

## Fifty Years on

Marc Galanter

The Supreme Court's fiftieth anniversary is a fitting occasion to survey the achievements of the judiciary of a reborn India. As someone who has spent much of my life working on Indian law, I have always been saddened by the apathy toward India that is so prevalent in the legal world outside the country. India has pulled off the astonishing feat of sustaining a regime of constitutional liberty with vigorous judicial protection of human rights in a very large, very poor and very diverse society. In the face of daunting obstacles, the Indian courts have succeeded in sustaining a regime of constitutional order and legal regularity. With scant material resources, they have managed to adapt the structure of colonial law to the vastly different conditions of independent, democratic India and to protect and extend constitutional liberty. For all its flaws and imperfections, this is surely one of the epic legal accomplishments of this century, yet it has gone largely unappreciated by supporters of democracy and the rule of law.

For a legal order to flourish requires not only the leadership of judges and the mediation of lawyers, but the responsive participation of the citizenry. For the law to infuse the practices of institutions and inform the dispositions of citizens, those citizens need access to the law's protections and remedies. Since courts are passive institutions, they have to be moved by citizens. One of the glories of the Indian legal system is that citizens have direct access to the higher judiciary to effectuate one vital set of protections. However, for most citizens and most matters, the site at which they could use the system is the lower courts. At the very time that the higher reaches of the judicial system have proved extraordinarily responsive and resilient, its lower reaches appear to be locked into a spiral of escalating gridlock and ineffectiveness.

One sign of this infirmity is public disdain for and avoidance of these lower courts. Since British times, it has been widely believed that the Indian population is extremely litigious.<sup>1</sup> This piece of received wisdom is however far from the mark. Indeed the rate of utilization or invocation of these courts by the citizens of India is very low. Reliable data are scarce and the state of record-keeping makes collecting them a daunting task, but there are sufficient bits to suggest that India is among the lowest in the world per capita use of courts. Before his untimely death, the late Professor Christian Wollschlager, the trailblazer of comparative judicial statistics, presented a comparison of the per capita rate of filing of civil cases in some 35 jurisdictions for the ten-year period 1987–96. Rates of filing in courts of first instance per 1000 persons ranged from 123 in Germany and 111 in Sweden at the high end to 2.6 in Nepal and 1.7 in Ethiopia at the bottom.<sup>2</sup> Since no national figures are available for India, Professor Wollschlager included in his comparison figures on Maharashtra, which ranked thirty-second of the thirty-five jurisdictions with an annual per capita rate of 3.5 filings per 1000 persons. There is no reason to believe that Maharashtra has less litigation than India as a whole, since the data point to a general correlation of court use with economic development. A few qualifications are however necessary to frame the comparison. First a smaller proportion of the population of Maharashtra are adults than is the case in the developed countries at the top of the list. Second, societies differ in what matters they assign to courts or to alternative institutions. Third, the nomenclature and record-keeping of these alternatives may defeat any attempt to include them. Thus, in Maharashtra the count was of courts and did not include the many matters brought to tribunals of various kinds. Finally, in India, civil courts' delays and court fees may induce some claimants to divert their efforts to criminal courts. These qualifications, notwithstanding the Wollschlager study, suggest that the received wisdom is quite unrelated to actual patterns of use of Indian courts.

The suspicions aroused by the Wollschlager study gain some confirmation from an earlier study by Robert Moog, who examined litigation rates in Uttar Pradesh from 1951 to 1976; a stopping point dictated by the fact that the state stopped issuing these statistics then.<sup>3</sup> He found that per capita civil filings in all district level courts in UP had fallen dramatically from the early days of Independence, when there were 1.63 per thousand persons in 1951 to 1976 when there were only 0.88 per thousand. Again, such a fall might reflect the decrease in adults as a portion of the total population and diversion into tribunals, as well as

the effect of land reforms. However, once again we find the data contravene the dominant perception of India as increasingly litigious.

How can it be that few and perhaps fewer Indians invoke the courts while there is a widespread perception that the courts are inundated with cases, that frivolous litigation is rife, and that there is an abundance of hungry lawyers? Is there a connection between the relative scarcity of litigation and the impression that there is so much of it?

Certainly the Indian courts are desperately congested, even though the number of cases filed is small on a per capita basis. They appear to be heavily used because there are relatively few courts (in comparison to other common law countries). These courts are poorly equipped and inefficient. Delay is endemic. Outmoded procedural laws provide abundant scope for delaying tactics. Judges, fearful of the Bar, lack leverage to discipline lawyers or use the available tools to expedite proceedings. Cases linger interminably and arrears mount.

The public has low (and generally realistic) expectations of law, lawyers, and courts.<sup>4</sup> Potential users forgo the lower courts or avoid them wherever possible; many from ignorance and many from calculation. The basic problem of low use of the courts and lawyers is that they are able to deliver so little by way of remedy, protection, and vindication. The courts provide a useful facility for those who wish to postpone payment of taxes or debts and those who wish to forestall eviction or other legal action. Generally, they serve those who benefit from delay and non-implementation of legal norms, that is, parties who are already in possession or satisfied with the status quo. For those who require vindication and prompt implementation of remedies and protections against dominant parties—women from husbands or relatives, labourers from landowners, citizens from government—the system works only haltingly, partially, and occasionally. Since so many of the potential meritorious claims are absent from the courts, it is not surprising that the claims that are present there include a significant proportion that are 'frivolous' in the sense of being brought for purposes of harassment and delay.

Given the long delay (and high interest rates at which future value must be discounted), mounting expenses and meagre damage awards, the present value of most suits for money damages is probably close to zero if not negative. Indeed, much litigation in India can be described as a 'sunk cost auction'<sup>5</sup> in which the competitors invest ever-higher amounts in the hope of staving off larger losses. Widespread popular intuition of this produces avoidance of the civil courts and the diversion

of potential money damages cases into criminal cases and claims for injunctive relief.

For large sectors of society and large areas of conduct, courts afford no remedies or protections. When pressure builds up to provide remedies, the solution is typically not to reform the lower courts but to bypass them. In a way, the writ jurisdiction is the prototype for this bypassing strategy, which has been applied to motor vehicle accidents and consumer grievances. The forums created by these measures are court-like: they weigh competing proofs and arguments within a framework of authoritative rules. The notion is that they will do a superior or at least more efficient job of adjudication than the regular courts.

Recently, would-be reformers have embraced another strategy of reform which we might label informalism; an approach that abandons or dilutes the idea of adjudication. In most or all societies with flourishing legal systems, most regulation takes place and most disputes are resolved through informal processes of deference, reciprocity, and bargaining rather than through the formal legal process; and of those disputes taken to formal legal processes a great many or most are resolved by informal bargaining that leads to settlement. The fact that informal appendages of the formal legal system are the location of the resolution of so many disputes gives rise to the impression that informal devices produce results independently of the formal legal system. Their independent functioning however is at least partly illusory.

So long as recourse to the courts is a viable alternative, the outcomes in informal bargaining reflect to some degree the bargaining endowments conferred by the law, as registered in the commonplace 'bargaining in the shadow of the law'.<sup>6</sup> The parties' endowments reflect not only the entitlements conferred by substantive legal rules, but also the rules (or procedure, evidence, and so forth) that enable those entitlements to be vindicated. Rules are however only one part of the endowment conferred by the legal forum: the delay, cost and uncertainty of eliciting a favourable determination factors that reflect rules but are heavily influenced by such non-rule factors as the number and organization of courts and lawyers—also confer bargaining counters on the disputants.<sup>7</sup>

The present enthusiasm for Lok Adalats presents a striking instance of this illusion of informal remedies as a realm independent of the law. The Lok Adalats' achievement, it appears, is to provide an official process for claimants to secure a portion of their entitlements without the aggravation, extortionate expense, inordinate delay, and tormenting uncertainty of the court process. To secure this, they yield up discounts. Assume, for example, a motor accident claimant who would secure

Rs 50,000 compensation after an expensive ten-year struggle in the courts. Imagine that this same claimant might be able to get half that amount at a Lok Adalat in just a few months. This is clearly a preferable outcome for the claimant, given the legal costs avoided and given the appropriate discount for the futurity and uncertainty of the court recovery. Thus, the establishment of the Lok Adalat is viewed as providing a significant benefit for a claimant in this situation.

Of course, this claimant is actually entitled not to the discounted 2010 value of his claim, but to the full 2000 value. What makes the delivery of the discounted amount a 'benefit' is simply that the full entitlement can be vindicated only by recourse to a disastrously flawed system that can at best deliver it in 2010. Thus the 'benefit' is a benefit only by virtue of the enormous transaction costs imposed by that system.<sup>8</sup> Besides, these transaction costs impact differentially on different kinds of parties. Those who are risk-averse and unable to finance protracted litigation are the ones who have to give the discounts in order to escape these costs; those who occupy the strategic heights in the litigation battle are able to command steep discounts. Since the sums ordinarily awarded by the courts fall far short of fully compensating the injured, the injured are triply under-compensated: first, by the inadequate level of compensation; second, by the high transaction costs; and finally by the discounts they must yield to avoid the infliction of these costs. As the injured are under-compensated, injurers are under-assessed for the costs they impose on society for their risk-creating behaviour and under-deterred from persisting in injurious conduct.

The establishment of Lok Adalats represents the use of scarce reform energies to create alternatives that are 'better' than the lower courts. It is not however necessary to be very good to be better than that. The flaws of the system serve not as a stimulus to reform it, but as a reason for setting up institutions to bypass it. Lok Adalat proponents take pride in delivering needed compensation expeditiously to a large number of claimants. It is telling that the bulk of the caseload at many Lok Adalats is not made up of cases diverted from the rigidities of ordinary unreformed civil proceedings. Instead, they are cases diverted from a 'reformed' and 'streamlined' sector of the court system, the Motor Accident Claims tribunals, themselves established to provide expeditious proceedings with no court fees and some compensation available without a showing of fault. This accentuates the point that Lok Adalats do *not* provide additional access to justice: they do *not* provide new facilities for the vast number of potential claims that are discouraged—by court fees, the cost of lawyers, the prospects of delay, and paltry recoveries—from us-

ing the courts at all. Instead, they provide a truncated process for some of the few who *do* attempt to utilize the courts. What is remarkable is how modest are the aspirations their promoters have for them. The post-Independence proponents of *nyaya* panchayats, in contrast, sought to provide a convenient, accessible, understandable forum that would encourage popular participation, express popular norms, and promote harmonious interaction. They were unable to deliver on this, but the aim was to provide a system of justice superior to that of India's British-style courts. In contrast, the virtues claimed for Lok Adalats are their expeditiousness and lower processing cost. No one claims that they deliver a form of justice superior to that promised (though frequently not delivered) by law.

Lok Adalats are then an instance of a debased informalism—debased because it is commended not by the virtues of the forum it provides but by avoidance of the torments of the formal institutional process. Lok Adalats are only the most visible manifestation of this debased informalism, premised on the irredeemability of the formal legal process. A most dramatic and striking instance of this was the February 1989 settlement of the Bhopal case. The Government and many observers, including some in the judiciary, justified the settlement as beneficial to the victims by comparing it with the results of further litigation that would have lasted 'anywhere from 15 to 25 more years'.<sup>9</sup> This was not a claim that the settlement represented the victims' true entitlements; rather it was an assertion that whatever the magnitude of those entitlements, the unalterable character of the Indian legal system made it inevitable that they could not be obtained before passage of so long a period that the discounted present value of these claims was less than the amount to be delivered under the settlement. The features of the system that insured protracted delay were treated as given and unchangeable.

Lok Adalats and other manifestations of 'banyan tree justice' are reflections of 'failing faith'<sup>10</sup> in the efficacy and virtue of the formal legal process—at least in the lower courts. Abandoning all hope of reform, what is offered instead is a programme of palliation which is virtually a photographic negative of the animating idea of Public Interest Litigation (PIL) that the Supreme Court pioneered in the 1980s. PIL sought to be 'strategic'; it sought to empower organizable constituencies of the disadvantaged. In contrast, the new informalism addresses isolated individual victims. Where PIL sought to marshal facts by extensive investigation and to develop the law by trailblazing cases, the new informalism seeks compromises that obviate both factual and legal definition. Where PIL encouraged the development of new specialized ex-

pertise and wide dissemination of new knowledge, the new informalism demands no expertise and generates no new knowledge. Where PIL sought to use the wider, radiating effects of legal action to bring large-scale movement toward constitutional ideals, the new informalism eliminates consideration of these wider aggregate effects and confines its concern to specific cases.

Law Commissions and other observers have been decrying the conditions of the lower courts for a century. It is curious that the current surge of defeatism should appear just as expanded understanding of the dynamics of courts and new technologies supply would-be reformers greater insight and more options than were available earlier. Although energizing the broad base of the judicial system to make it responsive to public needs requires legislative enactments, many initiatives could be pursued by the higher judiciary in its role as overseer and guide of the lower courts. For example, the Supreme Court could set a model for the courts by curtailing unlimited oral argument; it could propose ways to free lower court judges from recording evidence and to modify the evaluation of those judges to reward resistance to delay; it could give priority on court dockets to cases involving claims of excessive delay in the lower courts, so that powerful interests who wanted their cases heard promptly would be enlisted to support measures to assure that lower courts were functioning adequately.

In addition to these institutional and procedural changes, the higher courts have some scope to provide the lower courts with the substantive tools they need to make justice accessible to ordinary citizens. Perhaps the single greatest opportunity is the development of tort law, a field that legislative neglect has left to the judiciary for incremental common law development.<sup>11</sup> The rationale of tort law is that in addition to dramatizing public standards of care, it secures compensation that makes an injured party 'whole', shifting cost of injuries to injurers and inducing potential injurers to invest in preventive efforts that reduce the incidence of future injury. Experience elsewhere has shown that tort is a rather spotty and uneven way of providing compensation for injuries and that the preventive effects it generates are often less than optimal. However, in a setting of no remedies for negligent injury and no pressure for prevention from the law, the net incremental benefits of a vivified tort law would be substantial.<sup>12</sup>

In addition to being viable because it is already 'there' in theory, tort law has a further advantage: it does not depend on continuing inputs from government or external actors, but would generate strong incentives among lawyers and parties for its continuing use and development.

Besides, it can operate without the extensive *ex ante* investment that it takes to put into place safety regulations or administrative controls and the continuing investment in updating and enforcing them. The major function of government would be to resist pressures from discomfited parties to dismantle or cripple the system.

The need for the legal system to adapt to international capital flows and new productive technologies is widely understood. However, the changes incident to modernization of the economy also impact on the workers, consumers, and neighbours; machinery, transport, and chemicals bring unprecedented benefits, but they also bring injuries and risks of greater magnitude, typically caused by remote entities over whom there is no control through the ordinary reciprocities of life. The development of the kinds of remedy and accountability that may be afforded by tort law is particularly needful in an industrializing society in which neither social insurance nor effective administrative regulation is present.

In the coming decades the Supreme Court will be challenged by many difficult and momentous legal questions. It will also face difficult problems of restructuring itself as an institution to meet the new demands that will engulf it. In addition, the Court will encounter the daunting task of building a strong and effective system of lower courts in which ordinary Indians can find expeditious remedies for everyday harms. Those remedies cannot be found in informalism detached from a flourishing system of efficacious courts. The road to useful informalism is through vigorous reform of formal legal institutions, not through resigned surrender to the unalterability of their defects.

## Notes

<sup>1</sup> References to many expressions of this view among British administrators are found in Marc Galanter, *Law and Society in Modern India*, Oxford University Press, Delhi, 1989, 38-9.

<sup>2</sup> Christian Wollschlager, 'Exploring Global Landscapes of Litigation Rates', in Jurgen Brand and Dieter Stempel (eds), *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag* Nomos Verlagsgesellschaft, Baden-Baden, 1998, 577, 582.

<sup>3</sup> Robert Moog, 'Indian Litigiousness and the Litigation Explosion', *Asian Survey*, Vol. 33, No. 12 (1993) 1136, 1138.

<sup>4</sup> Velcheru Narayana Rao, 'Courts and Lawyers in India: Images from Literature and Folklore', in Y.K. Malik and D.K. Vajpeyi (eds), *Boeings and Bullock-Carts: Studies in Change and Continuity in Indian Civilization*, Chanakya Publications, Delhi, 1990, Vol. 3, p. 196.

<sup>5</sup> A sunk cost auction is a game, often used as a business school exercise, in which some good (say a lakh of rupees) is awarded to the highest bidder, but the person who bids the second-highest amount also must pay the amount he bid. Thus, even if the opponent's

last bid exceeds one lakh, there is an incentive to bid just a little more in order to reduce one's loss by the value of the prize, but then the opponent is presented with a similar incentive, ad infinitum. In practice, the game ends when one party runs out of money or grows indifferent to the possibility of reducing the loss by the prize amount.

<sup>6</sup> Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', 88 *Yale Law Journal* 950 (1979).

<sup>7</sup> Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law', 19 *Journal of Legal Pluralism* 1 (1981).

<sup>8</sup> For purposes of the argument here, transaction costs include lawyers' fees, court fees, bribe, and other litigation expenses, lost time, uncertainty of outcome and uncertainty of execution if a favourable outcome is obtained.

<sup>9</sup> The Government of India's anonymous justificatory statement noted that '[e]minent lawyers have argued that this case, which has already been four years in various courts in the pretrial stage, would in the most optimistic circumstances need anywhere from 15 to 25 more years for an ultimate decision'. 'Bhopal Gas Settlement: Govt. justifies Amount', *Hindustan Times*, 3 March 1989.

<sup>10</sup> Cf. Judith Resnik, 'Failing Faith: Adjudicatory Procedure in Decline', 53 *University of Chicago Law Review* 494 (1986).

<sup>11</sup> In the discussion that follows, the possible development of tort law is assessed in regard to personal injury (due to negligence or related notions of strict liability) and cases of misuse of authority. I put aside the question of whether a new regime for tort cases should include other intentional torts (defamation, malicious prosecution, etc.), which have a history in the subcontinent of employment in the course of personal feuds, etc.

<sup>12</sup> It is easy to imagine schemes of social insurance and administrative regulation that might perform these functions in a superior fashion. Choices among institutions however turn not only on images of their optimal performance, but also on the probability of their being enacted and sustaining themselves. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, University of Chicago Press, Chicago, 1994. Is there any likelihood that other institutions that would produce more ample compensation or more efficacious prevention might be put in place in its stead? It seems evident that neither comprehensive social insurance against negligent injury nor effective governmental regulation of risks are at all likely in the near future. The choice is not between these and tort law; it is between tort law and the present no-remedy no-accountability system for dealing with personal injuries.