Exploring Market Solutions to State Monopoly (In) Justice

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Introduction

According to a Transparency International India survey, 77% of the respondents believe that the judiciary is corrupt. The report further states that as of February 2006, 33,635 cases were pending in the Supreme Court; 3, 34, 000 cases in high courts with 670 judges; and 2.5 crore cases in 13,204 sub-ordinate courts. "This vast backlog leads to long adjournments and prompts people to pay to speed up the process. In 1999, it was estimated that at the current rate of disposal of cases, it would take another 350 years for pending cases" says the report.[1]

The report underscores the desperately ironical situation that India is in today. On one hand an astounding majority does not seem to have any faith in the judiciary, on the other, the number of cases being filed in courts is increasing at an exponential rate. Absence of alternatives to the government monopoly in disseminating justice seems to be the only logical argument behind the existence of this paradox that we find ourselves in.

Most of the flaws of the judiciary stem from its organisational structure. The fact that the courts are a Government Monopoly, hence are afflicted with bureaucratic failure and ineffective rationing are the prime reason for corruption, congested courts, endemic delays, high costs, unavailable legal help, gigantic backlog of cases and so on and so forth.

This paper attempts to explore private, competitive solutions to the provisioning of justice. The belief that justice and its provisioning, even more than national defence, is a government domain and cannot be provided otherwise if society has to exist in harmony, is usually never questioned. However considering the general cynicism towards the judiciary and that the current problems of the judiciary are likely to continue for a long time to come, and also that reforms for improving the state of judiciary have not been very successful lead us to explore whether private adjudication is the answer to the problems.

The structure of Competitive adjudication essentially involves mutual compulsion, that is, both parties consenting to a choice of Adjudicator. A model of this form will ensure impartiality, efficiency, accessibility and speed and accuracy in resolution of disputes, the very characteristics that are lacking in the present system of adjudication. The intended model, however, is not free from imperfections. The intent is to envision a system of adjudication which is better, more credible and accountable than system in place presently.

[1] Chauhan, Chetan and Prakash, Satya (2007, May 25). 77 per cent believe Indian judiciary is corrupt: survey. *Hindustan Times*.

Research Objective

The objective of this research is to explore the alternatives to the present system of State Monopoly on Judiciary. The emphasis of the paper throughout would be only the Dispute Resolution Function of the Judiciary. The Rule Formation and Enforcement Functions of the judicial system will be considered external to the analysis.

Throughout the paper, the following issues would be attempted to be addressed:

- How the present system of judiciary creates an organisational structure that detaches justice from law.
- How private law institutions functioned in history. An attempt would be made to understand why customary system of law evolved in Middle Ages Europe and why the system dissolved.
- How the principles of private adjudication can be applied in the Indian context.
- What problems may arise if purely private adjudication is allowed to function in Indian Property markets and how those ambiguities could be resolved

On the basis of the answers to these questions, a final comment will made on how successful the private adjudication model can be, when applied to the Indian context and its effect on the Indian property market.

Methodology

The research methodology involves answering all these questions by studying existing literature by prominent authors, professors, lawyers and other experts in the field of law as well as economics. Also the state of the Indian judiciary was studied to understand the current problems and their source. Field trips were made to Lok Adalats and Patiala House Court in order to be familiar with the ground realities. Opinions of experts on the subject of the Indian Judiciary were taken into consideration. On the basis of all the above, a model of private adjudication was constructed. Finally the model was applied to particular aspects to Indian property law to assess the feasibility of the proposed model.

What plagues our Judiciary: Analysing the causes behind the apathetic state of the Judicial System

Before delving into the problems of the judicial system, we must understand how convolutedly the judicial system operates in India. Astoundingly India has some 10,000 courts.[2] Out of the 18 High Courts, only *six* of them have original jurisdiction.[3] The others are Appellate Courts; even disputes involving enormous amounts of money have to go to lower courts, which often do not have the expertise needed on many complicated issues, hence making appeals inevitable. In addition, there are around 2000 judicial officers are posted in the various Tribunals, for instance Land Tribunals, Industrial Tribunals, Tax Tribunals, Service Tribunals, the Company Law Board et al. Apart from Tribunals, another initiative of the State for securing speedy justice has been Lok Adalats. Lok Adalats are held at various District and High Courts all over the country, as well as at particular Public Utility Departments. Under the Legal Services Authorities Act, 1987, disputes in Lok Adalats are settled amicably between two parties, the judge acting as a mediator, conciliating the differences of the parties.

Figure 1 describes the unilateral hierarchy that governs the Indian Judicial System.[4]

Despite the existent grandiose structure of Judiciary, we are stuck with an enormous backlog of cases; one that, according to a Law Commission report, will take more than 300 years to clear, judging by the present rate of disposal and provided no fresh cases are instituted in this period[5]. Excluding Tribunals and quasi-judicial bodies, a shocking 23 million cases are stuck in courts, out of which the High Courts account for 3.2 million.[6] These numbers indicate the utter failure of the judicial system in guaranteeing speedy justice, a fundamental right as declared by the Supreme Court.

Time and again, there have been Committees, Reports, Recommendations, and Inquires for assessing the magnanimity of the judicial crisis and for suggesting reforms to improve the situation. Introducing reforms in the judiciary is a mammoth task, requiring the alignment of several interests groups, each having multiple and conflicting interests. Few reforms have gotten past the debating stage; those that did, yield limited results.

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[2] One Supreme Court, 18 High Courts, 3150 District Level Courts, 4816 Magistrate Courts and 1964 Magistrate II and equivalent courts (Debroy, 2001)

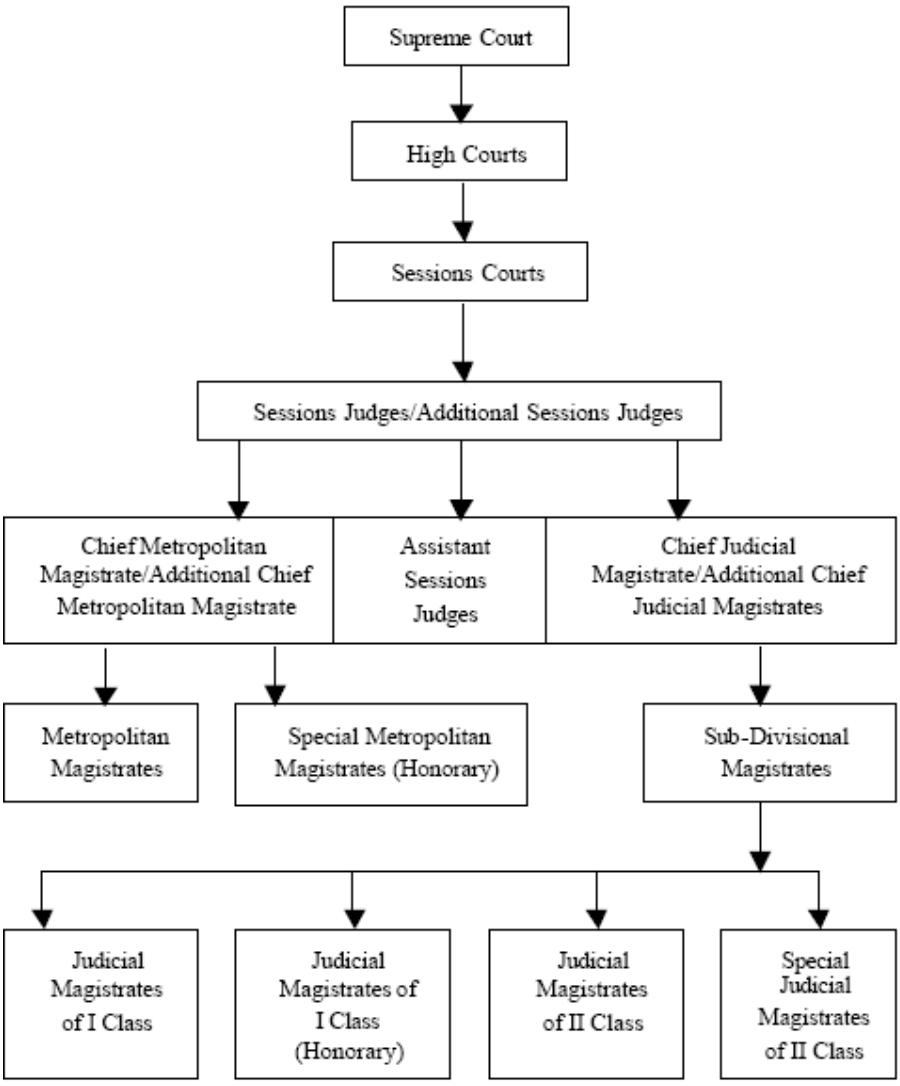
[3] Original jurisdiction means civil suits can be directly filed in these courts provided the monetary value of the suit is above a certain amount.

[4] Adapted from Debroy, Bibek (2001). Some Issues in Law Reform in India.

[5] Lokur, Madan B (2003) Case Management and Court Administration.

[6] Debroy, Bibek. Reforming the Legal System

Figure 1



Tribunals, for one, were intended to be a step towards specialised and faster justice, being free of cumbersome procedures. However, significant transaction costs and the fact that there is always scope of appeals to High Court and Supreme Court have lead to outcomes far from those that were intended. Another experiment of the Government is the Lok Adalat initiative. The idea behind Lok Adalats is commendable. Yet ideas not being translated into reality have become the rule, rather than the exception. Cases go through the customary waiting time at courts before being transferred to Lok Adalats as no dispute can be referred to a Lok Adalat if it is not pending in one court or the other. This, and the omnipresent bureaucratic failure, is indicative of Lok Adalats taking the same path as the Tribunals.

Increasing the number of judges has not helped either. From the 14th to the 79th, 121st and 124th Report of the Law Commission of India, emphasis has been on augmenting the judgeship strength and a pressing need to fill up judicial vacancies. Even the Malimath Committee Report, 1990 reiterated the need for an increased judicial supply. However, there is little evidence that this approach has worked. As an example, while the Sanctioned Strength of judges in Delhi High Court has increased from 30 in 1994 to 36 in 2001, the arrears have actually increased from 146613 to 175040. Even though number of cases disposed per judge have in this period have increased by 41%, the rise in productivity of judges has not been enough to catch up with the additional number of cases filed and the previous arrears.[7] In a bizarre application of the classic Say's Law, an increase in the number of judges was accompanied with a proportional growth in the number of cases. Hence the aggregate situation has only worsened.

Efforts to remedy the pathetic state of affairs have brought about disappointing results. This point to the fact that the problems of corruption, congested courts, endemic delays, high costs, unavailable counsel, gigantic backlog of cases et al are only symptoms of a graver problem at core. The problems emanate from the system itself and the way it works. They thus cannot be remedied unless the system is overhauled. The judiciary has severe organisation problems by its very construction as an institute. The two issues at heart, of Bureaucratic Failure and Problem of Common Property, which are the source of the judicial crisis, are detailed below.

A. Bureaucratic Failure:

Judges once appointed hold their tenure for life, thus facing the same incentives as other bureaucrats. The incentives to efficiently and effectively provide quality service are relatively weak. Also judges are usually much less accountable to the public. Judicial negligence is rampant yet judges have never been held guilty, nor have they been charged for the cost of their incorrect decisions. In fact the incorrect decisions only solicit further costs of appeals and the like.

Judicial authorities, instead of playing the role of public servants, act like absolute, unquestionable authorities. This stance is validated by the Chief Justice of India K G Bal Krishnan's contention "The Chief Justice is not a public servant. He is a constitutional authority. RTI does not cover constitutional authorities." Since the CJI gets a fixed salary from the government (which is public money) he is a public servant. His role as a constitutional authority stems from the virtue of his position as a Public Servant, and certainly not as his appointment as a Constitutional Authority. By saying this, the CJI is giving an impression that there is something unscrupulous about judicial officers' demeanour and conduct that needs to be veiled from the public eye. Not only does the Right to Information Act not cover judges, the process of appointment of judges in India is opaque, lacks transparency and answerability. India is perhaps the only country worldwide that which

[7] High Court of Delhi, New Delhi (2007). Annual Report.

follows the practice of allowing only collegiums of judges to appoint judges, with limited answerability on the selection procedure.

All judges are required to be lawyers; accentuating the extent of absolute monopoly that the judicial community has come to acquire in carrying out justice. The judges in India have come to acquire an almost untouched position, unchallenged power. It is ironic that a country that prides itself on being the largest democracy in the world would delegate the appointment of the guardians of the Law and Order machinery of the country to an entirely undemocratic practice. With selection procedure of this sort it is not surprising that most judges appointed either share ideological positions or bonds of friendship and blood with the existing clan.

The Judges (Inquiry) Act, 1968 strengthens the judicial monopoly by having extremely stringent procedures for impeachment in place. Thanks to this canonical legislation, no a single judge of a High Court or Supreme Court has been removed by impeachment. Impeachment proceedings as a form of punishment are not feasible as merely initiating proceedings requires support of 50 members in the Rajya Sabha or 100 members in the Lok Sabha. Even if that is achieved, a committee of judges will examine the allegations against the accused judge and present a report of their findings to the Parliament. Then each house of the Parliament votes on the removal of the judge. Only if the motion is supported with an astounding two-thirds majority in Parliament – an impossible feat by itself, can the President order the removal of a judge. Judges by themselves are not bad people; it is human nature to respond to incentives. Unfortunately the present system is one that offers inducements to be corrupt and dishonest.

B. The Commons Problem

The courts are after all public property. In the general case, when price do not reflect the scarcity of the good in question, allocation will necessarily be inefficient. In case of Courts, demand exceeds supply. Hence rationing is done on a first-cum-first-serve basis. The legal system is a community resource, which means it is not owned by anyone. The costs of the system, are largely paid for by society.

In fact one of the *attractive* features of the court system **is delay**. The fact that the courts are a forum that provides one party with an opportunity to delay the case by persistently outspending its opponent is testimony to the imminent collapse of the system. The tendency of the state owned and managed judiciary to function in an ineffective **way is** summed up by Hans-Hermann Hoppe:

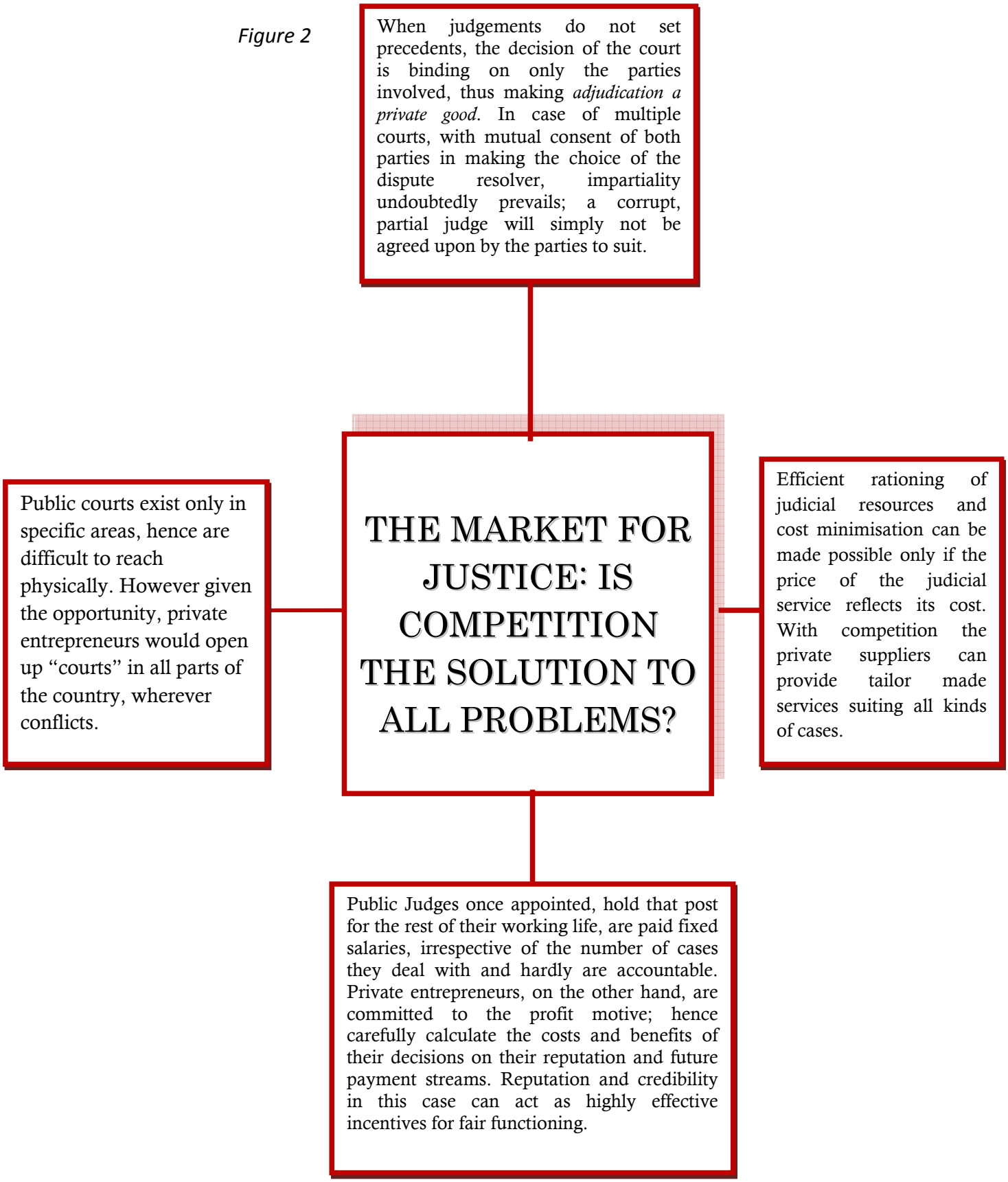
> "Conventionally, the state is defined as an agency that possesses two unique characteristics. First, the state is an agency that exercises a territorial monopoly of ultimate decision-making. That is, it is the ultimate arbiter in every case of conflict, including

> conflicts involving itself, and it allows no appeal above and beyond itself. Furthermore, the state is an agency that exercises a territorial monopoly of taxation. That is, it is an agency that unilaterally fixes the price private citizens must pay for its provision of law and order."[8]

What can be understood from the above study is that the very incentive structure inherent in a public institution of Law and Justice is what breeds the inefficiency that is abhorred by one and all.

[8] Hoppe, Hans-Hermann. (2006). The Idea of Private Law Society.

Figure 2


When judgements do not set precedents, the decision of the court is binding on only the parties involved, thus making *adjudication a private good*. In case of multiple courts, with mutual consent of both parties in making the choice of the dispute resolver, impartiality undoubtedly prevails; a corrupt, partial judge will simply not be agreed upon by the parties to suit.
Public courts exist only in specific areas, hence are difficult to reach physically. However given the opportunity, private entrepreneurs would open up "courts" in all parts of the country, wherever conflicts.
THE MARKET FOR JUSTICE: IS COMPETITION THE SOLUTION TO ALL PROBLEMS?
Efficient rationing of judicial resources and cost minimisation can be made possible only if the price of the judicial service reflects its cost. With competition the private suppliers can provide tailor made services suiting all kinds of cases.
Public Judges once appointed, hold that post for the rest of their working life, are paid fixed salaries, irrespective of the number of cases they deal with and hardly are accountable. Private entrepreneurs, on the other hand, are committed to the profit motive; hence carefully calculate the costs and benefits of their decisions on their reputation and future payment streams. Reputation and credibility in this case can act as highly effective incentives for fair functioning.

Private Law: A Historical Perspective

Historically, customary law had been the source for defining the rules of a society, particularly trade and commerce. Private adjudication and enforcement was dominant in Middle Ages Europe where Western mercantile law – *lex mercatoria* (Law Merchant) – first found feet and went on to become an integrated body of law encompassing commercial transaction in all of Europe for at least five centuries. The fact that the system of Law Merchants was not the result of the edict of Authoritarian Law meant that it was continually evolving in nature and catered to the needs of merchants. It is said that the commercial revolution of the eleventh through the fifteenth centuries which showed the way for Renaissance and industrial revolution would not have been possible *sans* this system of customary law.[9]

The Law Merchant was a body of rules and principles laid down by merchants themselves to regulate their dealings and resolve their conflicts. The then Civil Law was inadequate in dealing with the specialised nature of problems that traders came across hence a need for quick and effective jurisdiction was felt administered by specialised courts. State interference in dispute adjudication was nil. While the flourishing trade made possible by the Law Merchant brought in enormous tax revenues, not a penny of tax payers' money was spent. In that respect the Law Merchant was distinct from any other legal system in place; evolving from commercial practice and responding to the needs of the merchants. It was for this reason that the Law Merchant enjoyed a unique cosmopolitan position, pervading all strata of the trader community.

However, one chief reason for omnipresent nature of Law Merchant was its voluntary nature. Given that individuals had to voluntarily enter into a contract implied that Law Merchant had to be objective and impartial, otherwise the legal system would not be recognised. On the other hand, court decisions were almost always abided by, even though defaulters were not punished because the merchant who did not do so invited ostracism and trade boycott, the two very effective measures of enforcement. *Compliance was thus achieved without coercion*.

The system made it mandatory that adjudicators were experts in the area of the dispute referred to them. Thus the technical issues were dealt with by professionals, as opposed to laymen. Additionally, this resulted in speediness in the process of adjudication. Traders required quick settlement of dispute, owing to the nature of their business and participatory adjudication was thus necessary. Simplicity and informality was also encouraged and many legal innovations, that were illegal in royal courts, were validated in merchant courts. For instance, there was free transfer of debts, appeals were forbidden and notorious attestation was not required as evidence.

A system that is fully adaptable as well as accountable to the community it serves, yet is resilient enough to withstand changes in power can only arise from the grassroots. All features of the Law Merchant that grant it a position unparalleled by any other system in place can be attributed to the fact that the Law Merchant arose from the people. Thus law itself was a secondary force, reinforcing rather than defining the rules of the cycle of business practice.

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[9] Benson, Bruce. (1990). *The Enterprise of Law: Justice without the State*, San Francisco, Pacific Research Institute for Public Policy.

The Law Merchant provides an excellent example of how law and order can flawlessly be achieved by people acting solely in their own self-interest; how the state and authoritarian establishments thereof are not pre-requisite for the harmonious functioning of society; and often how authoritarian law is far removed from justice. Substantiating this argument, the reason for the dissolution of the Law Merchants was due to the adoption of national commercial law codes instituted to protect the interests of local merchants, hence implying the loss of autonomy of merchant tribunals to state courts. Increasing emphasis on state interests spelled the end of the Law Merchants.

The Model

Before outlining the model of how private adjudication can work in Commercial Law, few premises need to be defined:

a. Conflicts are perpetual phenomena, even in a utopian society.

b. Laws are set by the legislature, only application thereof is privatised. Decisions taken by the non-state adjudicators are based on the prevailing set of laws and legislations, and do not set precedents. Thus rule production, being a public good, is exogenous to the model.

c. A frictionless credit and banking industry.

Private provisioning of Law may seem like an appalling idea at the first thought. However various aspects of law need to be differentiated. We will only be looking at the dispute resolution function of law, a private good by all measures. Given our assumption of no precedents being set in the private market for dispute adjudication, the decision of the court is binding on only the parties involved, thus making adjudication a private good. To substantiate the argument, we compare the dispute resolution with national defence. An attack on a Country A by Country B will inevitably affect every citizen of Country A. However, the conclusion of an altercation between two individuals X and Y need not affect any other party.

Painting a picture of what actually does not exist is a difficult task, given our multi-dimensional society. However, most technological inventions that we tend to take for granted today were actually refuted unanimously by the geniuses of that era. Some or all of the arguments presented here may be compartmentalised into “social fiction”. Nevertheless, this model is only an attempt to portray how a modern society would function under privately adjudicated laws.

The Scenario

In the highly ideal world, where there are zero transaction costs and perfect information symmetry, the second possibility would not arise, as all possible contingencies between all members of the society would be clearly and accurately defined. A code of conduct and its application would be known and decided in advance. Perfect information would ensure that injured reputation and the threat of ostracism act as effective enforcement measures.

However, since the assumptions of perfect information and nil transaction costs are not very plausible, we must look at incomplete contracts, unanticipated wrongs and disputes arising in unforeseen relationships.

In the competitive model that I propose, there would be an adequate supply of Private Adjudicators in the market for disseminating Justice to cater to the demand for determination of problems. The Private Adjudicators could form themselves in a hierarchical manner, there being multiple such hierarchies.[10] The said Private Adjudicators in the market would be free to advertise their services to prospective clients and a database of the cases resolved by each adjudicator and the verdict thereof would be maintained to ensure that prospective parties to suit make an informed choice.

The revenue of the adjudicators would be a proportion of the claim of the respective suit. However the proportion would differ from one Adjudicator to another, as in a competitive market suppliers are free to set their prices. The implication is that reputed Adjudicators will be in a position to demand more. This also results in efficient rationing of judicial resources, as opposed to the inefficient non-price rationing system in place as of date. Accessibility would be another key feature of such a judicial procedure as the dynamics of markets work. Supply would automatically be ensured wherever there is demand for judicial services. Most importantly strict accountability of Adjudicators would be secured. Mutual consent of parties to the Adjudicator would guarantee impartiality, as an Adjudicator known to be corrupt would simply to be consented to by both the parties.

[10] A court hierarchy is a collection of courts in which there is one court that has ultimate appellate jurisdiction over all the others, or any single court whose decisions are not subject to the review of any other court. India, for example, has a single court hierarchy, with the Supreme Court at the top.

Mutual Consent: Is it Feasible?

Disputes between two parties can arise in two ways.

A. Out of pre-existing relationships.
B. Torts, that is, civil wrongs, other than the breach of contracts.

A. Relationships bound by Contracts

When two parties are bound by contracts that they have agreed to abide by, the choice of Adjudicator is clearly defined. This sort of arrangement does not pose many problems. The only sources of disputes would be differences in interpretation of clauses and/ or incomplete contracts. Both these kinds of problems can be mediated/ adjudicated by the Adjudicator who is chosen by the consent of the parties involved.

This sort of system, although still in its nascent stages, is prevalent today and becoming more popular by the minute. This trend only points to the development of a fully competitive judicial structure in the future. If there is a breach of contract, then one party (the plaintiff) has the power to compel the other party (the defendant) to submit to adjudication. However this does not amount to coercion as the defendant agreed to submit to adjudication in the first instance.

B. Unforeseen disputes/ Contracts:

Disputes that are not avoided beforehand must be resolved after they arise. Lack of contracts (as often is the cases between strangers) leads to such problems. In such cases competition for litigants is the motivation for the Adjudicators. Since judges collect fees from litigants, the pecuniary motive may be sufficient to justify this assumption.

Given our competitive model, as described above, the consequences of the impact of competition on the market for justice depends on the mode of selection of the Adjudicator. In their groundbreaking article, Adjudication as a Private Good, Landes and Posner claim that ensuring competition may not lead to optimal solutions:

> "The competition would be for plaintiffs, since it is the plaintiff who determines the choice among courts having concurrent jurisdiction of his claim. The competing courts would offer not a set of rules designed to optimize dispute resolution but a set designed to favour plaintiffs regardless of efficiency."[11]

However, in saying this Landes and Posner present a very pessimistic view of the situation. They do not consider Mutual Compulsion, focussing on only Unilateral Compulsion, which gives the power to the Plaintiff to compel the Defendant to adjudication in the court of his choice. When the ability of plaintiffs to compel defendants to submit to adjudication applies

[11] Landes, William and Posner, Richard. (1978). Adjudication as a Private Good.

to only a single court system, such as the public courts of today and the others require the defendant's consent to be binding, pro-plaintiff bias will be limited. However, unilateral compulsion with multiple courts is not an institutional arrangement which courts can be called competitive.

Voluntary Adjudication Forums, of the form that have been described above, require the consent of both parties for their case to be submitted to Adjudication. Systematic biases towards the Plaintiff or the Defendant, if any, can be easily spotted and prove detrimental to the profitability of such tribunals. Hence objectivity and fairness is guaranteed.

Now the question that is raised is: how can institutional arrangements, with competitive courts, multiple court hierarchies and mutual compulsion be created? At the first thought, it seems that with mutual compulsion, no conclusion about the choice of Adjudicator would be reached.

Under mutual compulsion, both parties have the right to compel the other to submit to courts of their choice. One way of doing so would be giving the Defendant the power to appeal against the decision of the Adjudicator chosen by the Plaintiff, not necessarily in the same court hierarchy. Every decision can be appealed against, in any court hierarchy. So no court is secondary to another; they are all subservient to the litigants' power to choose amongst alternate venues of Adjudication. Submission to a particular court hierarchy requires the consent of that Adjudicator to take on the case.

Instinctively, it may seem that such a system would lead to pandemonium. No decisions would be arrived at and disputes would be prolonged till eternity. However there are two reasons why in actual this would not be the case:

1. We tend to overlook the fact that people in general are rational, prescient and thus would anticipate this situation before it occurs and act to avoid it. They also realise that moving from one court to another costs a lot of resources in terms of time and money and thus would prefer choosing un unbiased court, instead of choosing one that is biased and then having to move to another court time and again when the decision is appealed against. Even a slight probability of an infinitely prolonged suit would lead parties to opt for an objective, unprejudiced Adjudicator.

   > "Because each party knows that removing the case to a court biased toward himself will only lead the other party to do the exact same thing back to him, and so on and on until both are bankrupt, it is in his interest to choose a court that the other party will not reject." [12]

   It may be thought that if one party is financially more powerful than the other, it will drag on cases from one court to the other until his opponent gives up. However this argument is flawed in the light of our assumption of the existence of a perfect credit market, which would make finances available, given the credibility of the borrower.

[12] Diiani, Isaac. The Role of Competition in the Market for Adjudication.

Someone with a strong case, thus, will not have problems in securing funds from banks and other credit agencies to fight his case.

Slight irregularities in the credit market do not mean that those who are financially independent can perpetually drag cases against those who are not. Just because they can do so, does not mean they will, as the amount they are willing to spend will be restricted to the amount of claim of the case. Spending more than what you *might* gain would not be a course of action undertaken by a rational person.

2. Even from the point of view of the judges, it may, at first seem that since the amount of fees collected by the judges is a function of the number of cases decided by them, they have an incentive to accept as many cases as the litigants are willing to offer. But we need to remember that Judges are only resolving disputes, give the Laws set up by the State. There can only be a limited number of interpretations that judges can give to a particular law which is applied in a certain case. Also, giving diverse judgements in cases would actually decrease the attractiveness of such a court system as a means of settling disputes. There is an optimal amount of cases for judges as a whole which maximises the gains from fees. Beyond that, litigants would start substituting away from the courts as a means of dispute resolution. Thus it would in the judges' best interests to cooperate, and give results that have a low probability of being appealed against, as opposed to giving arbitrary judgements and forego future opportunities for adjudication. Thus even if the litigants fail to find an unbiased venue of adjudication; the judges will have an incentive to produce unbiased outcomes. Another factor which would *force* the judges to be unbiased is reputation and the damages that come with being known to be prejudiced. Judges face a trade off between being nonaligned to any interest group and have a chance of being nominated for adjudication by the entire market or being biased towards a particular group and ensure that they are not selected by anyone other than that group, plus always having their decisions appealed against. The former is a much more lucrative option than the latter.

3. There could be other ways of minimising the number of appeals to keep it to the optimum level and prevent errant appeals. For example, if one party appeals to a decision that has gone against it and loses it, it should be made to pay the other party's legal costs as well. This way, the cost of unnecessary appeals is raised and thus nuisance suits are avoided and only genuine concerns come up for appeals.

In a sense, the optimal number of venue changes is zero, with judges compromising beforehand and keeping their rulings within some range that all or both hierarchies find acceptable. If we assume zero information and transaction costs, that will be the outcome. In reality, however, venue changes are a natural and necessary part of the competitive process, and we should expect to see some positive number.

Even so, many questions remain unanswered. I attempt to provide answers for a few of them.

a. How will opponents be compelled to adjudication?

The answer to this question can only come about if we think beyond the system that prevails today. With the private adjudication system in place, private could have legal power of ex-party judgement, in case of non-appearance by the defendant. This is possible as the government retains the rule-making and rule-enforcement power even in our model of private dispute resolution. There could be other methods of ensuring cooperation by the defendant: for example, abolishing his right to appeal in case he does not comply with adjudication.

However even in the absence of such legislation, the chances of the Defendant not appearing for Adjudication are slim. Firstly, the Defendant, by refusing to appear to Adjudication has extinguished his chance of a fair hearing. The private Adjudicator would be well within its power to appeal on the basis of evidence provided by the Plaintiff and the law enforcement agencies would enforce that decision, unless it is appealed to by the Defendant, in which case his appeal would lose credibility. Even with an appeal, the Defendant risks losing the case and paying the costs of the Plaintiff, with a much greater probability than if he had appeared in the first instance. The second reason why a Defendant would comply for adjudication is that non-compliance invites damage to reputation and in case of commercial disputes, trade ostracism, the cost of which is likely to be very high.

b. How will the poor get justice?

The answer to this question is clear. The market provides the solutions. With competition, there will be a number of adjudicators in the market for justice, catering to all kinds of customers, like every other competitive market. There could be Adjudicators who do not charge an exorbitant price, or non-profit Adjudicators who are present in the market to ensure justice for the needy. The market is dynamic entity; continually innovating and evolving to provide service to the consumers. It differs from the government courts in the sense that for the private adjudicators to exist and thrive, litigants must be persuaded by way for lower costs and better service. The government on the other hand reached the same ends by compelling the litigants to appear; irrespective of costs or service.

c. Would people with more wealth not be at a clear advantage in this system, having the option to prolong cases at will?

It may seem that litigants with greater endowments or those who are willing to spend perpetually any amount to influence the outcome of the case, can continue to change the venue of adjudication after the other party is unable to devote resources further resources.

A person who has financial clout can guarantee himself a victorious outcome by repeatedly moving the venue of adjudication—even from unbiased courts—to courts biased in his favor, until the opposite party gives up. However, this pro-wealth bias needs to be probed further. Just because doing something is possible, does not mean that it would always be done. If the amount of the claim is lower than the amount of money needed to defeat an opponent by outspending it, then the cost of doing so outweighs the benefit. For example, if a dispute is worth ten thousand rupees, then the most that a risk-neutral litigant will be willing to spend to guarantee an outcome in his favor is ten thousand rupees, no matter how wealthy he happens to be.

The threat to outspend one's opponent would not be credible because the credit market would take care of such problems. Under our assumptions of low transaction costs in the credit market (an assumption which is not very implausible, given the development on Indian banking sector), those with strong cases would find financiers willing to fund the risk of venue changes.

Judges face tradeoffs too, in applying a biased doctrine and losing credibility, and applying an unbiased doctrine and making himself available to the entire market. It is not obvious that the latter would represent more business than the former.

In Theory *and* Practice? Putting the Model to Test:

Having outlined the foundations of the system of private adjudication, we proceed to test the feasibility of this model by applying its rules to certain aspects of Indian Property law. As a representative of the property market disputes, we will be taking two specific types of disputes:

a) Landlord-Tenant Disputes.
b) Co-ownership Disputes.

Landlord-Tenant Disputes

The disputes may arise due to non-payment of rent, enhancement of rent, fixation of fair rent, eviction of the premises or for any other reason. However, the tenant and the landlord have a written agreement between them (the Rental Agreement) which are legally binding on both parties and specify the jurisdiction in case disputes arise. Presently a landlord-tenant dispute can be adjudicated in the any District or High Court, by an Arbitrator or by a rent controller, depending upon the agreement between the two parties.

With our new model of private, competitive adjudication, every Rental Agreement will, on the outset, specify the Adjudicator who will be responsible for resolving disputes as and when they arise. The choice of the Adjudicator will not be arbitrary, and be reached by the mutual consent of both the parties. Out of all the available Private adjudicators in the market, the one who is most cost efficient, and is well acquainted with the facts and circumstances pertaining to Rental disputes will be decided on, thus ensuring expertise in dispute adjudication. In case a dispute arises in the relationship, one of the parties can approach the appointed Adjudicator for relief. The Adjudicator will summon the other party, hear the respective arguments and give the judgement. In case one party is not satisfied with the judgement. It has the option of appealing to another Adjudicator, in the same or a different court hierarchy.

Though the choice of Arbitration is already available with respect to Landlord-Tenant disputes today, it is still in embryonic stages. Certain diverse clauses of the convoluted Arbitration and Conciliation Act 1996 have constrained the growth of Arbitration as an industry. Another principal objection to the legislation is that it gives powers to the Courts to interfere with the arbitration proceedings, even before an award is made by the arbitrator. There is excessive judicial interference in the Arbitration Process. The single most remarkable aspect of the Indian experience over the last decade has been judicial intervention — while the Act bolted the front door and limited judicial intervention, courts have found other means to break through. The fact that Indian courts continue to not resist the temptation to intervene in arbitrations can be lethal. For a legal system which is plagued by endemic delays, a pro-arbitration stance would reduce the pressure on courts. Clearly, Indian courts are struggling to cope with the huge case-load. As of today Arbitration is not merely an attractive option for resolving disputes – it is absolutely essential to maintain the integrity of the Indian legal system. Encouraging parties to arbitrate however requires that the courts respect autonomy and refrain from intervening in the arbitral process unnecessarily. If disputes are going to

end up in courts anyway, there is scant incentive for parties to bother to arbitrate in the first instance.

Co-ownership Disputes

When there are co-owners of a property and one of the co-owners wants to get his/her share in the property to be enjoyed separately and independently, he/she may have to file a suit for partition. Partition suits can be settled by dividing the property by metes and bounds or by sale of property. Family Partition suits become especially complicated as there are documents like the will involved; the authenticity of which has to be confirmed.

Partition Suits are generally affected by dividing the property according to the shares to which each of the parties is entitled in law applicable to him. Each divided property gets a new title.

Taking the example of family disputes wherein siblings contest for their share in the ancestral property. The issues at stake could be many. Absence of a bonafide will by one or both the parents, doubting the authenticity of the will, demand for a greater share and so on and so forth. Family disputes, like divorce cases, tend to become complex due to the intensity of sentiments involved. This characteristic of such suits lends to the persistent delays, incessant interim orders and spiteful stays. When a dispute of this nature arises, compromise is usually the most preferred option to solve the problems. However, when compromise does not work, the only option that is left is to approach the courts. Generally, such cases take a lot of time before they are resolved.

In our model of private adjudication, resolving disputes which arise out of the blue, require the selection of an Adjudicator. When there are bonds of blood/ friendship, it might be possible to select an Adjudicator of common choice. Inability to do so would lead to the injured party filing a suit in the court of his choice, compelling the accused party to adjudication in the same court. After the court hands out its decision, the party that loses the case has the option of appeal to a higher court in the same or different hierarchy.

Looking Ahead

From the above analysis, few conclusions can be derived. Firstly, that the problems pertaining to the judiciary are not removed from the way and will continue to persist even after suggested reforms have taken place. A complete overhaul of the system of adjudication, as radical as it may sound, might possibly be the only solution.

Secondly, introducing privately competitive adjudication model may not work as perfectly as it is supposed to. Like any other model, it will have its shortcomings. However, that should not be enough for us to dismiss the model completely. What is needed is the realisation of the fact that this model can rid us off many of the incurable laws of the present system, even if it overlooks some aspects.

Thirdly, for private adjudication to fully develop into the role envisaged, parallel evolution of the society as a whole is a pre-requisite. This kind of system cannot develop in vacuum, nor can it sustain itself without complimentary changes in protection and security services, insurance services, legal education and the like.