

To,

The Deputy Secretary
National Mission for Judicial Reforms
Department of Justice
Ministry of Law & Justice,
Jaisalmer House
26, Mansingh Road
New Delhi 110011

1st April 2021

Dear Sir,

Ref: - Sanction Order dated March 22, 2019

(File No. N-9/5/2019-NM)

**Sub: - Re-Submission of the Final Report of Study on the Impact of
Public Infrastructural Projects**

Under the Scheme for Action Research and Studies on Judicial Reforms National Law School of India University has undertaken a research study on “Study the Impact of Public Infrastructural Projects” as approved by the Ministry of Law and Justice, Government of India.

As per the approved terms of project sanction by the Department of Justice a separate and independent Final Report of the research project has been drafted highlighting the details of the work carried out.

Based on the suggestions provided by the Joint Secretary during the final project presentation meeting held on 22nd February 2021(Ref: Minutes letter dated 2nd March 2021), we conducted a One-Day Consultation cum Validation Programme and have proposed an action plan.

The details of the One-day Consultation cum Validation Programme on the Impact of Litigation on Public Infrastructure Projects held on 10th March 2021, is included in the report as Annexure - 1.

The Action Plan Report has been included in the report as Chapter 8.

With warm regards,
Yours Sincerely

Dr. Yashomati Ghosh
Associate Professor

Final Report

On

The Study on Impact of Litigation on Public Infrastructural Projects

**Under Scheme for Action Research and Studies on Judicial
Reforms**

**Department of Justice
Ministry of Law and Justice
Government of India**

Final Report

**Submitted by: National Law School of India University,
Bengaluru**



PROJECT INFORMATION

Project Title:	Study on the Impact of Litigation on Public Infrastructural Projects
Date of Award and Expected Date of Completion	April 1, 2019 –December, 2020
Report Number and Period	Final Report
Name of the Principal Investigator	Dr. Yashomati Ghosh

Principal Investigator: Dr. Yashomati Ghosh, Associate Professor

Research Investigator: Mr. Richin S Kottaram

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A meaningful research study involves the cooperation and support of many individuals. I take this small opportunity to express my gratitude to all the people and institutions without whose support the completion of this research study would have been a distant dream. At the outset I am grateful to the Department of Justice, Ministry of Law and Justice, Government of India for initiating the Scheme for Action Research and Studies on Judicial Reforms and providing NLSIU the opportunity to conduct the research study on “*Impact of Litigation on Public Infrastructural Projects*”. I am thankful to all the official members of the Department of Justice for providing all the necessary support in conducting this study.

I express my deepest gratitude to the Advocates of various High Courts and Subordinate Courts for providing all information relating to government litigations and policies. I am equally grateful to all the project management officials of various infrastructural projects working under different ministries for providing their opinions and data for the research study.

I record my sincere appreciation towards all the several members of the civil society group who at different points of time provided their wholehearted support and commitment to the research study.

Most importantly I am indebted to my Vice Chancellor, Prof. (Dr.) Sudhir Krishnaswamy, without his kind support and encouragement the research study would not have turned into a reality. I am thankful to all the members of the faculty and administrative staff at NLSIU for the assistance and cooperation provided by them.

Last but not the not least I am grateful to all my family members for standing beside me and extending their love and support.

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EXECUTIVE SUMMARY

Infrastructure is critical for economic and social development the world over. At the most basic human level, people need access to clean, safe water for drinking and cooking, and power for lighting and heating their homes. Roads and railways allow people to get to work and provide for their families. This transport infrastructure, as well as seaports and airports, allows firms to reach the markets they need to trade their goods and services, including across international boundaries. In these ways, and many more, infrastructure is vital to quality of life and economic development.

Litigation affects the implementation of the infrastructure projects in multiple ways. It adversely affects the working of administrative processes and cause immense delay. Long delays in infrastructure are not just peculiar to India but a challenge in many democracies. It is after all a hallmark of an open society that affected citizens have the right to ask for reviews and changes. However, even considering those necessary checks and balances we have some egregious delays and cost overruns.

The research study evaluated and reviewed the implementation of infrastructural projects in light of any delay caused due to litigation and various court process. The study identified the bottlenecks which are instrumental in giving rise to litigation and consequently suggested a way forward for reducing litigation.

The research methodology was a combination of both empirical study and doctrinal research. The doctrinal research involved analysis of primary and secondary resource materials. A major part of research was conducted through empirical method and the research was based on studying the implementation of five infrastructural projects and analyzing the impact of litigation on the effective implementation of these projects.

The findings of the study emphasized on the non-compliance of existing laws and policies, lack of proper alternate dispute resolution framework, lack of proper mediation as the preferred form of dispute resolution, impact of litigation on public infrastructure in India, economic analysis of litigation and role of arbitration in litigation.

The study also makes some important policy recommendations to reduce the delay of public infrastructural delays due to litigation. It includes the compliance of existing laws and policies by various government departments, timely monitoring of cases, introduction of mediation at

the pre-litigation stage, proper communication within the ministries, data management etc. With respect to Strategies for Reforming the Administration of Justice, the study recommends on simplifying the laws and procedures, promoting transparency in judicial proceedings, making more use of technology etc. Considering the project management perspective, the study recommended in designing a project management program or scheme approach to infrastructure development, appointing a professional who have expertise in project management and delivery to manage infrastructural projects and to enhance institutional capacity and capacity of professionals.

CHAPTER 1

INTRODUCTION

1.1 Background

“Infrastructure” is many and diverse: roads, tunnels, bridges, railways, airports, harbors, canals, subways and tramways, dams, irrigation networks, water pipes, water purification plants, sewers, water treatment plants, dumps and incinerators, power plants, power lines and distribution networks, oil and gas pipelines, telephone exchanges and networks, district heating equipment, etc.

Infrastructure is critical for economic and social development the world over. At the most basic human level, people need access to clean, safe water for drinking and cooking, and power for lighting and heating their homes. Roads and railways allow people to get to work and provide for their families. This transport infrastructure, as well as seaports and airports, allows firms to reach the markets they need to trade their goods and services, including across international boundaries. In these ways, and many more, infrastructure is vital to quality of life and economic development.

National Infrastructure Commission¹ states that infrastructure investments are of major importance, in both developed and developing economies. For the latter, the impact can be seismic transforming an economy and the prospects for its citizens as roads are built and utilities put in place. But in more mature economies too, where evidence suggests that returns to investment are more in line with other types of capital investment, keeping pace with infrastructure needs remains integral to sustaining economic growth—whether through new investment or upgrading of existing provision.

Infrastructure affects economic growth in two central ways—by directly boosting activity and by underpinning productivity. In the former, simply constructing and operating new or upgraded infrastructure supports economic activity, boosting demand for goods and services and providing jobs. Much more fundamentally, however, infrastructure underpins productivity throughout an economy. Good quality roads and railways, for example, make it easier, cheaper

¹National Infrastructure Commission is a non-ministerial government department responsible for providing expert advice to government on pressing infrastructure challenges.

and faster to transport goods and people, while airports and seaports connect firms across international boundaries, facilitating trade and investment. Reliable electricity, water and telecoms infrastructures enable firms to function efficiently and without disruption, and support wider goals, such as those related to the environment. All this means that even in the most advanced economies, if infrastructure capacity does not increase in line with economic and demographic growth, it can instead act as a drag on progress.

One of the major hinderance for public infrastructure development in India is the delay in completing the project. Long delays in infrastructure are not just peculiar to India but a challenge in many democracies. It is after all a hallmark of an open society that affected citizens have the right to ask for reviews and changes. However, even considering those necessary checks and balances we have some egregious delays and cost overruns.

One major cause of the delay in project implantation is government litigation and judicial intervention. According to the Economic Survey 2017-18² the impact of court injunctions in ongoing projects in six ministries has resulted in loss of more than Rs. 52000 crores. The government is fighting more than 1.35 lakh cases belong to different ministries and proper mechanism may bring down the number.

The Economic Survey 2018 reports that, it is difficult to estimate the total costs of pendency and delays, however, since the project costs are pre-dominantly debt-financed, it is likely that project costs have increased by close to 60 percent given the average duration of court stay. The survey quoted data collected from State Bank of India (SBI) to highlight a similar grim situation in the private sector. At least 11 projects financed by the SBI worth Rs 33,540 crore sought at least 28 extensions in the last three years due to legal tussle.

In the context of increasing impact of litigations on many infrastructure projects, it becomes important to conduct an independent study on the impact of litigation and judicial processes on the over-all cost of infrastructural projects and to identify the various factors of impediments adversely affecting the feasibility of the project works.

There has been no substantive research study done for analyzing the impact of litigation on infrastructural delays. The Law Commission of India in in the 126th Report³ on Government

²Economic Survey 2017-18, available at <http://mofapp.nic.in:8080/economicsurvey/>

³Law Commission Report – 126, available at <https://indiankanoon.org/doc/42589691/>

and Public Sector Undertaking Litigation Policy and Strategies (1998) had dealt with certain aspects of government litigation and the estimated cost involved in such litigation but had not analyzed manifold impact of litigation on infrastructural projects such as cost-overrun, increase in the cost of manufactured product, profitability of public sector undertakings, loss of public exchequer etc.

The primary goal of research study is to evaluate and review the implementation of infrastructural projects in light of any delay caused due to litigation and various court process. The study will be beneficial in identifying the bottlenecks which are instrumental in giving rise to litigation and consequently would suggest a way forward for reducing litigation.

1.2 Research Objectives

- To identify and study five infrastructural projects which have been affected by court litigation.
- To analyse the primary legal issues involved in the government litigation and evaluate the role of government in initiating the litigation.
- To study the nature of cases, grounds for filing of appeal and the impact of grant of interim injunction on the infrastructural projects.
- To identify the factors such as cost of materials, labour, electricity etc. which has a direct impact on the overall cost of the infrastructural project and evaluate the impact of delay on these factors and the total cost of the project.
- To identify the factors of litigation cost and analyse whether an increase in litigation costs adversely affects the feasibility of the project.
- To critically analyse the frequency and extent to which arbitration awards are challenged in a court.

1.3 Description of the Team

- i. Principal Investigator: Dr. Yashomati Ghosh, Associate Professor
- ii. Research Investigator: Mr. Richin S Kottaram

1.4 Literature Review

It has always been said that the laws in India are well-based, but the people do not believe in the law due to the impact of litigation- mainly the financial impact. According to the National

Judicial Grid Data there are a total of 32196336 pending cases where 9020006 are civil cases.⁴ Even though there are steps taken by the High Court of each state where all the District Courts have to submit a weekly report of the cases disposed, there is still so many pending cases. There is still a huge delay in case disposal, and this creates a huge impact on the society at various levels. The Law Commission way back in the year 1958 had emphasized the need to effectively deal with the problem of arrears.⁵ Judicial backlog is presently a matter of concern for all the major states of the country.

A significant percentage of government spending in India goes towards the creation of new infrastructure like the construction of roads, ports, railways, and power plants. Construction contracts, however, often have a reputation for disputes and conflicts between contractors and governments. Such disputes ultimately delay implementation of the contracts and increase total costs, adversely impacting development outcomes of the projects.⁶

The issue of impact of litigation on heavily funded public infrastructure projects is a matter of growing concern. The probable causes which could be giving rising to this issue in the first place are:

- Is there proper enabling legislation in the state where the company is doing business?
- Is the project within the scope of any enabling legislation? Even in states with enabling legislation.
- Was the project proposed and approved properly? The enabling legislation will contain requirements for the proposal and adoption of the project and, depending upon the level of government partner, additional guidelines for a local government to adopt its own rules.
- Was the bidding process flawed? Errors in the bidding process are a sure-fire way to send a project back several phases or may lead to greater liability. Entities not selected for a project have every motivation to go over the bidding with a fine-tooth comb and to bring any irregularities to light.

⁴Welcome to NJDG - National Judicial Data Grid, available at https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard

⁵ 14th Law Commission Report on the Reforms of Judicial Administration (1958), p 64, available at <http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf>

⁶Shankar Lal, RESOLVING DISPUTES, AVOIDING LITIGATION IN INDIA WORLD BANK BLOGS (2016), available at <https://blogs.worldbank.org/governance/resolving-disputes-avoiding-litigation-india>.

- Do any local zoning rules or guidelines prohibit the project? Projects should not run afoul of zoning rules or any other local requirements without a plan for the same.
- What effect will the project have on nearby landowners, businesses, or residents? Identifying and addressing individuals who may be affected by condemnation, nuisance or other similar issues is critical to the long-term potential for success.
- What effect will the project have on the environment? Legislation or regulations may require an environmental impact study or fee before the project can be approved or begun. Even if not required, a study may be advisable depending on the character of the affected land or area.
- Under certain circumstances, concerned citizens, non-profit or advocacy groups or even jilted competitors may file suit to halt a project.
- Litigation filed by the public partner; and
- Litigation filed by other interested parties, usually attempting to stop the particular project.⁷

According to the Announcements made by the Union Budget 2019-2020, the Government of India is taking every possible initiative to boost the infrastructure sector where India plans to spend US\$ 1.4 trillion on infrastructure in the next five years and the Govt has given a massive push to the infrastructure sector by allocating Rs 4.56 lakh crore (US\$ 63.20 billion) for the sector.⁸ On the positive side, over the past 4 years the largest PE investment witnessed by India is the Canadian asset management firm Brookfield's US\$ 1.9 billion acquisition of Pipeline Infrastructure India in first quarter of 2019.⁹ The economic surveys for the years 2018-2019 and 2019-2020 along with the 100th, 126th and 240th Law commission reports are used to understand the impact of litigation on public infrastructure project.

A brief idea of what has been discussed in the above-mentioned reports respectively:

The Law Commission Report on Litigation by and against the Government - This report deals with certain areas of law relating to litigation by and against the Government. The Report tries to bring in focus the important aspects of litigation by and against the Government, in view of

⁷Litigation Risks in Public-private Partnerships, CONSTRUCTION EXECUTIVE | WELCOME (2016), available at <http://www.constructionexec.com/article/litigation-risks-in-public-private-partnerships>.

⁸Brand India, IBEF, available at <https://www.ibef.org/industry/infrastructure-sector-india.aspx>.

⁹ Id.

their urgent and pressing importance in the context of Court congestion, justice to the citizen and the concept of the Welfare State. The Section 80 of the Civil Procedure Code creates more problems rather than solving them as it diverts the attention from the essential issues and focuses on the technicalities. Hence the cause of justice gets defeated and the procedural provision becomes obstacles in achievement. Another issue raised in the Report is that a longer time period is allowed for a Government to file a suit and this creates hardship to the prospective defendant.

The Law Commission Report on Government and Public Sector undertaking Litigation Policy and Strategies - The purpose of this report was to lay down broad guidelines on litigation policies and strategies of the public sector undertakings and the Govt with a view to reduce litigation, saving avoidable costs on unproductive litigation. One of the reasons given in the report is the lack of accountability with respect to the multiplication of the litigation with respect to public sector undertakings. The Report suggests arbitration as a remedy to reduce the litigation and its costs.

The Law Commission Report on Costs of Civil Litigation - This report was taken up based on the observations made by the Supreme Court that the legal provisions relating to costs needs to be revisited by the legislation. The Supreme Court in the case of *Ashok Kumar Mittal vs. Ram Kumar Gupta*¹⁰ has said that “The present system of levying meagre costs in civil matters (or no costs in some matters), no doubt, is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed or resorted to as a “buying-time” tactic. More realistic approach relating to costs may be the need of the hour. Whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and should engage the urgent attention of the Law Commission of India.” The common idea is that (i) costs should ordinarily follow the event; (ii) realistic costs ought to be awarded keeping in view the ever-increasing litigation expenses; and (iii) the cost should serve the purpose of curbing frivolous and vexatious litigation. Another important component of cost is the advocate’s fees as it is on this count, a party to the litigation is put to heavy expenditure which he will not be able to recover. One of the recommendations given is that costs in civil suits/proceedings should be such as to curb false and frivolous litigation and to discourage adjournments on feeble grounds or for ulterior purpose. Further, the costs to be

¹⁰ (2009) 2 SCC 656

awarded to a successful party should be realistic and reasonable and to this effect the rules in vogue should be revisited by the High Courts.

Economic Survey of India (2018-2019) - According to the survey, India needs to spend 7-8 per cent of its GDP on infrastructure annually, which translates into annual infrastructure investment of US\$200 billion. However, India has been able to spend only about US\$100-110 billion annually on infrastructure, leaving a deficit of around US\$90 Billion per annum. Given the fiscal constraints that leave less room for expanding public investment at the scale required. With the aim of boosting investment in infrastructure, National Investment and Infrastructure Fund has been created with a capital of approximately `400 billion to provide investment opportunities to commercially viable projects. In addition, a Credit Enhancement Fund for infrastructure projects for increasing the credit rating of bonds floated by infrastructure companies is going to be launched in the country. The Survey also states that Public Private Partnerships are quintessential for addressing infrastructure gaps in the country and there is a need for establishing an institutional mechanism to deal with time-bound resolution of disputes in infrastructure sectors.

Economic Survey of India (2019-2020) - According to the Survey, the growth of infrastructure/ construction goods has declined by 2.7 per cent in the current financial year 2019-20 (April-November). It is well-accepted that investment in infrastructure is necessary for growth. Power shortages lead to dependence on expensive captive power, which in turn impels high costs and lack of competitiveness for the economy. In the Report it is mentioned that India recently launched the National Infrastructure Pipeline for the period FY 2020-2025 where to achieve the GDP of \$5 trillion by 2024-25, India needs to spend about \$1.4 trillion (100 lakh crore) over these years on infrastructure. The challenge is to step-up annual infrastructure investment so that lack of infrastructure does not become a binding constraint to the growth of the Indian economy. To implement an infrastructure program of this scale, it is important that projects are adequately prepared and launched. The NIP has projected total infrastructure investment of ` 102 lakh crore during the period FY 2020 to 2025 in India. As per the NIP, Central Government (39 per cent) and State Government (39 per cent) are expected to have equal share in funding of the projects followed by the Private Sector (22 per cent). This is the first ever exercise undertaken in the country. However, it is recognized that financing of the National Infrastructure Pipeline would be a challenge. Therefore, the aim is to reduce the litigation as

well as the costs of litigation so that it does not have a more negative impact of the public infrastructure projects in place.

1.5 Research Methodology

The research methodology will be a combination of both empirical study and doctrinal research. The doctrinal research will involve analysis of primary and secondary resource materials. A major part of research will be conducted through empirical method and the research will be based on studying the implementation of five infrastructural projects and analyzing the impact of litigation on the effective implementation of these projects. The empirical research will be conducted amongst the various Union Ministries and Public Undertakings.

Sample case studies will be conducted from amongst six major ministries which are largely involved with infrastructure development works. The empirical research will be conducted by means of field visit, questionnaire – based survey, interview schedule, case study method and collection of data.

1.5.1 Empirical Study

Five Infrastructural Projects which are affected by court litigation have been identified and analyzed for the research. They are:

- Elevated Corridor Project, Bangalore, Karnataka
- Araku Valley Project, Andhra Pradesh
- Delhi Metro Phase IV Project, New Delhi
- Bandra-Worli Sea Link Project, Maharashtra
- Karapuzha Irrigation Project, Kerala

1.5.2 Sampling Plan

The empirical research was conducted by means of questionnaire-based survey, interview schedule, field visit and collection of data. Field study were conducted in the identified infrastructure project areas.

The case studies were selected based on the nature of infrastructure. Information on primary legal issues, nature of cases, grounds for filing of appeal, impact of interim injunction etc were collected from different High Courts and District Courts.

1.5.3 Data Collection Method

The Secondary data was collected from study of various governmental reports, books, articles as well as other existing literature. Primary data was based on the empirical study conducted. The research team principally used survey research by using field interview as the means for collection of data. Other data collection tools e.g., field observation method, focused group discussion was also employed to collect the primary data for the purpose of the study. The activities undertaken by the research team for collection of primary data is mentioned below:

- Collection of Quantitative Data
 - i. Data on government litigation from different State High Courts and District Courts.
 - ii. Data on infrastructure projects and their cost part has been collected various ministry reports and circulars.
 - iii. Data on factors of litigation, overall cost, Assessment Reports etc. have been collected through RTI Applications. However, the researchers did not receive data regarding all the queries. Some of the data received were not provided in the manner sought. Most of the government departments failed to respond to the queries sent through the RTI applications. The data analysis is mostly based on the information collected and the materials which are accessible in the public domain.
 - iv. Data available on the e-Suvidha portal of the government.
 - v. Data from various State government websites and documents.
 - vi. Data from reputed research journals and newspapers.

- Collection of Qualitative Data
 - i. Interview Schedule: Interview of different government officials, advocates and construction agencies were conducted through detailed one to one discussion as well as focused group discussion. The methodology applied was a combination of open-ended interviews with series of checklists, guided conversations and relating short answers to specific questions. Effort was made to understand the various legal issues and factors causing the delay of public infrastructure. The emphasis was that the respondents narrated their experience in their own words.
 - ii. Questionnaire Method: The information on the litigation and major issues concerned with infrastructure projects were collected from individuals and

petitioners related to the concerned projects. The selection of respondents was based on their relationship with the project.

- iii. Consultation with the members of the civil society group: Several rounds of consultation sessions were conducted wherein members of the civil society group and citizens were invited to share and narrate their experiences related to different infrastructure projects.
- iv. Field Study were conducted in various government Departments, Courts, and other offices.

1.6 Major Activities Conducted

- Studied and Analyzed the impact of litigation on the overall cost of the infrastructure.
- Evaluated the factors of litigation cost and analyzed whether an increase in such cost adversely affects the feasibility of the project.
- Studied the nature of cases and primary legal issues involved in it.
- Studied the nature of decisions/orders issued by first court jurisdiction and the time taken in passing the order regarding the case studies.
- Studied the case preferred for second appeal, including appeals made before the Supreme Court of India and the time taken for the disposal.
- Analyzed whether the consequent norms of administrative law principles have been responsible for increase in government litigation.
- Studied the limitations of infrastructural laws and the land acquisition laws which often results in litigation.
- Studied the feasibility of tribunals in reducing court pressure.
- Analyzed whether the delay and uncertainty in litigation proceedings have a detrimental impact on investments.
- Analyzed the functioning of the regulatory authorities in implementation of the projects.
- Critically studied the various measures initiated and adopted by various State and Union Ministries for reducing litigation.

CHAPTER 2

PRIMARY LEGAL ISSUES IN GOVERNMENT LITIGATION AND THE ROLE OF GOVERNMENT

2.1 Introduction

Stating the Ministry of Law and Justice, government departments are a party to around “46 percent” of court cases¹¹. This figure, albeit unverified, hides more than it reveals about the nature and extent of the problem of government litigation. To a citizen, everything from a local panchayat to the Prime Minister’s Office could be representative of the “government”. In addition, entities such as nationalized banks and universities, which most citizens might not consider as “government”, “State” for the purposes of Article 12 of the Constitution. Therefore, resolving the issue of “government litigation” should be based on the fact that the government in India functions in so many different forms that a one-size-fits-all approach to deal with the issue is impossible.

The ‘government litigation’ contributes the most to the judicial burden, it is necessary to understand why these cases enter the system to solve the problem of an over- burdened judiciary. This is not only important for the judiciary, but also the government, since litigation affects the pace of government administrative process by road-blocking the decision-making process on matters that are the subject of litigation.

The legal burden on government departments has always found mention in debates surrounding governance reform. Most concretely, National Litigation Policy (NLP) formulated in 2010, was an important attempt to provide strategies to manage government litigation. It suggests setting up an internal monitoring system to track legal burden of each department and recommends inter-ministerial bodies to oversee litigation at the national and regional levels. A draft of the new policy was reportedly considered and apparently also passed by a ‘high-powered committee of secretaries’ in 2015¹².

¹¹Action Plan to Reduce Government Litigation, Ministry of Law and Justice, 13th June 2017, Available at: <http://doj.gov.in/page/action-plan-reduce-government-litigation>

¹²“Secretaries' panel clears litigation policy”, The Business Standard, 5th June 2015, Available at: http://www.business-standard.com/article/pti-stories/secretaries-panel-clears-litigation-policy115060400439_1.html

2.2 Government Litigation

Overall, about 3.6 crore cases are pending in the Indian judicial system across the Supreme Court, High courts, and subordinate courts¹³. Government is considered to be the biggest contributor to litigation in India. Approximately 46 per cent of the total pending cases in courts pertains to the government¹⁴. This includes cases relating to the Public Sector Undertakings and other autonomous bodies. The litigation includes service matters, disputes with private entities as well as inter-se disputes between two government departments and disputes between two PSUs.

Writ jurisdiction made possible most of the litigations against the government. Writ jurisdiction, regarded as ‘extraordinary jurisdiction’¹⁵ assures the citizens easy accessibility of High Courts for seeking relief against any authority, including any government, for the violation of any legal right. In Article 226, the Constitution of India empowers the High Courts to issue writs, orders, directions to any individual or authority, for protection of the fundamental rights or any other rights.

Under Article 226, a High Court can provide relief not only against persons or authorities within its territorial jurisdiction, but also beyond – as long as the cause of action, in whole or in part, arises within such territories. Article 226 grants High Courts wide- ranging powers, even wider than the power vested in the Supreme Court of under Article 32, which can be invoked for enforcing Fundamental Rights alone

2.3 National Litigation Policy, 2010

In 2010, the National Litigation Policy was introduced in recognition to the fact that the government and its several agencies are the predominant litigants in tribunals and courts. The policy provides a systematic framework to handle various aspects of government litigation, such a government representation, seeking adjournments, exploring alternative dispute resolution mechanisms etc.

¹³ National Judicial Data Grid, Data as of 2020. Available at: <http://njdg.ecourts.gov.in>

¹⁴ National Judicial Data Grid, Data as of 2020. Available at: <http://njdg.ecourts.gov.in>

¹⁵ The writ jurisdiction under Article 226 and the supervisory jurisdiction under Article 227 are extraordinary jurisdiction; 124th Law Commission Report, Available at: <http://lawcommissionofindia.nic.in/101-169/Report124.pdf>

Most states have created corresponding State Litigation Policies along the lines of the NLP. After over seven years of existence and subsequent attempts at redrafting, the NLP has failed to have any noticeable impact.

The National Litigation Policy identifies key stakeholders in the management of litigation including “the Ministry of Law & Justice, various Departments heads, Law Officers and Government Counsel, and individual officers”. It creates monitoring systems at the individual level and calls for establishment of ‘Empowered Committees’. The Committee is set up “to receive and deal with suggestions and complaints including from litigants and government Departments and take appropriate measures in connection therewith.” The government representation to these committees is to be made by a “Screening Committee” at every level. The policy recognizes the need for coordination amongst these bodies but fails to clarify the role distribution amongst them, resulting in lack of transparency in their work. Even though the NLP recognizes ‘accountability’ as the cornerstone of a successful policy, no measurable or tangible yardstick has been provided to determine efficiency and effectiveness of the committees or their work.

2.4 Limbs (Legal Information Management and Briefing System)

It is a web-based application by the Department of Legal Affairs under the Ministry of Law and Justice, is an initiative to make legal data available at one single point and streamline the procedures of litigation matters. The major benefits under this system are as follows:

- This provides the government an efficient legal framework for speedy resolution of disputes. It helps in achieving the government's objective of “Minimum government, maximum governance”, “Digital India”, “Ease of doing business” and improve the Transaction Capacity Governance.
- It provides a low-cost web technology access to all the stakeholders involved in a court case in a coordinated way whereby it provides inputs which are available seamlessly on 24×7 basis as per the defined access rules.
- It helps in organizing scattered Information at one single database and also create a professional base available for expert advice.
- It reduces the huge expenditures involved in resolving the cases, saves time and makes the working of different departments under a ministry.

LIMBS involves civil cases that should be extended to criminal cases. Presently, it is applicable only to the union government, the idea must be extended to state governments also. LIMBS is in its nascent stage. To make the effort more coordinated, various departments should submit the real-time data as early as possible in a time bound manner.

The government has also taken many other steps to reduce the litigations. Some of them are discussed as follows:

- 1. Action Plan by the Department of Justice:** The Department of Justice, in 2017, released a document titled 'Action Plan to Reduce Government Litigation' providing a breakdown of case burden on each department. Based on data from LIMBS, the Action Plan shows that the Railways is the most litigious government department at the central level. While it is commendable that the government has started to collate data on its individual departments, we do not have the actual details of what the data points being collated. Even basic information which indicates whether the department is a petitioner or a respondent in many of these cases is not available. Moreover, beyond providing information, the impact of the Action Plan in reducing the volume of government litigation is unclear.
- 2. Promotion of Alternate Dispute Resolutions:** To reduce the heavy demand on Court time, efforts were made to resolve the disputes by resorting to Alternative Dispute Resolution Methods which includes Arbitration, Mediation and Conciliation. As regards to the promotion of alternative methods of dispute resolution, the International Centre for Alternative Dispute Resolution (ICADR) was established by the Department of Legal Affairs with the main object of the ICADR is to promote popularize and propagate Alternative Dispute Resolution to facilitate early resolution of disputes to reduce the burden of delay in the Courts. In the Indian context the scope of the rules for the arbitration process are set out broadly by the provisions of the Arbitration and Conciliation Act, 1996 and in the areas uncovered by the Statute the parties are free to design an arbitration process appropriate and relevant to their disputes. The Process of mediation aims to facilitate the development of a consensual solution by the disputing parties. It is highly promoted by the Courts especially in family cases. For conciliation, the Department of Legal Affairs provides annual recurring Grants-in-aid to National

Legal Services Authority (NALSA) which is a statutory body to facilitate conciliation proceedings.

3. **Setting up of Legal Cells in all Departments:** The government is planning to introduce the Integrated Legal Departments same as that of Integrated Financial Adviser (IFA) scheme of the department of expenditure, in which 54 Indian Legal Service (ILS) officers will be posted in ministries and departments.
4. **Attempt of Judiciary to Reduce Cases:** The High Court of each State has ordered all the Lower Courts to send bi-weekly reports and monthly reports stating the number of cases disposed to the pending cases and why is there a delay in disposing of cases, etc. This measure is taken by the Judiciary to ensure that the backlog of cases is reduced and in turn reduce litigation and costs of litigation.

2.5 Primary Legal Issues in Government Litigation

The primary legal issues involved in the government litigations are as follows:

1. **Non-Compliance of Existing Laws and Policies:** When dealing with government policies, guidelines, and law, one significant question faced is the nature of these policies, directions and contracts and its compliance. For e.g., do the codes and guidelines issued by different departments of the Government of India or the contracts entered by public bodies fall in the broad area of public law and therefore enforceable by judicial intervention or are they simply executive instructions subject to deviations.

On the issue of high number of government litigation, it has been estimated that almost 70 per cent of the total cases pending are involving the government and its various authorities. The reason for increasing government litigation has been attributed to the numerous public services provided by the state and its various agencies.

Most of the Indian courts have addressed these questions in various cases and circumstances while dealing with the petitions filed against the government. These petitions seek strict enforcement and compliance of these government policies as a matter of right and held that executive instructions which are not statutory in nature or under some provision of the Constitution of India, are not 'laws' and not judicially enforceable.

Therefore, compliance cannot be enforced through courts, and the competent authority might slide away from those guidelines where the exercise of discretion so warrants. This is because such guidelines, by their nature do not fall in the category of legislation, direct, subordinate, or ancillary. They play an advisory role and non-adherence to or deviation from them is necessary and implicitly permissible if circumstances of any fact or law warrants the same. Judicial control takes over only when the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.

In the Delhi Metro case study, it is observed that around 80% of the estimated compensation was not paid to the Appellants by the Government even there was an indefeasible obligation on part of Government to make payment but due to the non-compliance thereto it resulted in the vitiation of acquisition proceedings.

With respect to the Bandra-Worli Project, several aspects of the Environmental Regulations of the country have been violated. The most important being the non-consultation of the local community and the fact that the condition to have a public hearing on the proposed was never complied with. This had led to filing of litigations by the local communities which caused delay to the project.

In the Elevated Corridor study, it is found that the project doesn't have approval from the Metropolitan Planning Committee (MPC) and it is designed and proposed by the Bangalore Development Authority (BDA), who doesn't have the authority to do so under 74th Constitutional Amendment. The proposal is currently stayed by the Hon'ble High Court of Karnataka because of the petition filed by the Namma Bangalore Foundation (NMF) and Citizen Action Forum.

In the case of the Araku Valley Project, due to the non-implementation of FRA, there has been many litigations. The main reason being that the state

government is yet to fully distribute land titles in accordance with the Act. Also, after the Samata judgement of 1997 (Samata vs. Union of India)¹⁶, mining activities are stopped in Araku Valley (Scheduled Tribal Areas).

Acquisition of land by government on the Karappuzha Project has lately drawn resistance in many cases due to inadequate compensation for the land and loss of livelihoods of the affected people, as well as for involuntary displacement without proper rehabilitation. The Hon'ble Supreme Court has cleared the air over the validity of land acquisition that was initiated but could not be completed in the stipulated five-year period. The court ruled the process will be deemed lapsed only if the possession of land is not complete and no compensation been paid. The SC further clarified that delay caused due to an interim order passed by a court has excluded from the computation of five years. The ruling will help speed up land acquisition and reduce litigation.

There are many incidents of non-compliance or poor implementation of the laws for example, in the power sector there have been some significant regulatory successes for example, introduction of the concept of Availability-Based Tariffs and discipline imposed on the overdrawing of power from the electricity grid. However, after the early years of reform there has been a slowdown in momentum. Progress has been poor in critical parameters such as open access due to inability to resist political pressure. There seem to be inadequacies in regulatory implementation in the power sector. Power scarcity has been sought to be overcome through reform comprising of unbundling of the power supply set up and suitable introduction of competition into the separated elements. However, flouting of open access principles, continuation of exclusive power purchase agreements, lack of competitive neutrality and legal violations by state governments have deterred private entry and hampered competition. The case of the power sector implies that regulations that seem good on paper often do not have the expected impact because of poor implementation.¹⁷

¹⁶ Civil Appeal Nos. 3415-3416/2020: MANU/SCOR/41418/2020

¹⁷Vijay Vir Singh, Regulatory Management and Reform in India, Available at <https://www.oecd.org/gov/regulatory-policy/44925979.pdf>

One of the main factors is significant human and technical capacity constraints that impacts effective execution of all compliance and enforcement functions at the central, state, and local levels.

On the recommendations of the Supreme Court in *Salem Bar Association v. Union of India*¹⁸, a committee was appointed to study the application of a case flow management system in India, and accordingly a draft rule known as the 'Case Flow Management Rules for High Courts and Subordinate Courts' was prepared. Similar recommendations were made in the policy document on 'National Mission for Delivery of Justice and Legal Reform', a blueprint for judicial reforms, Strategic Initiatives 2009–2012 and Justice A. M. Khanwilkar Committee on Case Management System. On the basis of all the above recommendations, almost 21 state judiciaries had adopted the concept of case flow management and framed their own rules for ensuring timely justice since 2005. But despite adoption of the case flow management rules, there is severe lacunae in the actual application of the same, and hence in the Chief Justices' Conference, 2016, a resolution was made towards strengthening case flow management rules for the purpose of reducing arrears and ensuring speedy trial by all the High Courts.¹⁹

Another example is that while analyzing the land acquisition disputes, it is found that 95 per cent of all disputes happened between 1950 and 2016 arose because of administrative non-compliance with the process of land acquisition under the law. It also includes the process of computation of market value compensation for acquired land²⁰. Out of these, about 34 per cent of disputes involved irregularities in completion of acquisition procedure. Almost half of the cases involved the unwillingness to comply with the rule of law. Remaining half was due to administrative incapacity and partly because of the failure of government to regularly update administrative manuals based on changes in the law²¹.

¹⁸ AIR2003SC189

¹⁹Yashomati Ghosh, INDIAN JUDICIARY: AN ANALYSIS OF THE CYCLIC SYNDROME OF DELAY, ARREARS AND PENDENCY - YASHOMATI GHOSH, 2018 SAGE JOURNALS (2017), available at <https://journals.sagepub.com/doi/full/10.1177/2322005817733566>.

²⁰ Wahi et al., 'Land Acquisition in India'

²¹Namita Wahi, INDIAN COURTS CLOGGED WITH LAND DISPUTES BECAUSE LAWS KEEP CONFLICTING EACH OTHER THE PRINT (2019), Available at <https://theprint.in/opinion/indian-courts-clogged-with-land-disputes-because-laws-keep-conflicting-each-other/254033>

However, there are no government sources to confirm the actual quantum of its litigation. The absence of this statistic itself is an indicator of how 'interested' various governments have been in attempting to understand this problem or tackling it meaningfully. Hence one could see that non-compliance of laws and policies is a reason for government litigation.

2. **Lack of credibility about the actions taken by government in various developmental projects:** A lack of credibility about the actions taken by the Government and the public sector under-takings has also contributed to the litigation explosion involving government and public sector undertakings. Ordinarily, when in course of commercial activity, plants or equipment to the Government or public sector undertaking are sold, the court is to be reluctant to examine the fairness or correctness of the decision²². If the Directorate of a Government company has acted fairly, even if it is altered its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task. The function, from the point of view of court, is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for itself by rules of public administration.²³

Under the Delhi Metro Phase IV project, the National Metro Rail Policy of August 2017, which specifies the role of the Union government in public transport infrastructure project was introduced. As per the policy, the Central government would provide financing assistance, up to a ceiling of 20 per cent of the cost of state metro projects and it states that the responsibility of the project sustainability vests with the state government. The Delhi government has made it conditional that given that the ownership of the Delhi Metro is divided equally between the Union and the State, the Central government must share the land and taxes proportionately. The lack of resolution to this outstanding issue has led to an unfortunate impasse. Here, one could see that

²² 126th Law Commission Report, 1988. Available at: <https://indiankanoon.org/doc/42589691/>

²³ 126th Law Commission Report, 1988. Available at: <https://indiankanoon.org/doc/42589691/>

both the Central as well as the State government is not ready to take any steps or responsibility with respect to the implementation of the project.

With respect to the Bandra-Worli Project, the government is denying responsibility for giving Environmental Clearance to the project without holding a mandatory Public Hearing as per the Environmental Act. Thus, it can be clearly seen that the Government's is deny any kind of responsibility with respect to this project.

- 3. Lack of Proper Alternate Dispute Resolution (ADR) framework:** Initially, the ADR mechanisms were tried to be implemented with much emphasis on Statutes by way of inserting the ADR clauses in those contracts. But these process and policy was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court and in this process, Courts are authorized to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance, etc. Power is also conferred upon court so that it can intervene in different stages of proceedings.

But these goals cannot be achieved without requisite infrastructure and proper institutional framework. The Financial memorandum points out that the amount of expenditure that is most likely to be incurred as a result of any statute in the existing statute. Prior to bringing in S.89 of the CPC and other statutes, no assessment was conducted as regards the financial implications or the infrastructural requirements too make it effective. For example: for mediation, a trained mediator is a requirement with adequate expenses incurred for their training.

Most of our courts lack proper infrastructure for their existing work, and therefore, it may not be possible for them to accommodate suitable facilities of the ADR regime. The institutional framework must be brought about at three stages. The first stage is to bring awareness, the second acceptance and the third implementation.

Awareness: in view of this holding seminars, workshops, etc. would be imperative. ADR literacy programme must be done for mass awareness. Only recently, ever since the lockdown, there has been a sudden increase in creating awareness on ADR, especially arbitration. Not much awareness workshop could be seen with respect to mediation and conciliation.

Acceptance by training of the ADR practitioners should be made by some University together with other institution. For mediators, conciliators and facilitators, extensive training would be necessary. Most of them are unaware of the qualifications required to be a certified ADR expert or where to access such trainings etc. e.g., Industrial dispute Act, 1947 provides for appointment of conciliator who although are "charged with the duty of mediating in the promoting the settlement of industrial disputes" failed in performing their duties as they do not have requisite training. Likewise, matrimonial and family courts are unable to effectively settle the dispute as they do not have either the requisite training or the mindset thereof. Proper training should be a made a part of the continuing education on different facets of ADR.

Implementation: For this purpose, judicial officers and judges must be trained to identify the cases which would be apt for taking recourse to a particular form of Alternative Dispute Resolution. In the decision of House of Lords in *Dunnett V. Railtrack* (In railway administration²⁴, the Court had noticed that: "the encouragement and facilitating of ADR by the court in an aspect of active case management which is an important aspect of achieving the overriding objective of reducing arrears in the courts.

"The parties have an obligation or duty to help the court in achieving that objective and thus, they have a serious duty to consider the possibility of ADR being utilized for the purpose of solving their claim or particular issues within it when encouraged by the court to do so."

²⁴ [2002]2 All ER 850,

In practice, it has been proved that since the applicable fields have not been properly demarcated under the provisions of the Act, there are a few grey areas in the Act, which should have invited the attention of the policy makers. While examining the various factors affecting smooth functioning of the Act, the jurisdiction of the arbitral tribunal is an important element determining the validity of an arbitral award passed thereunder.

The irregular mode of appointment of arbitrators, their lack of jurisdiction and the element of bias or misconduct on their part can become solid grounds for challenging awards. Likewise, the principles of natural justice are the cardinal principles on which the entire arbitration process rests. For this reason, procedural irregularities in the conduct of arbitration and their effect on the validity of final award are also equally important. An arbitral award should be made fulfilling the requirement of fairness. Similarly issues of legality and fairness are also important elements in testing the validity of an award may it be domestic or international.

Arbitral awards not falling within the parameters set forth by the Act are easily vulnerable to challenge under the provisions of the Arbitration and Conciliation Act.²⁵

Aspect of procedural justice is often used as justification for judicial interference which was discussed in the case *Food Corporation of India v. Indian Council of Arbitration*²⁶ the court held that legislative intent underlying the Act is to minimize the supervisory role of the courts in the arbitral process and quick nomination or appointment of arbitrator, leaving all contentious issues to be decided by him. The institution opted by the parties shall nominate the arbitrator as sought for by them giving due importance to the procedural rights of the parties.²⁷

²⁵ADR: STATUS / EFFECTIVENESS STUDY by Prof. K. N. Chandrasekharan Pillai, Ms. Jaya V. and Mr. Vishnu Konoorayar. K

²⁶ AIR2003SC3011

²⁷ (2003) 6 SCC 564,

The Arbitration & Conciliation Act has been amended in 2015 and in 2019, where few of the changes brought in 2015 Amendment was reversed in the 2019 Amendment, which is yet to be seen if it effective or not. Any deviance from the normally expected standards may vitiate the entire arbitration process. The setting aside of an arbitral award on the ground of minor procedural irregularities may destroy the objective behind ADR mechanisms. Hence, to satisfy the minimum requirement of procedural fairness it is imperative that the Indian arbitration law is amended to include specific provisions as to maximum time limit for hearing the parties, examination of the documents and passing the final award, with total period not exceeding six months. ADR mechanism implementation can be helped by three things: Mandatory reference to ADRs, Case management by Judges and Committed teams of Judges and Lawyers.²⁸

In the Delhi Metro Phase IV case study, it is found that the Alternate Dispute Resolution framework was a failure, because of the unsuccessful arbitration between GNCTD (government of national Capital Territory of Delhi) and Union government with respect to the Delhi Metro Phase IV project. The unresolved issues that delayed the crucial public transport project are as follows:

- **The key difference stems from the National Metro Rail Policy of August 2017, which specifies the role of the Union government in public transport infrastructure projects. As per the policy, the Union government will provide financial assistance up to 20 per cent ceiling of the cost of state metro projects. It is said that the responsibility of the project sustainability resides with the Delhi government.**
- **The Delhi government made it conditional that given that the ownership of the Delhi Metro is divided equally between the Union and the State, the Central government must share the land and taxes proportionately. The lack of resolution to these outstanding issues has led to an unfortunate impasse.**

²⁸ Supra footnote 4

4. Lack of proper Mediation as the preferred form on Dispute Resolution:

Mediation can be defined as a process to resolve a dispute between two or more parties in the presence of a mutually accepted third party who through confidential discussion attempts to help the parties in reaching a commonly agreed solution to their problems amicably.

The biggest merit of mediation is that the entire process is strictly confidential. Mediation saves time and financial and emotional cost of resolving a dispute. A properly conceived mediation as method of alternative dispute resolution will ensure wide access to justice for all sections of the people.

This system has assumed a great importance as Lok Adalats are regular features in various parts of the country. Except people who stand to gain by delaying the process of justice, others do not perhaps enjoy taking recourse of litigation that consumes innumerable number of years and considerable amounts by way of expenses²⁹.

The Civil Procedure Code 1908 was also amended in the year 2002 by reintroducing section 89. In the decision of Salem Bar Association v. Union of India³⁰ Supreme Court gave special mention on Section 89. This Section provides for judicial settlement of disputes through arbitration, conciliation or court- annexed mediation. Lack of proper and effective training to be offered to judicial officers in ADR techniques and lack of necessary infrastructure for mediators and mediation centres are the major hurdles in the path of effective implementation of section 89 CPC.

The reasons why mediation is not a preferred for are:

- Lack of institutionalization
- Lack of case management
- Excessive interlocutory appeals

²⁹Justice S.B.Sinha, ADR and Access to Justice: Issues and Perspectives, Available at <http://www.tnsja.tn.gov.in/article/ADR-%20SBSinha.pdf>

³⁰ (2005) 6 SCC 344

Training of judges has to be properly institutionalized in order to achieve desired results. At the same time, lack of interest and cooperation among lawyers towards settlement of disputes through ADR mechanisms is another difficulty in the enforcement. Over burdening of Judicial Officers with routine court work gives very little time for them to give proper attention to resolution of disputes using ADR techniques. Lack of awareness among public and lawyers towards various modes of ADR also leads to prolonging of proceedings by the parties. Non-Cooperation from insurance companies and other similar departments, both governmental as well as of public sector undertakings is also cited as one of the reasons for non-implementation. Reluctance on the part of judges to refer the matter to ADR modes and nonappearance of one or both the parties also cause undue delay. On account of their personal reasons like fee/commission and other vested interests, quite often the lawyers tend to delay the proceedings.³¹

In the elevated corridor project, the civil society has conducted meetings with the government many times and still a common consensus has not been drawn which could be remedied if mediation was implemented in a better manner.

Mediation is the most suited method for a country like India for quick disposal of cases, would like the same to be done under a legal framework and with the intervention of professionals and so, these litigants prefer mediation. Not many Indians can afford litigation. This kind of situation makes common people, especially rural people, cynical about judicial process. Rent and eviction constitute a considerable chunk of litigation in urban courts, and they take on an average period of three years or more than that. Along with powers of administration, system of self-government dispute resolution can also be delegated to these institutes. If the object of judicial reform is fair, quick and inexpensive justice to the common people, there can be no better way to pursue the objective than to invoke participatory systems at the grass-root level for simpler disputes so that judicial time at higher levels is sought only for hard and complex litigation.³² It could prove to be very effective in wiping out arrears if some changes.

³¹ Supra Note 4

³²Supra Note 29.

are affected. Defects like, lack of public awareness, absence of quality training programmes, lack of supporting academic research and more importantly lack of efficient leadership should be immediately addressed.³³

There are online dispute resolution firms coming up right now, but the government is yet to create a tie up with them to solve the disputes.

5. Unnecessary Filing of Appeals: Government is the biggest litigant in the Courts. Supreme Court judge Justice MR Shah made a statement that the government should avoid filing unnecessary appeals in courts to reduce the growing pendency of cases where State is a party to 70-80 per cent of the litigations and on several occasions, it has been found that unnecessary appeals have been filed by various departments on issues which are already settled by earlier judgments. The appeals are not required at all, but at the department level, nobody wants to take a risk and responsibility, which ultimately adds to the burden of the courts.³⁴

For e.g., the Kerala High Court has criticized the state government for unnecessarily filing an appeal on a verdict to pay Rs 1.5 lakh as compensation to a woman died following a sterilization surgery, leaving the family chasing justice for 25 years.³⁵ The Hon'ble Supreme Court has come down heavily on the Government over its "couldn't-care-less and insouciant attitude with regard to litigation that has gone too far"³⁶. Criticizing the government for its slow-paced effort towards improving the litigation policy, a bench comprising Justice MB Lokur and Justice Deepak Gupta said that "under the garb of ease of doing business, the judiciary is being asked to reform. The boot is really on the other leg."³⁷ The apex court also reprimanded the Centre for filing appeals on similar questions though it had been fined for bombarding the system with frivolous cases³⁸.

³³ Supra Note 4

³⁴ Justice MR Shah to govt: Avoid filing unwanted appeals in courts, DNA INDIA (2019), Available at <https://www.dnaindia.com/ahmedabad/report-justice-mr-shah-to-govt-avoid-filing-unwanted-appeals-in-courts-2788637>.

³⁵ High court criticizes Kerala government for 'unnecessary' appeal: Kochi News - Times of India, THE TIMES OF INDIA (2020), Available at <https://timesofindia.indiatimes.com/city/kochi/hc-criticizes-govt-for-unnecessary-appeal/articleshow/74583840.cms>.

³⁶ *Union of India vs. Pritwiraj Singh, Civil Appeal no./180*

³⁷ Id

³⁸ Id

“We hope that someday, some sense, if not better sense, will prevail on the Union of India with regard to the formulation of a realistic and meaningful national litigation policy and what it calls ‘ease of doing business’, which can, if faithfully implemented, benefit litigants across the country,³⁹” the bench held. The Court’s observations stem from a bunch of appeals the Union Government had filed which were dismissed by the SC on December 8 last year. Yet, the Government went ahead and filed another batch of appeals in March this year pertaining to the same questions of law as the ones dismissed earlier⁴⁰.

These were dismissed at a cost of One Lakh rupees on March 9. On April 24, the Court came across another batch of appeals on the same questions of law. The bench stated that it had expected the central government to withdraw all pending appeals since its December order. “But obviously, the Union government has no concern and did not withdraw appeals from the registry. The central government should appreciate that by pursuing frivolous cases, it is further adding to the burden of the court and collaterally harming other litigants by delaying hearing in their cases through the higher volume of numbers. If the Union government hardly care for the justice delivery system, it should display some concern for litigants, many of whom must spend a small fortune in litigating in the Supreme Court,⁴¹” it said and slapped an additional cost of Rs 1 lakh while dismissing the appeals.⁴² This shows the unnecessary filling of appeals by the government as well as how expensive litigation due to the amount of costs charged.

In case studies like the Karapuzha Irrigation Project, the Delhi Metro Phase IV Project, etc. where due to the unnecessary filling of appeals has led to the delay in the projects.

A suggestion was made where a high-level committee under the chairmanship of a retired high court judge and consisting of principal secretaries and secretaries of departments should be constituted as part of the state litigation policy to take a call on whether an appeal is to be preferred or not.

³⁹ *Supra Note 36*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² SC Pulls up Centre For Filing Frivolous Cases, Blocking Courts, INDIA NEWS, BREAKING NEWS | INDIA.COM (2018), Available at <https://www.india.com/news/india/supreme-court-pulls-up-centre-for-filing-frivolous-cases-burdening-courts-with-unnecessary-work-3029245/>.

The lack of credibility in the actions taken by the government and the PSUs has also contributed to the litigation explosion involving the government. Usually, when in course of commercial activity, plants or equipment to the government or public sector undertaking are sold, the court is to be reluctant to examine the fairness of the decision. If the Directorate of government company has acted fairly, even if it is altered its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task. From the court's point of view, it is limited to testing whether the administrative action has been fair and free from unreasonableness and has substantially complied with the norms of procedure set for itself by rules of public administration.⁴³

A multi-pronged approach needs to be adopted to tackle the issue of “government litigation”, depending on the kind of litigation. For example, to reduce writ petitions filed under service and labour matters, the state must put in place robust internal dispute resolution mechanisms within each department which inspire confidence in its workers as a means of addressing their grievances against the management. On the other hand, in land acquisition matters, the state must either ensure that quasi-judicial authorities are judicially trained or create a separate class of judicial officers to discharge quasi-judicial functions.

2.6 Chapter Findings

- I Overall, about 3.6 crore cases are pending in the Indian judicial system across the Supreme Court, High courts, and subordinate courts. Government is regarded to be the biggest contributor to litigation in India. Approximately 46 per cent of the total pending cases in courts pertains to the government.
- II According to the Ministry of Law and Justice, government departments are a party to around “46 percent” of court cases.⁴⁴ This figure, albeit unverified, hides more than it reveals about the nature and extent of the problem of government litigation.
- III Government litigation includes service matters, disputes with private entities as well as inter-se disputes between two government departments and disputes between two PSUs.

⁴³<https://indiankanoon.org/doc/42589691/?type=print>

⁴⁴Action Plan to Reduce Government Litigation, Ministry of Law and Justice, 13th June 2017, Also Available at: <http://doj.gov.in/page/action-plan-reduce-government-litigation>

- IV. Writ jurisdiction made possible most of the litigations against the government. Writ jurisdiction, regarded as 'extraordinary jurisdiction'⁴⁵ assures the citizens easy accessibility of High Courts for seeking relief against any authority, including any government, for the violation of any legal right.
- V. Government introduced the National Litigation Policy, 2010, which was based on the recognition that government and its various agencies are the pre-dominant litigants in Tribunals and Courts. The policy attempts to provide a framework to handle various aspects of government litigation, such as government representation, litigation practices such as seeking adjournments, filing pleadings and appeals, exploring alternative dispute resolution mechanisms and so on.
- VI. LIMBS involves civil cases; it should be extended to criminal cases also. At present it is for the Union government, the idea must be extended to state governments also. LIMBS is in its infancy. To make the working of the government more coordinated, various departments must submit the data as early as possible in a time bound and integrated manner.
- VII. The government has taken many steps to reduce the litigations and some of them are as follows:
- a. Action Plan by the Department of Justice
 - b. Promotion of Alternate Dispute Resolutions
 - c. Setting up of Legal Cells in all Departments
 - d. Attempt of Judiciary to Reduce Cases
- VIII. The research has found out the major primary legal issues involved in the government litigation. They are as follows:
- a. Non-Compliance of Existing Laws and Policies.
 - b. Lack of credibility about the actions taken by government in various developmental projects.
 - c. Lack of Proper Alternate Dispute Resolution (ADR) framework.
 - d. Lack of proper Mediation as the preferred form on Dispute Resolution.
 - e. Unnecessary Filing of Appeals.

⁴⁵The writ jurisdiction under Article 226 and the supervisory jurisdiction under Article 227 are considered to be extraordinary jurisdiction; 124th Law Commission Report. Available at :<http://lawcommissionofindia.nic.in/101-169/Report124.pdf>

- IX. A multi-pronged approach needs to be adopted to tackle the issue of “government litigation”, depending on the kind of litigation. For example, to reduce writ petitions filed under service and labour classifications, the state must put in place robust internal dispute resolution mechanisms within each department which inspire confidence in its workers as a means of addressing their grievances against the management.

CHAPTER 3

IMPACT OF LITIGATION ON PUBLIC INFRASTRUCTURE IN INDIA

3.1 Infrastructure Development in India

The development of an economy depends mainly on the availability of its infrastructural facilities. The story of agricultural and industrial development depends solely on its infrastructural base. Without having an established infrastructure framework, a country cannot develop its economy. An important and challenging job in the country's development process is to provide the necessary infrastructural facilities. These infrastructural facilities include various economic and social overhead viz. Energy (Coal, Oil, Electricity), Irrigation, Transportation and Communication, Banking, Finance and Insurance, Science and Technology and other social overheads like education, health, and hygiene.

The correlation between and economic growth infrastructure investment for India is very high. The correlation of assets in inland, road, rail and airport infrastructure to GDP are higher than 0.90, indicating that there exists a strong correlation between GDP and investment in infrastructure⁴⁶. This further reiterates that massive investment is needed in infrastructure to achieve targeted economic growth in the country. Annually, India needs to spend 7-8 per cent of its GDP on infrastructure, which translates into an annual infrastructure investment of US\$200 billion currently.⁴⁷ However, India had spent only about US \$100- 110 billion annually on infrastructural facilities, leaving a deficit of around US\$90 billion per annum. Due to the fiscal constraints, there exist significantly less room for expanding public investment at the required scale, so there is an urgent need to accelerate private capital flow into infrastructure.

To boost infrastructure investment, the National Investment and Infrastructure Fund has been created with a capital of approximately `400 billion to provide investment opportunities to commercially viable projects⁴⁸. Besides, a Credit Enhancement Fund for infrastructure projects for increasing the credit rating of bonds floated by infrastructure companies will be launched in the country.

⁴⁶ Economic Survey, Volume I 2018-2019

⁴⁷ Economic Survey, Volume I 2019-20, available at <https://www.indiabudget.gov.in/economicsurvey/>

⁴⁸ Union Budget 2019, available at <https://www.indiabudget.gov.in/budget2019-20/index.php>

For infrastructure projects based on the approach of expected loss, a new Credit Rating System has also been launched, seeking to provide an additional risk assessment mechanism for informed decision making by long-term investors. Further, measures like Real Estate Investment Trusts and infrastructure investment trusts have been formulated to pool investment.

- a) **Road Sector** - Roads are part of an integrated multi-modal transport system that provides crucial links to railway stations, airports, other logistical hubs and ports and acts as a catalyst for economic growth by playing a critical role in supply chain management. It is the dominant mode of transportation compared to rail, air traffic and inland waterways. It accounts for about 3.14 per cent of GVA and 69 per cent and 90 per cent of the countrywide freight and passenger traffic, respectively. India's road network of around 58.98 lakh km is March 31 2017 with rural roads constituting 70.65 per cent and National highways comprising 1.94 per cent⁴⁹. Ministry of Road Transport and Highways (MORTH) declared 2018-19 as the 'Year of Construction' and has been making constant efforts to expand and upgrade National Highways' network in the country. As a result, the road construction grew at 30 km per day in 2018-19 as compared to 12 km per day in 2014-15⁵⁰

The primary constraints faced are the availability of funds for financing large projects, lengthy processes in the environmental concerns, acquisition of land and payment of compensation to the beneficiaries time, procedural delays, lesser traffic growth, cost overruns due to delays in project implementation, than expected increasing the riskiness of the projects. Thus, resulting in stalled/languishing projects and a shortage of funds required for maintenance. Significant investments are made, with total investment increasing more than three times from 51,914 crores in 2014-15 to 158,839 crores in 2018-19. In India, roads' assets have been financed from budgetary support, Internal and Extra-Budgetary Resources (IEBR) and private sector investment. Budgetary support accounted for 48 per cent of the investments in 2018-19, and IEBR accounted for 39 per cent, with private investment accounts for 14 per cent⁵¹.

⁴⁹ Economic Survey, Volume II, 2018-19

⁵⁰ Union Budget 2019

⁵¹ Economic Survey, Volume I, 2019-20

- b) **Railway Sector** - The history of rail transport in India dates back to 1832. Indian Railways (IR) has witnessed commendable progress by being a cost-effective long-distant transport mode. To provide a safe and secure and journey to passengers, IR has taken numerous steps such as the provision of lifts/escalators, plastic bottle crusher machines, mechanized cleaning and housekeeping etc., at major stations. Revenue Earning Freight loading (excluding loading by Konkan Railways) by Indian Railways during 2017-18 was placed at 1159.55 million tonnes, as against 1106.15 million tonnes during 2016-17, registering an increase of 4.83 per cent, with incremental loading of 53.40 million tonnes over 2016-17. In 2018-19, IR carried 1221.39 million tonnes of revenue earning freight, showing an increase of 61.84 million tonnes over the freight traffic of 2017-18 and translating into an increase of 5.33 per cent. There is an increase of 2.09 per cent in the number of passengers carried by IR during 2017-18 as compared to 2016-17 and a 0.64 per cent increase in 2018-19 as compared to 2017-18⁵².
- c) **Civil Aviation Sector** - India's scheduled domestic air transportation for passengers and goods grew by 14 per cent and 12 per cent respectively in 2018-19. Domestic passenger traffic in Revenue Passenger Kilometre (RPK– Revenue Passenger Kilometres/ revenue passenger miles (RPM). the air traffic for airbus and aircrafts is measured by the formula: $RPK/ RPM = P \cdot D$ where D is the distance travelled in kilometres and P is the total of revenue paying passengers. The fastest growth in the world at about 20 per cent for over 50 consecutive months up to December 2018, has been recorded which has positively impacted India's economy. Total number of international and domestic passengers were 204 million in 2018-19⁵³. According to the Union Budget 2019, "To meet the surging demand and providing air connectivity to remote regions, new Greenfield airports are being rapidly developed. At the end of 2018-19, a total of 107 airports provided scheduled airline operations. Based on the performance of joint ventures in the airport sector, the Government has decided to lease out six brownfield airports of Airports Authority of India (AAI) in Public-Private Partnership on Operation, Maintenance and Development model (Guwahati, Lucknow, Jaipur, Ahmedabad, Mangalore, and Thiruvananthapuram), which is expected to enhance service quality at these airports besides bringing enhanced revenue to AAI.

⁵² Economic Survey 2018-19, Volume II, available at <https://www.indiabudget.gov.in/economicsurvey/>

⁵³ Report of Working Group on Civil Aviation, Ministry of Civil Aviation, Government of India, available at <https://www.civilaviation.gov.in/sites/default/files/Committee%20reports%2015.pdf>

The demand and supply trends in civil aviation shows that passenger demand is higher than the seat supply”⁵⁴.

- d) **Shipping Sector** - Shipping plays a pivotal role in India’s trade dynamics. As per the Indian Shipping Statistics 2018, “India had a fleet strength of 1400 vessels with gross registered tonnage (GRT) of 12.68 million as compared to fleet strength of 1371 vessels with 12.35 million GRT at the end of December 2017”⁵⁵. As of January 31, 2019, India had a fleet strength of 1405 ships with a deadweight tonnage (DWT) of 19.22 million (12.74 million GT), including Indian controlled tonnage, with the Shipping Corporation of India (SCI) having the largest share of around 30.52 per cent. Of this, around 458 ships of 17.58 million DWT (11.26 million GT) cater to India’s overseas trade and the rest to coastal trade. Port sector development is very crucial for the development of any economy⁵⁶.

Ports handle around 90 per cent of EXIM Cargo by volume and 70 per cent by value⁵⁷. In order to meet the ever-increasing trade requirements, expansion of Port Capacity has been accorded the highest priority with implementation of well-conceived infrastructure development projects like Sagarmala, project Unnati etc. As per the Port Performance Benchmarking & Performance Index ⁵⁸published by Logistics Data Bank for February 2019, "Gateway Terminals India is in the top-performing category and International Container Transshipment Terminal, Kochi in the low performing category”.

- e) **Telecom Sector** - Telecommunication has been recognized world-over as a powerful tool of development and poverty reduction through the empowerment of the masses. Growth in the telecom sector in India remains strong over the last few years on the back of strong consumer demand and supportive policies of the Government. From a low of 93.30 crore in 2013- 2014, total telephone connections in India touched 118.34 crores in 2018-19, registering a growth of 26.84 per cent.

⁵⁴ Union Budget 2019

⁵⁵ Indian Shipping Statistics 2018, available at <http://shipmin.gov.in/sites/default/files/71646871482018Final.pdf>

⁵⁶ Indian Shipping Statistics 2018, available at <http://shipmin.gov.in/sites/default/files/71646871482018Final.pdf>

⁵⁷ Economic Survey 2018-19, Volume II, available at <https://www.indiabudget.gov.in/economicsurvey/>

⁵⁸ Logistics Data Bank Report, April 2019, available at: https://www.dldsl.in/Uploads/image/87imguf_LDB_ANALYTICS_March-Report-2019.pdf

As of March 2019, the total subscription stood at 118.34 crores out of which 51.42 crore connections were in the rural areas and 66.91 crores in urban areas. The wireless telephony now constitutes 98.17 per cent of all subscriptions, whereas the share of landline telephones now stands at only 1.83 per cent. The overall teledensity in India stands at 90.10 per cent, the rural teledensity being 57.50 per cent and urban teledensity being 159.66 per cent at the end of March 2019. The private sector dominated overall connections with a share of 88.72 per cent (104.99 crore) at the end of March '19 while the share of public sector was 11.28 per cent (13.35 crore)⁵⁹.

- f) **Petroleum and Natural Gas Sector** - The Government aims to “Reform, Perform and Transform”⁶⁰ the energy sector of the country by achieving self-sufficiency. India's primary energy demand is expected to grow at a CAGR of 4.2 per cent during 2017-2040, much faster than any major economy in the world. There is thus a need to augment refining capacity to meet the growing demand for petroleum fuels and petrochemicals, which play significant role in sustaining GDP. Crude oil production during 2018-19 was 34.203 Million Metric Tonnes (MMT) which was 4.15 per cent lower as compared to production achieved during 2017-18. Crude oil production during March 2019 was 2854.32 Thousand Metric Tonnes (TMT) which is 12.99 per cent lower than target and 6.16 per cent lower compared with March 2018. Natural gas production during 2018-19 was 32.873 BCM which was 0.69 per cent higher than the production achieved in 2017-18⁶¹. Refinery production (in terms of crude oil processed), during 2018-19 was 257.20 MMT which was 2.09 per cent higher than the production in year 2017-18. Refinery production during March 2019 was 22495.43 TMT which is higher at 6.51 per cent compared to March 2018 and 8.18 per cent higher than the target for the month. There is total 23 refineries in the country, 18 in the public sector, 2 in the joint venture sector and 3 in the private sector. Refinery capacity in India is projected to be 400 approximately MMTPA by the year 2030 through capacity revamps/ expansions at existing refineries and several grass-root refineries⁶².

⁵⁹ Telecom Statistics 2019, available at <https://dot.gov.in/sites/default/files/Telecom%20Statistics%20India-2019.pdf>

⁶⁰ NITI Aayog Report on Strategy for New India@75, November, 2018, available at: https://niti.gov.in/writereaddata/files/Strategy_for_New_India.pdf

⁶¹ Ministry of Petroleum and Natural Gas, Monthly Production Report, Government of India, March, 2019.

⁶² Ministry of Petroleum and Natural Gas, Monthly Production Report, Government of India, March, 2019.

- g) **Power Sector** - Power sector in India has witnessed a paradigm shift over the years due to the constant efforts of Government to foster investment in the sector. As a result, India improved its ranking in the Energy Transition Index published by World Economic Forum (76th position)⁶³. Fostering Effective Energy Transition, 2019 report of WEF states that “India, Indonesia and Bangladesh have made fast progress towards universal electrification due to strong political commitment, a stable policy regime, use of grid expansion, and decentralized generation sources, and a supportive environment for investment in infrastructure.”

Along with universal electrification there has been commendable progress in generation and transmission of electricity. The capacity installed has increased from 3,44,002 MW in 2018 to 3,74,199 MW in 2020⁶⁴. Total energy generated during 2018-19 was 1376 BU (including imports and renewable sources of energy). The capacity of thermal power is 64 per cent followed by renewable energy. Further, more than 46 per cent of power generation comes from private sector. In addition, the peak deficit i.e., the percentage shortfall in peak power supply vis-à-vis peak hour demand has declined from around 9 per cent in 2012-13 to 0.8 per cent during 2018-19 (March 2019)⁶⁵.

- h) **Housing Sector** - Housing is one of the sectors that is fast moving in the country. According to Census 2011, 377.1 million Indians comprising 31.14 per cent of the country's population lived in urban areas, which are projected to grow more than 600 million by 2031⁶⁶. Urbanization has become an important and irreversible process, and it is an important determinant of economic growth and poverty reduction. This process of urbanization is characterized by increase in the number of large cities, although India may be said to be amid transition from a predominantly rural to a quasi-urban society. Ministry of Housing and Urban Affairs (MoHUA) addresses various issues relevant to urban sector through appropriate policy guidelines,

⁶³ World Economic Forum Report 2019, available at <https://www.weforum.org/reports>

⁶⁴ Ministry of Power, Power Sector at a Glance, December 2020. Available at: <https://powermin.nic.in/en/content/power-sector-glance-all-india>

⁶⁵ Id

⁶⁶ Ministry of Housing and Urban Development Annual Report 2019, available at <https://www.hud.govt.nz/assets/Annual-report/8ae55b167e/HUD-Annual-Report-2018-2019-.pdf>

subordinate legislation and sectoral programmes. The legislations like Real Estate (Regulation and Development) Act, 2016. are such examples.

3.2 Infrastructure Needs in India: An Input – Output Analysis

Infrastructure is a critical input of production process. This is a key to overall economic development and prosperity of a nation. Without having a sound infrastructure base a country cannot develop its economy. The word infrastructure is defined in Merriam-Webster dictionary as “the underlying foundation or basic framework.” It is considered as the foundation on which the factors of production interact to produce output. It is infrastructure, which is treated as an engine of economic growth and provides key ingredients for socio-economic progress. Infrastructure is classified as 'Economic Infrastructure' and 'Social Infrastructure'. The former included Transport and Communication, Energy, Banking, and Insurance, etc., whereas the latter includes sectors like Health, Education, Housing etc.

The five significant characteristics of infrastructure services. They are as follows:

1. Infrastructure services are monopolistic in nature.
2. They usually involve high upfront costs and long payback periods.
3. Investments are typically bulky and lumpy.
4. These services are marked by presence of externalities. This reveals the ‘Public Good’ nature of infrastructure, i.e., the characteristics of ‘non-rival’ and ‘non-exclusive’.
5. These involve high volume of ‘sunk costs.

Thus, high volume of sunk costs, long period of gestation, inability to levy user charges and long project development makes the infrastructure sector investment really risky. Consequently, infrastructure services have been mainly provided by the public sector in almost all countries during the 20th century⁶⁷.

As the Indian economy is marching forward for a strong, broad based and high growth trajectory, it is imperative to examine the needs/impacts associated with the growth of the infrastructure sector on production process of Indian economy. A useful method for such type of analysis is the *Leontief's input – output multiplier* technique. Three of the most frequently

⁶⁷ EIB Research on Public and Private Financing of Infrastructure, 2010, available at <https://core.ac.uk/download/pdf/6313123.pdf>

used types of multipliers are output, income and employment. These traditional economic multipliers have been widely applied and discussed in economic literature. While these traditional multipliers are usually employed for ‘impact analysis’, other non-traditional multipliers should also be considered.

The *Leontief's* analytical system stems from input-output table. The input-output table or inter-industry transactions shows the flow of goods and services from sector of the economy to all other sectors over a specified period. It gives the systematic description of interdependence of different sectors of economy by way of two-way table. The economy is segregated into several homogenous sectors each of which is represented in a table by a row and a column. The aspect of interdependence between various sectors of the economy has led to explore the notion of key sector. The key sectors are those, which by their powerful linkages with other sectors are in favorable position to induce the expansion of other sectors and sometimes even help the initiation of new industries. Once the key sectors are identified, it is suggested that these sectors be given priority in investment allocation and industrial promotion strategy. It is argued that if resources can be concentrated on these key sectors, output, income, and employment in the economy will grow rapidly than if these resources were put elsewhere.

Now the question is what the desired objectives will be – one may be of the output maximization; one may be the minimization of use of infrastructure thereby reduce the burden on the fund for investment in infrastructure sector; the third one may be income/employment generation or any combination of the above. For policy formulation both the direct coefficients and multipliers should be considered. The ultimate production and investment plan must consider both direct and indirect needs and a compromise is essential among multiple objectives.

3.3 Impact of Litigation

Litigation in India is an elaborate time consuming and high costs involved process. It takes years for a matter to get settled after years of long drawn courtroom battles, adjournments, and appeals. Litigation comes with many impacts. In this chapter, the impact of litigation on infrastructure projects will be analyzed through the following mentioned below case studies.

- I. **Elevated Corridor Project:** In the case of the Elevated Corridor Project where the project's aim is to de-congest the city by increasing road capacity which in turn would lead to an improvement in the quality of life of those using public transport and by distribution of

private traffic. It is clear from the provisions in the constitution that the Municipalities are trusted with clear role and responsibilities in matters concerning resources planning, management and development. Having a say in the decision- making process and having a role in the implementation of the same, as to projects that include, infra-structure development, providing for civic amenities etc.

There is a requirement for detailed deliberations regarding planning and action plans as well as execution of such projects, with in the local bodies and their communication to authorities at different levels and the State Legislature, for the consideration by the latter and action thereafter. This democratic spirit is not just an aspiration but a mandatory Constitutional Command⁶⁸. There seems to be a breach in current instance, as there is no mention if this issue is figure under the deliberation of the concerned local bodies and whether their concerns, demands, and apprehensions got addressed before any decision with regard to the Elevated Corridors were made. There is not even a mention of, let alone consultation with local bodies, any deliberation within local bodies. Thus, resulting any recommendations emerging from them, as a trigger for the decision in the execution of the project in context.

A writ petition was filed by *Namma Bengaluru Foundation & Anr V. State of Karnataka* in January 2014 against the State of Karnataka and others for non-constitution of a Metropolitan Planning Committee (responsible for all developmental activities in the city) pursuant to 74th Constitutional Amendment⁶⁹. The petition in public interest, to bring to the attention of this Hon'ble Karnataka High Court the flaws, lacunae, non-application of mind and complete disregard for constitutional provisions, values and ideas envisaged in the Bangalore Metropolitan Planning Committee Rules, 2013 ("Rules") promulgated by the Respondent, in exercise of its powers under Section 503-B read with Section 421 of the Karnataka Municipal Corporations Act, 1976 ("the Karnataka Act"), to constitute the Bangalore Metropolitan Planning Committee. Finally, the division bench passed an interim order to stay the project while hearing the petition filed.

⁶⁸ Legalserviceindia.com. 2021. *Preamble The Spirit Of Constitution Of India*. [online] Available at: <http://www.legalserviceindia.com/legal/article-1682-preamble-the-spirit-of-constitution-of-india.html>.

⁶⁹ *Namma Bengaluru Foundation & Anr. V. State of Karnataka*, WP No 48720/2014

This means the Karnataka Road Development Corporation (KRDCL) under the State Public Works Department, the implementing agency for the project cannot resume any work including the tendering process. This shows that the staying of the project due to non-compliance of the statutory provisions by the KRDCL has led to a long drawn-out litigation which has in turn resulted in the stay of the project which has led to huge losses to the public exchequer as more the delay, more the loss as a huge investment of about Rs 29,582 crores⁷⁰ was made on this project.

- II. **Araku Valley Project:** the tribal region of Visakhapatnam district is rich in minerals – bauxite, laterite, calcite, limestone, mica, China clay, and precious red and white stones. India uses aluminium minimally; multinational companies have been exerting pressure on the central and state governments to make bauxite available to them. The state, in response to these global pressures, has been making consistent efforts over the last decade to facilitate the process of large-scale mining by private players, especially in forest areas. As mentioned above, it has entered MoUs with private companies for bauxite mining in the Araku region. Apart from the Jindal and ANRAK projects, the Government is planning to mine 27 hills in Araku Valley, Anantagiri, Chintapalli and G K Veedhi blocks. Now there are few possible effects of mining like the rivers Sarada, Tandava and Varaha in the Araku region that pass through these hills will be disturbed, which will seriously affect the tribal commons and, by extension, the sources of livelihoods such as subsistence cultivation, MFP and even small- scale coffee plantations that the state has helped build. This will also affect the commons of larger non-tribal populations such as the water supply to various towns and the city of Visakhapatnam, pollution is another major effect.

The mining activities will pollute larger commons such as air, water and biodiversity, etc. The Samantha Judgment, 1997⁷¹ was a landmark judgement in the Supreme Court questioning the encroachment of tribal lands by non-tribal actors in the region. The SCs judgment declared that mining leases to private companies in scheduled areas were against the law; it allowed tribal cooperatives in Andhra Pradesh Mineral Development

⁷⁰ Detailed Feasibility Report of Proposed Elevated Corridor, Bangalore , Karnataka Road Development Corporation Limited (February, 2019), <https://data.opencity.in/Documents/Recent/KRDCL-DFR-March-2018-elevated-Corridor-Bengaluru.pdf>

⁷¹ Samata vs Union of India and others, AIR 1997 SC 3297

Corporation (APMDC) to undertake mining in scheduled areas. Now, the world famous Borra Caves, known for its century's old stalactites and stalagmites, were under threat of destruction because the Government planned to give bauxite mining leases above the caves. Owing to such decisions by the Government by ignoring the rights of the people. Samata fought for the rights of tribal communities who would be affected and displaced by the private mining companies. A PIL was filed in the High Court of Andhra Pradesh, 1993 stating Government is a 'person' and hence does not have the power to grant leases in a scheduled area to non- tribals.

The judgement has played successful precedent in the Niyamgiri Bauxite mining case⁷². The judgment ruled in favour of the Dongria Kondhs who inhabit the sacred hills of Niyamgiri. The Supreme Court has strongly authorized gram sabhas as the democratic decision-making forum for issues regarding individual, community and cultural rights of the tribals and the traditional forest dwellers. Also, if you look at the official figures, you will find that no action is taken in cases of illegal mining year after year. Of the nearly 400,000 cases of illegal mining between the years 2013-17 in 22 states, FIRS were lodged in 5 percent of the cases and court cases were filed in less than 15 per cent of the cases. So egregious is the mismatch in some states that one cannot ignore the complicity of the authorities. In Andhra Pradesh, for instance, of the 36727 cases in the years 2013-17, FIRs were lodged in only three cases and court cases filed in four⁷³. In such a context, the Samantha judgement holds immense importance. Now, the judgement of the litigation with regards to the Araku Valley, has nullified all the mining leases granted by State government in the Scheduled areas and asked it to stop all mining operations. Only the State Mineral Development Corporation or a cooperative of the tribal people, it ruled, could take up mining activity and that too in compliance with the Forest Conservation Act and the Environment Protection Act.

Before granting leases, the State government is obliged to obtain the concurrence of the Centre, which would, for this purpose, constitute a sub-committee consisting of the Prime Minister and the Union Ministers for Welfare and Environment

⁷² WRIT PETITION (CIVIL) NO. 180 OF 2011

⁷³ Commoncause.in. 2021. [online] Available at: <<https://www.commoncause.in/pdf/journal21/Samata-Judgment.pdf>>

so that the policy of the State is consistent with that of the nation. Non utilization of natural resources reduces economic productivity and thereby reduces the state income. The litigation has stopped the mining activities in the Araku valley which led to huge losses for mining Groups such as Jindal and ANARK. Apart from the private companies, the Government was planning to mine 27 hills in Araku valley, Anathagiri, Chintapalli and G K Veedhi blocks. All these plans got affected due to the litigation. The government agreement with the companies, i.e., the companies will bear the cost of mining while the APMDC (Andhra Pradesh Mineral Development Corporation) will receive 1.25 times of seigniorage fee paid to the mining department and 0.5% of the annual turnover of the companies. These also got affected by the litigation. Again the failure of the Government to implement the already existing laws and regulations in letter and spirit, for example, consideration of Gram Sabha's views before awarding any contract in the Schedule V areas has led to considerable delays in the project and the unnecessary costs due to the lack of credibility or accountability by the Government in taking decisions which has resulted in a series of litigation and the above mentioned impacts.

There are few cases like the Tamil Nadu Generation and Distribution Corporation Limited v CSEPCI – Trishe Consortium and Another⁷⁴, Centre of Indian Trade Unions, A Federation of Registered Trade Unions v State of Maharashtra⁷⁵, etc. which have resulted to the delay in many infrastructure projects as such.

III. **Delhi Metro Phase IV Project:** In the Delhi Metro Phase IV, The Environment Pollution Control Authority (EPCA) has filed a report in the Hon'ble Supreme Court and said that phase-IV of the metro "will add significantly to the public transport infrastructure in the city. This combined with buses and last-mile connectivity (pedestrian and other facilities) would greatly improve the public transport network in the city and provide options for car-free travel"⁷⁶. It also stated that the approval of the project was held up since 2014. Phase IV of the Delhi Metro and directed authorities concerned to commence the construction work on the project. Even though approval to

⁷⁴ SLP Nos. 30098-30099 of 2015

⁷⁵ SPECIAL LEAVE PETITION (C) NO. 7734 OF 1997

⁷⁶ EPCA Report No 97, July, 2019, Available at: <https://www.epca.org.in/EPCA-Reports1999-1917/EPCA-Report-No-97.pdf>

commence the work has been given, the project hasn't started till date due to the lack of ownership as none of the governmental departments are ready to take responsibility of the project.

In the case of *Savitri Devi v State of Uttar Pradesh and others*,⁷⁷ It could be clearly seen that the delay with respect to planned industrial development is the dispensation of the inquiry under Section 5A can only be an exception where the urgency cannot brook the delay. The respondents, without application of mind, dispensed with the inquiry. The acquisition proceedings were deprecated as void, unconstitutional, tainted with malafide, abuse of authority/power and non-application of mind. Hence, the non-adherence to the laws in place has led to the fall of the project.

The phase IV of the Delhi metro consists of 6 corridors with a total length of 103.94 km. This phase will inter-connect many parts of the city and is primarily meant to increase ridership through densification of the network within the city. This combined with buses and last mile connectivity (pedestrian and other facilities) would improve the public transport network in the city greatly and provide option for car free travel. However, the project approval has been held up for lack of agreement between the Union Government, Ministry of Housing and Urban Affairs (MoHUA) and the Government of National Capital Territory of Delhi (GNCTD). Through cases like *Sunil Pannalal Bantia v. City & Industrial Development Corporation of Maharashtra Ltd*⁷⁸, *V.M. Kurian v. State of Kerala*,⁷⁹ *M. I. Builders (P) Ltd. v. Radhey Shyam Sahu*,⁸⁰ etc, which all deals with infrastructure projects, we could see that most of the projects had to be delayed or brought to a standstill, as the government both state and central and small institutions did not follow the law in place or no governmental body was ready to take up responsibility.

IV. **The Bandra Worli Sea Link Road Project (BWSLP):** It is a part of the Western Freeway Sea Project which is part of a bigger proposal to upgrade the network of road transportation of greater Mumbai according to the report by the Central Road Research Station commissioned by the Maharashtra

⁷⁷ Writ-C No. 17598 of 2017

⁷⁸ (2007) 10 SCC 674

⁷⁹ (2001) 4 SCC 215

⁸⁰ 1999 (6) SCC 464

Government. The project's aim is to provide one more corridor for free traffic flow from Bandra to Worli in the first phase and Worli to Nariman Point in the second phase. Therefore, the link will provide a second choice from the Mahim Causeway route which is currently the only connection between the Western and Central suburbs and the Island-city.

The major cause of delay was numerous Public Interest Litigations (PILs) filed by fishermen and environmentalists against the project. Also, both the planning and implementation of road projects have been entrusted to the Maharashtra State Road Development Corporation (MSRDCC), which is an engineering agency and has no expertise to take an overall view of the merits of such schemes. It is clear from the preliminary analysis that several aspects of the Environmental Regulations of the country have been violated. Also, the project as is planned will only seek to exacerbate the problem of vehicular pollution and traffic jams especially in the Worli-Haji Ali area which is already severely congested. The most worrying part of the project is that in depth studies using current data have not been used to estimate the environmental impact of the project on the city's coastline, mangrove forests and marine ecology. This again shows how the in numerous PILs filed is mainly the fault of the governmental bodies in charge for not doing their duty properly as well as the lack of accountability has led to the in numerous appeals by the Government which has led to the delay in the project as well as many financial costs.

- V. **Karapuzha Irrigation Project:** In Karapuzha Irrigation Project aims to provide irrigation facility during the second crop period of paddy. Many litigations were filed against the land acquisition problem of this project. Though the construction work of the right and left bank channels had been completed last year, five breaches occurred during the last monsoon. Thus, the full potential of the dam cannot be used for irrigation purposes. The irrigation project was cleared by planning commission in 1978 and the project is still not completed. i.e., 42 years of delay. The actual cost estimated at that time was Rs. 7.50 crore, as of now the Government has spent about Rs. 268 crores. One of the major causes of the delay is due to the litigations filed by those people affected by the acquisition process. The Government ends spending alot every year in the name of construction, but the output is seen nowhere.

The impact of litigation has been on the negative side as huge losses have been incurred by the Government.

3.4 Chapter Findings

- The connection between economic growth and infrastructure investment for India is very high. The correlation of investments in inland, road, rail and airport infrastructure to GDP are higher than 0.90 indicating that there exists a strong correlation between GDP and investment in infrastructure⁸¹.
- The five important features of infrastructure services.
- They are as follows:
 - Infrastructure services are monopolistic in nature.
 - They usually involve high upfront costs and long payback periods.
 - Investments are typically bulky and lumpy.
 - These services are marked by presence of externalities. This reveals the ‘Public Good’ nature of infrastructure, i.e., the characteristics of ‘non-rival’ and ‘non-exclusive’.
 - These involve high volume of ‘sunk costs.
- Ministry of Road Transport and Highways have been making constant efforts to expand and upgrade the network of National Highways in the country because of which the road construction grew at 30 kms per day in 2018-19 as compared to 12 kms per day in 2014-15⁸². As of 2020, the construction of highways has taken a hit. Presently the daily pace of construction is around 25-26 km⁸³.
- Litigation in India is an elaborate time consuming and high costs involved process. It takes years for a matter to get settled after years of long drawn courtroom battles, adjournments, and appeals.
- The impact of litigation has been on the negative side as huge losses have been incurred by the Government, both state and central along with governmental bodies due to the delay in the infrastructural projects and developmental activities.

⁸¹ Indian Brand Equity Foundation Report, 2019, available at <https://www.ibef.org/industry/infrastructure-sector-india.aspx>

⁸² Economic Survey 2019-20, available at <https://www.indiabudget.gov.in/economicsurvey/>

⁸³ Ministry of Road Transport and Highways, Annual Report, 2019-20, Available at: https://morth.nic.in/sites/default/files/Ministry%20Annual%20Report_2019-20.pdf

- The commonality between all these cases is that the governmental departments or agencies, etc. have refused to take responsibility or accountability of their actions with regards to compliance of the laws and policies in place or not ready to take action in the lines of the judgments which has led to the never-ending litigation by filing of appeals due to which many public infrastructure projects are put on hold or haven't started yet.

CHAPTER 4

THE ECONOMIC ANALYSIS OF LITIGATION

“India has acquired a reputation of an expensive legal system. In part, this is because of delays but there is also a question of affordability of fees. The idea is that a relatively poor person cannot reach the doors of justice for a fair hearing only because of financial or similar constraints while it is in our constitutional values and republic ethics. It is a burden on our collective conscience.”

-President Ram Nath Kovind

4.1. Introduction

Judiciary plays a key role in resurrecting the faith of people in democracy. Receiving justice is important but what is equally important is the effortless route for accessing justice. Today this route is witnessing several barriers, above all is the Legal cost incurred for seeking justice. The cost for seeking justice is escalating day by day which is making justice inaccessible for the majority of the litigants who are not economically sound to bear the rising cost of litigation. Exercising justice has always been considered a priority function of state and the judiciary is not explained in direct terms by the economic theory of markets. Several content have been made to back this point.

The main argument is that the state trades a group of services, which can be called protection and justice, for revenue. Since the economies of scale in providing the services, total income of the society is higher because of an organization specializing in these services than it would be if everyone in the society protected his own property.

A Law Commission of India report titled- “Cost of Litigation”⁸⁴, analyzed the various cost variables that burden a litigant in the Indian court system. The report came up with recommendations: such as to form gram-nyayalayas for simple and economical access to justice for the poor, set ceilings on lawyers’ fees, ameliorate the legal aid programs of the courts, and differentiate court-fees for corporate, tax and other high stakes matters. However, the study failed to base its analysis on statistical findings rather than on perceptions and opinions, so computing a figure of cost of justice was not possible. The economic analysis of litigation is

⁸⁴ 128th Law Commission of India Report, 1988, available at: <https://lawcommissionofindia.nic.in/101-169/Report128.pdf>

concerned with identifying and evaluating the circumstances under which a legal dispute will be litigated rather than settled out of the court.⁸⁵

4.2. Litigation Expenditures

According to Ministry of Law and Justice, government departments, both at the Centre and in States, are party around 46% of court cases⁸⁶. The expenditure incurred on litigation in the top court for the year 2014-15 was Rs 15. 99 crores, it rose to Rs 47. 99 crores in 2017-18⁸⁷. The rise is almost three times. The amount includes lawyers' fees and other expenditure incurred by the Central Agency Section in Supreme Court to file cases and other documents. Any peculiar civil action includes the following components of costs.

- Court Fee
- Professional Fee
- Miscellaneous Expenses and Disbursements

In a civil suit, it is required to pay the court fee which may be fixed or ad-valorem (a percentage of the claim amount) at the time of the institution of the suit. In General, the fixed fee is negligible. However, any claim associated with damages, property, compensation, or recovery may involve a court fee which would be a certain percentage of the claim amount or based on the value of the subject matter mentioned in the suit.

For example, a suit for recovery of a sum of INR 60 Million in Delhi High Court, payment of an amount equivalent to 1 % of the claim i.e., INR 0.6 Million must be done as court fee at the time of the institution of the suit. On the other hand, in criminal matters, only a trifling court fee is payable.

The component of a professional fee may include fee for advice, drafting of pleadings and appearance before the Court. In India, for professional fees, generally the system of lump-sum fee on 'hourly rate' basis is followed. Nonetheless, Indian law does not allow the payment of contingent fees or conditional fees, i.e., the fee is payable for the service provided only if there is a favorable result.

⁸⁵ It evaluates the cost benefit analysis on monetary terms through various tiers of court system. Robert Cooter and Thomas Ulen. Introduction to Law and Economics, 2000

⁸⁶ Action Plan to reduce Government Litigation, DEPARTMENT OF JUSTICE (2017), <https://doj.gov.in/page/action-plan-reduce-government-litigation> (last visited Jan 18, 2021).

⁸⁷ Id.

The third component of litigation cost, is usually not very high since the same pertains to miscellaneous issues related to litigation including typing, photocopying, postage, and courier charges etc.

Delay in litigation process further adds to the problem. Doing litigation in India may be an unending process. Indian Judicial System is marred with judicial delays and slow process. As of November 2019, there are 59,867 cases pending the Supreme Court, and 44.75 lakh cases in various high courts. At the district and subordinate court levels, the number of pending cases stand at shocking 3.14 crore⁸⁸.

The Hon'ble Supreme Court of India recently validated the concept of Litigation Funding in India. It is a practice where petitioner involved in litigation is provided with capital by a third party unrelated to the lawsuit in return for a portion of any financial recovery from the lawsuit. In India third – party funding is permitted. Under the Civil Code of Procedure 1908, the concept of third-party funding is statutorily recognized in some Indian states (e.g., Madhya Pradesh, Maharashtra, Uttar Pradesh and Gujarat) by their associated state amendments to Order XXV rules 1 and 3 of the Civil Procedure Code, 1908 (CPC). Hence, the acceptance of third-party funding in India can be pointed out from the CPC. Albeit the remaining states have not statutorily recognized the concept of third-party funding, there's no express bar under any legislation against the same. As a matter of fact, the Hon'ble Supreme Court of India has clarified the legal permissibility of third-party funding in India in Bar Council of India v AK Balaji⁸⁹ case. The Supreme Court has indeed brought the concept of third part funding to the forefront. It can be valuable in reducing litigation risk and exposure if one has a strong case.

The Supreme Court has mandated that lawyers are not allowed to fund litigation⁹⁰. However, there are no bar in the same being done by third parties. i.e., the recognition of funding by a third-party who is not a party, aids litigation. However, this third-party funding cannot help in saving arbitration costs. The Arbitration and Conciliation Act, 1996 does not permit the concept of third-party funding and remains unexplored in India. It focuses on cost sharing. In case of foreign laws, it regulates litigation funding. The Indian government is pacing towards

⁸⁸SUPREME COURT OF INDIA, STATISTICS | SUPREME COURT OF INDIA, Available at <https://main.sci.gov.in/statistics>.

⁸⁹ (2018) 5 SCC 379

⁹⁰ AIR 1954 SC 557

an inclusive economy. However, the Judiciary and the Parliament are yet to firm up a regulatory plan.

4.3. Cost of Justice in India

As of February 2020, India has almost 4 crore pending cases spanning the Supreme Court, various High Courts and numerous district and subordinate courts. In which Supreme court accounts for 62,054 (as on 31.08.2020), High court accounts for 51,57,378 (as on 31.08.2020) and District and Subordinate courts 3,45,71,854 (as on 31.08.2020). The total number of cases settled off by Hon'ble Supreme Court, High Court, District and Subordinate Courts are 45,787, 19,17,049 and 1,83,71,574 respectively (as on 2019)⁹¹ The Annual Budget allocation for the Supreme Court of India for the year 2020-21 is Rs 308.61 crore⁹². With these numbers it is very unsophisticated to evaluate the per unit cost of justice in India. The data available is also very less to make meaningful conclusions. Empirical research in this aspect is a very difficult task. Also, it is hard to get access to specific data other than the broad framework of numbers of instituted, disposed, and pending cases, which do not matter unless we are aware of the specifics of each case disposed in a year as to when they were instituted and how many years were, they pending as the Supreme Court is very hesitant in providing the same.

Seeking Justice in India not only include the State costs, but also the cost incurred by the parties seeking justice in terms of lawyers cost, travel costs, court fees, time costs etc. To compute near accurate per unit cost of justice all these factors must be taken into consideration. There exist many empirical hurdles while analysing this. They are:

- **Lawyer Costs:** It is very difficult to analyse the actual lawyer cost. The lawyers or even the party would not be open about their actual fees and the client unless a corporate body may not have proper accounts of expenses on lawyers' services and therefore the figures may not be authentic and reliable.
- **Court Fees:** The Supreme Court does not provide data on court fess separately for the cases disposed each year; rather it is available for the cases instituted each year. Deriving conclusions form available data is very insufficient and will remain as a major empirical hurdle.

⁹¹ Unstarred Question No.1381, answered on 22nd September, 2020, available at: <https://pqars.nic.in/annex/252/AU1381.pdf>

⁹² Union Budget 2020, available at: <https://www.indiabudget.gov.in/index.php>

- **Travel Costs:** Travel costs may vary according to the case. The cost would be very high in the case of the Supreme Court as most of the parties instituting a matter in the Court are not residents of NCT and are travelling from all over the country seek the highest intervention to resolve their dispute. These costs are also not documented by the parties accurately.
- **Time Costs:** It included the amount of time a person has spent on the resolution of his dispute and it would therefore be in the units of years or months. It is required to convert this factor cost in terms of unit of money to be homogenous with other costs. Conceptualizing a standard of conversion could be another hurdle.

In 2006, Supreme Court introduced the e-filing of litigation by submitting a draft of the plaint and written statement on the website. It was an initiative of the Supreme Court to mechanize Indian litigation. However, the number of cases filed through this mechanism is very less. While e-filing can substantially reduce the travel costs as well as time costs of the litigants, if the management of the e-filing is so dubious that only a half of the matters filed are found to be without any technical glitches it would not be truly cost-effective option for the litigants. Another consideration that could arise if this remains as unknown as it is the possibility of additional charge of the lawyers for filing a matter through internet. If such means are popularized and lawyers are trained to prepare briefs for online submission the technical glitches would reduce and this will not only bring down travel and time costs for the litigants but also lawyers' dependency and expenditure on clerks for filing would reduce, which could be reflected in fees. Now, since the Covid-19, courts have been relying heavily on e-filings as a safe precaution against Covid-19.

4.4. Analysis of the Bar Council of India Rules, 1975

The Bar Council of India has put forward rules of conduct for lawyers and to ensure a smooth functioning of the legal fraternity which is in accordance with the Advocates Act, 1961. The Bar Council of India Rules, 1975 is divided into a total of 9 Parts which is further divided into Chapters and then Rules.

Part IV of the BCI Rules are rules that govern the conduct of the advocates where chapter I deals with the restrictions on senior advocates such as that, he shall not directly accept from a client any brief or direction to present in any Tribunal or court, of before any authority or other-

person in India or a Senior Advocate who had acted as Junior Advocate in a case, shall not after he has been entitled as a Senior Advocate advise in the matter of appeal in a Court of Appeal or in the Supreme Court, except with an advocate as aforementioned.

Chapter II deals with standards of professional conduct and etiquette where section 2 of Chapter II where rules of conduct towards client is included from rules 11-33. Now, Rule 11 states that an Advocate is obligated to take any brief in Tribunals or in the Courts or before any other authority in or before which he admits to practice for a fee true with his standing at the Bar and the nature of the case. Extraordinary circumstances may justify his refusal to accept a particular brief. Therefore, here it can be seen that there is no specific base sum or rate that has been laid down for charging of fees. Rule 12 allows an Advocate to withdraw engagements once accepted if there is a sufficient cause and reasonable and sufficient notice is given to the client but instance of his withdrawal from a case, he shall return such part of the fee as has not been earned. Again, the rule has been worded in such a manner to give a wide interpretation of what consist as earned fees and what does not. Rule 20 states that an Advocate shall not impose for a fee subject to the the results of litigation or accept to share the proceed thereof. Now, there are oral agreements that happen where 10% or so of the compensation received will be considered as the lawyer's fees, this seems to be in contravention to the rule laid down. Overall, from the looks of it, there is no guidelines as such with respect to charging of the fees. Rule 23 states that an Advocate shall not alter fee payable to him by his client because of his own personal liability to the client, which liability does not arise in the course of his employment as an Advocate.

In the case of *Bar Council of Andhra Pradesh v. Kurapati Satyanarayana*⁹³ where the Lawyer mispend his client's money, BCI acquitted him from the charges on the ground that there was no motive. Supreme Court held this verdict of BCI to be “unfounded and perverse” and without the serious thought which was needed to be considered to the disciplinary committee of the BCI in handling the quasi-judicial functions while probing into such grave instances. Similarly, in the case of *Harish Chandra Tiwari vs. Baiju*⁹⁴ Misappropriation of client's money is a serious misconduct to be committed by a legal practitioner and must be punished accordingly under the Advocates Act.

⁹³ *Bar Council of Andhra Pradesh v. Kurapati Satyanarayana*, AIR 2003 SC 178

⁹⁴ *Harish Chandra Tiwari vs. Baiju*, 2002 (2) SCC 67

In the case of *Smt. Siya Bai vs. Sita Ram*⁹⁵ the decretal amounts paid were withdrawn by the advocate and violated the Rule 27 of the BCI Rules on Professional Ethics by not making the payment to the client. The advocate was ordered by the Disciplinary Committee of the Bar Council of India to return the money to the complainant with an interest of 10% per annum and also suspended the advocate for a period of one year.

In the case of *Rajendra Pai vs. Alex Fernandes*⁹⁶ the contingent fee was settled by the lawyer in a class action suit based on the portion of compensation allotted to the claimant; and that he assisted some claimants in starting a bank account wherein the cheque for the allotted amount of compensation was lodged and then the amount withdrawn which identification was later on found to be false. He was found guilty of misconduct (as in violation of Rule 20 of the BCI Rules of Conduct) and suspended for a period of seven years.

Rules 25, 26 and 27 state respectively that an Advocate must maintain details of the client's money entrusted to him, and the accounts must show the amounts paid by the client or on his behalf, the incurred expenses for him and the debits made on account of fees with concerned dates and all other required particulars and where moneys are accepted from or on account of a client, the entries made in the accounts must include a reference as to confirm that the amounts have been received for expenses or fees, and during the time of the proceedings, no Advocate shall, unless with the approval in writing of the concerned client, be at liberty to allocate any portion of the expenses towards fees. Where any payment is accepted or paid to him on behalf of his client the fact of such payment must be intimated to the client as early as possible. Also in the case of *In Re: Advocates vs. Unknown*⁹⁷, it was held that it is the imperative duty of the counsel on acceptance of the client's decretal money, to notify the client therefore and pay him without the amount mentioned in receipt without any delay. The respondent was suspended by the Kerala High Court for a period of six months, for non-fulfilment of this duty under Rule 27 of the BCI Rules- Chapter II.

Also Rule 28 and Rule 29 state respectively that after the discontinuance of the proceeding the Advocate shall be at liberty to act towards the settled fee due to him any sum remaining -

⁹⁵ *Smt. Siya Bai vs. Sita Ram*, BCI Tr. Case No. 8/1987

⁹⁶ *Rajendra Pai vs. Alex Fernandes*, AIR 2002 SC 1808

⁹⁷ *In Re: Advocates vs. Unknown*, AIR 1961 Ker 209

not spend out of the payment made or arranged to him for expenses, or any money that is received by him in that proceeding. Where the fee payment has been left unsettled, the Advocate shall be permitted to deduct, out of any amount of the client remaining in his hands, at the discontinuation of the proceeding for which he had been involved, the payment of fee under the rules of the Court, operational for the time being, of by then settled and the remaining money, if any, shall be returned to the client. This shows that the oral agreements can be entered where the lawyer's fees would be percentage of the proceeding received. Rule 32 provides that An Advocate shall not lend money to his client for the reason of any act or legal proceedings in which he is engaged by such client as an Advocate shall not be held accountable for a violation of this rule, if in the process of a unsettled suit or proceeding, and without any agreement with the client in view of the same, the Advocate feels obliged because of the rule of the Court to remit a payment to the Court on behalf of the client for the continuation of the suit of proceeding. Also under Rule 38, an Advocate shall not accept a fee payment lesser than the taxable fee under the rules when the client is able to pay the same. Therefore, these are the rules with regards to fees and the rules are wide in scope and hence, the lawyers are at a liberty to charge higher fees.

Chapter III deals with right to practice and Chapter IV deals with form of dresses or robes to be worn by advocates. Part VII deals with disciplinary proceedings and review which includes complaints filed against advocates and proceedings to be regarded by disciplinary committees of the state bar council and the bar council of India where rules are laid down with regards to filing a complaint, withdrawal of proceedings and appeal, application for stay and other matters, in camera proceedings, orders, etc. Section 44 of the advocates Act gives power to the Bar Council for review where the procedure for Review is laid down in Chapter II of Part VII. Part VIII lays down the fees schedule which can be levied by the Councils (Both State & Central). Part IX deals with general principles to be followed by state bar councils and the rules of bar council of India for supervision and control by the bar council of India like how the election of members of State Councils shall only be conducted by secret ballot. There shall be no voting by post unless a State Council may authorize voting by post to Advocates eligible to cast vote and who do not ordinarily practice at the seat of the High Court or the seat of any of the District Courts in the State as an Advocate shall be deemed ordinarily to practice at the place, which is given in his address in the Electoral Roll.

Or the rule that states the funds of State Councils must first be deposited in the State Bank of India or any Nationalized Bank before expending money, and disbursement shall normally be made by cheques, unless the concerned amount is small and how every state Council shall support a provident fund for the employees and also gratuity shall be given in accordance with rules, which each Council may frame. Rules of enrollment is also laid down where In addition to the enrolment fee laid mentioned in section 24 of the Advocates Act, persons desirous of being enrolled as advocates shall also be obliged to make payment to the State Councils, Stamp Duty payable by them under the Indian Stamp Act and such Bar Councils shall be authorized to reclaim the same prior to making the entry of their names in the rolls and Ever candidate-seeking enrolment shall be needed to confirm and subscribe to the following declarations: (a) I shall uphold the Constitution and the Laws; (b) I shall faithfully discharge every obligation cast on me by the Act and the Rules framed thereunder'. Also, there are rules on supervisions and controls. Finally, right of practicing Advocate to take up law teaching. Notwithstanding anything to the contrary given in any rule made under the Act, an advocate may, while practicing, pursue teaching of law in any academic institution which is affiliated to a University within the law of the university Grants Commission Act, 1956 (3 of 1956), so long as the hours during which he is so involved in the teaching of law do not exceed three hours in a day or when any advocate is employed in any such academic institution for the teaching of law, such employment shall, if the hours during which he is so comitted in the teaching of law do not cross hours, be deemed, for the purposes of the Act and the rules made there under, to be a part-time employment irrespective of the manner in which such employment is described or the remuneration receivable (whether by way of a fixed amount or on the basis of any time scale of pay or in any other manner) by the advocate for such employment.

Hence, the BCI rules tries to cover and lay down guidelines to be followed by the legal fraternity with respect to towards the court, client, to fellow colleagues.

4.5. Strategies for Reform

Courts and judicial framework are not secondary or complementary to political economy but play a fundamental role in well-being of market economy. Failure to enforce and guarantee legal rights and norms can have disastrous economic and social consequences. At. The very basis of understanding the issue and enhancing the justice administration is not dealing broad generalizations associated with litigation levels but rather an investigation of the incentive structures facing all stakeholders: litigants, judges, lawyers etc.

Some of the strategies for reforming the administration of justice and for reducing the delay of justice delivery are as follows:

- **Simplify the Law:** Simplification of law can have a serious impact on the level and nature of litigation. Where the law is clear and transparent it becomes easier to monitor actions and economical to settle disputes.⁹⁸ Simple rules can assist courts in resolving a controversy at lower costs.
- **Simplify Procedures:** Complex procedures are a certain source of delay and it increases the cost of litigation. Eventhough there is a trade-off between cost, delay and accuracy, this does not mean that substantial slack does not exist.
- **Promote Transparency in Judicial Proceedings:** Increasing level of transparency and accountability in courts can greatly improve performance.
- **Make More Use of Technology:** Greater use of technology in the management of litigation has yielded substantial results in many countries. It has been consistently shown that – where there is commitment – information technology used for case tracking, jurisprudence and writing decisions can make courts function more efficiently and reduce clearance rates.⁹⁹
- **Review Alternate Means of Dispute Resolution:** An obvious means for consideration in reducing the case burden on court is to deflect cases towards alternative means of dispute resolution. From an efficiency perspective, the benefits of ADR are not.

4.6. Conclusion

In India, we can see that delivery of justice has always been a core state function and economic theory of demand and supply does not explain the judiciary in direct terms. The economic model of litigation is concerned with identifying the circumstances under which a legal dispute will be litigated rather than settled out of court.

And there exists no theory on the economic model of production of justice by courts and other mechanisms of dispute resolution. The literature about the supply of legal services mostly regards the market for lawyer as agents for one of the parties, not about the market for mediators, arbitrators, courts or other neutral institutions.

⁹⁸ A. Mitchell Polinsky & Steven Shavell, 1999. "[The Economic Theory of Public Enforcement of Law](#)," [NBER Working Papers](#) 6993, National Bureau of Economic Research, Inc.,p.3

⁹⁹ Buscaglia, Edgardo, 1999."Judicial Corruption in Developing Countries: Its Causes and Economic Consequences", p.21

4.7. Chapter Findings

- According to Ministry of Law and Justice, government departments, both at the Centre and in States, are party around 46% of court cases. The expenditure incurred on litigation in the top court for the year 2014-15 was Rs 15.99 crores, it rose to Rs 47.99 crores in 2017-18¹⁰⁰.
- Seeking Justice in India not only include the State costs, but also the cost incurred by the parties seeking justice in terms of lawyers cost, travel costs, court fees, time costs etc.
- Delays in litigation process further adds to the problem. Doing litigation in India may be an unending process. Indian Judicial System is marred with judicial delays and slow process. As of February 2020, India has almost 4 crore pending cases spanning the Supreme Court, various High Courts and numerous district and subordinate courts. In which Supreme court accounts for 62,054 (as on 31.08.2020), High court accounts for 51,57,378 (as on 31.08.2020) and District and Subordinate courts 3,45,71,854 (as on 31.08.2020). The total number of cases settled off by Hon'ble Supreme Court, High Court, District and Subordinate Courts are 45, 787, 19,17,049 and 1,83,71,574 respectively (as on 2019)¹⁰¹.
- In 2006, Supreme Court introduced the e-filing of litigation by submitting a draft of the plaint and written statement on the website. It was an initiative of the Supreme Court to mechanize Indian litigation. However, the number of cases filed through this mechanism is very less. While e-filing can substantially reduce the travel costs as well as time costs of the litigants, if the management of the e-filing is so dubious that only a half of the matters filed are found to be without any technical glitches it would not be truly cost-effective option for the litigants.
- Some of the strategies for reforming the administration of justice and for reducing the delay of justice delivery are as follows:
 - Simplify the Law: Simplification of law can have a significant influence on the nature and level of litigation. Where the law is transparent it becomes easier to monitor actions and less costly to resolve disputes.¹⁰² Simple rules can assist courts in resolving a controversy at lower costs.

¹⁰⁰ Supra Note. 3

¹⁰¹ PENDING CASES IN COURTS, (2020), <https://pqars.nic.in/annex/252/AU1381.pdf>.

¹⁰² Shavell (1999), p.3

- Simplify Procedures: Complex procedures are an certain source of delay and it increases the cost of litigation. Though there is a trade-off between cost, delay and accuracy, this does not mean that significant slack does not exist.
- Promote Transparency in Judicial Proceedings: Increasing level of transparency and accountability in courts can greatly improve performance.
- Make More Use of Technology: More use of technology in the management of litigation has created significant results in many countries. It has been consistently shown that – where there is commitment – information technology used for jurisprudence, case tracking, and writing decisions can make functions of the court more efficiently and reduce clearance rates.¹⁰³
- Review Alternate Means of Dispute Resolution: An obvious means for consideration in reducing the case burden on court is to deflect cases towards alternative means of dispute resolution. From an efficiency perspective, the benefits of ADR are not.
- The economic model of litigation is concerned with identifying the circumstances under which a legal dispute will be litigated rather than settled out of court. And there exists no theory on the economic model of production of justice by courts and other mechanisms of dispute resolution.

¹⁰³ Buscaglia and Dakolias (1999), p.21

CHAPTER 5

ROLE OF ARBITRATION IN LITIGATION

5.1 Introduction

The Government has always focused on infrastructure development and maintenance. There's always plenty of work to be done on the same, either regularly or sparsely. “Most of the infrastructure projects involve contracts of significant value and time. There is a procedure in place where bids are made on the basis of specifications and requirements. But activities required for project development like land acquisition, regulatory clearances like environment/forest, detailed feasibility study are not given adequate importance. Therefore, it leads to insufficient identification of requirements at the bidding time, which results in bidding based on approximations. Thus, the work executed in reality is far off from the initial data, leading to disputes. The delay in payments by government organizations has been a long-standing issue across all departments, including the central and state governments.

The Government resources are limited, which invariably results in delay in payment. There are contracts that have penal provisions for payment delays. The provisions are not fully or partly adhered to, which leads to disputes again. Around 2013, there were 135 cases before the arbitral tribunal with over Rs. 9000 crores being disputed about India's National Highways Authority, this number would have increased by tenfold now.¹ Furthermore, 79 cases were pending in various courts with over Rs. 2000 crores of arbitral awards being contested in 2013.¹⁰⁴ Each department of the Central Government like Railways, Central PWD, State Government departments, Military Engineering Services, Government Corporations have a huge number of arbitration cases. A special attraction is there with contracts involving the private sector with government agencies and corporations even though they are usually one-sided and involves several challenges. However, the private players have realized that it is not just having a contract with the Government which is important.

¹⁰⁴ National, Science, Sports, World, Variety, Education, Estate, Estate, R., Stocks, Forex, Commodities, Silver, Silver, G., Pick, Pick, T., Tracker, Tracker, P., Index, Economy, Economy, M., Policy, Business, Business, A., Logistics, 2020, 2020, B., How-To, Media, Media, S., Laptops, Laptops, C., Tablets, Tablets, M., Gadgets, Gadgets, O., Editorial, Columns, Take, Take, Q., Letters, Books, Blogs, BusinessLine@25, People@Work, focus, focus, A., Tech, Tech, C., Entrepreneurs, Entrepreneurs, E., Plan, Plan, F., File and File, I., 2021. *Govt Departments Do Not Allow Arbitration To Work*. [online] @businessline. Available at:

¹ Importance of Arbitration in government contracts - ipleaders. (n.d.). Retrieved March 28, 2021, from <https://blog.ipleaders.in/importance-arbitration-government-contracts/>

But, it is equally important to execute the contracts completely and realize the amount due on time. If the parties face disputes during that period, it should be possible to resolve the same without any undue delays. There are certain areas where there is always a chance of dispute with the government bodies. The impact of such disputes is also extremely significant.

There should be an efficient dispute resolution mechanism in place to ensure that there is a successful execution of government contracts. Contracts of high value with less than adequate dispute resolution mechanism and costs of delay concerning dispute resolution are considered very high risks. They are not acceptable, which can be seen in the case studies like the Bandra-Worli sea project, the metro phase IV project, etc.

Now, the process in the Court in India is extremely cumbersome. Counsels for the parties keep stretching the litigation process, which results in costly and time-consuming litigation. Therefore, the system in place is not efficient. Therefore, the parties have to seek other alternatives for dispute resolution. Such alternatives include amicable settlement, conciliation, mediation, Arbitration, expert determination, etc. Arbitration is a procedure where a dispute is submitted based on an agreement between the parties to an arbitrator/s who decides on the dispute which is binding. In choosing Arbitration, the parties choose for a private dispute resolution procedure.² Litigation is an age old process which involves determining issues in a court in the front of a judge or jury. In contrast, Arbitration involves the parties in a dispute to work with a disinterested third party to resolve the dispute. Initially, the ADR mechanisms were tried to be implemented with much emphasis on Statutes by inserting the ADR clauses in those statutes. But these process and policy was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court. In this process, Courts are authorized to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance, etc. Power is also conferred upon court so that it can intervene in different stages of proceedings.

The Indian Arbitration and Conciliation Act, 1996 have consolidated the provisions relating to domestic and international Arbitration in to one single document. The Act contemplates both ad hoc and institutional Arbitration that may be accomplished by an agreement between the parties or the Act's provisions. This Act has been amended twice,

² What is Arbitration? (n.d.). Retrieved March 28, 2021, from <https://www.wipo.int/amc/en/arbitration/what-is-arb.html>

once in 2015 and later in 2019. This act is the principal act that governs Arbitration in India. In this chapter, the role of Arbitration is examined with respect to its effect on litigation.

5.2. Importance of Arbitration

In India arbitration is gaining importance due to the over worked judicial system and the huge pendency of cases. Arbitration has gained importance due to the advantages that Arbitration has over litigation. It minimizes the court intervention, brings down the costs of dispute settlement, fixes timelines for expeditious disposal, and ensures there is a neutral arbitrator and enforcement of award. A sound arbitration law will encourage foreign investments to a country because an arbitration law will project the country as an investor friendly who has a sound legal framework in place, which is an added advantage. The Indian judiciary is vast at some 17,000 judges, and while it boasts many professional and diligent judges, the system is under strain. With almost 24 million cases currently pending in the system, the courts are understaffed, meaning bottlenecks and delays are endemic. Depending on the court, commercial cases may take in the region of 5, 10 or 15 years to reach judgment.¹⁰⁵ In such a situation, most commercial cases may be abandoned when they approach trial. As the pace of development, the passage of time and inflation have rendered the original dispute no longer relevant or economic to fight. The trials have resulted in an important question of 'interim' relief. Litigants fight with creativity and aggression to achieve interim injunctions which can often decide a dispute for all relevant commercial purposes.

The Delay in Indian courts and the judiciary's excessive involvement in the arbitral proceedings have resulted in not being favored as a seat of Arbitration. This has resulted in discouragement of foreign parties to arbitrate. Parties delay arbitration proceedings of by initiating court proceedings before or during arbitral proceedings or at the arbitral award's enforcement stage. The high pendency cases before Indian courts also means that arbitration-related court proceedings will also take time to be disposed. The reasons given for an articulated preference for institutional Arbitration is mainly the perceptions of certain inherent advantages of institutional Arbitration, namely, better management of the arbitral process and assurance of timely resolution of disputes.

¹⁰⁴ Id note 105

¹⁰⁵ Herbert Smith Freehills | Global law firm. 2021. *Arbitration In India: Dispute Resolution In The World's Largest Democracy*. [online] Available at: <<https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-dispute-resolution-in-the-worlds-largest-democracy>> [Accessed 13 January 2021].

Further, the following reasons are cited: (a) a fixed framework of rules governing the arbitral proceedings; (b) the provision of administrative support for the Arbitration; (c) a higher standard of professionalism; (d) accountability of arbitrators, which in turn ensures timely hearings and awards; (e) appointment of arbitrators from a wider pool of individuals; and (f) scrutiny of awards by the arbitral institution. It was also opined that institutional Arbitration would create potential for the development of arbitral jurisprudence with publication of redacted awards. There is preference for ad hoc arbitration due to the flexibility and autonomy it gave to the parties. Additionally, parties felt that ad hoc arbitrations allowed them to choose arbitrators having knowledge / experience in the area in which the dispute arose, and gave them the liberty to choose arbitrators in accordance with the complexity of the dispute. Institutional Arbitration, whether domestic or international, formed a negligible percentage of the disputes submitted to Arbitration. This confirms that India prefers ad hoc arbitration as a mode of dispute resolution.

5.3 How can Arbitration Reduce litigation?

The Arbitration and Conciliation Act, 1996 governs Arbitration. This Act only codifies Arbitration and conciliation. Mediation and negotiation are still not codified mechanisms in India, although the parties can have such proceedings prior to being legally bound by the final decision. The courts of that jurisdiction play a pivotal role in exercising supervisory jurisdiction over Arbitration and in marking an arbitral institution into a 'good seat'. Though Arbitration involves party's autonomy, but judicial co-operation is vital to give effect to the law of Arbitration.

Therefore, an effort is to be made to identify those steps which would make good balance between judiciary and Arbitration, at pre, during and post arbitral proceedings. This would entail court intervention in upholding/restraining arbitral awards, providing timely court assistance when needed, recognizing party autonomy in the arbitral process. In the Indian context, interference by courts was identified as one of the major reasons for delay in arbitrations.

An award in *White Industries vs. Republic of India* in 2011¹⁰⁶, is a case in point. In this matter, an Australian company successfully claimed compensation, equivalent to the amount of award, from the Indian Government on account of judicial delay. There are two issues that emerge from the above award: one is interference by courts and two- delay in Arbitration.

¹⁰⁶ IIC 529 (2011)

With respect to interference by courts, it is well debated and agreed that judiciary should minimize its intervention into the Arbitration, as is being done in various other jurisdictions.

Arbitration has many positive impacts and one such impact is the reduction of the cases that are pending in the Court, now people have a very reluctant attitude towards Arbitration, and this can be seen in the case of Delhi Metro Phase IV project where no arbitration has happened till date¹⁰⁷. If Arbitration is implemented properly then cases like the Karapuzha Irrigation Project, the Delhi Metro Phase IV Project, etc where due to the unnecessary filing of appeals has led to the delay in the projects could have been saved from the unnecessary delay by Arbitration.

Another issue that has been recognized as a cause of concern is lack of consistency in decisions by Indian judiciary on Arbitration and decisions taken by arbitral authorities. Judicial supervision lacks uniformity in so far as owing to the federal structure of States and Central relations in India and each State having its own Judiciary, the perspective of individual Courts to the objections filed under Section 34 of Arbitration and Conciliation Act¹⁰⁸, 1996 vary as per conditions. The judicial academies are called for action to impart training to judges on how to deal with cases challenging and seeking setting aside of arbitral award and other related issues, besides ensuring that frequent transfer of judges holding such courts should be avoided. It has been identified that a heavy reliance on retired judges as arbitrators is in problematic. This affects the proceedings in two ways. One, it is believed that with retired judicial members as arbitrators, the case acquires a slow pace as the hierarchy in place takes precedence. Also, the exorbitant fee charge for Arbitration by retired judges which is seen to have a discouraging impact on the parties. The judiciary and the arbitration proceedings should be supportive roles to each other- when the arbitrator decides the merits of a case, the court should support the decision and its implementation. Broadly, the courts should support Arbitration in the following ways: Where it is mandatory to refer the matter to the Arbitration; in case of interim measures, which assume importance in absence of any provision for appointment of emergency arbitrators and the role of the court becomes all the more important; in case of application under Section 11 reference may be made to designated institutions rather than individual arbitrators; court may ensure effective Arbitration by constituting special/designated benches.

¹⁰⁷ RTI, (2019).

¹⁰⁸ Section 34 deals with the application for setting aside an arbitral award. It lays down the conditions and the procedure for setting aside an award.

The reasons given was that there is an articulated preference for institutional Arbitration due to the stakeholders' perceptions of certain inherent advantages of institutional Arbitration such as better management of the arbitral process and assurance of timely resolution of disputes. Further, respondents cited the following reasons for their preference: (a) a fixed framework of rules governing the arbitral proceedings.

(b) the provision of administrative support for the Arbitration; (c) a higher standard of professionalism; (d) accountability of arbitrators, which in turn ensures timely hearings and awards; (e) appointment of arbitrators from a wider pool of individuals; and (f) scrutiny of awards by the arbitral institution. It was also opined that institutional Arbitration would create potential for the development of arbitral jurisprudence with publication of redacted awards¹⁰⁹. Respondents who preferred ad hoc arbitration emphasized the pliability and autonomy it gave to the parties. Additionally, respondents felt that ad hoc arbitrations allowed them to settle on arbitrators having knowledge / experience within the area during which the dispute arose and gave them the freedom to choose arbitrators in accordance with the complexity of the dispute. Interestingly, one respondent who preferred ad hoc arbitration stated that institutional Arbitration was not accessible to all due to high costs, and that nomination to the panels of arbitrators maintained by arbitral institutions is fraught with nepotism. Another respondent stated that there's an insufficient number of arbitral institutions to satisfy the stress of users, and existing arbitral institutions aren't equipped to handle the present volume of arbitrations. While there appears to be in theory a preference for institutional Arbitration, a different picture emerges as far as practice is concerned.¹¹⁰

Most respondents are involved in domestic ad hoc arbitrations. Institutional Arbitration, whether domestic or international, formed a negligible percentage of the disputes submitted to Arbitration. This confirms that India prefers unplanned Arbitration as a mode of dispute resolution. Additionally, it appears that international arbitrations seated in India are not quite common. This confirms that India prefers unplanned Arbitration as a mode of dispute resolution This confirms that India prefers unplanned Arbitration as a mode of dispute resolution.

¹⁰⁹ High Level Committee to Review the Institutionalization of Arbitration Mechanism in India, [www.legalaffairs.gov.in](https://www.legalaffairs.gov.in/sites/default/files/Report-HLC.pdf) (2017), <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> (last visited Jan 17, 2021).

¹¹⁰ Id.

Additionally, it appears that international arbitrations seated in India are not quite common. The responses reflect several the explanations for equivalent — the overall perception is that institutional Arbitration isn't as flexible as ad hoc and is not cheap. The following sections use data gathered from responses to debate other reasons why institutional Arbitration is not preferred in India, which are primarily associated with the functioning of arbitral institutions¹¹¹

The Government spends a significant percentage for the creation of infrastructure like construction of roads, railways, ports and power plants. But, contracts for construction have a reputation of disputes and conflicts between governments and contractors. Such disputes ultimately result in the delay implementation of the contracts and increases the total costs, adversely impacting development outcomes of the projects. For disputes involving Indian public sector enterprises (“PSEs”), there is also a Permanent Machinery of Arbitration (“PMA”) under the Department of Public Enterprises to settle disputes between PSEs and government departments or between PSEs inter se. However, since the PMA is not subject to the ACA, arbitral awards rendered by such mechanism are not enforceable by Indian courts. This has negatively impacted its efficacy and legitimacy as a mechanism for dispute resolution. The preference for ad hoc arbitration is not limited to arbitrations where the amounts in dispute are small. For instance, construction and infrastructure, one of the fastest growing sectors in the Indian economy, spends crores of rupees on resolution of disputes. In 2001 alone, 54,000 crores of capital were blocked in construction sector disputes.¹¹² Dispute resolution in this sector consists mostly of ad hoc arbitration. While Government is the most prolific litigant in India, it can encourage institutional Arbitration. The general clauses used by the Government and PSUs do contain arbitration clauses, but these clauses does not expressly provide an option for institutional Arbitration. Further, government policy on Arbitration requires an assessment if institutional Arbitration is to become the norm, especially for disputes which has high value. For instance, Government, being the biggest litigant, were to adopt institutional Arbitration as the norm, the huge volume of cases moving to arbitral institutions would provide a powerful impetus to institutional Arbitration.

¹¹¹ Justice B. N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, available at <https://www.lawinsider.com/documents/IKiW3onTMQ9>.

¹¹² Desai, S., 2021. *Institutional Arbitration And Mediation In India- Failure In Making Law And Its Implementation An Analysis - Shruti Desai & Co.* [online] Shruti Desai & Co. Available at: <<https://www.shrutidesai.in/institutional-arbitration-and-mediation-in-india-failure-in-making-law-and-its-implementation-an-analysis/>> [Accessed 13 January 2021].

Discussions and initiatives were done on the part of few state governments to promote institutional Arbitration, by stating that it would be more organized and cost-effective. However, effectively, the Government has focused its attention on Arbitration. Separate action for the development of arbitral institutions is required to encourage institutional Arbitration. A Indian arbitration law jurisprudence has been criticized particularly regarding its interpretation of legal provisions concerning setting aside of domestic arbitral awards (section 34 of the ACA) and refusing enforcement of foreign arbitral awards (section 48 of the ACA). For instance, the expansive interpretation given to the “public policy” ground for setting aside of domestic arbitral awards and its extension to foreign arbitral awards created a climate where parties seeking to enforce arbitral awards in India had no certainty as to its enforcement. Recent judicial decisions, which have restricted the use of the “public policy” ground to undertake a review on merits, appear to have changed this perception to some extent.

5.4 Government Initiatives on Arbitration

NITI Aayog, along with other supporting institutions had organized a three-day Global Conference on “National Initiative towards Strengthening Arbitration and Enforcement in India”¹¹³. The following section on ways to making Indian the Global Arbitration hub draws largely upon the takeaways from this conference. The Institutional Dispute Board initiative was launched on June 23, 2016, in New Delhi, ICA is responsible for updating the list of Dispute Board members whenever needed, the training and empanellment of Dispute Board members in self-developed standard operating procedures and providing a continuous platform for training of all stakeholders including the operating staff of the employer, functional employees, the engineer’s organizations and the contractor, etc.

After the standard operating procedures is finalized, the ICA empaneled and trained nearly 200 experts in different trades as potential board members.¹¹⁴ This initiative is to build confidence among all stakeholders and create a new era of dispute resolution in India. There are over 35 arbitral institutions in India which include arbitration facilities provided by various

¹¹³ Cgichicago.gov.in. 2021. [online] Available at: <http://www.cgichicago.gov.in/pdf/Brochure_Arbitration.pdf> [Accessed 13 January 2021].

¹¹⁴ World Bank Blogs. 2021. *Resolving Disputes, Avoiding Litigation In India*. [online] Available at: <<https://blogs.worldbank.org/governance/resolving-disputes-avoiding-litigation-india>> [Accessed 13 January 2021].

public-sector undertakings ("PSUs"), city-specific chambers of commerce and industry and trade and merchant associations, A large number of these arbitral institutions conduct arbitrations as per their rules or as per the Arbitration Rules of the United Nations Commission on International Trade Law.

The Commercial Courts Act has tried to fix this situation by setting up commercial courts at the district level or commercial divisions in High Courts having ordinary original civil jurisdiction. The 2015 amendments, in two important respects, signal a paradigm shift towards minimizing judicial intervention in the arbitral process. Firstly, Section 9 amendment under the Arbitration and Conciliation Act, 1996, provides that "courts should not entertain applications for interim relief from the parties unless it is shown that interim relief from the arbitral tribunal would not be efficacious". Secondly, the amendment to section 36 of the Arbitration and Conciliation Act, 1996, provides that "the filing of an application to set aside an arbitral award will no longer trigger an automatic stay on the operation of that award. Prior to the 2015 Amendment Act, both section 9 and section 36 enabled uncooperative parties to engage in dilatory tactics through unnecessary involvement of the courts".

5.5 Conclusion

India has not fully embraced institutional Arbitration as the preferred mode of Arbitration despite the existence of several institutions which administer arbitrations. Arbitration has clearly evolved to be the ideal tool for dispute resolution as it saves the court's time and helps in assisting the parties to reach quick remedial measures. Each Arbitration is based on practical application of law and its evolution can be seen as proof of its importance as a tool in the actual proceedings. Thus, Arbitration is the most preferred platform for resolution of disputes especially in the industrial and corporate realm. Considering that the stakes involved are high for most of the government contracts and the experience in the approach of the government organizations for raising disputes on almost most of the contracts the importance of Arbitration is very apparent for dispute resolution. The arbitration clauses which is loosely worded in the government contracts result in significant court intervention which defeats the purpose of having alternative dispute resolution mechanism. Intervention of court cannot be eliminated which is specifically mentioned in the Arbitration and Conciliation Act. However, more clarity will help in drafting tight arbitration clauses so that it is less susceptible to court intervention and

other procedural delays. Also, resorting to the arbitration mechanism would ensure the full benefits.

5.6 Chapter Findings

- The delay in payments by government organizations has been a long-standing issue.
- Around 2013, there were 135 cases before arbitral tribunal with over Rs. 9000 crores being disputed with regard to National Highways Authority of India, this number would have increased by tenfold now.
- There were 79 cases pending in various courts with over Rs. 2000 crores of arbitral awards being contested in 2013.
- The existence of a credible and efficient dispute resolution mechanism is very important for the successful execution of government contracts.
- Arbitration involves 2 parties in a dispute to work with a disinterested third party to resolve the dispute.
- Having an arbitration law encourages foreign investments to a country as that projects the country as investor friendly as the country has a sound legal framework.
- Delays in Indian courts and excessive involvement of judiciary in arbitral proceedings have resulted in not being favored as a seat for Arbitration.
- The high pendency of cases before Indian courts means that arbitration-related court proceedings take a long time to be disposed of.
- India has not fully embraced institutional Arbitration as the preferred mode of Arbitration despite the existence of several institutions which administer arbitrations.
- Arbitration is the preferred means for quick resolution of disputes, especially in the industrial and corporate realm.

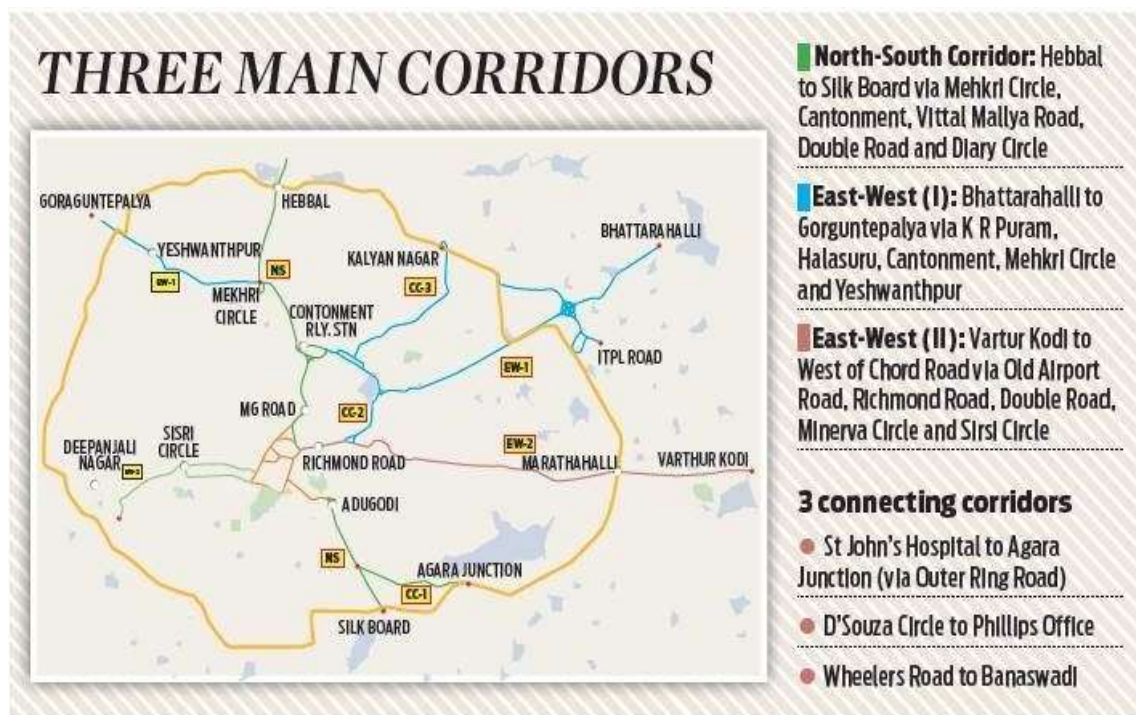
CHAPTER 6

CASE STUDY SUMMARIES

Infrastructural works like roadways, power-generation plants, railways etc. are of immense importance in the overall development of a nation. The State undertakes many infrastructures building projects to improve the quality of life of the people, but these projects often get entangled in a web of legal issues which adversely affects the timely completion of the projects. Delay in implementation and completion of the projects results in not only causing hardships for the common people but also results in increasing the overall cost of the project. One major cause of delay in project implementation is government litigation and judicial intervention.

6.1 Elevated Corridor Project, Bangalore

It is a 92 km long elevated roadway, connecting all the ends of Bangalore city with the aim to decongest the city's increasingly choked roads. Karnataka Road Development Corporation Ltd (KRDCCL) is the implementing agency of the project.



Source: Detailed Feasibility Report, 2019

The very objective of the elevated corridors in Bangalore will only be achieved if the proposal is integrated with development of Peripheral Ring Road (PRR) to avoid the through traffic

from entering the City Core central area, development of Mass Transit System including new Metro and Monorail feeder corridors.

6.1.1 Major Issues

- Objectives and Justifications – the objectives to decongest city by increasing road capacity and improving quality of life needs to back by clear and credible evidence. The project lacks credible evidence for these outcomes.
- Environmental Concerns – The project would violate the NGT order¹¹⁵ on lake buffer zones by running above the Halsuru lake, Hebbal lake and Agara lake. It requires the chopping of 3,820 trees and pruning another 2000, its construction stands to impact 1,130 structure and breaches over 60 air and noise-sensitive localities like hospitals, libraries, education institution and hostels.
- Due Process – The project has bypassed the provisions of Chapter V of the Karnataka Town and Country Planning Act, NGT orders, the Metropolitan Planning Committee, and the Karnataka Preservation of Trees (KPT) Act.
- Constitutionality of Local Self Governments (LSGs) – LSGs are required of detailed deliberations about planning action plans and execution of such projects, with in the local bodies and their communication to authorities at different levels and State legislature, for the consideration by the latter and thereafter. This appears to have been breached in the current instance, as there is no mention of whether this issue figured in the deliberation of the concerned local bodies and whether their concerns, demands, and apprehensions got addressed before any decision regarding the Elevated Corridors were made.
- Sustainability Factor - According to the Sustainability Report¹¹⁶ on Elevated Corridor Project (IISC, Bangalore), the proposed elevated corridor project will increase the vehicular pollution and raise traffic congestion by 2030. Instead, a metro rail built along the same alignment can be a viable alternative as it reduces emissions.

¹¹⁵NGT order dated 21.10.2019 in respect of OA No. 127/2017, https://greentribunal.gov.in/sites/default/files/all_documents/REPORT%20BY%20BBMP%20IN%20OA%20NO.%20125%20of%202017.pdf

¹¹⁶Verma, P. (2018). *Sustainability Analysis of the Proposed Elevated Road Corridors in Bangalore City - A Comparative Scenario Analysis with Metro Rail System* (Rep.). Bangalore, Karnataka: IISC.

A writ petition¹¹⁷ was filed in January 2016 against the State of Karnataka and others for non-constitution of a Metropolitan Planning Committee (responsible for all developmental activities in the city) pursuant to 74th Constitutional Amendment. The petitioners involved are Namma Bangalore Foundation (NMF) and Citizen Action Forum.

6.1.2 Major Findings

- The Karnataka government Budget has proposed to construct six interconnected elevated corridors in the next four year at the cost of Rs 15,825 crore under hybrid annuity to provide good transport/communication in Bengaluru.
- The Government of Karnataka has proposed the preparation of the Detailed Feasibility Report of the Elevated Corridor Project in January 2016 and the project is not started yet.
- The Karnataka Road Development Corporation (KRDCL) under the state Public Works Department, the implementing agency for the project cannot resume any work including the tendering process.
- The scheme will be taken up through Hybrid Annuity through Karnataka Road Development Corporation Limited (KRDCL). For this programme, Rs 1,000 crore has been earmarked this year alone (2019-20) but the work has not started yet even the tendering process.
- The major legislations involved are:
 - Karnataka Town and Country Planning Act, 1961,
 - Environment Protection Act, 1986,
 - 74th Constitutional Amendment (Nagarapalika Act)
 - Karnataka Preservation of Trees Act, 1976
 - Environment Impact Assessment Notification, 2006
 - National Green Tribunal (NGT) Order dated 4th May 2016 in O.A. No. 222 of 2014
- Proper consultations were not conducted in the process of planning this project and proper assessments such as EIA were not conducted properly.
- Violation of major laws including Karnataka Town and Country Planning Act, 1961, Environment Protection Act, 1986, Karnataka Preservation of Trees Act, 1976.

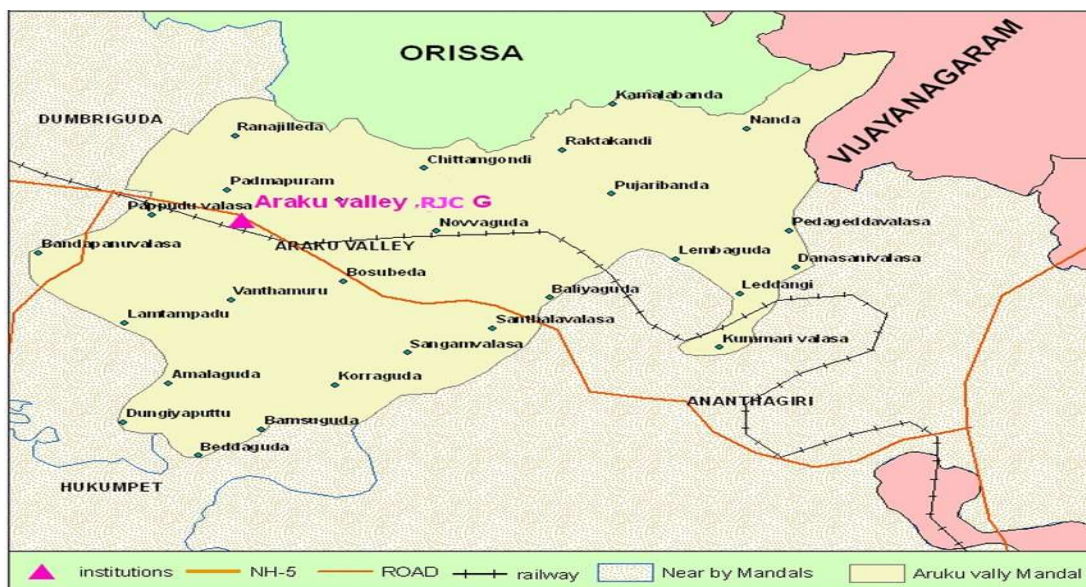
¹¹⁷ Namma Bengaluru Foundation vs. Shashi Distilleries Private Limited and Ors. (08.08.2017 - SC Order):MANU/SCOR/31087/2017

- Cost Factor - The Elevated Corridor Project is a huge infrastructure investment of about Rs 26,000 crores and any delay in the construction may cause huge loss to the public exchequer.
- Time Factor - The proposed time for completion of the project is five years and delay in starting the project may extend the estimated time of completion.
- Systemic and Procedural discrepancies are the major issues which led to the litigation of this project.

The newly appointed government scrapped the existing tender plan and are trying to bring a new plan with proper consultations and deliberations. As the project is in its ongoing stage, further analysis can be drawn in future by evaluating the various fore coming events and policies.

6.2 Araku Valley Project, Andhra Pradesh

Araku valley is a hill station in Visakhapatnam district in the Indian state of Andhra Pradesh, lying 111 km west of Visakhapatnam city. It is located in the Eastern Ghats about 114 km from Visakhapatnam, close to Odisha state border. The Anantagiri and Sukarimetta Reserved Forest, which are part of Araku Valley, are rich in biodiversity and are mined for bauxite.



Source: India Maps

According to the Geological Survey of India, **AP holds 600 million tonnes of bauxite, which is 21% of the total bauxite re- serves in the country. More than 90% of these reserves are in six deposits in the Visakhapatnam forest region¹¹⁸.**

Samata judgement, 1997¹¹⁹ was a landmark judgement in the Supreme Court questioning the encroachment of tribal lands by non-tribal actors in the region. The SCs judgment declared that mining leases to private companies in scheduled areas were against the law; it allowed tribal cooperatives in Andhra Pradesh Mineral Development Corporation (APMDC) to undertake mining in scheduled areas. From 2005, the government has been tactfully using ambiguities in the Samata judgement to grant leases to private companies. Accordingly, the government has asked the APMDC to mine bauxite on behalf of the private companies. The agreement with the companies is that they will bear the cost of mining while **the APMDC will receive 1.25 times of the seigniorage fee paid to the mining department and 0.5% of the annual turnover of the companies.** The APMDC has not yet obtained the mandatory consent from the gram sabhas and tribal advisory council for these projects approved in 2005 and 2007. It is a clear case of the state acting as an agent of the private companies to encroach on land in scheduled areas.

Recently, **The National Green Tribunal ruled** in a different case¹²⁰ in which Samata had challenged the public hearing held for a large bauxite mining project through APMDC and that finally ruled that as the environmental clearance was issued in 2008 and the mining has not taken place the clearance is null and void. **APMDC will have to approach the MOEFCC for fresh clearance in case they want to take up mining and that time concurrence of Samata must be taken.**

6.2.1 Major Issues

- Environmental Issues – The rivers Sarada, Tandava and Varaha in the Araku region that pass through these hills will be disturbed, which will seriously affect the tribal

¹¹⁸ PRASAD, N., VAKULABHARANAM, V., LAXMINARAYANA, K., & KILARU, S. (2012). Tragedy of the Commons Revisited (II): Mining in Tribal Habitats of Araku Valley. *Economic and Political Weekly*, 47(42), 14-17. Retrieved January 13, 2021, from <http://www.jstor.org/stable/41720260>

¹¹⁹ Samata vs Union of India and others, AIR 1997 SC 3297

¹²⁰ ENVIS Centre on Environmental Problems of Mining. 2017. *NGT Ruling Calls For Rethink On Bauxite Mining Leases*. [online] Available at: <Elaw.org. 2021. India -- Rambhau Patil V. Maharashtra State Road Development Corporation WP. 348/2000 (2000.10.09)(Worli-Bandra Sea Link Project) | ELAW. [online] Available at: <https://www.elaw.org/es/content/india-rambhau-patil-v-maharashtra-state-road-development-corporation-wp-3482000-20001009worl>.

commons and, by extension, the sources of livelihoods. Mining also lead to clearing of large acres of forest land. Pollution is also a major issue, especially to the indigenous communities.

- Displacement Issue – Mining projects displace large number of tribal people from their lands.
- Illegal Activities – Behind mining project, many illegal activities such as drug marketing, illegal land occupancy etc also takes place.
- Land Enroachment on Schedule V areas - The APMDC has not yet obtained the mandatory consent from the gram sabhas and tribal advisory council for these projects approved in 2005 and 2007. It is a clear case of the state acting as an agent of the private companies to encroach on land in scheduled areas.
- Violation of Forest Rights Act, 2006 - The state government is yet to fully distribute land titles in accordance with the Act. Around 1,60,000 hectares of the Araku agency belongs to tribals as per FRA but the government has so far granted land titles (pattas) for only 16,000 hectares. What we found is that all the land adjoining the bauxite reserves has been exempted from allocation despite claims by legitimate forest dwellers.
- Mining adversely affect the commons, have lasting effects on not merely communities of tribals or peasants (who are immediately threatened) but also other populations.

6.2.2 Major Findings

- After the Samata judgement of 1997 (Samata vs. Union of India)¹²¹, mining activities are stopped in Araku Valley (Scheduled Tribal Areas). But during 2005, the government has been tactfully using ambiguities in the Samata judgement to grant leases to private companies. Accordingly, the government has asked the APMDC to mine bauxite on behalf of the private companies. Recently, The National Green Tribunal ruled in a different case in which Samata had challenged the public hearing held for a large bauxite mining project through APMDC and that finally ruled that as the environmental clearance was issued in 2008 and the mining has not taken place the clearance is null and void. APMDC will have to approach the MOEFCC for fresh clearance in case they want to take up mining and that time concurrence of Samata has to be taken.

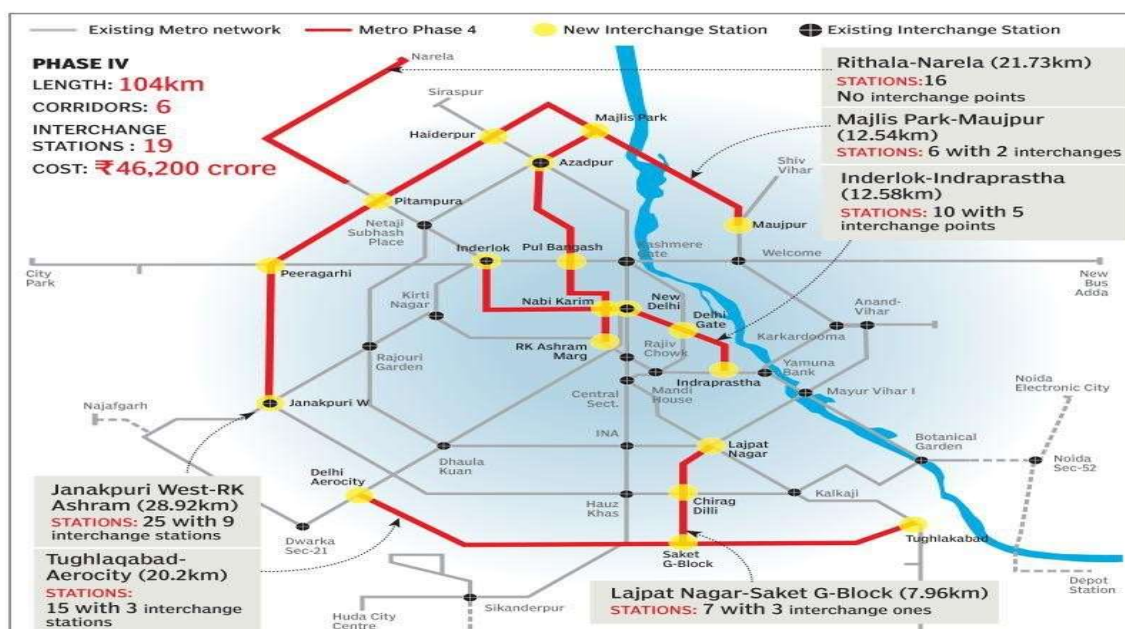
¹²¹ Id.

- Stoppage of mining caused huge investment loss to the Andhra Pradesh Mineral Development Corporation (APMDC) – a state government agency.
- Araku Valley Project was clear case of state acting as an agent of the private companies to encroach on land in scheduled areas.
- There were land Enroachment on Schedule V areas - The APMDC has not yet obtained the mandatory consent from the gram sabhas and tribal advisory council for these projects approved in 2005 and 2007.
- The government was planning to mine 27 hills in Araku valley, Anathagiri, Chintapalli and G K Veedhi blocks. All these plans got affected due to the litigation.
- The government agreement with the companies, i.e., the companies will bear the cost of mining while the APMDC (Andhra Pradesh Mineral Development Corporation) will receive 1.25 times of seigniorage fee paid to the mining department and 0.5% of the annual turnover of the companies. These also got affected by the litigation.
- Due to stoppage of mining activities, many people lose their employment. The labours include people from and outside the state of Andhra Pradesh.
- Thevalueofoutputfromminingactivitiesarealsoaffectedduetothe litigation. Stoppage of many of the mining units reduced the total productivity of the state.
- Major legislations involved are:
 - Andhra Pradesh Land Transfer Regulation Act, 1970
 - Forest (Conservation) Act, 1980
 - Environment Protection Act, 1986
 - Schedule V of Indian Constitution
 - Mine and Mineral (Regulation and Development) Act, 1957
 - National Mineral Policy, 2019

6.3 Delhi Metro Phase IV Project, New Delhi

The phase 4 of Delhi metro will consist of six corridors -- Aerocity to Tughlakabad, Inderlok to Indraprastha, Lajpat Nagar to Saket G Block, Mukundpur to Maujpur, Janakpuri West to R K Ashram and Rithala to Bawana and Narela. Of the 103.94 km to be constructed, 37.01 km will be underground while around 66.92 km will be elevated. The estimated cost of the project is Rs 46,845 crore. As per Delhi Metro Rail Corporation (DMRC), its operational network is 343 km with current average daily ridership of nearly 28 lakhs. The phase IV of the

Delhi metro was planned to start in early 2014 and got delayed due to the stalemate situation between GNCTD and Union Government (Ministry of Housing and Urban Development).



Source: Metro News

6.3.1 Judicial Intervention

The Environment Pollution Control Authority (EPCA), in July 2019 has filed a report¹²² in the Hon'ble Supreme Court and said that phase-IV of the metro “will add significantly to the public transport infrastructure in the city. This combined with buses and last-mile connectivity (pedestrian and other facilities) would greatly improve the public transport network in the city and provide options for car-free travel”. It also stated that the approval of the project was held up since 2014. The report said that there was a “stalemate” in discussions between the central government and Delhi government on certain financial aspects of the project. According to the report by EPCA, the project is critical as it will add another 104 km to the existing metro network, and it is designed to make the system more viable and attractive to commuters.

On Friday, 12th July 2019, the Hon'ble Supreme Court ordered implementation of the 103.94 km, Phase IV of the Delhi Metro and directed authorities concerned to commence the construction work on the project.

¹²² The Environment Pollution Control Authority, 2019. *3-Wheeler Registration: Report Filed In Compliance With Direction Of Hon'ble Court Dated 26.8.2019 And IA No 11028/2019 On Behalf Of DMRC*. [online] Delhi: EPCA, pp.pgs.1-40. Available at: <<https://www.epca.org.in/EPCA-Reports1999-1917/EPCA-report-no105.pdf>>

6.3.2 Major Issues

- According to the EPCA report¹²³, the Metro phase IV clearance is a matter of urgency and further will cost the city enormously. This proposal for this phase of metro was first submitted in 2014 and work was to begin by 2016. But there is a stalemate in the discussions between the Union Government and the Delhi government on different financial aspects of the project.
- The major issues involved in the project that caused delay are:
 - Resolution on bearing of operational loss of Delhi Metro Phase IV
 - Repayment of JICA loan in case of default
 - Sharing of land cost and taxes.
- Delay in the commencement of work affected the public transport system in Delhi. The phase IV is estimated to add around 18.6 lakh riders per day.

6.3.3 Major Findings

- In this case, the court intervention led to a positive impact to the commencement of phase IV of the Delhi metro.
- The Hon'ble Supreme Court said that, the operational loss, if any of the Delhi Metro Phase IV would be borne by the Delhi government as it is a mode of conveyance in the national capital.
- According to the Metro Rail Policy of 2017, States and union Territories were advised to recast their proposals of metro project in line with provisions in the policy.
- It is mentioned that metro rail projects of other cities like Bhopal, Indore, Kanpur, Patna, Agra, Surat etc. have been sanctioned on the same financing pattern as the Delhi Metro phase IV in accordance with Metro Rail Policy, 2017. The Ministry also conveyed that 'there cannot be any special privileged condition for Delhi. All metro projects in any part of the country are approved as per Metro Rail policy, 2017 or practices evolved over the years. These conditions were applied in approving Delhi Metro Phase IV project'.
- One of the major understanding of the analysis is that, In the case of Delhi Metro Phase IV, the **Supreme Court order led to an end to the delay of this project which were**

¹²³ Id.

caused by a stalemate in the discussions between the Union government and Delhi government on different aspects of the project.

- As of now, three major contracts awarded under this project.
 - Ayesa – Ingenieria Arquitectura SAU JV/ Consortium with Fountainhead and Ayesa India: Architectural and Building Services including E&M works for Inderlok-Indraprastha (UG) and Majlis Park – R.K Ashram.
 - AECOM Singapore Consortium with Tandon Consultants and AECOM India: Detail Design Construction Services including E&M works for Tuglakabad-Saket (UG & Elevated) Saket – IGI Airport (UG) and Lajpat Nagar-Saket.
 - Egis Rail SA in Consortium with Egis India Consulting Engineers: Detail Design Consultant including E&M works for Rithala-Bawana-Narela (Elevated), Janakapuri – Majlis Park (Elevated), Majlis park – Maupur (Elevated).
- With Phase IV, DMRC is planning one of the most ambitious projects yet-one that is structurally sound and takes metro technology to new heights. The new metro corridors will open the doors for people from more areas to make use of the lifeline of the city.

6.4 Bandra Worli Sea-link Project, Maharashtra

The Bandra–Worli Sea Link (officially known as Rajiv Gandhi Sea Link) is a cable-stayed bridge with pre-stressed concrete-steel viaducts on either side that links Bandra in the Western Suburbs of Mumbai with Worli in South Mumbai. The bridge is a part of the proposed Western Freeway that will link the Western Suburbs to Nariman Point in Mumbai's main business district. The ₹19.75 billion (US\$290 million) bridge was commissioned by the Maharashtra State Road Development Corporation (MSRDC) and built by the Hindustan Construction Company.

The project starts from the interchange at Mahim Intersection, i.e., intersection of Western Express Highway and Swami Vivekanand Road, at the Bandra end and connects to Khan Abdul Gaffar Khan road at the Worli end. The project has been commissioned to divert traffic that presently is 1,25,000 cars a day in each direction and is expected to grow at the rate of 250 cars per day¹²⁴. The prime consultants of the project are the Consortium of Sverdrup Civil Inc.,

¹²⁴ W.S. Atkins Final Report for the Phase I Feasibility Study, Under the Road Transportation Study of Non-Rail Components of the MUDP-II.

AGRA, Shrikhande Consultants, TPG, and KPMG with HNTB and Ratan Batliboi. Proof consultants are Consortium of Construma Consultants, Mott Mc Donald and Schlaich Bergermann.



The original plan estimated the cost at ₹6.6 billion (US\$95 million) to be completed in five years. But the project was subject to numerous public interest litigations, with the 5-year delay resulting in the cost escalating to ₹16 billion (US\$230 million), with the additional interest cost alone accounting for ₹7 billion (US\$100 million).

6.4.1 Major Issues

- No public hearing:** As per the Circulars and Guidelines issued by the Central Ministry of Environment and Forests (MoEF), dated 27th January 1994, 4th May 1994 and 10th April 1997, under the Environment Protection Act (EPA) it is clear that a Public Hearing is mandatory in development projects such as the Bandra Worli Sea Link. The Maharashtra Pollution Control Board (MPCB) has been made responsible for holding such Public Hearings. This public hearing is not an empty formality. The local population often more conversant with the local implications of a project than government agencies and experts exercising their judgement from outside. Besides, in attempting to push through a lucrative project, the agencies are known to turn a blind eye, even to obvious harmful implications, and the public hearing gives an opportunity, albeit limited, to highlight such consequences. In addition, public participation is an extremely crucial component of governance and has to be treated seriously. Above all,

the affected population has a right to be informed about any project, which is likely to influence its quality of life and livelihood. **All the members of the local community, scientists and other concerned citizens who deposed before the IPT stated that they were not consulted about the project nor were they aware about any public hearing being held for this project.**

- **Incomplete Environmental Impact Assessment:** According to the notification dated 10th April 1997¹²⁵ issued by the MoEF, the Impact Assessment Agency should prepare a set of recommendations based on the technical assessment of documents and data furnished by the project authorities and supplemented by data collected during visits to factories and sites if undertaken and details of the public hearing. In addition, according to schedule ii) of the above-mentioned notice, for obtaining Environmental Clearance of projects, the applicant has to obtain a No Objection Certificate from the concerned State Pollution Control Board (SPCB). The MPCB should issue this No Objection Certificate only after completing a Public Hearing. As is clearly shown earlier, the Public Hearing was not held regarding (BWSLP), nor were the relevant documents etc. made available for inspection to the IPT panel or other NGOs and concerned citizens. Therefore, the panel concludes that the EIA is incomplete.
- **Project Report not Available:** According to schedule (iv) of notice dated 10th April 1997, issued by Ministry of Environment and Forests (MoEF), whoever applies for Environmental Clearance of projects has to submit 20 sets of a summary of the salient features of the project and other relevant documents as prescribed, to the concerned State Pollution Control Board so that the same can be made accessible to the concerned persons in case of a public hearing. The Mumbai Environmental Action Group (BEAG) approached the MoEF for an opportunity to raise objections regarding the project. MoEF agreed to give them the opportunity but no particulars, maps or other information was furnished to the BEAG. The BEAG in its letter dated 8th September 1998 addressed to the Chairman of Expert Committee for Infrastructure, Development and Miscellaneous Projects, MoEF, notified that they were not given access to the EIA report and other relevant documents, but no response was received to this letter.

¹²⁵ [The Principal Notification was published in the Gazette of India via No. S.O. 60\(E\) dated the 27th January, 1994 and subsequently amended vide number S.O. 356 \(E\) dated the 4th May, 1994, S.O. 318 \(E\) dated the 10th April, 1997, S.O. 73 \(E\), dated the 27th January, 2000, S.O. 1119 \(E\) dated the 13th December, 2000, S.O. 737 \(E\) dated the 1st August, 2001, S.O. 1148 \(E\) dated 21st November, 2001, S.O. 632 \(E\) dated 13th June, 2002 and S.O. 248 \(E\) dated 28th February, 2003.](#)

- **CRZ Violations Due to Reclamation:** In the case of *Maneka Gandhi v. Union of India and others*¹²⁶, the State of Maharashtra and the MMRDA gave an undertaking that no reclamation would be carried out in the Bandra- Kurla Complex area and no mangrove in the Mithi River and its estuary would be destroyed. There has been a blatant violation of the terms and the conditions of the Environmental Clearance¹²⁷ dated 7th January 1999. Condition (viii) of the environmental clearance states that “land reclamation should be kept to the minimum, at any cost to less than 4.7 hectares and the same should be monitored closely so that it does not violate the provisions of the CRZ notification, 1991 or as amended subsequently.
- **Local Community not consulted:** Condition (x) of the Environmental Clearance¹²⁸, reads as follows, “wherever fishing activities are getting affected, the concerned association or union of people should be consulted, and their concurrence obtained for this project.” The fishermen affected by this project were neither consulted nor was their consent obtained.

6.4.2 Major Findings

- Initially, in the Bandra Worli Project, several aspects of the Environmental Regulations of the country have been violated. The most important being the non-consultation of the local community and the fact that the condition to hold a public hearing on the project was never complied with. This had led to filing of litigations by the local communities which caused delay to the project.
- Another major finding is that in depth studies using current data have not been used to estimate the environmental impact of the project on the city’s coastline, mangrove forests and marine ecology.
- The outcome of the objective of reducing traffic congestion in the Worli-Haji area with the project remains unachieved.
- Another major reason for the delay was that there has been no survey undertaken to elicit how much the citizens are willing to pay for the use of the bridge it should not end up being another white elephant to the State’s exchequer.

¹²⁶ *Aaneka Gandhi v Union of India and other* [1978] AIR (SC)597.

¹²⁷ Elaw.org. 2021. *India -- Rambhau Patil V. Maharashtra State Road Development Corporation WP. 348/2000 (2000.10.09)(Worli-Bandra Sea Link Project)|ELAW.* [online] Available at: <<https://www.elaw.org/es/content/india-rambhau-patil-v-maharashtra-state-road-development-corporation-wp-3482000-20001009worl>>

¹²⁸ *Id.*

- The delay of five years led to an increase in cost from 13 billion to 16 billion.
- Latest statistics show the daily traffic count on the six-kilometre, predominantly cable-stayed bridge has dropped by over 11% in the past year, from 45,952 vehicles in 2011-12 to 40,808 in 2012-13¹²⁹.
- Over four years from 2009 to 2013, the daily vehicle count has dropped by over 16%. High toll is considered a major contributing factor to people finding the bridge, a less attractive commuting option. Also blamed are congestion towards Pedder Road for south-bound traffic and new flyovers that move north-south traffic on the eastern flank of the city, especially the 2.6-km Lalbagh flyover.¹³⁰

6.5 Karapuzha Irrigation Project, Kerala

Karapuzha Irrigation Project, the first project taken up for execution during Vth Five Year Plan, envisaged construction of an earth dam across Karapuzha stream to create a reservoir of 76.50 Mm³ storage capacity and to irrigate an (net) ayacut of 5221 hectares(net) of land in three taluks of Wayanad district. The project aims to provide irrigation facility during the second crop period of paddy. Karappuzha Irrigation Project was included in the Accelerated Irrigation Benefit Programme under Prime Ministers Relief Package during 2006-07.¹³¹

The project was approved by Planning Commission in 1978 with an estimated cost of 7.60 crore envisaging irrigation to Cultivable Command Area of 5600 ha and an ultimate irrigation potential of 8721 ha. As per 2010 schedule of rates, the revised estimate is 441.50 crore. The project has been partially commissioned on 20.6.2010 with an ayacut (CCA) of 390 ha and an irrigation potential of 608 ha was created out of 7355 ha envisaged. As on March 2016, on completion of repairs of canal, additional CCA of 211 ha was created. Thus, as on 31.03.2016, total CCA created is 601 ha.¹³²

¹²⁹Times of India, 2013. On Bandra-Worli sea link,: Available at <https://timesofindia.indiatimes.com/city/mumbai/on-bandra-worli-sea-link-traffic-down-16-in-4-years/articleshow/20039141.cms>

¹³⁰Times of India, 2013. On Bandra-Worli sea link,: Available at <https://timesofindia.indiatimes.com/city/mumbai/on-bandra-worli-sea-link-traffic-down-16-in-4-years/articleshow/20039141.cms>.

¹³¹Spb.kerala.gov.in. 2021. *Economic Review 2016, State Planning Board*. [online] Available at: http://spb.kerala.gov.in/EconomicReview2016/web/chapter02_06.php

¹³²Id.

The cumulative expenditure incurred up to October 2016 is 322.87 crore. Head works, works of right bank canal and left bank canal are completed. 47.26 per cent of branch canal works and 5 per cent works of distributaries are also completed.¹³³



Source: Karapuzha Irrigation Project Office Report

6.5.1 Major Issues

- The irrigation project was cleared by planning commission in 1978 and the project is still not completed. i.e., 42 years of delay.
- The actual cost estimated at that time was Rs. 7.50 crore, as of now the government has spent about Rs 268 crores.
- About 200 families were evacuated for the construction of this project.
- One of the major causes of the delay is due to the litigations filed by those people who were affected by the land acquisition process.
- The government is spending crores of rupees every year in the name of construction, but the output is seen nowhere.
- Even the canals and allied infrastructure built for the project got damaged due to the delay in construction of the major project.

¹³³ Id.

6.5.2 Major Findings

- Karappuzha irrigation project (Kabini Scheme) is being implemented, in the Kabini sub - basin of the interstate river Cauvery. This is the first project to be taken up in the Kabini sub - basin. The project is to construct an earthen dam at Vazhavatta across karappuzha Rivulet with an objective to create a reservoir of 76.50 Mm³ storage capacities and to irrigate a net ayacut of 5221 hectares of land in Vythiri, Sulthan Bathery and Mananthavadi Taluks of Wayanad District through a network of canal system. The Karapuzha irrigation project reservoir is spread in Ambalavayal, Muppainadu and Thommattuchal village of Vythiri and Sulthan Bathery taluk of Wayanad district.
- Over the years, the Project has transformed into a multipurpose project viz; Drinking water supply scheme to Kalpetta municipality is commissioned and certain other schemes supplying drinking water to adjoining panchayaths in Vythiri and Sulthan Bathery taluks also are under implementation from the Karappuzha reservoir.
- The irrigation project was cleared by planning commission vide No. II 20 (4) 77 I & CAD dated 19/4/1978 and administratively sanctioned vide G.O. (MS) No. 67/78/W&T dated, 28/7/1978. Revised DPR of the project was prepared based on 2014 DSR and sanction to this DPR was obtained vide G.O.(Rt) 988/2017/WRD, Thiruvanthapuram, dated 11/12/2017 of the Water resources department (MP).¹³⁴
- Karappuzha Medium irrigation Project is being implemented, in the Kabini sub-basin of the inter-state river Cauvery. Karappuzha dam and reservoir are owned and operated by the irrigation department, Kerala. It is the first irrigation project taken up in the Wayanad district, Kerala with an average elevation of 780 mM above the sea level, lying on the eastern slope of Western Ghats.
- The proposed project area consists of acquisition of land only, hence there will be no need for ancillary infrastructural facilities.
- As per the available information, no studies to assess social or environment impact of the project are conducted in the past. Existence of any technical feasibility reports with respect to the project are also not found in any possible sources. Recently a social impact assessment was conducted and published. The applicable laws on land

¹³⁴Rajagiri outreach, 2019. *Social Impact Assessment Study*. [online] Wayanad. Available at: <http://outreach.rlabz.in/wp-content/uploads/2020/01/karappuzha-english-final_compressed.pdf>

acquisition, rehabilitation, and resettlement for the proposed land acquisition for Karappuzha irrigation project in Wayanad district are:

- The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.
 - Kerala Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Rules 2015.
 - Government of Kerala - Revenue (B) Department -State Policy for Compensation and Transparency in Land Acquisition vide G.O (Ms) NO.485/2015/RD dated 23/09/2015.
 - Government of Kerala - Revenue (B) Department -State Policy for Rehabilitation and Resettlement Package for Land Acquisition in the State in lieu of RFCTLARR Act 2013 vide GO(MS)No.448/2017/RD dated 29/12/2017.
 - Right to Information Act, 2005.
- The irrigation project was cleared by planning commission in 1978 and the project is still not completed. i.e., 42 years of delay.
 - The actual cost estimated at that time was Rs. 7.50 crore, as of now the government has spent about Rs 268 crores.
 - About 200 families were evacuated for the construction of this project.
 - One of the major causes of the delay is due to the litigations filed by those people who were affected by the land acquisition process.
 - The government is spending crores of rupees every year in the name of construction, but the output is seen nowhere.
 - Even the canals and allied infrastructure built for the project got damaged due to the delay in construction of the major project.

CHAPTER 7

FINDINGS, CONCLUSION AND RECOMMENDATIONS

7.1 Key Findings of the Study

7.1.1 Primary Legal Issues in Government Litigation

- a. **Non-Compliance of Existing Laws and Policies:** When dealing with government policies, guidelines, and law, one is often faced with the question of the nature of these policies, directions and contracts and its compliance. For e.g., do the codes and guidelines issued by different departments of the Government of India or the contracts entered by public bodies fall in the realm of public law and therefore enforceable by judicial intervention or are they simply executive instructions subject to deviations.

On the issue of high number of government litigation, it has been estimated that almost 70 per cent of the total cases pending are involving the government and its various authorities¹³⁵. The reason for increasing government litigation has been attributed to the numerous public services provided by the state and its various agencies.

- b. **Lack of credibility about the actions taken by government in various developmental projects:** A lack of credibility about the actions taken by the Government and the public sector under-takings has also contributed to the litigation explosion involving government and public sector undertakings. Ordinarily, when in course of commercial activity, plants or equipment to the Government or public sector undertaking are sold, the court is be reluctant to examine the fairness or correctness of the decision¹³⁶. If the Directorate of a Government company has acted fairly, even if it is altered its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task. The function,

¹³⁵ Yashomati Ghosh, INDIAN JUDICIARY: AN ANALYSIS OF THE CYCLIC SYNDROME OF DELAY, ARREARS AND PENDING - YASHOMATI GHOSH, 2018 SAGE JOURNALS (2017), available at <https://journals.sagepub.com/doi/full/10.1177/2322005817733566>.

¹³⁶ 126th Law Commission Report, 1988. Available at: <https://indiankanoon.org/doc/42589691/>

from the point of view of court, is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for itself by rules of public administration.

- c. **Lack of Proper Alternate Dispute Resolution (ADR) framework:** Initially, the ADR mechanisms were tried to be implemented with much emphasis on Statutes by way of inserting the ADR clauses in those contracts. But these process and policy was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court and in this process, Courts are authorised to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance, etc. Power is also conferred upon court so that it can intervene in different stages of proceedings.
- d. **Lack of proper Mediation as the preferred form of Dispute Resolution:** Mediation can be defined as a process to resolve a dispute between two or more parties in the presence of a mutually accepted third party who through confidential discussion attempts to help the parties in reaching a commonly agreed solution to their problems amicably. The biggest advantage of mediation is that the entire process is strictly confidential. Mediation saves time and financial and emotional cost of resolving a dispute. A properly conceived mediation as method of alternative dispute resolution will ensure wide access to justice for all sections of the people. This system has assumed a great importance as Lok Adalats are regular features in various parts of the country. Except litigants who stand to gain by delaying the process of justice, others do not perhaps enjoy taking recourse of litigation that consumes innumerable number of years and considerable amounts by way of expenses.
- e. **Unnecessary Filing of Appeals:** Government is the biggest litigant in the Courts. Supreme Court judge Justice MR Shah made a statement that the government should avoid filing unnecessary appeals in courts to reduce the growing pendency of cases where State is a party to 70-80 per cent of the litigations and on several occasions, it has been found that unnecessary appeals

have been filed by various departments on issues which are already settled by earlier judgments. The appeals are not required at all, but at the department level, nobody wants to take a risk and responsibility, which ultimately adds to the burden of the courts.

7.1.2 Impact of Litigation on Public Infrastructure in India

- a. The major constraints faced by infrastructure sector are availability of funds for financing large projects, lengthy processes in acquisition of land and payment of compensation to the beneficiaries, environmental concerns, time and cost overruns due to delays in project implementation, procedural delays, lesser traffic growth than expected increasing the riskiness of the projects resulting in stalled or languishing projects and shortfall in funds for maintenance. Litigation in India is an elaborate time consuming and high costs involved process. It takes years for a matter to get settled after years of long drawn courtroom battles, adjournments, and appeals.
- b. The impact of litigation has been on the negative side as huge losses have been incurred by the government, both state and central along with governmental bodies due to the delay in the infrastructural projects and developmental activities.
- c. The common thread between all these cases is that the governmental departments or agencies, etc. have refused to take responsibility or accountability of their actions with regards to compliance of the laws and policies in place or not ready to take action in the lines of the judgments which has led to the never-ending litigation by filing of appeals due to which many public infrastructure projects have been put on hold or haven't started yet.
- d. The correlation between infrastructure investment and economic growth for India is very high. The correlation of investments in inland, road, rail and airport infrastructure to GDP are higher than 0.90 indicating that there exists a strong correlation between GDP and investment in infrastructure.
- e. Ministry of Road Transport and Highways have been making constant efforts to expand and upgrade the network of National Highways in the country because of which road

construction in kms grew at 30 kms per day in 2018-19 as compared to 12 kms per day in 2014-15¹³⁷. As of 2020, the construction of highways has taken a hit. Presently the daily pace of construction is around 25-26 km¹³⁸

7.1.3 Economic Analysis of Litigation

- a. According to Ministry of Law and Justice, government departments, both at the Centre and in States, are party around 46% of court cases. The expenditure incurred on litigation in the top court for the year 2014-15 was Rs 15. 99 crores, it rose to Rs 47. 99 crores in 2017-18¹³⁹.
- b. Seeking Justice in India not only include the State costs, but also the cost incurred by the parties seeking justice in terms of lawyers cost, travel costs, court fees, time costs etc. To compute near accurate per unit cost of justice all these factors must be taken into consideration. There exist many empirical hurdles while analysing this. They are:
 - i. Lawyer Costs: It is very difficult to analyse the actual lawyer cost. The lawyers or even the party would not be open about their actual fees and the client unless a corporate body may not have proper accounts of expenses on lawyers' services and therefore the figures may not be authentic and reliable.
 - ii. Court Fees: The Supreme Court does not provide data on court fess separately for the cases disposed each year; rather it is available for the cases instituted each year. Deriving conclusions form available data is very insufficient and will remain as a major empirical hurdle.
 - iii. Travel Costs: Travel costs may vary according to the case. The cost would be very high in the case of the Supreme Court as most of the parties instituting a matter in the Court are not residents of NCT and are travelling from all over the country seek the highest intervention to resolve their dispute. These costs are also not documented by the parties accurately.

¹³⁷ Economic Survey, Volume II, 2019-20, available at <https://www.indiabudget.gov.in/economicsurvey/>

¹³⁸ Ministry of Road Transport and Highways, Annual Report, 2019-20, Available at:

https://morth.nic.in/sites/default/files/Ministry%20Annual%20Report_2019-20.pdf

¹³⁹ Supra Note. 3

- iv. Time Costs: It included the amount of time a person has spent on the resolution of his dispute and it would therefore be in the units of years or months. It is required to convert this factor cost in terms of unit of money to be homogenous with other costs. Conceptualizing a standard of conversion could be another hurdle.
- c. Delays in litigation process further adds to the problem. Doing litigation in India may be an unending process. Indian Judicial System is marred with judicial delays and slow process. As of February 2020, India has almost 4 crore pending cases spanning the Supreme Court, various High Courts and numerous district and subordinate courts. In which Supreme court accounts for 62,054 (as on 31.08.2020), High court accounts for 51,57,378 (as on 31.08.2020) and District and Subordinate courts 3,45,71,854 (as on 31.08.2020). The total number of cases disposed off by Hon'ble Supreme Court, High Court, District and Subordinate Courts are 45, 787, 19,17,049 and 1,83,71574 respectively (as on 2019)¹⁴⁰.
- d. The economic model of litigation is concerned with identifying the circumstances under which a legal dispute will be litigated rather than settled out of court. And there exists no theory on the economic model of production of justice by courts and other mechanisms of dispute resolution.
- e. Empirical research in this aspect is a very difficult task. Also, it is hard to get access to specific data other than the broad framework of numbers of instituted, disposed and pending cases, which do not matter unless we are aware of the specifics of each case disposed in a year as to when they were instituted and how many years were they pending.

7.1.4 Role of Arbitration in Litigation

- a. A significant percentage of government spending in India goes towards the creation of new infrastructure like the construction of roads, ports, railways and power plants. Construction contracts, however, often have a reputation for disputes and conflicts

¹⁴⁰ PENDING CASES IN COURTS, (2020), <https://pqars.nic.in/annex/252/AU1381.pdf>.

between contractors and governments. Such disputes ultimately delay implementation of the contracts and increase total costs, adversely impacting development outcomes of the projects. For disputes involving Indian public sector enterprises (“PSEs”), there is also a Permanent Machinery of Arbitration (“PMA”) under the Department of Public Enterprises to settle disputes between PSEs and government departments or between PSEs inter se. However, since the PMA is not subject to the ACA, arbitral awards rendered by such mechanism are not enforceable by Indian courts.

- b. The 2015 Arbitration Act amendments, in two important respects, signal a paradigm shift towards minimizing judicial intervention in the arbitral process. First, the amendment to section 9 of the Arbitration and Conciliation Act, 1996, provides that courts should not entertain applications for interim relief from the parties unless it is shown that interim relief from the arbitral tribunal would not be efficacious. Second, the amendment to section 36 of the Arbitration and Conciliation Act, 1996, provides that the filing of an application to set aside an arbitral award will no longer trigger an automatic stay on the operation of that award. Prior to the 2015 Amendment Act, both section 9 and section 36 enabled uncooperative parties to engage in dilatory tactics through unnecessary involvement of the courts.
- c. Existence of an efficient and credible dispute resolution mechanism is very important for successful execution of government contracts. Arbitration, on the other hand, involves two parties in a dispute who agree to work with a disinterested third party in an attempt to resolve the dispute.
- d. Having an arbitration law encourages foreign investments to a country as that projects the country as an investor friendly as the country has a sound legal framework.
- e. Delays in Indian courts and excessive judicial involvement in arbitral proceedings have resulted in India not being favoured as a seat for arbitration.
- f. The high pendency of litigation before Indian courts means that arbitration-related court proceedings take a long time to be disposed. India has not fully embraced institutional arbitration as the preferred mode of arbitration despite the existence of several institutions which administer arbitrations.

- g. Arbitration has emerged as the most preferred platform for quick resolution of disputes especially in the industrial and the corporate realm.

7.2 Major Recommendations

- a. **Compliance of Existing Laws and Policies:** The government departments should comply to existing laws and policies while undertaking developmental activities and designing projects.
- b. **Timely Monitoring of Cases:** Every ministry needs to constitute an expert committee to monitor cases timely and to analyze and evaluate modifications to reduce litigation in service matters. Timely monitoring of cases is recommended.
- c. **Mediation:** Ministries should introduce mediation at the pre-litigation stage.
- d. **Proper Communication within the Ministries:** Well-structured guidelines should be issued to the organizations or autonomous bodies within the ministries to reduce litigation and contempt cases.
- e. **Data Management:** Every government department should be required to maintain proper data relating to number of cases filed by or against them in various courts and tribunals. Such data maintenance would be helpful in identifying the nature and types of litigation which a department is faced with and thereby help in avoiding frivolous and similar type of litigation. Law Department should maintain an over-all data on the number of cases pending in different courts in which State is a party. Lack of adequate data maintenance may give rise to misapprehension about the high number of government litigation pendency.
- f. **Status Reports:** The Law Department should publish a Monthly Status Report and an Annual Report on the conduct of government litigation to improve efficiency and accountability.
- g. **Suggested Strategies for Reforming the Administration of Justice** and for reducing the delay of justice delivery are as follows:
 - i. **Simplify the Law:** Simplification of law can have a substantial impact on the nature and level of litigation. Where the law is clear it becomes easier to monitor

actions and less costly to resolve disputes.¹⁴¹ Simple rules can assist courts in resolving a controversy at lower costs.

- ii. **Simplify Procedures:** Complex procedures are an obvious source of delay and it increases the cost of litigation. Though there is a trade-off between cost, delay and accuracy, this does not mean that substantial slack does not exist.
- iii. **Promote Transparency in Judicial Proceedings:** Increasing level of transparency and accountability in courts can greatly improve performance.
- iv. **Make More Use of Technology:** Greater use of technology in the management of litigation has yielded substantial results in many countries. It has been consistently shown that – where there is commitment – information technology used for case tracking, jurisprudence and writing decisions can make courts function more efficiently and reduce clearance rates.¹⁴²
- v. **Review Alternate Means of Dispute Resolution:** An obvious means for consideration in reducing the case burden on court is to deflect cases towards alternative means of dispute resolution. From an efficiency perspective, the benefits of ADR are not.

h. Project Management: The government should create a proper framework for project delivery of infrastructural projects in India. It includes:

- i. Designing a project management program or scheme approach to infrastructure development.
- ii. The infrastructural projects should be managed by a professional who have expertise in project management and delivery.
- iii. It is important to enhance institutional capacity and capability of professionals.

7.3 Contribution of this Study

Litigation affects the implementation of infrastructure projects in multiple ways. It adversely affects the working of administrative processes and cause immense delay. One of the major hinderance for public infrastructure development in India is the delay in completing the project. Long delays in infrastructure are not just peculiar to India but a challenge in many democracies. It is after all a hallmark of an open society that affected citizens have the right to ask for reviews

¹⁴¹ Shavell (1999), p.3

¹⁴² Buscaglia and Dakolias (1999), p.21

and changes. However, even considering those necessary checks and balances we have some egregious delays and cost overruns.

One major cause of the delay in project implantation is government litigation and judicial intervention. According to the Economic Survey 2017-18¹⁴³ the impact of court injunctions in ongoing projects in six ministries has resulted in loss of more than Rs. 52000 crores. The government is fighting more than 1.35 lakh cases belong to different ministries and proper mechanism may bring down the number.

This study undertook detailed analysis of the impact of litigation on infrastructural delays using five major case studies. The empirical research will be conducted by means of field visit, questionnaire – based survey, interview schedule, case study method and collection of data. The case studies were selected based on the nature of infrastructure. Information on primary legal issues, nature of cases, grounds for filing of appeal, impact of interim injunction etc were collected from different High Courts and District Courts. The study provides detailed recommendation to ensure effective working of the system. The findings and recommendations of this study will help the government in formulating realistic policy framework to reduce the impact on public infrastructure development.

7.4 Scope for Further Research

The present study on the impact of litigation on public infrastructure throws light on several important propositions. The study evaluated and analysed five major infrastructural case studies including Elevated Corridor Project Bangalore, Araku Valley Project, Andhra Pradesh, Delhi Metro Phase IV Project, Delhi, Bandra – Worli Sea Link Project, Maharashtra and Karapuzha Irrigation Project, Kerala. The study analysed the manifold impact of litigation on these infrastructural projects such as cost-overrun, wastage of resources and loss to the public exchequer. The study identifies the importance of credibility of actions taken by government departments in various developmental projects, need of a proper Alternate Dispute Resolution (ADR) framework and the importance of mediation as a preferred form of dispute resolution.

The study also identified that the economic model of litigation is concerned with identifying the circumstances under which a legal dispute will be litigated rather than settled out of court.

¹⁴³Economic Survey 2017-18, available at <http://mofapp.nic.in:8080/economicsurvey/>

And there exists no theory on the economic model of production of justice by courts and other mechanisms of dispute resolution. Empirical research in this aspect is a very difficult task. Also, it is hard to get access to specific data other than the broad framework of numbers of instituted, disposed and pending cases, which do not matter unless we are aware of the specifics of each case disposed in a year as to when they were instituted and how many years were they pending. Also the existence of an efficient and credible dispute resolution mechanism is very important for successful execution of government contracts. Arbitration, on the other hand, involves two parties in a dispute who agree to work with a disinterested third party in an attempt to resolve the dispute. With data availability it would be interesting to understand the per unit cost of justice and the exact monetary impact of litigation on infrastructure development in India in light of the new economic condition India is facing after the COVID pandemic.

CHAPTER 8

PROPOSED ACTION PLAN ON THE IMPACT OF LITIGATION ON PUBLIC INFRASTRUCTURE PROJECTS

This research study has undertaken in-depth research of five infrastructural projects and analyzed the impact of litigation on the overall implementation of the project work. The study is beneficial towards identifying the bottlenecks which are instrumental in giving rise to litigation and tries to propose few suggestions towards reducing litigation.

This study also makes some important policy recommendations to reduce the delay of public infrastructural delays due to litigation. It includes the compliance of existing laws and policies by various government departments, timely monitoring of cases, the introduction of mediation at the pre-litigation stage, proper communication within the ministries, data management etc.

With respect to strategies for reforming administration of justice, the study recommends simplifying the laws and procedures, promoting transparency in judicial proceedings, making more use of technology etc. Considering the project management perspective, the study recommended designing a project management program or scheme approach to infrastructure development, appointing a professional who has expertise in project management and delivery to manage infrastructural projects, and to enhance the institutional capacity and capacity of professions.

The proposed action plan on the impact of litigation on public infrastructure projects are as follows:

8.1 Conduct of Government Litigation in Infrastructural Projects

- a. Implementing designated courts instead of dedicated special courts under the Special Relief (Amendment) Act, 2018 is a welcome move. Under this, the high courts have to dedicate special days every week to enable exclusive handling of specific relief matters pertaining to infrastructure project contracts. As of now, Karnataka, Allahabad and Madhya Pradesh high courts have dedicated special courts. All high courts should follow this to help enforcing the contract both from the perspective of time and cost, thereby stimulating investors' confidence and creating conducive business climate.
- b. Legal Information Management and Briefing System (LIMBS) is a web-based application created by the Department of Legal Affairs under Ministry of Law and

Justice. It is an initiative to make legal data available at one single point and streamline procedures of litigation matters. At present, it is only for the Union government, it should be extended to state governments also. To make the working more coordinated, various government departments should submit the data as early as possible in a time bound and integrated manner.

- c. Effectively implement the State Litigation Policy (SLP) to achieve the goals of efficient and responsible litigant.
- d. Every government department should be required to maintain proper data relating to number of cases filed by or against them in various courts and tribunals. Such data maintenance would be helpful in identifying the nature and types of litigation which a department is faced with and thereby help in avoiding frivolous and similar type of litigation. Law Department should maintain an over-all data on the number of cases pending in different courts in which State is a party. Lack of adequate data maintenance may give rise to misapprehension about the high number of government litigation pendency.
- e. The Nodal Officer should have the responsibility of properly maintaining each case file containing all the documents. Files should have a separate note sheet column and the enclosures should be properly numbered and indexed. All reference details relating to previous actions or correspondences should be maintained.
- f. To maintain the chain of accountability the Department Nodal Officer should send a weekly and monthly report to the office of Law Secretary updating the status of each case, including the conduct of government advocates.
- g. The general practice in cases of disputes involving immovable property that the government will routinely file an appeal needs to be revisited.
- h. Government (State and Union) to come up with a Committee for Disposal of Matters within a certain period. Such a committee must be overlooked by senior members.
- i. Fix time for officers to hold a file/case with himself; Delay in filing to be noted and reported from time to time.

8.2 Arbitration as a Solution

- a. Arbitration and Litigation do not create many differences, instead, mediation can be a better alternative to such disputes.
- b. In every dispute attempt should be to use Section 89 provision of CPC for reference of such disputes to be resolved by Conciliation/Mediation. The Minister of Law and Justice may write to Chief Justices of High Courts and Chief Ministers of States direct the civil courts, all

tribunals, Advocate-General of States and Government departments to strictly comply with the Section 89 reference in all cases involving infrastructure disputes.

- c. Focus should be laid on the planning stage rather than the implementing stage.
- d. Ministries should introduce mediation at the pre-litigation stage. The Commercial Courts Act requires compulsory pre-litigation mediation. Such approach can be adopted in infrastructure disputes and Permanent Mediation Body established for this purpose in every State.
- e. A normative study should be conducted on decision making and decision taking
- f. process, wherein a check on the representatives of State who hold autonomy in such matter is relevant.

8.3 Public Infrastructure- Administrative Procedural and Legal Reforms

- a. Every project should have an overlooking body to be presided by experts from the concerned departments.
- b. Old policies need amends, as certain crucial positions which the technicalities are omitted, such as – project management consultant, procurement specialists etc.
- c. Scope of the project to be noted from the viewpoint of the stakeholders involved.
- d. It would be beneficial to consider the ranking of judicial processes in case of litigations that involve stakeholders from government and industry. Citizens also need to rope into the ranking process because infrastructure projects are after all meant to be used by the maximum number of people.
- e. In cases of speedy resolution where outcomes are amicable, relayed promptly, and the projects are not held up due to political or bureaucratic interference, court processes could be evaluated very favorably to secure higher rank.
- f. Use of technology, as the parameters like time, cost and outcomes will have to be communicated through a legal ranking portal for every case and involved litigants. If courts are now receiving more planned budgets, it is crucial to also get the infrastructure updated to ensure smoother functioning.
- g. Enhance the IT infrastructure of the courts to ensure reliable data collection, better categorization of cases based on their priority, monitoring and tracking of cases etc to make the justice procedure more litigant friendly.
- h. There exists a need of Systems Thinking Framework to be applied to the judicial process and focus should be made on how laws are made and administered.

8.4 Ensuring Accountability and Transparency in Implementing Infrastructure Projects

- a. To ensure transparency, dedicated websites need to be created for infrastructure projects and should be accessible to the citizens.
- b. Infrastructure projects should invest heavily in pre-planning stage and reform procurement and contract management.
- c. Ensure proper stakeholder management and ensure transparency in providing available information.
- d. The government should design a project management program or scheme approach to infrastructure development.
- e. The infrastructural projects should be managed by a professional who have expertise in project management and delivery. It is important to enhance institutional capacity and capability of professionals.

8.5 Importance of Civil Societies and Public Consultation in Implementing Infrastructure Projects

- a. The government should ensure the compliance of existing laws while undertaking infrastructure projects. For example, checks towards Environment Impact Assessment, Social Impact Assessment before the execution stage.
- b. There exists a need for recourse for affected parties to be administered, based on supportive stance of the Constitution and its role in view of the government and citizens.
- c. The project implementing agency should identify the important stakeholders involved and consult them during the planning stage.
- d. The government should ensure checks and balances to be done in following the due process of law.
- e. The implementing agency should construct a cost benefit analysis before framing the project policies.
- f. The Social Impact Assessment should be presented to the committees at the local government level.
- g. Committee of local community members should be established before implementing the infrastructural projects to avoid conflicts of interest.
- h. The project management should ensure clear and continuous communication between all stakeholders including the civil society organisations and local communities involved. Regular meetings should be conducted with all the stakeholders. It is to be ensured that expectations of all parties and issues faced by them are discussed with each other.

The need of the hour is to reduce the impact of litigation on public infrastructural facilities. It is

necessary to contemplate and take necessary steps to address the issue ie., the delay of infrastructure projects due to litigation because time holds prime importance in any project. Time performance is the most stressed after factor of project management.

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ANNEXURE – 1**Conference Proceeding****One Day Consultation Cum Validation Programme on
The Impact of Litigation on Public Infrastructure Projects****March 10, 2021****Sponsored by the Ministry of Law & Justice, Government of India under Scheme for Action
Research and Studies on Judicial Reforms****Organized by:**

National Law School of India University, Bangalore

Sponsored by the Ministry of Law & Justice, Government of India under Scheme for Action
Research and Studies on Judicial Reforms**Moderators:**

- Dr. Yashomati Ghosh, Principal Investigator
- Mr. Richin S. Kottaram, Research Investigator

Sub-theme:

Conduct of Government Litigation in Infrastructural Projects

Inaugural Address:

- Prof. (Dr) Sudhir Krishnaswamy, Vice-Chancellor, NLSIU

Panelists:

- Mrs. Kathyayini Chamaraj, Social Activist and Executive Trustee, CIVIC NGO, Bangalore
- Professor. Sridhar Pabbisetty, Founding Director, Kautilya School of Public Policy, Hyderabad
- Dr. Anirban Chakraborty, Associate Professor, NALSAR, Hyderabad
- Advocate Swarupama Chaturvedi, Advocate on Record, Supreme Court of India
- Dr. Ragini Khubalkar Assistant Professor, Maharashtra National Law University, Nagpur
- Dr. Shailendra Kumar, Assistant Professor Symbiosis Law School, Hyderabad
- Mr. Veeresh Bellur, RTI Activist
- Ms. Praseeda Mukundan, Senior Research Associate, Centre For Public Policy And Research, Kochi
- Mr. Soumya Chatterjee, Senior Reporter, The News Minute, Bangalore
- *Mr. Tushar Meshram, Public Policy Consultant, Bengaluru*

Friday, March 10, 2021 – 15.00-17.30

Abstract

This research study has undertaken in-depth research of few infrastructural projects and analyzed the impact of litigation on the overall implementation of the project work. The study is beneficial towards identifying the bottlenecks which are instrumental in giving rise to litigation and tries to propose few suggestions towards reducing litigation.

The study also makes some important policy recommendations to reduce the delay of public infrastructural delays due to litigation. It includes the compliance of existing laws and policies by various government departments, timely monitoring of cases, the introduction of mediation at the pre-litigation stage, proper communication within the ministries, data management, etc.

With respect to Strategies for Reforming the Administration of Justice, the study recommends simplifying the laws and procedures, promoting transparency in judicial proceedings, making more use of technology, etc. Considering the project management perspective, the study recommended designing a project management program or scheme approach to infrastructure development, appointing a professional who has expertise in project management and delivery to manage infrastructural projects, and to enhance the institutional capacity and capacity of professionals.

1. Presentations

(a) Overview of the Research Project- Dr. Yashomati Ghosh, Principal Investigator

Dr. Ghosh presented the key overview on the Impact of Litigation on Public Infrastructure Project.

Further, she presented the major objectives of the present study:

- To identify and study five infrastructural projects which have been affected by court litigation.
- To analyze the primary legal issues involved in the government litigation and evaluate the role of the government in initiating the litigation.
- To study the nature of cases, grounds for the filing of an appeal, and the impact of grant of interim injunction on the infrastructural projects

- To identify the factors such as cost of materials, labor, electricity, etc. which has a direct impact on the overall cost of the infrastructural project and evaluate the impact of delay on these factors and the total cost of the project
- To identify the factors of litigation cost and analyze whether an increase in litigation costs adversely affects the feasibility of the project
- To critically analyze the frequency and extent to which arbitration awards are challenged in a court.

(b) Inaugural Address- Dr. Sudhir Krishnaswamy, Vice-Chancellor, NLSIU Bangalore

Dr. Krishnaswamy began his address by referring to his book- “A Qualified Hope”, which looks at the impact of litigation in the Supreme Court. Further, he raised certain highlights to the topic of Litigation and questioned the viability of data on existing litigation costs. The range of litigation varies from Economic Survey to Ease of doing Business Budgetary Litigation. Further, he raised concern on the value of 52000 crores which is again and again quoted in economic surveys, research reports, etc.

Event study methodology used in IIM’s can be used in performing ‘Impact Analysis’. Notable suggestions:

- Ascertaining the actual cost of loss and the scope of such loss.
- Concept of delay to have a normative time frame.

(c) Five Infrastructural Projects: Case Study Reports & Findings- Mr. Richin S. Kottaram, Research Investigator

Mr. Richin investigated and formulated his report on 5 case studies, namely:

1. Elevated Corridor Projects, Bangalore, Karnataka
2. Araku Valley Project, Andhra Pradesh
3. Delhi Metro Phase IV Project, New Delhi
4. Bandra-Worli Sea link project, Maharashtra
5. Karapuzha Irrigation Project, Kerala

He presented his findings and portrayed major issues on development projects. Some of his notable findings were:

- 70 percent of total cases pending are involving the government and its various authorities
- Non-Compliance of existing laws and policies
- Lack of fair process/due process compliance in various developmental projects

- Procedural Non-compliance – Pre-natal publication, Consultation, Right of Hearing
- Acquisition of land and payment of compensation
- Lack of Environmental Impact Assessment
- Lack of communication/ understanding between Government Department
- Litigation and Judicial Intervention has shown a negative impact on public infrastructure development except for one case study
- Grounds of Judicial Review are limited but judicial processes are dilatory

(d) Conduct of Government Litigation: Issues & Findings- Dr. Shailendra Kumar, Assistant Professor Symbiosis Law School, Hyderabad

Professor Shailendra through his presentation portrayed an analysis of cases recorded on the National Judicial Data Grid. According to him, the absence of any statistic on government litigation is an indicator of a lack of interest among the various stakeholders in dealing with the problems of arrears and delays in an effective and meaningful manner. He highlighted the need of framing a commonality between National Litigation Policy and State Litigation Policy. He described the present scenario pertaining to National Litigation Policy and State Litigation Policy, and the shortcomings accruing to them.

Through interviews conducted with government lawyers, it was found that most lawyers are not equipped with basic facilities, and there is a crucial need for refresher courses for imparting training to specialists. Failure on part of the government to maintain and monitor data on litigation in infrastructural projects is also evident.

2. Observations & Suggested Changes by Panellists

(a) Advocate Swarupama Chaturvedi, Advocate on Record, Supreme Court of India

Miss Chaturvedi pointed out the importance of litigation and how it is crucial in determining the standpoint of law and interpretation of such laws and policies. Further, she noted that litigation is not the sole reason for the delay; litigation does not have a complete negative impact on most projects, at times it acts as means for imparting justice to affected parties. Some notable points made by her were:

- Government of India has a nodal agency to record data on litigation
- Many states have Litigation Policies and one cannot generalize the absence of such policies in all states

- Government's role is very restricted in litigation, thereby expertise in such cases have to be dealt with from case-to-case basis.

Notable Suggestions:

- Orders of Supreme Court to be included on delay in Litigation.
- Government (State & Union) to come up with a Committee for Disposal of Matters within a certain period of time. Such a committee must be overlooked by senior members only.
- Fix time for officers to hold a file/case with himself; Delay in Filing to be noted and reported from time to time.
- Number of pendency shows nature of cases, not the efficiency of courts/ministries (e.g., Finance Ministry is supposed to have a bulk number of cases, one cannot infer that they lack in efficiency by mere speculations on cases disposed of)

(b) Mrs. Kathyayini Chamaraj Social Activist and Executive Trustee, CIVIC NGO, Bangalore

Mrs. Kathyayini pointed the major cause of delay being the failure on consulting the people before framing such policies. Pre-Project-Consultation Policy for State Projects is very crucial in preventing such delays in the completion of public projects in the required time frame. She reflected the importance of the RTI Act in keeping checks and collection of data in public projects. One of the notable points she raised was that the people are often not told about the acquisition of their property before their actual acquisition which is one of the major reasons for the delay in infrastructure projects. And the actual loss to speculated cost is much higher than the actual figures portrayed.

Few Notable suggestions made by her were:

- Cost-benefit Analysis before framing of Project Policies.
- Pre-Acquisition Compliances
- Checks and Balances to be done in following Due Process of Law
- Social Impact Assessment to be presented to committees at Gram Panchayat & Ward level
- Committee of local community members to be established before Infrastructural Projects

(c) Mr. Sridhar Pabbisetty, Founding Director of Kautilya School of Public Policy

Professor Pabbisetty noted certain failures on part of ignorance based on internal inconsistencies among government officials. He pondered the need of performing extensive studies on the actual

reason for delays in infrastructural projects. Litigation costs are to be monitored from a case-to-case basis, and a need of making fundamental changes in administering law for the government as well as citizens is necessary.

Notable suggestions made by him were:

- Need for recourse for affected parties to be administered, based on the supportive stance of the Constitution and its role in view of government and citizens.
- Need of a Systems Thinking framework to be applied to the judicial process.
- Focus to be made on how laws are made & administered.
- Public policy on balancing the role of Litigation & Accountability on government is evident in present-day government projects.

(d) Dr. Anirban Chakraborty Associate Professor, NALSAR, Hyderabad

Dr. Chakraborty in analyzing the importance of Arbitration in matters of Infrastructural projects highlighted that the nature of Arbitration is Cure oriented and is one of the conspicuous ways in resolving issues of infrastructural projects, but it is not the best post-effective solution concerning such cases. Instead, we should focus more on dispute processing & dispute prevention. He further highlighted the role of Section 89(Settlement of Dispute outside of Court) and the absence of reliable data on the success of this section in reducing litigation in courts. Arbitration in his opinion should be the last resort in resolving disputes after litigation. While discussing the viability of alternative dispute resolution, he shared one case study on public infrastructure in Nagpur, wherein he faced difficulties in contemplating research due to lack of resources in assessing data provided by officials, this portrayed the ground level or actual issues faced during infrastructural projects. This reflects why Dispute Prevention should be focused upon rather than the Dispute Cure mechanism. There has to be a normative/suggestive framework on how to make a decision and, related to that, persons who should be represented in the engagement framework, must have the capacity to take such decisions. Time Planning & Assessment should not be confined to certain issues but must cover a wide area of subjects.

Suggestions:

- Arbitration & Litigation do not create many differences, instead, Mediation can be a better alternative to such disputes.
- Focus should be laid on the Planning stage rather than implementing stage.

- A normative study should be conducted on Decision-making & Decision-taking process, wherein a check on the representatives of State who hold autonomy in such matters is evident.

(e) Dr. Ragini Khubalkar Assistant Professor, MNLU, Nagpur

Dr. Ragini pondered that Arbitration to a certain extent is beneficial in resolving disputes and matters of Infrastructural Projects are one such ambit. The judicial Process is a complex system for a layman to understand but arbitration meanwhile is rather a less complex process in contesting their rights and needs.

Some suggestions made by her were:

- Subject matter of Arbitration varies from the case-to-case basis, and thereby public infrastructural projects do attract such means of amicable resolution of disputes.
- Structural Framework varies from Litigation to Arbitration, and thereby it would be favorable to resort to arbitration as means of dispute resolution as it would be layman-friendly who can easily contest their case and request solutions.

(f) Mr. Veeresh Bellur, RTI Activist

Mr. Bellur with his prior-experience portrayed the need for transparency in public projects. He shared some of his notable public infrastructure project experiences, and how cost analysis in proposed and actual expenditure on projects vary from a case-to-case basis. Further, he reflected how the original rates differ from the revised rates of public projects accruing to the time frame they undergo.

Notable Suggestions made by Mr. Bellur were:

- Dedicated website creation for particular project accessible to citizens
- Valuation of compensation to be revised
- Public Consultancies to be done before the implementation stage
- Payment of compensation to actual owners to be monitored by the administering body

(g) Ms. Praseeda Mukundan, Senior Research Associate, CPPR, Kochi

Miss Praseeda indicated the importance of SPVs & Specialised agencies who play a vital role in resolving issues. She gave some insight on Kochi Projects & the absence of responsible positions in its infra projects, and thereby difficulties faced due to such deficiency.

Notable suggestions made by her were:

- Every project to have an overlooking body to be presided by People in Important Positions in the government
- Old Policies need amends, as certain crucial positions which look into the technicalities are omitted, such as- Project Management Consultant, Procurement Specialists, etc.
- Checks towards Environmental Impact Assessment before execution stage
- Challenges in projects must take place before the pre-implementation phase
- Scope of Project to be noted from the viewpoint of stakeholders involved
- Mitigation of Project Cost before the assessment
- Other Innovative Mechanisms, such as- Transfer of Redevelopment Rights. can be opted for such projects

(h) Mr. Soumya Chatterjee, Senior Reporter, The News Minute, Bengaluru

Mr. Chatterjee pointed the autocratic nature of the working class and the need for public participation in public projects. Government solutions are at times against expert advice, thereby such solutions must be backed by sound reasoning instead of biased opinions. Need of a uniform plan on the city level for a common set of projects.

Suggestions by Mr. Soumya:

- Supreme Court & High Courts to ensure clearing public consultation and Environmental Norms, to avoid Litigation issues.

(i) Mr. Tushar Meshram, Public Policy Consultant, Bengaluru

Mr. Meshram pointed out that the demand for better public infrastructure has been growing, and rightly so, with the economy registering a growth between 6-8% year-on-year for the past few years. With factors like population, limited land resources, and political meddling, infrastructure projects running into litigation is no surprise. Appreciating the facts put by other panelists he emphasized the crucial need to maximize the benefits to the public through infrastructure projects.

Some notable suggestions made by Mr. Meshram are-

- Major cause for cost overruns is attributable to stalled projects, which are the major reason for hefty monetary losses to the investors and the taxpayers.

- It would be beneficial to consider the ranking of judicial processes in case of litigations that involve stakeholders from the government and industry. Citizens also need to be roped into the ranking process because infrastructure projects are after all meant to be used by the maximum number of people.
- In cases of speedy resolution where outcomes are amicable, relayed promptly, and the projects are not held up due to political or bureaucratic interference, court processes could be evaluated very favorably to secure a higher rank.
- Periodical assessment of ongoing litigation costs is vital.
- Use of technology, as the parameters like time, cost and outcomes will have to be communicated through a legal ranking portal for every case and the involved litigants.
- If courts are now receiving more planned budgets, it is crucial to also get the infrastructure updated to ensure smoother functioning.

3. Questions and comments

A number of perspectives emerged in the general discussion. Several participants noted the failure in keeping a check on the compliance guidelines prior to the execution stage. Further, most of the points raised by the panelists were on the issue of transparency in cost, litigation, and policy formulation.

Some participants highlighted resource management and prior approval of the public as the major cause of delay on such infrastructural projects. And thereby, the vital reason for the financial loss is accrued due to 'pre-implementation consultation' by the affected parties. Others questioned technical points made by the panelists were in light of dispute resolution as the notable idea here was that if before the implementation all the affected parties are consulted and awarded with sufficient compensation, then the issue of litigation is eradicated.

4. Conclusions

Mr. Richin, the moderator & research investigator, summarized the session in three conclusions: Non-Compliance of existing laws and policies by the government in their public infrastructure projects, need for a holistic approach towards litigation and project management is evident, and the role of civil societies in contesting the right of affected parties is the major concern for bringing litigation at rise. Adequate Decision-making process can aid in reducing litigation, a notable remark

on NITI Aayog's program on reducing litigation based on cost-benefit analysis can result in timely completion of targeted projects.

Dr. Ghosh proposed a Project Management System, which can identify appropriate yardsticks before initiating any infrastructural project viable in reducing litigation cost.

8. Does any estimation of costs (social cost, environment cost etc.) have been conducted by the organization with respect to the Elevated Corridor project?
9. Does the petitioners have consulted any authority before filing the litigation?
10. What are the remedies sought under this litigation?
11. Are there any similar projects affected by litigation in Bangalore?
12. What are the future endeavors of the organization with respect to this issue?
13. Does the civil society can contribute more towards the issue?
14. Do you have any suggestions or opinions regarding the project and its issues?

ANNEXURE – 3**A Study on the Impact of Litigation on Public Infrastructure – Elevated Corridor Project, Bangalore**

Questionnaire for Government Representative

1. Name of the Representative

Designation

Department

2. Under which law the Elevated Corridor Project is implementing in Bangalore?

3. Which is the implementing agency and what is the proposed budget of this project?

4. What are the expected outcomes of this project in Bangalore?

5. What is the investment model employed in this project?

6. What are the procedures involved in calling the tender of this project?

7. What is the expected time frame of this project?

8. The primary litigation was majorly on the Constitution of Metropolitan Planning Committee (MPC) under the 74th amendment of Constitution in which the Elevated Corridor project got attached later. Do you think the constitution of MPC is conducted under a mandated democratic procedure?

9. Has the government conducted the Environment Impact Assessment under the Environment Protection Act, 1986?

10. Has the government conducted Social Impact Assessment under the Land Acquisition Act, 2013 before implementing the project?

11. Has the government published the information and facts regarding the project to the general public under Section 4 of Right to Information Act, 2005?

12. Is there any monitoring platform designed particularly for this project to ensure transparency and accountability?

13. Has the government conducted public hearing as per section 81 B of Karnataka Town and Country Planning Act?

14. Does the government prepare any pre-reports or studies about this project? Please provide a copy of such report/study.

15. Do you think Elevated Corridor Project is a relevant solution to the existing traffic congestion in Bangalore?

16. Does the government failed to constitute a Metropolitan Planning Committee as per the 74th amendment to look after the development projects in the city?

17. Does any of the petitioners consulted the government before filing the litigation against this project?

18. What is the impact of this litigation on the project?

19. Is there a proper mediation procedure involved in this project?

20. Is there any alternative dispute resolution mechanism working under the law for this project?

21. What is the present status of the project?

22. What is the department's forward plan regarding this Elevated Corridor project?

ANNEXURE – 4**A Study on the Impact of Litigation on Public Infrastructure – Elevated Corridor
Project, Bangalore**

Questionnaire for the General Public

Name of the Respondent:

Age:

Gender:

Occupation:

Area of Residence:

Questions

1. What is your view on Bangalore's traffic congestion problem?

2. Do you know about the Elevated Corridor Project implementing in Bangalore to reduce traffic congestion?

3. Do you think the Elevated Corridor project will reduce traffic congestion in the city?

4. Are you affected by the project? If yes:
 - a. How are you affected?
 - b. Do you get proper communication from the authority?
 - c. Are you satisfied by the intervention by the government?

5. Are you aware of the litigation filed against the Elevated Corridor Project? If yes, what is your say on that?

6. Do you think the government has followed all due procedures mandated by the law before implementing the project?

7. Are you aware of any other such public infrastructure projects got delayed by the litigation in Bangalore city?

8. Do you know about the impacts of the Elevated Corridor project in Bangalore?
YesNo

9. Do you know about the proposed outcomes of the project in Bangalore?
YesNo

10. Do you think the litigation has an impact on ongoing public infrastructure projects like the Elevated Corridor Project?

11. Did the government provided proper transparency mechanism to provide accurate and timely information regarding such public infrastructure projects?

12. Do you think, there is violation of some laws with respect to the implementation of the Elevated Corridor Project?

13. Do you have any suggestions or opinions about the public infrastructure development happening in your city?

ANNEXURE – 5**A Study on the Impact of Litigation on Public Infrastructure – Araku Valley Project,
Andhra Pradesh****Questionnaire**

- Under which law the mining project is implementing in Araku Valley?
- Who is the implementing agency of the project?
- Is the mandate of law is followed in implementing this project?
- Are the procedures of mining are taking place in compliance with the due process of law?
- What is the expected cost of mining?
 - Cost of procedures for attaining License.
 - Workers Cost and Technical Cost
 - Additional Cost incurred due to issues like Litigation.
 - Other Costs
- What are the procedures required to get a mining license?
- What are the expected outcomes of this mining project?
- What are the procedures involved in the following statutes regarding this project?
 - Andhra Pradesh Land Transfer Regulation Act, 1970
 - Forest (Conservation) Act, 1980
 - Environment Protection Act, 1986
 - Forest Rights Act, 2006
 - National Mineral Policy, 2019
 - Mine and Mineral (Regulation and Development) Act, 1957

- What were the major legislations involved in the litigation?
- What is the present status of Mining activities in Araku Valley?
- What were the major impacts of mining in the valley?
- Did the Samata judgement had impact on the development activities taking place in the valley?
- What is your overall analysis of the litigation and its impact on this infrastructure facilities?

ANNEXURE – 6**A Study on the Impact of Litigation on Public Infrastructure – Bandra-Worli Project,
Maharashtra****Questionnaire**

- Under which law the project is implementing?
- Who is implementing agency of the project?
- Who all are the major petitioners involved in issue?
- Are you also a part of the Litigation?
- When has the Litigation filed?
- What are the legal issues concerning this project?
- What is the cost of this litigation and expected time for the delivery of justice?
- Do the petitioners consult the government before filing the writ petition?
- Who all are the other stakeholders involved in this legislation?
- What are the remedies sought under this litigation?
- What are the major arguments raised in the litigation?
- What are the major concerns regarding the proposed project?
- What was the impact of its judgement on the existing project?
- Is there any other similar Litigation with respect to this issue?

- Does the civil society can contribute more towards the issue?
- Do you have any further opinions about the project and its issues?

ANNEXURE – 7**A Study on the Impact of Litigation on Public Infrastructure – Delhi Metro Phase IV
Project, New Delhi****Questionnaire**

- Under which law the project is implementing?
- Who is implementing agency of the project?
- Who all are the major petitioners involved in issue?
- Are you also a part of the Litigation?
- When has the Litigation filed?
- What are the legal issues concerning this project?
- What is the cost of this litigation and expected time for the delivery of justice?
- Do the petitioners consult the government before filing the writ petition?
- Who all are the other stakeholders involved in this legislation?
- What are the remedies sought under this litigation?
- What are the major arguments raised in the litigation?
- What are the major concerns regarding the proposed project?
- What was the impact of its judgement on the existing project?
- Is there any other similar Litigation with respect to this issue?

- Does the civil society can contribute more towards the issue?
- Do you have any further opinions about the project and its issues?

ANNEXURE – 8**A Study on the Impact of Litigation on Public Infrastructure – Karapuzha Irrigation Project, Kerala****Questionnaire**

- Under which law the project is implementing?
- Who is implementing agency of the project?
- Who all are the major petitioners involved in issue?
- Are you also a part of the Litigation?
- When has the Litigation filed?
- What are the legal issues concerning this project?
- What is the cost of this litigation and expected time for the delivery of justice?
- Do the petitioners consult the government before filing the writ petition?
- Who all are the other stakeholders involved in this legislation?
- What are the remedies sought under this litigation?
- What are the major arguments raised in the litigation?
- What are the major concerns regarding the proposed project?
- What was the impact of its judgement on the existing project?
- Is there any other similar Litigation with respect to this issue?

- Does the civil society can contribute more towards the issue?
- Do you have any further opinions about the project and its issues?

ANNEXURE – 9

Field Visit and Online Consultation Photographs



Photo 1: Research Investigator interviewing Mr. G Shyam Babu, MRO, Araku Valley



Photo 2 : Interviewing tribal people of Battivalasa village, Araku Valley



Photo 3: Coarse Rice Cultivation of Dummagudiri Village, Araku Valley



Photo 4: Interviewing Mr. G.V Rambhabu, MDO, Araku Valley



Photo 5: A Friday Tribal Market of Araku Valley



Photo 6: Interviewing Mr. Killo Surendra, Leader – AP Girijan Sangham



Photo 7: Karapuzha Irrigation Project, Kerala



Photo 8: Karapuzha Irrigation Project, Kerala

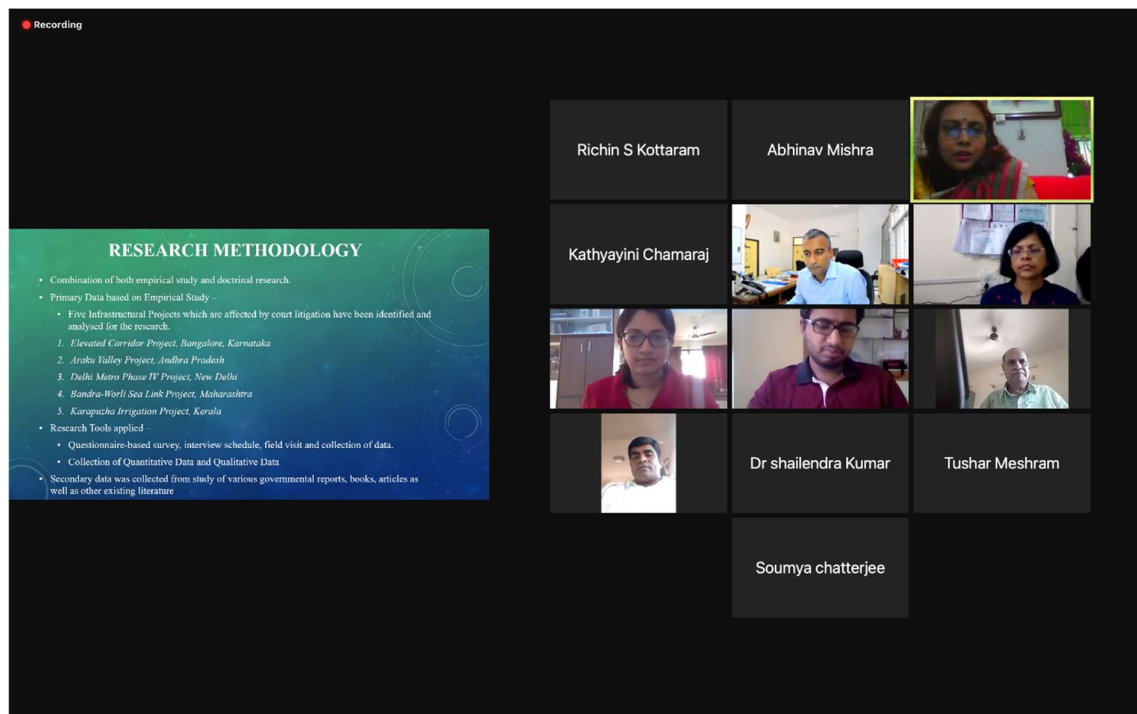


Photo 8: Online Consultation conducted on March 10, 2021

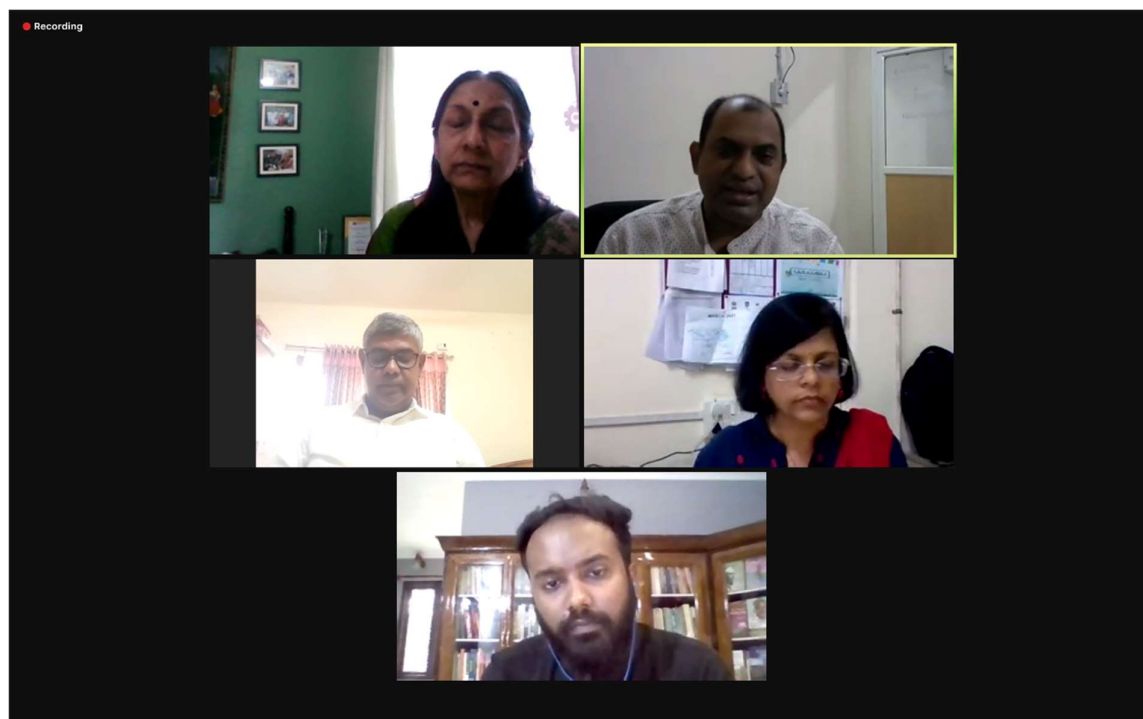


Photo 9: Online Consultation conducted on March 10, 2021