Differentiated Case Management for Indian Judiciary

Working Paper I – A framework for Constitution Bench cases

April 2023

V | D H | Centre for Legal Policy

This report is an independent, non-commissioned piece of work by the Vidhi Centre for Legal Policy, an independent think-tank doing legal research to help make better laws.

About the Authors

Deepika Kinhal is a Senior Resident Fellow and team lead for the JALDI (Justice, Access and Lowering Delays in India) initiative at the Vidhi Centre for Legal Policy.

Aditya Prasanna Bhattacharya is a Senior Resident Fellow in the Research Director's Office at the Vidhi Centre for Legal Policy.

Jyotika Randhawa is a Research Fellow at the Justice, Access, and Lowering Delays in India (JALDI) initiative at the Vidhi Centre for Legal Policy.

Table of Contents

List of Tables

Need for Differentiated Case Management in India

I. Context

The fact that the Indian judiciary is staggering under the weight of a burgeoning docket is no secret- the numbers speak for themselves. At present, approximately 4.8 crore cases are pending before the High Courts and the district judiciary, about 9 lakh of which have been stuck in the system for more than 20 years.[1] Even the highest court of the land, the Supreme Court of India, is grappling with a pendency of about 68, 847 cases as of April 1, 2023.[2] Over the years, several solutions have been suggested to resolve the intertwined issues of pendency and delay, from increasing the number of judges to setting up more fast track courts, with little to no impact on the overall pendency. An analysis of the institution and disposal trends for the last year reveals that for every 100 cases filed, the district judiciary across the country is able to dispose of only 89.[3] More cases are therefore entering the system than exiting it.

Overall, the numbers are indicative of a lack of frameworks and processes that enable the matching of supply of judicial time with the demand for it. The fact that pendency and delay have become synonymous with the Indian judiciary demonstrates the need for innovative, new ways to tackle these issues. The crux of such innovation lies in vesting the power to manage case timelines with the court in a real, practical way. What is needed is a scientific framework which ensures that each case gets the time it deserves based on objective metrics, and does away with the current reality where the judicial time spent on a case is determined by myriad, subjective factors such as political exigencies, stature of advocates or the preference of individual judges.

II. Differentiated Case Management System - an introduction

An approach that the judiciary can adopt for more efficient management of its caseload is Differentiated Case Management.[4] As the name suggests, Differentiated Case Management (DCM) is premised on the understanding that cases vary in their requirements, complexity and trajectory and therefore should not be treated alike. Some cases for instance may be fairly simple and straightforward and may not require as much time and supervision as a relatively complex case. Judicial resources must therefore be allocated according to the specific needs of cases. This would mean that lesser time and resources are devoted to the simpler cases so that space within the system is freed up to focus intensively on the challenging ones.

[1] Indian Ministry of Law and Justice, 'The National Judicial Data Grid' <https://njdg.ecourts.gov.in/njdgnew/index.php> accessed 5 April 2023

[2] Supreme Court of India, 'Statistics'<https://main.sci.gov.in/statistics> accessed 5 April 2023

[3] Indian Ministry of Law and Justice, 'The National Judicial Data Grid' <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 5 April 2023; Formula used for determining the Clearance Rate (2022) is the number of cases disposed by District courts in 2022 divided by the number of cases instituted before the District judiciary in 2022 (19991145 ÷ 22307316 = 0.89 x 100 = 89%)

[4] US Department of Justice, 'Differentiated Case Management: Program Brief' (1993) <https://www.ojp.gov/pdffiles/difb.pdf.> accessed 5 April 2023; C Cooper, M Solomon and H Bakke, 'Differentiated Case Management: Implementation Manual' (1993) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/differentiated-case-management-implementation-manual> accessed 11 April 2023

Box 1: Steps for implementation of DCM

1. Categorisation of cases: The first step in the implementation of DCM is the categorisation of cases based on the judicial resources that they require.

2. Determining judicial resource allocation: The second step entails the determination of the actual quantum of judicial resources, including time, that should be allocated to each category

3. Creating a monitoring mechanism: The first two steps cannot be actualised without the existence of an efficient monitoring mechanism. The final step is to therefore develop tools that empower judges to monitor and enforce the system effectively.

The fact that DCM has been increasingly implemented and consistently retained in a wide range of jurisdictions, such as the U.S.A,[5] U.K.,[6] Australia,[7] Singapore[8] and Philippines,[9] is a testament to its success. In the U.S., the introduction of DCM in Minnesota saw a 94 percentile reduction in the pending caseload within the first 8 months.[10] Similarly, its implementation in a Washington county court led to a 700% increase in the number of cases that were being disposed of in the first 90 days.[11] While the replication of the results is definitely desired, a replication of the system as it stands in other jurisdictions may not benefit the Indian judiciary. For best results, it is imperative that the DCM principle be attuned to the functional reality of the Indian courts.

Through a series of working papers, the Justice, Access and Lowering Delays in India (JALDI) Initiative will not only endeavour to introduce and explicate the principles of DCM but will also demonstrate how they can be fine-tuned to reduce pendency and increase disposal rates in the Indian courts. In the first of its papers, JALDI will demonstrate how the use of DCM in Constitution Bench cases[12] can result in certainty of timelines, quicker disposal, and optimal utilisation of the Bench and the Bar's time.

[5] Nineteenth Judicial Circuit, 'Differentiated Case Management' <https://www.circuit19.org/dcm> accessed 11 April 2023; Montgomery County <https://www.montgomerycountymd.gov/cct/departments/dcm.html> accessed 11 April 2023

[6] Civil Procedure Rules 1998 (U.K.) Part 26 <https://www.legislation.gov.uk/uksi/1998/3132/contents> accessed 11 April 2023

[7] Practice Note No. 88 (Supreme Court, New South Wales) 1995 <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/000826d145b5a1b5ca2572ed000cec85?OpenDocument> accessed 11 April 2023

[8] Waleed Haider Malik, Judiciary -led Reforms in Singapore: Framework, Strategies and Lessons (World Bank, 2007) 54

[9] Associate Justice Presbitero J. Velasco, 'The Philippine Experience in Case Management' (2019) <https://www.aseanlawassociation.org/wp-content/uploads/2019/10/workshop2-phil.pdf> accessed 11 April 2023

[10] US Department of Justice, 'Differentiated Case Management: Program Brief' (1993) <https://www.ojp.gov/pdffiles/difb.pdf.> accessed 5 April 2023

[11] Ibid.

[12] Under Article 145(3), all cases involving substantial questions of law as to the interpretation of the Constitution must be heard and decided by a bench of a minimum of 5 judges of the Supreme Court of India. These cases are called 'Constitution Bench cases' for ease of reference.

Differentiated Case Management for Constitution Bench Cases

I. The issue of protracted Constitution Bench hearings

Historically, Constitution Benches hearings have been long-drawn and naturally so. With these cases pertaining to some of the most seminal legal and constitutional issues, Senior Counsels engaged on the matter painstakingly argue over the minutiae, consequently stretching their oral submissions into days. The Kesavananda Bharati case continues to hold the record for the longest ever hearing before the Supreme Court of India at 68 days, followed by the Ayodhya case at 40 days.[13]

While the significance of Constitution Bench matters is not lost on anyone, the length of these hearings is still concerning given that they reserve the time and expertise of a minimum of five judges throughout. This is the primary reason why the Supreme Court has found it difficult to regularly constitute Constitution Benches[14] despite their wide ranging legal and practical implications[15]. At present there are 463[16] Constitution Bench matters (47 main and 416 connected matters) pending before the Supreme Court with the longest pending case[17] being more than 29 years old.

In the recent past, the Supreme Court has attempted to rein in lawyers and take charge of the hearings to ensure time-bound progress. In the recent EWS case for instance, the Supreme Court limited the advocates' arguments to a predetermined time[18] and the hearings could therefore be completed in just 8 days despite having more than 15 lawyers arguing the case. This is a step in the right direction.

Similarly, in the just concluded Maharashtra Assembly case hearing,[19] Chief Justice D.Y. Chandrachud prescribed time limits for oral submissions right before the commencement of arguments on either side. While this allowed for the proceedings to be completed expeditiously, we accessed the livestream footage of the case to analyse how far the lawyers could comply with the timeline. Roughly 2.5 hearings were allocated to each side to complete their arguments, with half a day being reserved for rejoinder. Using the livestream footage[20], we have collated the following information on the time that was orally allotted to each lawyer and the time actually taken by them to conclude their arguments.

Before going into the details, below is a short glossary to understand the data in Table 1.

[13] India Today, '40-day hearing in Ayodhya land dispute case was 2nd longest in SC's history' (India Today, 4 April 2022) <https://www.indiatoday.in/india/story/40-day-hearing-in-ayodhya-land-dispute-case-was-second-longest-in-supreme-court-history-1617369-2019-11-09> accessed 11 April 2023

[14] Vaidehi Mishra, 'Supreme Court needs to set up Constitution Benches, now!' (Vidhi: Centre for Legal Policy, 8 February 2022) <https://vidhilegalpolicy.in/blog/supreme-court-needs-to-set-up-constitution-benches-now/> accessed 04 April 2023

[15] Alok Prasanna Kumar, 'Demonetisation Judgement Too Little, Too Late' Economic and Political Weekly, Vol. 58, Issue No. 3, 21 Jan 2023.

[16] Supreme Court of India, 'Monthly Pending Cases' <https://main.sci.gov.in/statistics> accessed 04 April 2023

[17] *Arjun Flour Mills v State of Orissa*, Civil Appeal No. 8763/1994 (S.C)

[18] *Janhit Abhiyan v Union of India* 2022 SCC OnLine SC 1540

[19] *Subhash Desai v Principal Secretary, Governor of Maharashtra & Others*, Writ Petition (Civil) no. 493 of 2022

[20] Supreme Court of India, 'Archive of Constitution Bench Matters' <https://main.sci.gov.in/arch_disp> accessed 04 April 2023

Box 2: Glossary

1. Hearing- It is used to indicate the taking up of a case by the court on a particular day. One hearing is equivalent to listing a case for one day for any duration.

2. Average no. of hours per day of hearing- In the Maharashtra Assembly case, this was calculated using the formula:

$$\frac{\text{Total time taken in minutes for hearing for all 9 days (1796 minutes)}}{\text{Total number of hearings (9)} \times 60} = \textbf{3.33 hours}$$

3. No. of hearings taken by advocates- This was calculated using the ratio of time taken by each lawyer to the total time of hearing.

   For instance, Mr. Sibal took:
   - 2 full hearings on 21st and 22nd February + 60 minutes on 23rd February 2023.
   - The court sat for 2 hours 50 minutes on 23rd February 2023 (170 minutes), excluding one hour for lunch.
   - The ratio of 60 to 170 would be 0.3.

   Therefore, the no. of hearings Mr. Sibal took = 2 + 0.3 = 2.3 hearings.

Table 1: No. of hearings per advocate in Maharashtra Assembly case

Advocates	Time allocated (no. of hearings) by the Court	Actual time taken (no. of hearings)
Petitioners		
Mr. Kapil Sibal	1	2.3
Dr. Abhishek Singhvi and Mr. Devadatt Kamat	1.5	1
Respondents		
Mr. Neeraj Kaul	1	2.27
Mr. Mahesh Jethmalani and Mr. Manindar Singh	0.5	0.57
Mr. Tushar Mehta (Solicitor General)	0.5	0.7
Mr. Harish Salve	Not allocated	0.53
Rejoinder		
Petitioners	0.5	1.2
Total time allotted vs. total time taken		
Petitioners	3	4.5

Respondents	2	4.07

It is evident that in all but one instance, the advocates exceeded the allotted time for oral submissions. This perhaps has two explanations - one, the time-limit set by the Court was unscientific and hence impossible for the lawyers to have adhered to; and/ or two, given that the time limit was not recorded in the order sheet, the lawyers didn't feel the need to adhere to the same.

For either or both of the above explanations, the Supreme Court can devise a method to improve upon the status quo. A scientific system that allows the court to calculate the maximum number of hearings required in a Constitution Bench case can help predetermine the judicial time it needs to devote towards a case. One objective criteria that is readily available is the actual number of hearings historically taken by advocates in similar cases. Basing the system on an objective criteria based on empirical evidence could make the resulting timelines more realistic and attainable.

Further, recording the timelines based on mutual deliberation between the court and the advocates would enable everyone's buy-in; it allows the advocates to plan and pace their arguments more effectively. Additionally, a structured schedule would ensure equitable distribution of time between parties, providing each advocate with an appropriate amount of time to present their case.

One such scientific system which caters to both the above requirements is the Differentiated Case Management (DCM') system. The following section contains an illustration of how the DCM system can be applied to Constitution Bench cases.

II. Applying DCM to Constitution Bench cases

As indicated above, DCM requires objective criteria to determine approximate allocation of judicial time per case. One such objective criteria is the historical average of the number of hearings conducted in prominent 5 judge bench cases. Such an average can be weighted with the complexity of the pending case to approximate the maximum number hearings that would be required for the pending case. A step by step formula to derive this is outlined below:

Step 1: To arrive at the historical average, a few Constitution Bench cases can be selected through random sampling and the mean number of hearings taken by each advocate can be calculated for each case by applying the following formula:

$$\frac{\text{Number of hearings conducted } (N_h)}{\text{Number of advocates appeared } (N_a)}$$

(Formula 1)

Step 2: Once this ratio is derived for each of the sample Constitution Bench cases, the average of these ratios can give us the number of hearings an advocate should ideally take to complete her hearings. We can call it the **Good Advocate Ratio**.

To demonstrate, the following 5 judge bench cases have been randomly selected and the above mentioned formula is applied to determine the mean number of hearings taken by 1 advocate for each case.

Table 2: Historical average in sample 5 judge Bench cases

Sr. No.	Cause Title*	No. of hearings** (N_h)	No. of advocates** (N_a)	(N_h / N_a)
1.	Rameshwar Prasad v Union of India	8	9	0.88
2.	Indian Young Lawyers Association v State of Kerala	8	32	0.25
3.	Shayara Bano v Union of India	6	15	0.40
4.	Joseph Shine v Union of India	3	8	0.38
5.	Dr. Jaishri Laxmanrao Patil v State of Maharashtra	11	28	0.39
6.	Central Public Information Officer, SC v Subhash Chandra Agarwal	2	3	0.67
7.	Sushila Aggarwal v State (NCT of Delhi)	2	6	0.34
8.	Indore Development Authority v Manoharlal	12	40	0.30

The Good Advocate Ratio can be arrived at by determining the average of the third column in the table above:

$$\frac{N_h/N_a}{\text{Number of sample cases}}$$

(Formula 2)

Applying this formula to the sample cases gives us the following Good Advocate Ratio:

3.61/8 = 0.45

Therefore based on the historical average, an advocate should take no more than 0.45 hearings for her arguments in a Constitution Bench matter.

Step 3: In line with the principles of DCM, it is acknowledged that no two cases are similar and a one size fits all approach can be counterproductive. For that reason it is important to account for the differential complexities of each case while setting the limit for the number of hearings. A model can be designed to gauge the case complexity using other metrics. As a preliminary exercise the following metrics may be used:

Case complexity score = Number of issues involved + Number of laws involved + Number of precedents in conflict.

(Formula 3)

Based on the complexity score, the pending cases can be assigned to 3 different tracks - **hard, intermediate,** and **standard**. The harder the case, the greater the weightage can be given to complexity when determining the upper limit of the number of hearings. This can be done by assigning three distinct complexity coefficients to three bands of complexity scores.

Table 3: Determination of Complexity coefficient

Track	Complexity score	Complexity coefficient
Hard	>6	2
Intermediate	4-6	1.5
Standard	1-3	1

Step 4: As a culmination, the following formula can be applied to calculate the maximum number of hearings in a Constitution Bench Case

Hearings = Good advocate ratio x Number of advocates appearing in the case x Complexity coefficient of the case

(Formula 4)

Applying this to the **Maharashtra Assembly case** to determine its complexity score:

1. To apply Formula 3 above to determine the Complexity Score, details in the order for reference[21] can be used:

> Complexity score = 10 (Number of issues involved) + 1 (Number of laws involved) + 1 (Number of precedents under conflict) = **12**

2. As indicated in Table 3, Complexity Score of >6 puts this case under the category of a "hard case" with a complexity coefficient of 2.
3. Now applying Formula 4 to determine the maximum number of hearings in the case -

> $Hearings_{max}$ = 0.45 (Good Advocate Ratio) x 8 (number of advocates appeared) x 2 (Complexity Coefficient) = **7.2**

Therefore, according to this formula, the total number of hearings that should have been conducted to dispose of the case is 7.2 (approximately 7).

However, as seen earlier, the Supreme Court allotted only 5 hearings while the advocates in fact ended up with 8.57 hearings. A scientifically predetermined number of hearings (7.2 in this case) could have helped the advocates measure their submissions and saved the court at least a day's worth of hearing.

4. The above formula can also be applied to determine the maximum hearings each side should take to complete their arguments. For instance,

[21] *Subhash Desai v Principal Secretary, Governor of Maharashtra & Others*, Writ Petition (Civil) no. 493 of 2022 <https://main.sci.gov.in/supremecourt/2022/20234/20234_2022_1_301_37640_Judgement_23-Aug-2022.pdf> accessed 11 April 2023

$Hearings_{max}$ = 0.45 (Good Advocate Ratio) x 3 (number of advocates appearing for the petitioner) x 2 (Complexity Coefficient) = **2.7**

$Hearings_{max}$ = 0.45 (Good Advocate Ratio) x 5 (number of advocates appearing for the respondent) x 2 (Complexity Coefficient) = **4.5**

Therefore, the petitioners who were allocated three hearings and exceeded that by taking 4.5 hearings, should have tentatively required 2.7 hearings. Conversely, the respondents, who were only allocated two hearings and used approximately 4.07 hearings, should have been allowed 4.5 hearings to conclude their arguments.

A scientifically-based limit on the number of hearings would have yielded a more structured, equitable schedule which the advocates on both sides could have followed to consciously limit the time taken by them for their arguments. Since the court will be using an objective formula that takes into account not only the historical performance of advocates in landmark cases but also the complexity of the individual case before the court, it will be in a position to strictly enforce the timelines. This is more difficult when the maximum number of hearings is based on an arbitrary and subjective assessment of the time required by the parties.

III. Monitoring and enforcement of the framework established

It is clear from the Maharashtra Assembly case that mere oral indication of the time limit has little to no bearing on the actual time taken. Therefore, adherence to the timeline could be ensured by holding a pre-hearing conference in consultation with the advocates and recording the schedule so decided in the order sheet. The court can conduct a pre-hearing conference in various ways, one of which is outlined below.

Box 3: Format for pre-hearing conference

What is it?	○ Mandatory pre-hearing conference for every case
When should it be organised?	○ At least 7 days before the main hearing is scheduled to begin ○ On every Friday at 2PM
Who should attend it?	○ Presiding judge of the 5-judge bench and 1 other judge from the bench ○ Nodal advocates chosen by the bench & senior advocates appearing in the case
What should be the aim?	○ The bench will propose the tentative maximum no. of hearings and discuss it with the advocates ○ Once fixed, this number will be recorded in the order sheet

This will ensure all-round compliance of the timeline since the schedule is not only scientifically arrived at, but is also discussed with the advocates before recording in the order sheet.

As Constitution Bench cases get listed with greater frequency, it is becoming increasingly important for the Supreme Court to adopt a scientific method to effectively manage these judicially demanding proceedings. The DCM-based approach outlined above provides a reference for how this can be done. However, the Court could develop additional metrics to determine the maximum number of hearings for Constitution Bench cases. The key requirements are that any such system should be data based, and the prescribed upper limit should be recorded in a pre-hearing scheduling conference. This will ensure that the approach towards streamlining Constitution Bench hearings is systematic and practical.

www.vidhilegalpolicy.in

Vidhi Centre for Legal Policy
D-359, Defence Colony
New Delhi – 110024

011-43102767/43831699

vidhi@vidhilegalpolicy.in