GOVERNMENT LITIGATION: AN INTRODUCTION

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Vidhi
Centre For Legal Policy
BETTER LAWS. BETTER GOVERNANCE

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I. INTRODUCTION

It is a truism to argue that India needs to fix delays and backlog in the courts in order to meet its growth goals.[1] One obvious mechanism to ensure this is to reduce the number of cases entering the judicial system. Though no verifiable data is available, various sources, including a recent document by the Ministry of Law & Justice, state that the government, including public sector undertakings (PSUs) and other autonomous bodies, are party to around "46 percent" of court cases.[2] This makes the 'government', taken as a single entity, the biggest litigant in the country. Since 'government litigation' contributes the most to the judicial burden, understanding why these cases enter the system becomes necessary to solve the problem of an over-burdened judiciary. This is not only in the interest of the judiciary, but also the government, since litigation slows down government administrative processes by delaying decision-making on matters that are the subject of litigation.

Thus far, there has been no focused study on what makes the government the biggest litigant. The oft-repeated "46 percent" figure in relation to government litigation only gives a bird's eye view of the problem, which tends to hide more than it reveals. For a start, in a decentralized structure of governance, where everything from a local panchayat to the Prime Minister's Office is part of the government, there is no clear understanding of which level of government contributes to litigation. This is further complicated by an expansive interpretation of the term "State" under Article 12 of the Constitution, which includes entities such as public-sector undertakings (PSUs), nationalized banks, co-operative societies, and so on.[3] By corollary, if government functions in so many forms and structures, a one-size-fits-all approach is unlikely to resolve the problem.[4] Therefore, it is critical to understand what kind of litigation that involves the government is excessive or frivolous, and then design targeted interventions to reduce the quantum of such litigation. This will ensure a robust justice system where both the government and the general public can hold each other accountable in a rights-respecting, mutually-benefitting and fair manner.

[1]Ease of Doing Business' Next Frontier: Timely Justice, Economic Survey, 2018, Also Available at: http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf Last Accessed: 3rd February 2018

[2]Action 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 Last Accessed:5th February 2018

[3]Deepika Kinhal, "Tackling Government Litigation", The Hindu, 13th January 2018, Also Available at: http://www.thehindu.com/opinion/op-ed/tackling-government-litigation/article22444640.ece Last Accessed: 1st February 2018

[4]Deepika Kinhal, "Tackling Government Litigation", The Hindu, 13th January 2018, Also Available at: http://www.thehindu.com/opinion/op-ed/tackling-government-litigation/article22444640.ece Last Accessed: 1st February 2018

II. PRESENT UNDERSTANDING OF GOVERNMENT LITIGATION

The government has full cognizance of its contribution to judicial delays. In October 2016, the Prime Minister raised relevant concerns regarding the burden of government litigation on the judiciary. He said, "The judiciary spends its maximum time on us … government".[5] In January 2017, he brought up the issue again, with regard to litigation between two (or more) government departments.[6] In April 2017, the Law Minister wrote to all Union and Chief Ministers of India, highlighting the need to address the rising litigation burden within the state.[7] The letter noted the increased costs of litigation, and called upon "[e]ach Ministry/Department …[to] chalk out an 'Action Plan for Special Arrears Clearance Drives' to reduce the number of court cases by following various methods...and implement the plan on Mission Mode."[8] The Department of Justice, Ministry of Law and Justice subsequently held a series of inter-ministerial meetings between June and August to discuss litigation burdens on the ministries/departments and find strategies that could be employed to address them.[9] While the focus of the discussion was the need to evolve alternate dispute resolution mechanisms, some departments also shared details of methods they were employing to reduce litigation.[10]

Simultaneously, the government has made some efforts to collate data on cases pending in different courts. An internal portal called 'LIMBS', an acronym for Legal Information Management and Briefing System, was created in 2015 with the objective of tracking cases to which the government is a party.[11] Till June 2017, LIMBS has reportedly collected data pertaining to 1.35 lakh cases.[12] As of 12 February 2018, this number appears to have gone up to 2.1 lakh 'live' cases.[13] However, there is limited information available to the public,[14] leaving little opportunity for researchers to examine the

[5]"Government biggest litigant, need to lessen load on judiciary: PM Modi", Times of India, 31st October 2018, Also Available at: https://timesofindia.indiatimes.com/india/Government-biggest-litigant-need-to-lessen-load-on-judiciary-PM-Modi/articleshow/55154921.cms Last Accessed: 5th February 2018

[6]"PM Modi laments depts working in silos, settling disputes in courts", Indian Express, 20th January 2018, Also Available at: http://indianexpress.com/article/india/pm-narendra-modi-addresses-joint-conference-of-tourism-culture-and-sports-ministries-via-video-conference-4483620/ Last Accessed: 6th February 2018

[7]Department of Justice, D.O No: 15011/27/2017/ JUS (AU) Dated 7th July 2017, Also Available at: http://doj.gov.in/monthlyachievement/monthly-achievement-june-2017 Last Accessed: 8th February 2018

[8] Minister of Law and Justice, D.O.No. N-17/13/201-NM, Also Available at: http://www.csir.res.in/sites/default/files/CSIR_03-05-2017_1.PDF Last Accessed: 11th February 2018

[9]Depak Patel, "Disputes involving govt: A case to cut litigation count", The Indian Express, 16th January 2018, Also Available at: http://indianexpress.com/article/india/disputes-involving-govt-a-case-to-cut-litigation-count-5026317/ Last Accessed: 4th February 2018, and Department of Justice, D.O No. 15011/27/2017 - JUS (AU) Dated 11th October 2017

[10]Depak Patel, "Disputes involving govt: A case to cut litigation count", The Indian Express, 16th January 2018, Also Available at: http://indianexpress.com/article/india/disputes-involving-govt-a-case-to-cut-litigation-count-5026317/ Last Accessed: 4th February 2018, and Department of Justice, D.O No. 15011/27/2017 - JUS (AU) Dated 11th October 2017, Also Available at: http://doj.gov.in/monthlyachievement/monthly-achievement-june-2017 Last Accessed:12th February 2018

[11]"D V Sadananda Gowda Urges Other Ministries to Start Uploading Their Data on the Web-Based Application-Legal Information Management & Briefing System (LIMBS), Developed by the his Ministry in Consultation with the Railway Ministry and the NIC", Ministry of Law and Justice, Press Information Bureau, 22nd September 2015, Also Available at: http://pib.nic.in/newsite/mbErel.aspx?relid=127089 Last Accessed: 9th February 2018

[12]Action Plan to Reduce Government Litigation, Ministry of Law and Justice, 13th June 2017, http://doj.gov.in/page/action-plan-reduce-government-litigation Last Accessed: 22nd January 2018

[13]As per LIMBS website, see https://www.limbs.gov.in/main.asp# Last Accessed: 12th February 2018

[14]This database is accessible only to government officials and government advocates

performance of government as a litigant. The database is also not likely to be comprehensive (as yet), as it relies on self-reporting from various government ministries and advocates.

It is not that the subject of its litigation has caught the government's fancy only now. 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 2015.[15] However as of early 2018, this draft has as yet not been made available to the public.

In recent years, both the judiciary and legislative bodies have attempted to raise the issue the issue of government litigation as a major concern. For instance, in his 2007 address at the "Ethics in Governance – Moving from Rhetoric to Results" organized by the Administrative Reforms Commission and the National Judicial Academy, the then Chief Justice Y. K. Sabharwal noted,

"...It is common knowledge that government is the major litigant in each rung of the judicial hierarchy...Suggestions for appropriate mechanism to review the position taken by the Government in disputes coming before the courts of law have been made from time to time. The object of such a review mechanism is to curtail unnecessary and avoidable litigation. Unfortunately, these suggestions have always received half-hearted response. The State can ill-afford wastage of resources by engaging itself in legal disputes that are not going to serve public interest."[16]

Earlier, Member of Parliament Shri Pawan Kumar Bansal had raised the issue in the Parliament discussion on 16th December 1999. He said, "I think to change the environment regarding litigation in the country, the hon. Minister would really find support from all sections of the House and from outside also, if the Government were to decide that they cut down their expenditure on litigation and cases are not filed the way they are now filed. Perhaps we have never given a serious thought to it, but I am sure the hon. Minister would now come out with a litigation policy for the Government."[17] This was over 10 years before the government came up with the NLP. Clearly, the litigation burden on the government has remained a backdrop to discussions surrounding governance and judicial reform in India.

While the last decade has surely seen increased dialogue on judicial pendency, the commentary on managing government litigation is much older. The earliest attempts to discuss this were initiated by the Law Commission of India (LCI) when it published two reports on issues surrounding government litigation. These include its 100th report titled '*Litigation by and against the Government: Some*

[15]"Secretaries' panel clears litigation policy", The Business Standard, 5th June 2015, Also Available at: http://www.business-standard.com/article/pti-stories/secretaries-panel-clears-litigation-policy-115060400439_1.html Last Accessed: 9th February 2018

[16]4th Report, Second Administrative Reforms Commission, Ethics in Governance, 2007, Also Available at: http://arc.gov.in/4threport.pdf Last Accessed: 1st February 2018

[17]Lok Sabha Debates, 16th December 1999, Also Available at: http://164.100.47.194/Loksabha/Debates/Result_Archive.aspx?dbsl=1307145 Last Accessed: 1st February 2018

Recommendations for reform' (1984),[18] and its 126th report titled '*Government and Public-Sector Undertaking Litigation Policy and Strategy*' (1988).[19] Despite these reports, the causes for increased litigation involving the government have not been conclusively identified. Besides the volume of cases it adds to the judicial system, there are certain aspects unique to government litigation that make it a cause for significant concern. The following sections attempt to delineate some of these concerns.

Costs

The first concern, which has been widely accepted over the decades, is that government litigation proves costly to the public exchequer. For instance, the 126th LCI report notes that data from 43 departments show that the government incurred INR 9,23,65,322 in direct litigation costs between 1985 and 1989.[20] The report further highlights, "more the litigation, more the courts, and apart from the litigation cost which the state bears… the state also has to bear the [additional] expenses of setting up courts, providing personnel for manning posts".[21] Thus, litigation curtails the executive from performing its primary responsibility of governance as efforts are redirected to managing its legal burden. On similar lines, the 100th LCI report notes, "once litigation commences there is considerable expense of time, money and labour in all quarters".[22] While both reports recognise that the government cannot avoid litigating, they also state that all attempts must be made to reduce its quantum.[23] The Indian Economic Survey 2017-18 has also attempted a basic estimate of costs incurred due to litigation pending in court. For instance, data collected from six central departments show that 52 infrastructure projects of over Rs. 52,000 crore have been hindered because cases related to them have been pending for an average of 4.3 years. The Survey suggests that the actual estimate of financial burden affected due to judicial delay is too colossal to comprehend.[24]

Power Imbalance

The second concern is that of government litigation being an encounter of unequals, where an ill-equipped individual person or entity is pitted against a massive government machinery with its limitless resources.[25] As an example, the 100th LCI report sheds light on how procedural law is also framed to give the government or its subsidiary bodies advantages in litigation. The report notes that

[18] 100th Report, Law Commission of India Report, Litigation By And Against the Government: Some Recommendations for Reform, 1984, Also Available at: http://lawcommissionofindia.nic.in/51-100/Report100.pdf Last Accessed: 13th February 2018

[19] 126th Report, Law Commission of India Report, Government and Public Sector Undertaking Litigation Policy and Strategy, 1988, Also Available at: http://lawcommissionofindia.nic.in/101-169/report126.pdf Last Accessed: 13th February 2018

[20] 126th Law Commission of India Report, Annexure
Not included in the total is the amount spent by Public sector enterprises as it was collated data of multiple government financial bodies including banks. Also, not included in the total was Council and Industrial Research which quotes the amount spent on litigation to be INR 16,912 lakhs - which seemed incorrect.

[21] 126th Law Commission of India Report, Para 1.9

[22] 100th Law Commission of India Report, Para 3.3

[23] 100th Law Commission of India Report, Para 3.3 & 126th Law Commission of India Report, Para 8.1

[24] Ease of Doing Business' Next Frontier: Timely Justice, Economic Survey, 2018, Also Available at: http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf Last Accessed: 3rd February 2018

[25] 100th Law Commission of India Report, Para 4.2 & 126th Law Commission of India Report, Para 2.2

Section 80 of the Civil Procedure Code requires a prospective petitioner to issue notice to a government department, and wait for two months before approaching the court.[26] According to the report, this additional procedural requirement is used by government departments as a way to avoid responsibility when it has failed to deliver its duties, thereby causing unnecessary delays and injustice to the plaintiff.[27]

Government v/s Government Litigation

A major concern when attempting to diagnose government litigation lies in the understanding of what comprises that which we refer to as 'government'. While the 100th LCI report sees 'government' as a monolith, the 126th LCI report attempts a slightly more nuanced understanding. It makes a distinction between 'Public Enterprises' and 'government departments', and also attempts to understand how the nature of dispute may vary from government department to an enterprise.[28] It tries to understand government litigation not only as a dispute between a government and its citizens, but also as conflicts amongst various governmental bodies and between the centre and state governments.[29]

While recognizing some such complexities, the 126th LCI report notes that, "over enthusiastic departments" have pursued "litigation at the drop of a hat … and after tasting blood … pursued it right till the apex court."[30] This is especially costly to the public exchequer if both bodies involved in litigation are either government departments or agency.[31] The report highlights how the absence of a monitoring body allows departments to initiate and pursue litigation unchecked. This has been noted by various quarters of the government,[32] especially in cases between different government bodies. To address this, the 126th LCI report asks for arbitration to be made compulsory method of dispute resolution between public enterprises. Following this recommendation, the government set up the Committee of Disputes in 1991 and made it compulsory for all disputes between two government entities to be examined by the High Powered Committee (Committee on Disputes) before proceeding to a court or tribunal for adjudication.[33] However, the Supreme Court in its order in 2011 noted that although the committee was set up with "laudatory object" (to reduce government litigation and avoid waste of government resources), it had failed to achieve it in practice. The Committee, as per the court, had only caused delay in litigation and, on occasion, has given clearance

[26] 100th Law Commission of India Report, Para 2.1
[27] 100th Law Commission of India Report, Para 2.9
[28] 126th Law Commission of India Report, Para 8.1
[29] 126th Law Commission of India Report, Para 8.21
[30] 126th Law Commission of India Report, Para 2.25
[31] 126th Law Commission of India Report, Para 2.25
[32] Utkarsh Anand, "Sad state of affairs that govt-owned bodies fight each other in courts: Supreme Court", The Indian Express, 15th July 2015, Also Available at: http://indianexpress.com/article/business/business-others/sad-state-of-affairs-that-govt-owned-bodies-fight-each-other-in-courts-supreme-court-2914595/ Last Accessed: 6th February 2018, and "PM Modi laments depts working in silos, settling disputes in courts", Indian Express, 20th January 2018, Also Available at: http://indianexpress.com/article/india/pm-narendra-modi-addresses-joint-conference-of-tourism-culture-and-sports-ministries-via-video-conference-4483620/ Last Accessed: 6th February 2018
[33] Manual for Filing Appeals in High Court and Supreme Court, Direct Taxes Regional Training Institute, 2011, Also Available at: http://www.nadt.gov.in/writereaddata/MenuContentImages/streamlining%20of%20Appeals%20Manual%20for%20NWR634729497354353682.pdf Last Accessed: 11th February 2018

to one body while denying it to another on same set of facts. For these reasons, the Committee was decommissioned.[34]

Similar attempts to set up internal dispute resolution mechanisms were made by specific departments as well. In 1989, the Department of Public Enterprises set up a "Permanent Machinery of Arbitrators"[35] under its wing. Based on this, it directed enterprises that all commercial disputes (excluding disputes on income-tax, customs and excise, later extended also to the railways) should be settled by arbitration, and that this dispute resolution mechanism should be a part of all contractual and tender agreements.[36] However, there is no data to see if, and to what extent, this direction is being implemented.[37] On the contrary, the department itself has in recent times recognised the delay in settlement of internal disputes due to non-submission of required documents by the parties.[38]

Lack of Data

While the LCI reports introduce and recognize government litigation as a challenge, sufficient data and empirical evidence is still missing. The 126th report only provides basic details on number of cases in which public sector enterprises and government departments are involved or a party to and the amount spent on litigation. The discussion around government litigation has been going on for over three decades, but no sufficient progress has been made in collating data around the issues. The 126th LCI report lists the expenditure incurred by various government enterprises and departments, but it does not comment on the nature of cases filed against the government, or the courts at which they are concentrated (subordinate courts, the High Courts or the Supreme Court). After the 126th LCI report, no actual estimate of costs or comprehensive litigation data (regarding number of cases, categories and government department party) has been collated. In the limited discussion on the issue over the years, government litigation has been repeatedly described as contributing to about 46 percent of all litigation in the country,[39] but no further information is made

[34]Settlement of Disputes Between One Central Government Department and Another and One Central Government Department and Central Government Public Enterprises and Public Enterprises and Another Dated 1st September 2011, The Cabinet Secretariat, Also Available at: https://cabsec.gov.in/files/committeondisputes/codsep2011.pdf Last Accessed: 11th February 2018

[35]The Permanent Machinery of Arbitrators will consist of: One Legal Adviser-cum-Joint Secretary in the Department of Legal Affairs, nominated by the Law Secretary to function in the PMA is appointed by the Secretary in-charge of Department of Public Enterprises as sole Arbitrator in each case. See, Settlement of commercial disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises, Department of Public Enterprise, DPE O.M. No. DPE/4(10)/2001-PMA-GL-I Dated 22nd January 2004, Also Available at: http://dpe.gov.in/sites/default/files/Guideline-260.pdf Last Accessed: 1st February 2018

[36]Permanent Machinery of Arbitration—Regarding, DPE D.O. No. 15(9)/86-BPE(Fin) Dated 29th March 1989, Also Available at: http://dpe.gov.in/sites/default/files/Guideline-258.pdf Last Accessed: 1st February 2018

[37]Parsa Venkateshwar Rao Jr, "PSU Litigation: Tied up in Knots", India Legal Live, 20th June 2017, Also Available at: http://www.indialegallive.com/top-news-of-the-day/legal-article/psu-litigation-tied-knots-28096 Last accessed: 12th February 2018

[38]Settlement of commercial disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitration (PMA), Department of Public Enterprise F. No. 4(1)/2013-DPE(PMA)/FTS-1835, 2016, Also Available at: http://dpe.nic.in/sites/default/files/PMA_1835_27_05.pdf Last Accessed: 1st February 2018

[39]See for example: Action 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, and Department of

available. Even with newer measures such as LIMBS, we have no way of verifying comprehensive litigation data is being methodically collected. As a result, we do not know who bears the responsibility of generating government litigation: is it the citizen who seeks to "redress legal rights" or is it an "over enthusiastic department" preventing citizens from exploiting a welfare system.

No Uniform Administrative Control

A major recommendation of the 100th LCI report was to set up a 'litigation ombudsman' in each state to manage and handle government litigation. In similar vein, the 126th LCI report recommends the creation of a grievance redressal system within departments, specifically to manage disputes between the government-employer and its employees. Building on these recommendations of the LCI, the NLP of 2010 recommends setting up on the national and regional level monitoring system to minimize litigation. To monitor case burden in each department, it recommends designating a "Nodal Officer" to "actively" monitor litigation and track court cases.[40] However, seven years after the policy came was formulated, no efforts have been made to understand how the policy has shaped litigation practice in the country.

Justice, D.O No. 15011/27/2017 - JUS (AU) Dated 11th October 2017, Also Available at: http://doj.gov.in/monthlyachievement/monthly-achievement-june-2017 Last Accessed: 3rd February 2018

[40]National Litigation Policy, Chapter 2 Point (I)

III. PRESENT POLICIES ON GOVERNMENT LITIGATION

In 2010, the government introduced the NLP with a mission to "transform government into an Efficient and Responsible litigant … so as to achieve the Goal in the National Legal Mission to reduce average pendency time from 15 years to 3 years."[41] 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. 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.[42] When it was drafted in 2010, it offered an opportunity to effectively manage government litigation, and curb the future incidence of such litigation, but has not succeeded. This is most likely because the NLP contains broad, vague standards with no accountability framework, and lacks in implementable and actionable reforms to achieve the ambitious goal it sets for itself.

To illustrate, Chapter 5 of the NLP provides directions on when to pursue appeals. It recognises that service matters should not be normally appealed, and only cases which involve questions of constitutional interpretation should be pursued all the way till the Supreme Court.[43] However, this criteria is broadly phrased, and leaves the determination of whether something is a 'question of constitutional interpretation' or not to the administrator, and effectively, keeps the decision to pursue an appeal as ambiguous as before. Similarly, the policy calls for filing appeals in an order "only if the order is not vacated and the continuation of such order causes prejudice."[44] This directive is ineffective since it can be interpreted to mean that anything can be appealed against. Following the recommendations of the 126th LCI report, the NLP stresses upon the need to pursue arbitration, especially for public sector undertakings.[45] However, no guidelines have been laid down as to the nature of disputes that can be pursued through arbitration.

The NLP identifies key stakeholders in the management of litigation including "the Ministry of Law & Justice, Heads of various Departments, 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 expected to consist of representatives of each department, chaired at the national level by Solicitor General of India, whilst regional committee will run under the chairperson of Additional Solicitor General of India. The Committee is "to receive and deal with suggestions and complaints including from litigants and government Departments and

[41]National Litigation Policy, Chapter 1, Point 3
[42]Lok Sabha Unstarred Question No. 514, 2014, Also Available at: http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=5523&lsno=16 Last Accessed: 2nd February 2018, and Lok Sabha Unstarred Question No. 3110, 2014, Also Available at: http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=11315&lsno=16 Last Accessed: 2nd February 2018, and Lok Sabha Unstarred Question No. 1352, 2016, Also Available at: http://164.100.47.190/loksabhaquestions/annex/7/AU1352.pdf Last Accessed: 2nd February 2018, and Lok Sabha Unstarred Question No. 479, 2017, Also Available at: http://164.100.47.190/loksabhaquestions/annex/12/AU479.pdf Last Accessed: 2nd February 2018
[43]National Litigation Policy, Chapter 5, Point H
[44]National Litigation Policy, Chapter 5, Point A
[45]National Litigation Policy, Chapter 7

take appropriate measures in connection therewith."[46] The government representation to these committees is to be made by a "Screening Committee" at every level. The policy recognises 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 recognises '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.

The NLP provides for a designated "nodal officer" in each department who will have a "legal background and expertise" and will be responsible for "active case management" which will involve "constant monitoring of cases particularly to examine whether cases have gone 'off track' or have been unnecessarily delayed".[47] The move towards designating responsibility, while necessary, is incomplete. The policy asks for "suitable action" to be taken against officials for violating the policy, but provides no particulars as to what such action could look like. Similarly, the policy states that advocates and officers must be encouraged to contribute meaningfully to government litigation, and that such persons would be appropriately rewarded for "extraordinary work",[48] but provides no details on such rewards or incentives when they do.

Besides the NLP, the Department of Justice, in 2017, released a document titled '*Action Plan to Reduce Government Litigation*',[49] 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 that indicates whether the department was a petitioner or a respondent in a majority of these cases is not available. Moreover, beyond providing information, the impact of the Action Plan in actually reducing the volume of government litigation is unclear.

[46]National Litigation Policy, Chapter 1, Point 4 (D)
[47]National Litigation Policy, Chapter 2, Point I
[48]National Litigation Policy, Chapter 2, Point F
[49]Action 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 Last Accessed: 5th February 2018

IV. VIDHI SERIES

A review of the existing literature on the issue of government litigation and the policies aimed at addressing the issue, reveals that there are fundamental gaps in the information about the volume and nature of litigation at different levels of government. The Vidhi Centre for Legal Policy (Vidhi) seeks to bridge this gap through a series of studies on the issue, with a view towards contributing to the framing of a realistic and implementable policy to tackle government litigation.

The Economic Survey 2017-18 takes up the example of tax-related matters and suggested ways of reducing such matters.[50] Although not offered as a solution to government litigation, the proposals made in the Economic Survey are attempted at reducing the burden on the higher judiciary.

Compulsive Litigant or Habitual Defendant

To begin with, the framing of the question around government litigation itself is of particular interest. Much of the discussion around the issue, including in the various litigation policies and official recommendations made over the past few years, tends to be focused around the concept of 'government being a compulsive litigant'. In other words, these policies and recommendations assume that the issue of excessive government litigation can be addressed if the government, functioning through different departments and agencies, can curb its litigious tendency.

However, one aspect of government litigation that tends to have been ignored is that a bulk of the litigation involving government, particularly in the higher courts, comprises cases filed *against* it. As a previous study by Vidhi on the Supreme Court of India (SC) has shown, only 7.4 percent of the fresh cases filed before the SC in 2014 were by the central government.[51] This shows that there is a definite need to focus on cases filed against the government, particularly in the higher judiciary, i.e., the High Courts and the Supreme Court. This will not only give a holistic understanding as to what constitutes 'government litigation', but also shed light on the equation between different sections of society and different levels of government.

Government Litigation and Writ Jurisdiction

Litigation against governments is made possible especially through the writ jurisdiction of High Courts. Such writ jurisdiction, regarded as an 'extraordinary' jurisdiction',[52] allows the High Court to become directly accessible to ordinary citizens seeking relief against any authority, including any

[50]Ease of Doing Business' Next Frontier: Timely Justice, Economic Survey, 2018, Also Available at: http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf Last Accessed: 3rd February 2018

[51]Vidhi Centre for Legal Policy, Towards an Efficient and Effective Supreme Court, 2016, https://vidhilegalpolicy.in/reports/2016/2/8/towards-an-efficient-and-effective-supreme-court Last Accessed: 2nd February 2018

[52]The High Courts are vested with civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The writ jurisdiction under Article 226 and the supervisory jurisdiction under Article 227 are considered to be 'extraordinary jurisdiction; 124th Law Commission of India Report, The High Court Arrears- A Fresh Look, 1988, Also Available at: http://lawcommissionofindia.nic.in/101-169/Report124.pdf Last Accessed: 7th February 2018

government, for the violation of any legal right.[53] Article 226 of the Constitution of India empowers High Courts to issue writs, orders, or directions to any person or authority, for protection of fundamental rights or any other rights.[54] 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.[55]

The power and jurisdiction granted to High Courts under Article 226 is justified in light of the intense legislative activity and regulatory enforcement carried out by administrative agencies at the State level, making it essential for a citizen to have speedy and effective redressal against unconstitutional enactment or unwarranted executive action.[56] This expansive interpretation has led to explosion of writ petitions at the High Courts. According to Indian Economic Survey 2017-18 data from six high courts show that over a million writ petitions are pending, making upto 50-60% of the backlog in the judicial system.[57] Therefore, the necessity and importance of analyzing writ petitions filed before a High Court, as a means to identify legislative lacunae and executive excesses is obvious. This is even more so while addressing the issue of 'government litigation'.

Accordingly, Vidhi's ongoing study of government litigation is based on an in-depth data driven analysis of the manner in which writ jurisdiction of High Courts is invoked and exercised.

Scope of the Series

There is a pressing need for a more incisive discussion around government's litigation burden. This requires disaggregated litigation information for each department to identify contributory causes and provide customised solutions. In lieu of this, we hope to study patterns of government litigation in multiple High Courts across India. A key focus of the series will be on civil writ petitions filed before High Courts under Article 226 of the Constitution.

The series intends to use primary data of writ petitions, as extracted from websites of various High Courts, to understand the nature of parties involved in such writ jurisdiction, why such petitions are filed, and what kinds of relief is claimed. This data lends itself to a host of further questions, not limited to the following:

[53]Prior to 1950, only the High Courts in the three presidency towns Madras, Bombay and Calcutta had power to issue writs, with a few other High Courts having similar power under different statutory provisions. However, under the Constitution of India adopted in 1950, this power has been expressly conferred on all the High Courts in the country; Justice B P Banerjee, *Writ Remedies- Remediable Rights under Public Law* [7th Edn., LexisNexis: 2016], page 36.
[54]*Madras Bar Association v. Union of India* (2014) 10 SCC 1.
[55]*State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12; *Naresh Sridhar Mirajkar v. State of Maharashtra*, 1966 SCR (3) 744; *DM Wayanad Institute of Medical Sciences v. UOI*, (2016) 2 SCC 315.
[56]14th Law Commission Report, Reform of Judicial Administration, Volume 1 1958, http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf Last Accessed: 22nd January 2018
[57]Ease of Doing Business' Next Frontier: Timely Justice, Economic Survey, 2018, Also Available at: http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf Last Accessed: 3rd February 2018

- What are the various levels of governance (Centre, State, government departments, government agencies) against which writ jurisdiction of the High Court is invoked?
- What are the kinds of cases filed against the 'government' at various levels? For example, is there a difference between challenges against the constitutionality of legislations and against executive actions?
- What solutions can be proposed to reduce the incidence of government litigation?
- How can the existing burden of government litigation be efficiently handled?

It is hoped that the reports answering the above questions will result in formulation of better policies to tackle government litigation. Correspondingly, it is bound to have a positive impact on judiciary by increasing disposal rates and reducing its burden.