Evaluating contract enforcement by courts in India: a litigant's lens.

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Abstract

The literature on the performance evaluation of the judiciary captures the perspectives of judges, researchers and court administrators. However, it is not obvious if a litigant who proposes to access the judiciary for the resolution of a dispute would use the same or similar metrics when evaluating the performance of courts. In this paper, we review the global literature that evaluates the performance of the judiciary and identify which of the metrics in the literature would directly matter to a litigant who proposes to access the courts for redress. Using the litigant's expectations as performance metrics, we develop an evaluative framework for comparing similar courts. Our work creates the foundation for developing an information system that could potentially help litigants make informed choices when approaching courts.

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1 Introduction

All economic activity benefits from a well-functioning judiciary. The judiciary is the mechanism through which disputes between contracting counterparties are adjudicated, arbitrary state action against individuals and businesses is restrained, property rights and contracts are enforced, and the rule of law is upheld. It is widely documented that this is critical for the functioning of markets, to spur entrepreneurship, and to sustain long term economic growth (Williamson, 1985; Milgrom *et al.*, 1990; Hayo and Voigt, 2008; Chemin, 2009a,b).[1] But, what is a well performing judicial system? How do we identify a well performing judiciary from one that does not perform well? Do we judge the judiciary's performance by the complexity of the law that it enforces, the volume of cases disposed of, the time it takes to dispose of cases, the number of hearings required, the costs per hearing, the quality of judgements or the trust that people repose in it? Or, do we apply a mix of these metrics?

There is little consensus on what an optimal measurement system for courts would look like. Since the 1990s, empirical research has sought to establish linkages between well performing judicial institutions and economic growth. This research emphasized the impact of court performance on various economic variables. If the causal relationships that this research seeks to establish are true, then the research would depend upon measures about the size of economic transactions that move through the courts. These could be the volume and value of economic transactions, the level of entrepreneurship or asset ownership in an economy, that can be used as rough proxies of the courts' performance. Policy oriented research, on the other hand, views the quality of the judiciary through the prism of inputs such as the judge to population ratio, the proportion of judicial vacancies, and the quality of the judicial infrastructure. The difficulty in arriving at a consensus in measurement is because what is measured depends upon the purpose of the measurement, and the preferences and context of the person undertaking the measurement.

In this paper, we build on existing literature to develop a framework to comparatively evaluate the performance of courts which adjudicate contractual disputes in India. We frame this evaluation from the perspective of the litigant, a key stakeholder in the justice delivery system, for the reasons explained in Section 2.

We limit the scope of our discussion and the resulting framework to the comparative evaluation of commercial courts' performance in India.[2] Why do we select commerical courts? A reading of the global literature on judicial performance suggests that it is problematic to apply a single set of metrics to evaluate courts that perform functions

[1] The centrality of judicial institutions to mutually consensual exchanges can be traced to Thomas Hobbes, the 16th century political philosopher. In Hobbes' words: when two parties enter into a contract, "he that performeth first has no assurance the other will perform after because the bonds of words are too weak to bridle men's ambitions, avarice, anger, and other passions without the fear of some coercive power." See Messick (1999) for a review of the literature seeking to establish such linkages in the 1990s.

[2] By commercial courts, we mean courts that adjudicate on contractual disputes in India.

which vary in complexity, type and processes. Doing so may risk making the framework too broad or rendering it impracticable to implement in the context of a large number of courts. A classic example is the difference between courts in common law and civil law countries. The procedural complexities in civil law systems may warrant different measurement metrics for courts in civil law countries, compared to those in common law countries whose legal systems are more precedent and custom oriented (Djankov *et al.*, 2003). Even within the same country, civil and criminal courts differ from each other in the types of cases and the procedures followed by them in adjudication. For instance, an important distinguishing feature is the evidentiary burden required to be followed by civil and criminal courts. Since criminal courts require the prosecution to discharge a higher evidentiary burden than civil courts, the rigour and steps involved in criminal trial procedures are significantly more than those in the civil courts, implying a different sort of resource consumption as well as litigants' expectations in terms of timelines, the number of hearings required, pleadings filed, and so on. Similarly, the intended relief for each matter may be different. For instance, in commercial matters, the relief sought is largely limited to specific performance, compensation and damages from the defendant. On the other hand, in a criminal matter, there could be components of compensation for the victim and fine or imprisonment for the convict. In constituitional matters, in addition to relief for the parties to the case, the courts are expected to protect and promote civil liberties and human rights, and to that extent, the courts' decision has a direct impact on the public or sections of the public at large. Applying a common measurement framework across these different types of courts, therefore, risks measuring them on inadequate or worse inaccurate metrics. The goal of our work is to develop a framework that allows a litigant to evaluate the performance of the forums that are available to them for dispute resolution and make informed choices in identifying a forum for pursuing their claim or dispute.

The development of our framework involves two steps. In the first step, we draw upon the existing literature that focuses on the different aspects of courts' functioning. This literature can be broadly classified into two categories. The first strand of literature is sourced from planners and court administrators (National Center for State Courts, 2005; European Commission for the Efficiency of Justice, 2016). This type of literature focuses largely on measuring the inputs that impact the performance of either a specific court or a class of courts, such as infrastructure, budget and the number and quality of support staff, and contains recommendations on the manner in which they can be measured. The second category of literature in this field is empirical in that it seeks to investigate the impact of court functioning on various socio-economic variables such as the size of firms, cost of capital and so on. In the second leg, we contextualise the metrics emerging from these two strands of literature to develop a measurement framework for Indian courts enforcing contracts.

This work is organised as follows in this paper. Section 2 reviews the importance of having a framework that measures the performance of the legal system from the perspective of the litigant. Section 3 discusses the parameters commonly found in the literature

for measuring court performance around the world. In Section 4, we contextualise the lessons from the previous sections to create a performance evaluation framework to measure contract enforcement in India. We also discuss the tools that can be employed to measure the parameters presented in our framework in Section 4. We summarise our learnings and conclude in Section 5.

2 The importance of evaluating judicial performance

The legal scholarship on judicial performance prior to the 1970s was largely doctrinal in nature, largely restricted to studying individual cases, and oriented towards analysing precedents that occupied a certain field of law. With the emergence of the law and society movement in the 1960s-70s, there was an increasing emphasis on studying the impact of laws and enforcement on outcomes, both at the level of the individual and the society.[3] The early work in the field focused on developing economic theories that explain the performance and behaviour of judicial institutions or their impact on decision making by parties. For example, William Landes and Richard Posner dedicated their scholarship to developing economic theories that explained the behaviour of judges or the impact of court functioning on behaviour, such as the impact of delays on decision making by the parties or the acceptance of settlements by parties and so on (Landes, 1971; Posner, 1973, 1993).[4] With the emergence of the neo-institutional school of economics in the 1990s, the focus of scholarship shifted to studying courts as social and political institutions, a sub-field of which focused on assessing the performance of courts. Since then, there has been a proliferation of academic work in the fields of economics, political science and law, using information on different aspects of court performance and understanding its impact on social and economic life.

The literature on performance evaluation of the judiciary largely captures the perspectives and preferences of judges, researchers and court administrators. These metrics ultimately feed into the overall experience of the litigant as a *consumer* of justice delivery. However, it is not obvious if those metrics are readily usable by consumers to make informed choices on which court is best suited for their purpose. For instance, Rottman and Tyler (2014) survey more than 2000 residents of California as part of an experiment in the field of social psychology. They find that judges who were rated highly by legal professionals were rated poorly by respondents who were not legal professionals. They attribute this difference to the observation that the evaluation criteria prioritized by attorneys were different from those prioritized by the public. These differences suggest that a judge or lawyer centric evaluation framework may lead to incomplete feedback loops necessitating a periodic, citizen-centric evaluation of judges and courts. While in some states in the United States, the idea of citizen based evaluation exercises for judges

[3] See Blocq (2018) for a historical overview of this movement.

[4] A remarkable exception to the then largely West-focused literature is the analysis of the behavioural patterns of judges of the Indian Supreme Court by George H. Gadbois in (Gadbois, 1970).

has been experimented earlier, more recently, even court administrators have made a case for a more citizen centric view of courts infrastructure, processes and evaluation (Mahoney, 1989; Clarke and Borys, 2011; Hagan, 2018).

We argue that a litigant-centric evaluation framework that would benefit courts is justified for four reasons:

First: the public's trust in the ability of the judiciary to deliver high quality and efficient outcomes speaks to the legitimacy of the judicial system. If people lose faith that the judiciary will help them resolve disputes fairly and efficiently, they will resort to other means of redress or restrict economic activity. For example, several scholars show that in environments with weak judicial capacity, the cost of raising capital increases (Mina, 2006; Djankov *et al.*, 2008).[5] The availability of consistent, regular and systematic information which allows the average citizen to evaluate the performance of the judiciary herself can help alleviate issues of trust that may arise from "not knowing the system well".

Second: the users' feedback will help judges, policymakers and court administrators understand the chokepoints of the system from a neutral perspective. It will facilitate informed decisions on the courts' infrastructure and human resource needs, and help plan for such needs. The demands for a higher allocation of tax-payer funds are more likely to be accepted by legislators, if judicial institutions are willing to regularly measure themselves on metrics that matter to all the stakeholders.

For instance, it is not enough to claim that a high vacancy ratio is responsible for an inefficient judicial system. This is because it could be, and has been, argued that surplus judges reduce the speed of disposal and scarcity leads to more optimum usage of resources (National Court Management Systems Committee, 2016). Thus, a demand for more resources is effective if it can be demonstrated that a higher number of judges and administrative staff or infrastructure will improve the experience of the average litigant in a court. A regular measurement system can help demonstrate this.

Third: an evaluative framework that compares courts on parameters that are of importance to litigants, such as the time, costs and quality of outcomes, will help litigants make informed decisions on various questions such as whether to litigate, where and when to litigate, and whether to accept a settlement offered by a counterparty.

Finally: the transparent dissemination of the results of a consumer centric measurement framework will enhance the accountability of the courts to the litigants themselves; reward well performing courts by enhancing their public reputation (anecdotally, a key driver for public officials including judges) and create incentives for more transparency in a competitive environment.

[5] See Section 4 for more references to the literature demonstrating the connection between well performing judiciaries and economic activity.

In line with this thinking, there is an emerging field of literature that looks at courts from a litigant's perspective. More recent literature, including from court administrators, has focused on the impact of issues such as technological interventions, infrastructure adequacy and court design on consumers' access to the courts (Barendrecht *et al.*, 2006; Clarke and Borys, 2011; Cabral and Clarke, 2012; Cunha *et al.*, 2014; Hagan, 2018). There is an increasing chorus voicing the need for litigant centric judicial reforms in India too, even as the development of standardised metrics of measurement to evaluate the current state of litigant friendliness of courts is at the early stages (eg., Kinhal (2022)).

3 Dimensions of judicial performance

Before identifying metrics, proxies, methods and data for evaluating judicial peformance, there is the challenge of defining judicial performance itself. What do we understand by the term 'judicial performance'?

Dakolias (1999) argued that the measurement of court quality should take into account three elements, namely, substantive law, judicial decision making and judicial administration. Prillaman (2000) narrowed this down and argued that at the very least, judicial performance is determined by the system's level of independence, efficiency and accessibility. He argued that each of these dimensions has a strong theoretical link to the judiciary's ability to ensure that "the democratic regime fosters economic development and build popular faith in the rule of law". We refer to this as "the Prillaman Framework". The Prillaman Framework is comprehensive, covering the widest outcomes of good judicial functioning.

Using the Prillaman framework as a base, Staats *et al.* (2005) developed a useful typology that takes into account the various metrics of court performance used by scholars in the 1990s. In developing benchmarks for measuring judicial performance across 17 Latin American countries in the 1990s and early 2000s, they identify five dimensions of judicial performance, namely (1) independence; (2) judicial efficiency; (3) accessibility; (4) accountability; and (5) effectiveness. These dimensions have universal applicability as they are agnostic to the region and system of the law which they seek to measure. Staats *et al.* (2005) argue that these benchmarks are most suited to advance the higher goals specified in the Prillaman Framework. We find that much of the literature on court performance takes into account variables that fit within one or more of these five dimensions. We call this the "Staats Et Al Framework".

While the Staats Et Al Framework focuses on the outputs of performance, there are other strands of literature that use a combined input-output method for evaluating judicial performance. For instance, Rosales-Lopez (2008), Ippoliti *et al.* (2014) and Yeung and de Azevedo (2011), measure the efficiency of the judiciary as one would measure the efficiency of a private organisation, such as measuring the producitivty of a firm in a private sector. Here, a process combines certain inputs, such as the quality of judges

and judicial staff, technology used and cost incurred, and obtains certain outputs such as disposals, warrants and sentences. Similarly, 'CourTools', a system of measurement for trial courts developed by the National Centre for State Courts in the United States, takes into account some output oriented measures specified in the Staats Et Al Framework, and adds inputs such as court employee satisfaction and the average processing cost per case as an input metric in the measurement system.

Given the litigant focus of our measurement framework, we do not emphasize the 'inputs' in our measurement criteria and only factor in the outputs seen by the litigant as a consumer of the judicial services. Thus, for example, we consider timeliness and predictability of the case trajectory as critical measures of judicial performance. We acknowledge that there may be several inputs that contribute towards making courts timely and predictable in their performance. However, we believe that if we were to measure courts from the perspective of a litigant, these inputs would not fit in the measurement criteria. This is akin to consumers rating any other sovereign function, such as the maintenance of street lights. There may be many reasons for why citizens might rate street lights in a given vicinity as poor, such as non-availability of personnel, non-payment of city taxes, and so on. For the citizen, however, the criterion for rating is limited to whether or not the street lights work well.

Basis these discussions, in the next few sub-sections, we explain how the literature has defined or interpreted consumer focused performance metrics for evaluating the performance of courts responsible for contract enforcement, and the advantages and limitations of using each metric in an evaluative framework.

3.1 Independence

The first metric of judicial performance identified in the StaatsEtAl Framework is judicial independence. Other scholars also hold that judicial independence is a critical determinant of trust in courts.

Some scholars have classified judicial independence into *de jure* and *de facto independence* and have identified specific indicators to measure each (Melton and Ginsburg, 2014; Linzer and Staton, 2015). In this literature, *de jure* independence is measured through formal rules such as the law governing the appointment, promotion, salaries and the removal of judges, *de facto* independence is measured through proxies such as the level of press freedom in a country. While these metrics are perhaps key determinants of the independence of the judiciary from the executive and political influence, these do not fully explain the idea of judicial independence in the context of commercial adjudication which will, in several cases, not involve the state as a counterparty.

Staats *et al.* (2005) define judicial independence at two levels: the institution and individual judges. They contend that judicial indpendence means the independence of the judicial system as an institution from unwarranted external political influence *and* the

ability of individual judges to make independent decisions in particular cases. While earlier scholars focused on judicial independence in the context of independence from the other arms of the state, Staats *et al.* (2005) brought in an element of fairness in their interpretation of judicial independence by insisting on independent decision making at the level of individual judges and individual cases. Dougherty *et al.* (2006) similarly focused on independence at the level of judges. They state that if the judges are unbiased and indepedent, citizens perceive the justice system to be fair. They further divided this fairness into procedural fairness and distributive fairness. Procedural fairness reflects the courts' ability to adhere to the procedures of law in a case that is brought before it. Distributive justice, on the other hand, refers to the extent to which a court can deliver outcomes or judgments that are fair and impartial to a group of people. For example, if a court is constantly seen to deliver judgments in favour of one class or sect of the population (based on religion or gender or other demographics), this reduces the confidence in the judiciary for citizens of the prejudiced class.

Several scholars have emphasized procedural fairness to measure judicial independence. For instance, Rottman and Tyler (2014) find that estimates of procedural justice emerge as the strongest explanatory variable (determinant) of public trust in the courts. Among survey respondents who used the courts, procedural justice was found to matter more than whether or not they had obtained favourable outcomes in their own case.[6] That is, whether or not a court follows the procedures laid down in the law is a primary factor that influences the citizens' experience and trust in the courts.

Other scholars have similar findings on judicial independence being a critical determinant of trust in courts. Voigt and El-Bialy (2014) find that there was a high correlation between trust in the judiciary and subjective factors such as independence of the judiciary, rather than objective factors such as a resolution rate or clearance rate. The reasoning underlying the 'fairness' measure captured in the National Center for State Courts (2005) and the International Consortium of Court Excellence (2020) is similar. Though they do not expressly use the term 'independence', they state that citizens' perception of courts are not just shaped by the outcomes of their case (winning or losing), but by how well they are treated by the courts, and whether the courts' decision making processes seem fair. This is the courts' ability to adhere to procedural and distributive fairness.

From the above discussion of the literature, we arrive at two proxies that can be used to measure judicial 'independence' in the context of contract enforcement:

> *Procedural fairness*: the degree of adherence to the procedures prescribed under law; and
>
> *Distributive fairness*: the fairness and impartiality in judgments that are being delivered.

[6] Rottman and Tyler (2014); pp.1051

3.2 Efficiency

The StaatsEtAl framework proxies efficiency with the absence of unreasonable delays (time from filing to disposal) and backlogs (volume of cases). These two dimensions are also most commonly used in the empirical literature to both (1) measure the impact of interventions or judicial reforms on judicial performance; and (2) establish causal linkages between judicial performance and various economic variables such as growth, entrepreneurship, firm size and access barriers (eg., Rosales-Lopez (2008), Chemin (2009a), Ippoliti *et al.* (2014), Palumbo *et al.* (2013)).

Workload : The workload of a court is one of the most commonly used metric of judicial performance in the Indian context as well. Examples include the Tata Trust (2019) which ranks Indian courts based on the pendency and clearance rates, Menon (2008) and Robinson (2013) who analyse the workload and pendency of the Indian Supreme Court, and Khaitan *et al.* (2017) and Vidhi Centre for Legal Policy (2021) who focus on the Delhi High Court. The standard metrics taken into account for determining a court's workload are the number of cases pending, the number of cases filed and the number of cases disposed of (eg., European Commission for the Efficiency of Justice (2016), Buscaglia and Ulen (1997), Rosales-Lopez (2008) Voigt and El-Bialy (2014)).

How relevant is a court's workload to a consumer's experience of a court? The court's workload is arguably a critical input that like all other inputs, such as infrastructure, judicial vacancies and judicial budgets, impacts the overall experience of the consumer. But, by itself, the litigant is not likely to take into account a court's workload or case backlog in evaluating its performance.

There are two other problems with emphasising 'case backlog' as a metric for evaluating the quality of a court. First, an excessive emphasis on the 'backlog' problem might cause worse resolutions (Rosales-Lopez, 2008). Courts may be incentivised to dispose of more cases at the cost of the quality of their judgments. In fact, a high workload may suggest a high level of trust among litigants to warrant the courts' continued usage. As a corollary, lower judicial workload may imply lesser usage of the system suggesting either low contracting activity or people not trusting the courts enough to settle their disputes. Moreover, comparing courts on this metric ignores the complexity of the disputes adjudicated by them. It is possible that courts with a higher backlog (more workload) are adjudicating more complex disputes relative to courts with a lower backlog.

Finally, in India, a key concern with using disposal and pendency that is reported by the court is what we call the 'counting problem'. It is unclear how disposal and pendency is calculated. This may vary across courts in India, and limits the extent to which the backlogs of courts can be compared with each other. For instance, a lot of workload and pendency data in India is sourced from the E-Courts database that disseminates aggregate case data at the district-level. Damle and Anand (2020)

highlight the lack of standardization in how 'cases' are computed across states. In any event, most of the workload related studies in India are undertaken on a sporadic basis thereby further undermining their utility.

An emphasis on workload, in isolation, renders the measurement system fallible to these concerns. Given that our framework focuses on the litigants' immediate experience of courts, we do not use workload as a metric in our evaluative framework. Here, we depart from the StaatsEtAl framework and restrict the dimension of efficiency to their first metric, namely, the duration of disposal of the case.

Timeliness : A consumer focused approach towards improving the judicial system emphasizes the time to disposal as a key determinant of judicial performance (European Commission for the Efficiency of Justice, 2016). The discourse regarding improving court systems also often focuses on the time taken to dispose off cases (National Center for State Courts, 2005; Dakolias, 1999). The predominance of this metric is evident from the fact that it has been used to compare courts across jurisdictions. For instance, Rosales-Lopez (2008) and Yeung and de Azevedo (2011) use this metric for a comparative analysis across courts of Spain and Brazil respectively. Palumbo *et al.* (2013) compare the time to disposal across the courts in the OECD countries. The time to disposal has also been found to have an impact on the outcomes of laws, especially in the context of contract enforcement (Chemin, 2009a). The time to disposal is calculated as the time period between the date of filing the case to the date of the final disposal of the case.

This begs the question: what is unreasonable (reasonable) in the context of judicial delays? If the law stipulates a timeline for the disposal of cases, that timeline should be the anchor. Where the duration from filing to disposal exceeds this timeline, it should be classified as a delay. But, most laws neither prescribe an outer timeline for the disposal of cases, and where they do, the timeline is not considered to be binding on the judiciary. The consequences of the judiciary's failure to adhere to the timelines prescribed by law are also unclear. There are two other problems with defining 'unreasonable' delays. First, much would depend on the complexity of the case and the existing workload of the court, which implies that what is unreasonable would depend on case complexity and the court's workload throughout the case life-cycle. Second, an exclusive emphasis on shorter disposal timelines as a metric of good performance suffers from the usual limitation of the quality of judgement. Finally, it does not take into account the age of non-disposed off cases. For example, the average time to disposal may be lowered by disposing off routine cases smoothly, even as problematic cases are allowed to continue aging.

The Prillaman Framework provides some guidance on this question. Prillaman argues that while inefficiencies are inherent in any judicial system, the presence of "uncontrolled variations" [in delays] is an indicator of unreasonable delays. The metric therefore is not a bright line of N days, for it is hard to hold such a line constant across courts and across time. Drawing upon the Prillaman Framework, we

argue that given the difficulty of defining optimal timelines for the disposal of cases, the metrics of lower variation and higher predictability in disposal timelines, would make for a more sound approach to judge judicial performance on the dimension of efficiency. Further, to mitigate the abovementioned problem of bias in taking into account the disposal timelines only for disposed of (possibly simpler) cases, some measurement systems, such as CourTools[7] developed by the United Centre for State Courts, therefore, use the Age of 'Active' Pending Caseload as a metric, where the 'active' cases take into account the non-disposed off cases as well.

Based on the discussion above, our framework will deploy 'timeliness' as the metric of judicial efficiency. Drawing from the Prillaman Framework and CourTools, we use the duration of disposed cases and the duration of pending cases for measuring the timeliness metric. That is, given the difficulty with identifying optimal timelines for disposal of cases, we do not prescribe what is the optimal timeline for any given court. Rather, we expect that our measurement exercise will facilitate a comparison of the 'timeliness' of disposal across courts adjudicating similar matters. If these measures can be calculated in a similar manner across different platforms, these can provide the litigant with a relative performance evaluation that can allow him/her to decide when, if and how to avail of the justice delivery system.

3.3 Predictability

In bare terms, predictability would mean the ability of the litigants to predict the outcome of the courts' judgment and the general trajectory of their case, such as what is the next stage likely to be, the dates on which their case will be heard by the bench, and the likely duration for disposal. The metric of timeliness in the judicial efficiency dimension covers the third element of predictability. We focus on the certainty of outcomes, and the general trajectory of the case in this dimension of judicial performance.

Certainty of outcomes Courts arrive at a judgment by applying the law to the facts in question. The law of the land is codified, common law courts are bound by precedent and expect to objectively apply the law and jurisprudence to the facts of the dispute. This means that any litigant approaching the court must be able to predict the decision of the court with some level of certainty. Disputes, however, have complex facts, laws are often indeterministic and open to interpretation, courts are often bound by precedent and frequently make judgements on a case to case basis. The challenge is, therefore, to arrive at an objective measure of certainty of substantive outcomes.

Some information on this metric can be discerned from appeal rates before higher courts as a higher appeal rate may be indicative of an inappropriate application of the law to the facts, ignoring facts or evidence before the court and so on (Palumbo

[7] National Center for State Courts (2005)

et al., 2013). The appeal rate is commonly measured as the percentage of appeals against the total number of judgments of the court (European Commission for the Efficiency of Justice, 2016).

However, this metric is not without its challenges. The main concern in using the rate of appeal as a metric of performance is that, there is little evidence of the link between outcome uncertainty and appeals. For instance, an appeal may not be linked to the poor quality or an error in judgment on the part of the court, and there may be other determinants of appeal rates. Similarly, the decision of whether or not to prefer an appeal may be linked to the financial strength of the losing party, the incentives built within the Iegal system against appealing or the incentives of attorneys.

Another practical challenge in using the appeal rate as a proxy to measure outcome certainty is the difficulty in tracking a life-cycle of a case from the court of first instance to the court of appeal. At the appellate court, the case receives a new case number. In most cases, particularly in India, the databases of the court of first instance and appellate courts are not integrated.

The next challenge is to determine the outcome of appeals. While a high appeal rate may only be a weak indicator of the outcome certainty metric, it becomes even weaker if it does not take into account the outcome of appeals. Thus, two other ratios become relevant, namely the reversal and confirmation rates. The reversal rate is the ratio of the number of orders of the lower court that were reversed by the appellate court to the total number of orders that were appealed. The confirmation rate is the ratio of the number of orders of the lower court that were confirmed by the appellate court to the total number of orders of the lower court that were appealed.[8] Taking into account appeals may also introduce lags in the measurement exercise further diluting its utility.

Certainty of case trajectory A key element of satisfaction of the litigant is the ability to have certainty on the trajectory of a case. Once a case is filed, it is reasonable to expect that most litigants would be curious on what the next stage of the case is, what is likely to happen on the next scheduled date of hearing, and so on. Certainty on these fronts allows litigants to make more informed choices on the costs and their likely options.

Few measurement systems reflect this element of consumer satisfaction. For instance, in their survey of litigants, Rottman and Tyler (2014) ask respondents if whether "uncertainty about what would happen" would reduce their trust in the judiciary and find that 40% of the respondents responded in the affirmative.[9] Fo-

[8] In the context of India, there is a third outcome, namely, remanded orders, where the appellate court 'remands' a case back to the lower court for fresh consideration. While this has a bearing on outcome certainty, it is unclear how the impact might be measured.

[9] See Rottman and Tyler (2014), pp.1055

cusing on the user friendliness of courts and the potential of self-representation in simple disputes, Hagan (2018) recommends the establishment of self help centres that provide 'Navigable Pathways', which help people understand the whole sequence of events that will face them during their legal processes, and more effectively assist them through that process, as a key element of court design.

One element of certainty on the case trajectory is codified in the framework developed by the National Centre for State Courts, which includes 'Trial Date Certainty' as one of the ten metrics in their evaluation framework (National Center for State Courts (2005)). It is calculated as the number of times a case is scheduled for trial. As our framework is pertinent to commercial disputes, we term this as 'Hearing Date Certainty.'

However, it is not sufficient if a hearing is scheduled for a particular case on a given date. It is also crucial to know if on a scheduled date of hearing, the case was given a substantive hearing or was merely postponed to a different date. For instance, Sharma and Zaveri (2020) find that, about 80% of cases that came up for hearing in the National Company Law Tribunal, India's tribunal adjuciating company law and bankruptcy cases, were adjourned without being given a substantive hearing.[10] Undue adjournments results in loss of resources for the litigants, both in terms of costs and time.

Given the multiple concerns with measuring outcome predictability explained in this sub-section, we restrict our framework to take into account the certainty of case trajectory. Basis the above discussion, we use two proxies to evaluate the certainty of case trajectory, namely, the average number of hearings for the disposal of a case and the average ratio of substantive hearings to non-substantive hearings in the trajectory of a case.

3.4 Access

The literature that evaluates the performance of courts considers access to justice as an important parameter of judicial performance, even as researchers differ in their methods of measuring 'access'. Jurisprudentially, the expression 'access to justice' has been used rather broadly to include the essential elements of a judicial proceeding. Thus, it would include the right to a fair and impartial trial, the right to be represented before the judge, the right to timely and affordable justice. These elements are also covered in other metrics discussed above, such as independence.

For the purpose of evaluation, the costs involved in accessing courts to resolve disputes is the most widely used proxy of the metric of access (Djankov *et al.*, 2008; Prillaman, 2000; Staats *et al.*, 2005). For instance, Palumbo *et al.* (2013) use the costs of litigation

[10] See Regy and Roy (2017) for similar findings with respect to the proceedings at Debt Recovery Tribunals.

as a measure of accessibility. Since they look at judicial systems as institutions providing a service, they focus on the costs of using the service, which they argue ought to be sufficiently low to avoid exclusion from the service, but not be so low as to encourage frivilous litigation.

Barendrecht *et al.* (2006) and Gramatikov *et al.* (2009) characterize the private costs of litigation into three types, namely, monetary costs, opportunity costs and intangible costs. The monetary costs include out-of-pocket expenses that are to be incurred by the litigant, such as lawyer fees, court fees, and travelling expenses. The oppportunity costs capture the costs of missed opportunities and would include, the devaluation of the assets in dispute, alternative uses of the money spent, uncertainty of the relationship for future transactions, etc. Finally, litigation generally involves several intangible costs, also termed as emotional cost, such as mental trauma arising from actively participating in judicial proceedings, and testifying. Often, courts include compensation for mental trauma as a component of damages in their final order.

It is likely that costs will be a critical input for litigants in making decisions. A system that spells out these costs upfront helps litigants make informed choices on whether to bring a matter to the court or not, and identify forums which would be most cost efficient. Further, the systematic measurement and dissemination of information on costs acts as a feedback to the system administrators to design the precise intervention required to make the system most cost effective. For instance, if litigants are hesitant to go to courts due to high lawyers fees, increasing the judge-population would be a misplaced solution (while fully recognising that the judge-population ratio may be endogeneous to costs).

Another widely used proxy for measuring access to justice is the user friendliness of the judicial system. For instance, in addition to monetary costs, Dougherty *et al.* (2006) conceptualize accessibilty as the degree to which courts are user-friendly. The European Commission for the Efficiency of Justice (2016) and National Center for State Courts (2005) conduct regular customer satisfaction surveys to evaluate how user-friendly courts are. Hagan (2018) lays out seven key areas to make the courts more usable. This includes the ability to help litigants understand the legal processes involved in a case, physical navigation through courts, ease of use of online tools and paper work and most essentially inculcating a feedback loop to understand litigants' negative experiences.

While it is important to study all types of costs for a comprehensive assessment of the accessibility of a system, given our focus on the consumer of justice as well as the constraints on studying non-monetary costs, we restrict ourselves to measuring the private costs incurred by a litigant in resolving a dispute. Drawing from the literature on accessibility, we also use user friendliness of courts as the second metric of accessibility.

3.5 Effectiveness

Measurement frameworks drawn up from the perspectives of researchers and planners rarely, if at all, take into account the ability of the courts and the costs involved, to enforce the orders and judgements passed by courts. This is partly because of an overwhelming focus on workload and timeliness and partly because of the difficulty of measuring the costs involved in enforcement.

A judiciary may be independent, efficient, accessible, and accountable, but it would not be serving its end purpose of providing justice to the consumer, without mechanisms and procedures that make its rulings effective. In addition to eroding the trust of the people in the judiciary, courts would be paying lip service to the consumer of justice, if their decisions cannot be acted upon or are hard to enforce. For instance, if a court passess an order for the payment of damages, the order would be ineffective if the judgment creditor cannot recover the money due to him from the judgment debtor. We argue that the frictionless execution of judgments is a critical measure of judicial performance. For this reason, several jurisdictions make specific provisions in the law, such as provisions for initiating contempt of court proceedings and enabling litigants to apply for the execution of court's orders, with the assistance of the local law enforcement machinery if parties do not comply with their orders on their own.[11]

There is limited literature that considers the *enforceability of court orders* to measure performance of the legal system. The StaatsEtAl Framework uses three metrics to measure the effectiveness of courts, namely, the effectiveness of a court in (1) in the promotion of civil liberties and the protection of human rights; (2) in the protection of the rights of the accused in criminal cases; and (3) in the provision of justice to parties in civil cases. They survey respondents for their opinions of courts on these three metrics. These metrics do not take into account the costs of enforcement of decrees and orders in a commercial matter.

The National Center for State Courts (2005) prescribes a more deterministic metric for measuring the effectiveness of such decrees and orders by courts. It takes into account a metric known as 'Management of Legal Financial Obligations' which is measured as a percentage of cases in which the legal financial obligations are fully met by the party on whom such obligations are imposed. While their focus is largely on the restitution for crime victims, we argue that this metric can be applied for enforcement of any financial or punitive obligation. The International Consortium of Court Excellence (2020) defines enforceability as compliance with a court's orders. It is described in terms of a court's fundamental obligation to enforce its orders and maximize compliance with the rule of law. Like National Center for State Courts (2005), they take into account the ratio of the amount of monetary penalties collected by the court to the amount of monetary penalties ordered by it in a given period.

[11] For instance, Rule 69 of the Federal Rules of Civil Procedure in the United States and Order XXI of the Civil Procedure Code in India.

Basis the above discussion, we define *judicial effectiveness* as a measure of a court's ability to enforce its order. As most commercial disputes would have monetary pay-outs as a key relief, the enforceability in such contracts can be calculated as the average of the ratio of the money recovered by judgment debtors to the total monetary compensation awarded by courts in favour of judgment debtors.

4 A framework to evaluate contract enforcement by Indian courts

The economics scholarship evaluating contract enforcement in different jurisdictions is largely focused on demonstrating the causal impact of effective enforcement of contracts on one or more economic variables, such as investment rates (Mina, 2006); the development of a credit market (Palumbo *et al.*, 2013); access to the credit market (von Lilenfeld-Toal *et al.*, 2012); product innovation (Jain *et al.*, 2022); firm performance (Chakraborty, 2016); cost of doing business (Sereno *et al.*, 2009); and insolvency of firms (Djankov *et al.*, 2008).

These studies use one or more of the metrics of court performance discussed in the previous section to demonstrate such causal linkages. For instance, Mora-Sanguinetti *et al.* (2017) use the clearance rate of court executions to explain the differences in the availability of credit and the accumulation of non-performing loans. They define clearance rate as the ratio of resolved cases to total (newly instituted and pending) cases. They find that an increase in the clearance rate of executions (when judges enforce the repayment of a debt) increases the ratio of total credit to GDP. Chakraborty (2016) uses pendency ratio (defined as fraction of cases pending to all cases pending in a year) to measure judicial quality. He uses this as a proxy for contract enforcement. He finds that judicial quality is significant for firm performance. This is similar to the workload metric discussed in the previous section.

Rodrigues (2019) measured the quality of courts using two other proxies, namely, the length of proceedings and the execution of collateral that secured the loans. His framework of measurement assesses the efficiency of courts to enforce contracts with minimal expenditure of time and resources and its efficacy in executing the collateral underyling debt contracts. These two proxies are closer to our metrics of timeliness, effectiveness and access, discussed in the previous section. Similarly, (Sereno *et al.*, 2009) lay out four factors of judiciary that drive up cost of doing business, i.e., high direct cost, delays, unpredictability and unfairness. These are in line with our metrics of access, timeliness, predictability and independence.

Other scholars have focused not on the quality of contract enforcement but on specific reforms in legal institutions, such as the establishment of special courts. For instance, Jain *et al.* (2022) find that setting up of fast track debt recovery tribunals increased the efficiency of debt contract enforcement and led to a significant increase in innovation in

manufacturing firms in India. von Lilenfeld-Toal *et al.* (2012) find that a judicial reform conferring better security enforcement rights on banks had an adverse distributive impact on credit access. That is, it reduced credit access for small borrowers and inreased it for wealthy borrowers. Djankov *et al.* (2008) surveyed insolvency practitioners of 88 countries to understand which is the most used procedure for contract enforcement in terms of the efficiency of time and cost. Pistor *et al.* (2000) find that reforms in law had limited impact on firms until legal institutions adjudicating them became more efficient.

While this research focuses on variables of court performance that are perceived to have an impact on the quality of contract enforcement, it does not place the experience or the preferences of the litigant at the centre of their research. The length of proceedings, legal reforms, the establishment of fast-track courts and clearance rates are some parameters used in the literature. However, neither does the research evaluate the impact of these on the litigants' experience nor do they attempt to identify the preferences of the median litigant or user of courts.

A key inference from this discussion is that 'contract enforcement matters' at an aggregate level and for overall welfare. But, what exactly do litigants value about courts in the context of contract enforcement? Our work attempts to fill this gap by taking the first step of hypothesizing what matters to litigants in enforcement of contracts. Our study does not focus on how or whether the quality of enforcement matters. Our prior, basis the literature discussed in this section, is that it matters. The focal points of the measurement in this work are the litigants who seek to use the justice delivery system and those who are put through this system.

The advantage of rolling out such an evaluative framework in India is the existence of multiple fora on which it can be tested. Laws in India that facilitate the enforcement of contracts have evolved since the time of independence, often with new legal provisions that were put in place in parallel to existing provisions. For instance, a breach of contract would previously be dealt with under the Indian Contract Act, 1872 or the Specific Relief Act, 1963. The parties would approach civil courts under the Code of Civil Procedure, 1908, for relief. In 2015, the Commercial Courts Act was enacted. It established separate commercial court benches for adjudicating commercial disputes[12]. However, suits for damages or specific performance may still be filed before the civil courts or commercial benches of such courts. In addition, parties may also choose to opt for alternative dispute resolution under the Arbitration and Conciliation Act, 1996. A large number of commercial disputes, such as securities frauds, bankruptcy claims, shareholder disputes, disputes with respect to companies' affairs, landlord-tenant disputes, motor vehicles claims, and so on, are covered under specific statutes governing them and adjudicated in quasi-judicial tribunals.

The existence of multiple fora in India to enforce contracts of different types ensures that the framework can be tested, and if satisfactory, scaled to numerous courts and

[12]See Sec. 2(c) of the Commercial Courts Act, 2015

tribunals in the country. It additionally creates the potential for disseminating sufficient information allowing litigants to compare the performance of different judicial fora and make an informed choice of the forum they prefer to use for seeking judicial redress.

Basis the above discussion, we propose that a litigant-centric measurement framework for evaluating judicial performance in enforcing contracts must comprise the metrics listed in Table 1. In the second column of the Table, we identify the proxies for the metrics listed in column 1. These proxies are drawn from the literature explained in Section 3, and the third column in the Table briefly explains each proxy. We do not prescribe what is *optimal* for any given court. Given the widely acknowledged problem with specifying the optimal performance of a given court, we simply lay down the metric and expect that deployment of the metric across multiple courts will generate sufficient information for their relative comparison.

A natural question and challenge is the actual operationalization of this evaluative framework. More specifically, the data sources that can be readily deployed to allow the repeated generation of information on these metrics at regular intervals and for a sizeable number of courts and tribunals in India. The literature that evaluates judicial performance primarily generally draws upon the secondary data published by courts (Rosales-Lopez, 2008; Yeung and de Azevedo, 2011; Choi *et al.*, 2012). While the data published by courts, such as causelists, orders and case life-cycles, could potentially be a rich source of real time information to measure judicial performance, the problems of consistency, regularity, standardization and availability highlighted by earlier scholars persist (Robinson, 2013; Damle and Anand, 2020). However, the problems of weak data availibility is likely to be a feature of developing countries. We, therefore, find that perception surveys of stakeholders, such as lawyers, court staff, judges and litigants, who are active participants in the litigation eco-system are also extensively used to evaluate court performance (Dougherty *et al.*, 2006; Rottman and Tyler, 2014; Staats *et al.*, 2005; European Commission for the Efficiency of Justice, 2016; National Center for State Courts, 2005). Several studies cited in this literature review use a combination of these two data sources (Palumbo *et al.*, 2013; Voigt and El-Bialy, 2014; Krishnaswamy and Aithala, 2020).

In the context of India, taking into account the quality of data generally disseminated by courts, we believe that the deployment of the measurement framework drawn up in this paper would need a mix of secondary data and survey tools. In the third column of Table 1, we show the appropriate data source for measuring each metric specified in the second column of the Table.

Table 1 Metrics to evaluate court performance for contract enforcement

No.	Metric	Proxy	Description of metric	Data source*
1.	Independence	Procedural fairness	Adherence to procedure and rule of law	S
		Distributive fairness	Fairness and impartiality in judgments	S
2.	Efficiency	Timeliness	Duration of disposed and pending cases	SD
3.	Effectiveness	Enforceability	Ratio of the total sum recovered to the total sum awarded awarded by court orders	S
4.	Predictability	Case trajectory certainty	Clarity on the stages of the case and what is likely to transpire at each stage	S
		Hearing date certainty	Certainty on no. of hearings per case	SD
			Predictability of substantial v. non-substantial hearings	SD
5.	Accessibility	Monetary costs	Costs to the consumer	S
		Convenience	Ease and user-friendly for consumers	S

*S refers to survey; SD refers to secondary data
**Sum of filed and pending cases

Our framework is agnostic to the territorial jurisdiction of courts and to the legal framework governing such courts. For instance, in the Indian context, it applies whether the court in question is a civil court adjudicating a civil or summary suit, a commercial court adjudicating a commercial dispute, a debt recovery tribunal adjudicating a debt recovery or security enforcement proceeding or a tribunal adjudicating an insolvency proceeding.

The extent to which these forums are comparable on specific elements, such as timeliness, is subject to the underlying law. For instance, it is possible that given the statutory timelines laid down in the Insolvency and Bankruptcy Code for the disposal of a corporate insolvency resolution petition, an insolvency proceeding may rank higher on the measures of timeliness and predictability, relative to a civil suit in a civil court, which is not bound by similar timelines. Similarly, as commercial courts were set up to provide speedy resolution of disputes, they may fair better on the metric of timeliness.

However, by placing the litigant at the centre of this framework and identifying the parameters that matter to the litigant, what this framework hopes to achieve is better information across different judicial forums that enforce contracts in India, allow meaningful comparison across these and enable litigants to make more informed decisions on the selection of the forum for enforcing their claims. Such comparison similarly allows defendants to make a more informed estimate of the costs involved in defending their claim and protecting their contractual rights. The framework is apposite for all kinds of litigants, different types of contracts and different sizes of claims.

The challenge with measuring judicial performance is the lack of regular systematic information on the pre-identified parameters. For example, we explained some of the challenges involved in measuring the workload of Indian courts and appeal rates and outcomes in Section 3. Our framework for measuring the performance of contract enforcing courts has some components that can be measured quantitatively and others which cannot. For instance, the efficiency (workload and timeliness) and some components of predictability (predictability of hearings) can be measured. On the other hand, metrics such as independence and the accessibility of courts are subjective in nature and not easy quantifiable. Further, in all cases, the accuracy of the measurement would necessarily depend on the soundness, regularity and consistency of the data that is available from these courts at any given point in time.

5 Conclusion

In this paper, we construct an evaluative framework for measuring the performance of courts. We begin with the proposition that courts perform significantly different functions depending on the kind of law they are adjudicating. We, therefore, discard the notion that a common evaluative framework can be laid down to compare courts that perform functions that vary, for example, in complexity and volume from each other, at the outset.

There are a plethora of both quantitative and qualitative analyses that evaluate the capacity, the efficiency and the backlog of the Indian judiciary by assessing the courts. We draw upon the metrics used by these analyses as well as the international literature commonly used to measure the judicial performance. The goal is to develop a framework that is comprehensive, scaleable and implementable in the context of Indian courts at a regular frequency.

For the purpose of conceptualising our framework, we place the consumer of the justice delivery system at the centre of the evaluation role. While doing so, we ask ourselves what would be important for a consumer of litigation? What would a consumer need to know to answer questions, such as should one approach the courts to enforce contracts? Which court should they approach? How long will the court take to enforce their contract and what are the costs involved?

Upon a review of the literature that measures various aspects of court performance in the fields of law, economics and political science, we find that independence, effectiveness, efficiency, predictability and accessibility of the courts are crucial for consumers. In the absence of evidence on which metric matters more, we assign equal weightage to these metrics in our framework, to begin with, while fully acknowledging that as the framework is used, evidence may emerge on what consumers care about more versus less.

While judicial under performance is an over used expression in both Indian academic literature and broader policy discourse, the absence of an evaluative framework exacer-

bates the ambiguity associated with this expression. We believe that this framework is a starting point in plugging this gap and is a useful foundation to begin to actually make judicial performance a more tangible and usable concept in India.

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