the following major changes in judicial policy might be contemplated:

- Shifting the debate about judicial numbers to a debate about judicial productivity.
- Adopting case settlement, rather than case adjudication, as their primary strategic goal of Indian courts.
- Substantially reducing case adjournment rates in India to levels achieved in other systems.
- Implementing continuous trials as the preferred trial method for cases that do not settle.

Each of these options, if applied with any vigor, would be regarded as radical in India. All of them, however, have already been successfully applied in other systems. The challenge for those that influence the policies and practices of Indian courts is to accept that the key to successfully reforming the Indian court system is to apply methods used in other systems that have been shown to be effective. Indian practice should emulate best court management practice and improve upon it; just as Indians have done so well with English literature and the sport of cricket.