

Uncorking the bottlenecks: Using political economy analysis to address court delay



JUSTICE
DELAYED
JUSTICE
DENIED

Photo: Tim Evanson

Long delays in the resolution of court cases are a common problem in both developing and developed countries and impede anti-corruption efforts. Technical solutions such as hiring more judges and reforming cumbersome procedures, when used alone, have proved ineffective. Political economy analysis can reveal how the interests and incentives of judges, lawyers, clerks, and litigants interact to create delays, providing a basis for more effective reforms. But the success of such reforms depends on support from senior judges and pressure from civil society.



Richard E. Messick
Consultant,
Anti-corruption and rule
of law

months (World Bank 2014). Reports from the Philippines, South Africa, and Peru, among other countries, speak of courts that are clogged with cases, imposing long waits for resolution. The Indian High Court in Delhi has tens of thousands of cases pending, some 600 of which have been awaiting adjudication for more than 20 years. In Nepal corruption cases take as long as seven years to try, and an appeal can add another five years or more.

Prevalence and consequences of court delay

Lengthy delays in the processing of court cases are especially common in developing countries. A World Bank estimate of the average time to resolve a simple commercial dispute found that while courts in Singapore can complete such a case in five months, in Egypt it takes 33 months, in Colombia and Liberia 43 months, and in Bangladesh over 48

Court delay is costly – to the parties to the case and to society as a whole. The lapse of time between the filing of a case and its resolution lessens the chances that the dispute will be justly decided; witnesses may die or disappear and memories can fade. Frustrated by long waits, parties may abandon the effort to vindicate their rights, and a few may turn to violence. Delay undermines public confidence in the court system and in government itself.

There are economic consequences as well. Businesses are reluctant to trade with parties they do not know, fearing that if these individuals breach a contract the business will be without a remedy. Banks hesitate to lend to new enterprises out of concern that if the borrower defaults, resort to the courts will be futile. Applicants wrongly denied government benefits or permits must wait years for court review of the bureaucracy's decision.

Endemic delay undercuts efforts to control corruption, for it robs the criminal law of its deterrent effect. The one consistent finding across recent reviews of anti-corruption policy is that it is fear of punishment that dissuades public servants from taking a bribe or committing other corrupt acts (Hanna et al. 2011). If corrupt actors think they can evade consequences by delaying their case, they will discount the threat of punishment. Where court delays are severe, it thus makes little difference how stringent the penalties on the books may be.

Political economy analyses of delay

Judicial reforms in developing nations have failed far more often than they have succeeded. The reason, as the World Bank (2012) has observed, is that reformers often gloss over problems of governance and power within the judiciary. For years the conventional wisdom in both developed and developing nations was that court delay was a result of too few judges and court staff, manual rather than automated processes, archaic procedures, and a lack of expertise. The traditional prescription for reducing delays called for technical fixes: hiring and training more judges and support staff, setting up specialised courts, introducing computer and information technology, and reforming procedures. When these remedies failed to reduce delays, reformers began to look behind the formal structure of the courts to examine how judges, lawyers, and clerks work together to conduct the courts' business and how their interests and incentives interact – in other words, a political economy analysis (DFID 2009, 2012; Andrews, Pritchett, and Woolcock 2012).

Research on delay in state courts across the United States found that the pace of litigation varied widely among courts with the same level of resources and caseloads and similar procedures and levels of training. Looking more closely, researchers discovered that the explanation lay in the interests and incentives facing the different actors in the court system. In some courts, judges, court staff, and even lawyers were rewarded, professionally and sometimes monetarily, for dispatching cases expeditiously. In other courts, these personnel benefited from delays (Messick 1999).

A study in the Philippines showed that much of the reason for delay lay with prosecutors' incentives (Hunter [2002]). Prosecutors were reluctant to screen out cases where the evidence was weak, given pressure from crime victims

wanting speedy action and given the fear of sanctions if they refused to file a case that later turned out to be meritorious. As a result, from half to three-quarters of the criminal cases filed in trial courts across the country were dismissed before trial – an extraordinarily high percentage. The filing of so many unmeritorious cases clogs the courts, requiring judges to spend time on cases that should never have been filed. Legislation is pending that would change the rules governing the filing of cases and reducing prosecutors' incentive to file weak ones.

Use of political economy analysis in a delay study in India

The first and still the most thorough use of political economy analysis to explain court delay in a developing nation is Robert Moog's *Whose Interests are Supreme? Organizational Politics in the Civil Courts in India* (1997). By the early 1970s, across most Indian states it took on average two to three years to resolve a simple case, and often an additional year or two to enforce the resulting judgment. Moog examined the reasons for delay of civil cases in the state of Uttar Pradesh, using quantitative data on case filings and dispositions supplemented by interviews with judges, lawyers, and court staff in two districts, Deoria and Varanasi.

Looking at the period from the 1950s to the early 1990s, he asked whether the factors traditionally blamed for delay – a lack of judges, archaic procedures, complex laws, or the often-claimed Indian predilection to sue – could explain the steady rise in case-processing time. If a lack of judges caused delay, one would expect that an increase in the number of judges would

reduce delay, provided the number of cases remained constant. What Moog found was that the number of judges in the Munsif courts, the lowest-level courts in Uttar Pradesh, had risen sharply over the period and the number of cases filed had dropped; yet the number of cases decided had decreased and the average time required to resolve a case had increased. No new, complex laws had been enacted in the 40-year period when delays had increased, nor were archaic procedures to blame. Indeed, the civil code had been simplified and amended to give judges the power to speed up case processing. Finally, contrary to the belief that Indians were a litigious lot, a comparison of litigation rates in India with rates in other countries showed Indians were less likely than citizens in other nations to sue.

Rejecting traditional explanations for delay, Moog turned to a political economy analysis. He identified three major groups of actors in the system – judges, lawyers, and court staff/process servers – and the interests of each. Judges' main concern was job security and promotion. Lawyers sought to maximise fees from current clients and attract new clients. Court staff and process servers were interested in earning unofficial fees – in other words, bribes – for various services to supplement their meagre salaries.

When [technical] remedies failed to reduce delays, reformers began to look behind the formal structure of the courts.

Once interests have been identified, the second step in a political economy analysis is understanding how the different interests interact. Moog's most striking finding concerned the relationship between judges, on the one hand, and lawyers and court staff, on the other. On paper, judges are all-powerful: they control the scheduling of cases, and they can sanction or even jail lawyers who defy them. Court staff, too, are under their control. These powers theoretically allow judges to reduce delays by scheduling cases expeditiously, denying requests to continue a proceeding, holding lawyers who drag out cases in contempt, and disciplining court staff who slow down the process.

But Moog discovered that in reality judges are at the mercy of lawyers and court staff. Lawyers can harm a judge's chances for promotion, which requires a judge to resolve a certain number of cases per month. If a judge disciplines a lawyer for delaying a case, the lawyer may persuade colleagues to boycott the judge's courtroom, halting all proceedings and preventing the judge from meeting his or her quota for the month. Judges thus have an incentive to stay on lawyers' good side. Judges also need the cooperation of court staff to ensure that the court runs smoothly. If a judge complains that a staff member is corrupt or incompetent, other staff members may retaliate by slowing down proceedings and preventing the judge from meeting the monthly quota. Even if a judge is willing to run that risk, he or she cannot act directly. Although assigned to an individual trial court judge, staff members are disciplined by the senior district judge. And if the senior judge acts on a complaint from a lower court judge, court staff might act collectively to disrupt court services throughout the district or send a letter to the state High Court alleging corruption of the senior judge. Any of these actions could harm the senior judge's career prospects. Ignoring a complaint, on the other hand, is costless.

If judges had a powerful incentive to reduce delays, some might be willing to risk the ire of the bar or the court staff to crack down on the practices causing delay. But the judges' incentives all work in the other direction. When judges are transferred to another district, they do not take their caseload with them, but leave it to their successor. Likewise, while judges must decide a certain number of cases to meet their monthly quota, there are no benefits for exceeding the quota. Moreover, the

quota does not adequately take into account the difficulty of different types of cases, which encourages judges to decide easy cases and delay more complex ones until another judge takes over. The High Court of Uttar Pradesh could change these incentives by backing judges who try to improve case disposition times, but in fact its members offer no support or leadership on the issue.

If the judges have little reason to speed the processing of cases, the lawyers and court staff have every reason not to. Delay boosts their income. Lawyers in India are paid for each appearance, even if the appearance is only to reschedule a case for a later date. Clerks in many instances are bribed to "misplace" a file by a litigant wanting to delay a case. Process servers may be paid by one side to claim falsely that the other party was notified of a court date, stretching out the time to final resolution and adding to the courts' workload.

By uncovering the real causes of delay, Moog's political economy analysis shows why traditional remedies do not work and how difficult it will be to overcome the network of tightly entrenched interests that profit from delay. His study remains the best published application of political economy to court delay in a developing country and provides a useful baseline against which to compare the interests of critical actors in the courts of other nations.

Using the findings from political economy analysis

If Moog's study shows the power of political economy analysis to identify critical reforms, it also suggests the limits of that analysis when it comes to enacting reforms. In particular, it points to the importance of strong leadership from reform-minded senior judges, coupled with pressure from civil society, the media, and others outside the judicial branch. During the time when he studied the Uttar Pradesh judiciary, the state High Court failed to back lower court judges who tried to reduce delays, siding instead with the lawyers and clerks who opposed the judges' efforts. At the same time, no civil society organisation stepped forward to support delay reduction programmes. As a result, the Uttar Pradesh courts remain mired in delay and backlog (Hindustan Times 2014).

In reality judges are at the mercy of lawyers and court staff.

INTERESTS OF KEY GROUPS IN UTTAR PRADESH COURTS AND EFFECTS ON DELAY

Group	Interests	Effect on disposition time
Judges	Job security and promotion	Judges are reluctant to discipline lawyers or staff for delaying cases
Lawyers	Maximum fees	Prospects of increased fees encourage delays
Court staff	Payments from lawyers and litigants	Bribes most often slow case resolution



U4 is a resource centre for development practitioners who wish to effectively address corruption challenges in their work. The centre is operated by the Chr. Michelsen Institute – an independent centre for research on international development and policy – and is funded by DFAT (Australia), DGD (Belgium), SDC (Switzerland), Danida (Denmark), DFID (UK), GIZ (Germany), Norad (Norway), Sida (Sweden) and The Ministry for Foreign Affairs of Finland. All views expressed in this brief are those of the author(s), and do not necessarily reflect the opinions of the U4 Partner Agencies or CMI/U4. (Copyright 2015 - CMI/U4)

By contrast, in Malaysia the new system established in 2008–11 by then Chief Justice Zali Azmi and continued by his successors provides judges with powerful incentives to process cases expeditiously. Each judge is required to observe strict rules governing requests for postponements of hearings or trials and to report daily on cases resolved and work accomplished. The chief justice and other senior judges conduct spot checks and make surprise visits to courtrooms to ensure that judges are following the new rules. The Malaysian Bar Association and executive branch agencies have also been enlisted in the reform effort (Choong 2014). The result: in one year the backlog in the High Court was cut from some 48,000 cases to just over 10,000. Even more spectacular reductions were realised in the trial courts (World Bank 2011).

Pressure from the media and civil society groups is often essential. In Britain in the nineteenth century, agitation by social reformers and their publications spurred the overhaul of the British courts. Surveying reform efforts across a number of countries today, one observer notes that without civil society support, reform frequently consists only of changes in “infrastructure and information systems,” what she terms “band-aid solutions.” Civil society can supply the pressure to overcome the “vested interests [that] often prevent reforms of a structural nature” (Dakolias 2000, S30).

Lessons from experience

As evidence from India, the Philippines, and the United States shows, conducting a political economy analysis can help uncover the real reasons for court delays. This in turn

is an essential first step towards designing effective reforms. Other lessons from experience:

- *Political economy analysis rests on a quantitative analysis of court records.* The Uttar Pradesh data gathered by Moog showed that assumptions that a lack of judges, complex procedures, or Indian litigiousness were the main causes of delay were without foundation. The Philippine data revealed that the problem lay in the large number of meritless criminal cases filed by prosecutors.
- *Reform must change incentives.* In India many procedural changes have been enacted that, on paper, empower judges to speed case processing. They have failed, as Moog’s study reveals, because of the powerful incentives that put judges at the mercy of lawyers and staff.
- *Changing incentives requires leadership from senior judges and the support of a critical mass of clerks, lawyers, judges, and litigants.* Behind the chronic delays in Indian courts is the failure of the senior district judges, and the High Courts to which they report, to take the lead on delay reduction. Successful delay reduction programmes require leadership, the secret of Malaysia’s reforms.
- *Civil society support is critical.* Changing the interests of powerful groups within the judiciary requires pressure from many different sources, including those outside the judicial system, often over an extended period of time.

References

- Andrews, Matt, Lant Pritchett, and Michael Woolcock. 2012. “Escaping Capability Traps through Problem-Driven Iterative Adaptation (PDIA).” Working Paper 299. Washington, DC: Center for Global Development. <http://bit.ly/1CUMIRm>.
- Choong, Yeow Choy. 2014. “Courts in Malaysia and Judiciary Initiated Reform.” Chap. 11 in *Asian Courts in Context*, edited by Jiunn-Rong Yeh and Wen-Chen Chan. Cambridge: Cambridge University Press.
- Dakolias, Maria. 2000. “Legal and Judicial Development: The Role of Civil Society in the Reform Process.” *Fordham International Law Journal* 24 (6): S26–S55.
- DfID (Department for International Development). 2009. *Political Economy Analysis: How to Note*. London. <http://bit.ly/1IUb375>.
- . 2012. *Tools from the “How to Note” on Political Economy*. London. <http://bit.ly/1Hm1Mxg>.
- Hanna, Rema, Sarah Bishop, Sara Nadel, Gabe Scheffler, and Katherine Durlacher. 2011. *The Effectiveness of Anti-corruption Policy*. London: EPPI-Centre, University of London. <http://bit.ly/1kVND>.
- Hindustan Times. 2014. “Justice Has a Mountain to Climb, of 31.3 Pending Cases.” 4 September.
- Hunter, Rosemary. [2002]. “Philippines Case Decongestion and Delay Reduction Project.” PowerPoint. World Bank. <http://bit.ly/1OLa07U>.
- McWilliams, J. Wesley. 1955. “The Law: A Dynamic Profession.” *ABA Journal* 41 (1): 18–20, 90–92.
- Messick, Richard E. 1999. *Reducing Court Delays: Five Lessons from the United States*. PREM Note 34. Washington, DC: World Bank. <http://bit.ly/1eW3xg>.
- Moog, Robert S. 1997. *Whose Interests Are Supreme? Organizational Politics in the Civil Courts in India*. Ann Arbor, MI: Association for Asian Studies.
- World Bank. 2011. *Malaysia: Court Backlog and Delay Reduction Program: A Progress Report*. Washington, DC.
- . 2012. *New Directions in Justice Reform: A Companion Piece to the Updated Strategy and Implementation Plan on Strengthening Governance, Tackling Corruption*. Washington, DC. <http://bit.ly/1DI6UHi>.
- . 2014. *Doing Business 2015: Going Beyond Efficiency*. Washington, DC. <http://bit.ly/1tgNlae>.