

# More Courtrooms, Judges & Tech Won't Reduce India's Pending Cases When The Biggest Litigator Is The Govt

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Supreme Court of India/ WIKIMEDIA COMMONS

India needs more than double the number of judges it currently has to dispose off roughly 50 million pending cases. The surest way of addressing this legal quagmire is if the country's leading litigator, the government, reduces what a former chief justice called "an avalanche of litigation": the

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**New Delhi:** On 6 September 2023, the Supreme Court dismissed an appeal by the government of Karnataka, imposed costs and **ordered** it to compensate landowners from whom it had taken away land and refused to pay up.

“Merely because the officers of the State Government do not have to pay for the litigation from their own pocket, they cannot be permitted to file such frivolous petitions and harass the landowners, who have already lost their valuable land,” said the Supreme Court order.

This order about the frivolity of government litigation is one in a series of orders by appellate courts in 2023 that made clear the nature of government litigation and the burden it places on the judicial system and the public exchequer.

In at least four cases courts expressed frustration at bureaucratic irresponsibility.

For instance, the Allahabad High Court on 13 October 2023 **said** “... this Court tends to explicate the unwelcoming experience over the frivolous petitions as the roster of this Court is clogged owing to the ignorant

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filed by the Haryana Urban Development Authority. “It is because of impersonal (sic) and irresponsible attitude of the officers, who want to put everything to Court and shirk to take decisions,” said the Supreme Court.

“However, still the appellants had not only filed appeals,” said the Supreme Court, “resulting in addition to the pendency of cases and also must have spent huge amount on litigation in the form of fee of the counsels and allied expenses.”

Once again, on 11 August 2023, the Supreme Court verbally **observed** that the government was responsible for 40% of frivolous litigation, “for a matter which involves Rs 700 per month, the state or Union must have spent Rs 7 lakh and too from the public exchequer”.

And finally, the Bombay High Court in October 2023 **said**, “...we are constrained to say this, that we are no strangers to repeated assertions from the Union government itself regarding pendency of cases, mounting arrears, frequent adjournments, and impediments allegedly caused by our courts to what the government calls 'the ease of doing business'.

Conveniently overlooked in all these assertions is the fact that it is the government that is by far the largest litigant

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The judiciary is not overstating the point that the government is the country's leading litigator.

The [National Judicial Data Grid](#), launched under the [E-Courts Project](#), [Supreme Court of India](#), has data on institution, pendency and disposal of cases, bench strength, reasons for delay in cases, details of registered and unregistered cases and age-wise break-up of cases, and is the single largest, government maintained repository of data on the functioning of courts.

However, public data on the type of litigants across 50 million cases, for instance, whether these litigants are individuals, government entities, or companies, is unavailable.

A recently released book, [Court on Trial: A Data-Driven Account of the Supreme Court of India](#), by Aparna Chandra, Sital Kalantry, and William H. J. Hubbard, however, found that the government is a litigant in almost 73% of all admitted matters before the Supreme Court.

Perhaps the most poignant moment in the last decade that marked the crisis of an overstretched judiciary came in 2016, when former Chief Justice T S Thakur [broke](#)

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*Justice Thakur's frustration at government inaction in appointing judges despite what he termed "an avalanche of litigation", repeated the popular assertion that more judges would reduce pending cases.*

This view is certainly true to an extent, given that India has only 21 judges per million people, and appears to need at least 50 judges per million people to cope with the current estimate of 50 million pending cases across all courts.

However, these numbers can mask an underlying pattern of behaviour displayed by the government, as courts have made clear in 2023. Frivolity and irresponsibility appear to be characteristics that define government litigation.

Given that the government is the largest litigator, surely the problem runs deeper than statistics might reveal.

Taking a cue from the Delhi High Court, which in 2023 asked for an audit of the decision-making process that led to such litigation, we spoke, on condition of anonymity, to two standing counsel for the government

## 'Bureaucratic Risk Aversion'

A 2021 [paper](#) by the *Indian Public Policy Review* highlighted bureaucratic indecision and risk aversion within the government. Indian bureaucrats, the paper argued, are prone to self preservation to avoid individual liability.

This was echoed in our conversations.

*"There is no value placed on a negative opinion," said a lawyer, who requested anonymity. This means that should a government officer decide not to litigate because there is no reason to do so, such a decision is not considered to be in the best interests of the government.*

Such officers do not have to bear the cost of litigation themselves, but they will bear the consequences of not having been litigious in the first place. The fear of being reprimanded or potentially tainted by a bad service record is real.

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As the Supreme Court [noted](#) in May 2023, government officers tended to avoid taking on responsibility, a problem caused by centralised decision making.

The Nobel prize winning economist Abhijit Banerjee [said](#) in 2019 that “in bureaucracy it is extremely important that people are empowered to take a call, though that call may not work. We need to allow for mistakes, if that is the price to be paid to make a decision”.

*Another incentive to be litigious is potentially intradepartmental politics. As the lawyer we spoke to said, if a government employee within a department approaches a court to resolve disputes with the government, such as non payment of dues, promotions, or not receiving other social security benefits that they may be entitled to, then they could likely face litigious consequences from within their own department, long after they have retired.*

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Health Services, Kashmir, for keeping a legal assistant “hanging for nearly 20 years”. The government officers in this case remained absent in the lower court despite being served, then proceeded to engage in multiple rounds of appeals against the legal assistant who originally sued for payment of dues. The government’s behaviour, the High Court noted, was ‘casual and careless’.

There is another financial incentive in play that could qualitatively impact the pendency number we see in the judiciary, panel advocates being paid per case or per day for tasks such as drafting petitions, making appearances, conducting conferences and filing cases (Retainer fees for government counsel are [currently](#) at Rs 6,000 a month at the district court, Rs 9,000 a month at high courts and Rs 13,500 per case per day at the Supreme Court. A detailed fee schedule issued by the Ministry of Law & Justice is available [here](#)).

*While the government’s retainer fee does not match a private client’s, it is likely that this could still incentivise filing ‘unnecessary litigation’. Anecdotally, we learnt that there are ‘career government*



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Sometimes, lawyers do not discourage an otherwise bad case from being filed. This is despite the fact that the same lawyer might face an irate bench and be publicly reprimanded for having filed such a case.

The reputational consequences of a lawyer having to face a frustrated judge is not enough to discourage this practice, we were told.

### **‘Being An Effective Litigant’**

What therefore, is a ‘good’ case, fit for challenge, and how should a government officer make this decision?

To reduce the caseload on the judiciary, in 2010, the ministry of law and justice evolved the [National Litigation Policy](#), which was framed based on the “recognition that the government is the predominant litigant in courts and tribunals across the country”.

Over the last decade, this is perhaps the most damning acknowledgement by the union government of its own role in adding to the volume of cases pending before courts in India. The policy states,

“‘Efficient Litigant’ means focusing on the core issues involved in the litigation and addressing them squarely.

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I'd like to emphasise this point in the policy, "A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that Government is not an ordinary litigant and that a litigation does not have to be won at any cost."

"Responsible Litigant" means that litigation will not be resorted to for the sake of litigating, that false pleas and technical points will not be taken and shall be discouraged," says the policy.

*One metric for a bureaucrat to decide if a case needs to be litigated, is to assess if the government has a high likelihood of success in winning a case. Sometimes, this could mean prioritising the financial stakes involved for the parties in question.*

The National Litigation Policy states that unless public finances are adversely affected, no appeal should be filed before the Supreme Court. A [case](#) in which the government appeals an order to pay Rs 700 per month to

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bail, or seeking an enhancement of sentence are the kinds of cases that should not form the bulk of cases pending before courts. Underlying this is the government's responsibility in upholding a rule of law principle to place personal liberty over vindictive, litigious action, as well as respecting the finality of an order.

As the book *Court on Trial* notes, nearly one in five cases admitted by the Supreme Court is one where the government is an appellant. This means that the government, in all likelihood, approached the Supreme Court after a minimum of two rounds of litigation paid for by public resources.

### **Can More Resources Solve The Pendency Problem?**

A January 2024 report by the Supreme Court's Centre for Research and Planning reveals that there are 50 million pending cases in the courts today, across civil and criminal cases.

The report emphasised four key indicators that could reduce pendency: increasing infrastructure, recruitment of judges, technology, and increased budgets for the judiciary. For instance, the report notes that between 2021 and 2026, the Central Government will budget Rs

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'Parkinson's Law': meaning, more time and more space would create more work. While increasing the number of courtrooms should hypothetically reduce backlog, it will also spawn thousands of new cases.

The government's deeper instinct to litigate will not be addressed by building new courtrooms.

As the government standing counsel at the Supreme Court said, the problem of pendency has to be understood at the microscopic level of decision making.

*Few lawyers, even at the Supreme Court, are conscientious enough to discourage litigation, or be in a position to refuse being litigious. As we learnt, a government officer, as any other client, can insist that a 'bad' case be filed.*

Except that the government is unlike other private clients because it uses public resources and time to engage in litigation.

### **The Link Between Pending Cases & New Criminal Laws**

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The erosion of civil liberties erosions that these laws will impose have been discussed at length (see [here](#), [here](#), [here](#), [here](#), [here](#) and [here](#)), as well as most recently at a public discussion on [Decoding the New Criminal Laws](#).

One concern for the future is the impact that the new criminal laws will have on [docket explosion](#).

As per [section 356 of the Bharatiya Nyaya Sanhita 2023](#) (replacing the [Indian Penal Code 1860](#)), all cases registered under the old law, will continue until final disposal.

Similar provisions exist in the [Bharatiya Nagarik Suraksha Sanhita 2023](#) (replacing the [Code of Criminal Procedure 1973](#)) and the [Bharatiya Sakshya Adhiniyam, 2023](#) (replacing the [Indian Evidence Act 1872](#)).

This means cases filed under the new criminal laws, will add to the existing [36 million](#) already pending criminal cases.

A [panelist](#) referred to the substantial increase in litigation that will also emerge from the problems caused in differing interpretations of the new laws by trial and appellate courts.

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using technology to provide administrative and secretarial assistance to judges, are all solutions that need to be aggressively implemented.

However, if the government continues to be the single largest litigator, it is akin to asking courts to solve the pendency problem by shovelling through six ft of snow with an [avalanche](#) headed for them.

*(Lubhyathi Rangarajan is a research fellow, funded by The Leverhulme Trust, at SOAS, University of London. She is also a member of Article 14's editorial board.)*

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