

Justice in slow motion corrodes Sri Lanka's economy

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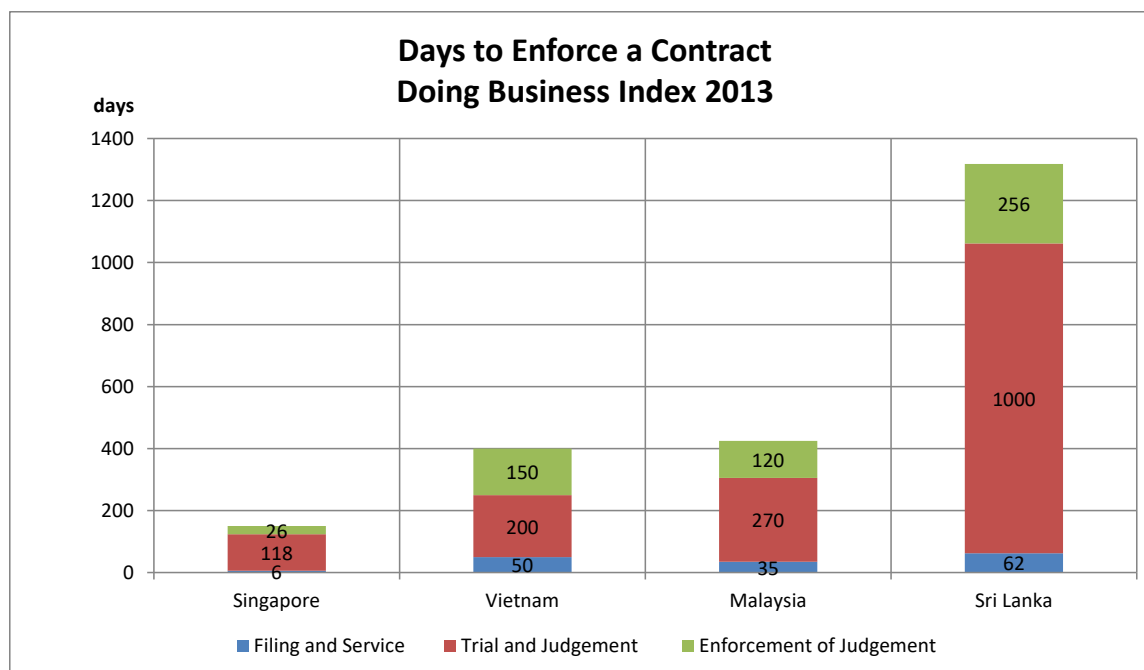
"Justice delayed is justice denied". If the celebrated maxim were true, Sri Lanka is an exceptionally unjust society. Litigants in Sri Lanka are regularly frustrated by the long delays inherent in our court system. Land cases, for instance, are known to span generations. So much so, that in times past, it was a convention in Sri Lanka for a lawyer, marrying the daughter of another lawyer, to be endowed a few land cases from his father-in-law's chambers as a handsome dowry!

There are at least three aspects to the problem that engage economists. First, delays in dispute resolution are costly – and not merely in legal fees, but in investments and initiatives "blocked" until a resolution. Second, a system with chronic delays in the legal system hugely increases uncertainty, risk and business competitiveness. Thirdly, it is an incentives and coordination problem (where everyone is a loser) and is therefore ripe for game theory-based analysis and solutions.

Impeding Business Competitiveness and Investment

The severity of the first two reasons: cost of delay and risk, are reflected in the "World Bank Doing Business Index 2013". Out of 185 economies, Sri Lanka ranks 133rd in "enforcing contracts". Three factors are considered when compiling this ranking, time, number of procedures and cost.

The major reason for the delay in Sri Lanka is the time taken in the courts. It takes an estimated 1,318 days to enforce a contract in Sri Lanka, while in Singapore (a country that Sri Lanka says it wants to emulate in terms economic progress) it takes just 150 days to enforce a contract. Even in the OECD, where some of the most complex international contracts are resolved, the estimated time is 510 days. This time delay, and the associated risks, then feed directly into estimations of "Business Competitiveness" and investor confidence. In fact, Sri Lanka is currently ranked at 81 in the global business competitiveness ranking. If, all things being equal, just the time variable is reduced to Singapore's 150, Sri Lanka's ranking would jump up nineteen places to 62nd in the world.



Amanda Perry in the American University International Law Review (2000) confirms the perception that court procedures in Sri Lanka were frequently subject to unreasonable delays. Based on empirical research on investor perceptions, she concludes that the highest priority should be given to addressing court delays in order to sustain investor interest in Sri Lanka.

The Coordination and Incentives Problems

The third reason, the incentives and coordination problem, is eminently solvable and simply requires some clear thinking. The problem is this: first, able lawyers waste valuable time idling uncertainly in courts waiting for cases to be called, which are then frequently postponed. This reduces the work they can do, increases the cost to their clients, and causes the justice system to slow down. Everyone, the lawyers, clients and the economy suffers; second, less able lawyers earn more when cases are postponed. Why does this happen?

Time is Uncoordinated

First, courts in Sri Lanka lack a time management system that enables lawyers and litigants to plan effectively. In the District Courts, a case list is displayed outside the courthouse, but without an assigned time, and litigants must come early and wait for their case to be called. In the Magistrate's Courts it is worse. Often there is no such list, and cases are called according to their type and in an order arbitrarily determined by court clerks.

Trials in the District and Magistrate's Courts are heard at the very end of a court day, with no indication on how long each trial is likely to take. Cases that are called down the order are very likely to face postponement, but lawyers must still come prepared and waste their time waiting.

Other jurisdictions have addressed this problem through simple means. Before 1849, oral arguments before the U.S. Supreme Court were unrestricted and arguments continued for days, making scheduling impossible. Yet by the mid-1800s, with increasing caseloads, time permitted to lawyers steadily decreased. In 1849, the Court limited oral arguments to two hours per side, which was reduced to one hour per side in 1925 and finally to one half-hour per side in 1970. In the United Kingdom, even the County Courts follow fairly strict schedules. Lawyers from each side are expected to provide prior estimates on the time required to present their cases, based on which judges allocate a reasonable time. This containment to an allotted time has resulted in efficient arguments, scheduled times and faster results.

As found also by the Sri Lanka Laws Delays and Legal Culture Committee (1985), in Sri Lanka, only the very senior, and very expensive lawyers, who are treated differentially by judges, are capable of getting scheduled times for their cases. They invariably serve the powerful clients. The Committee also acknowledged that these clients often gain from delays, particularly if the status quo is to their advantage.

Fee Structure has Perverse Incentives

Second, the fee system incentivises less able lawyers to accept, and even perpetuate, such delays: Lawyers are generally paid per appearance in court, whether or not the case is heard or postponed. Therefore, there is no great push from within the law profession to solve the problem.

The regulations and norms around legal fees in Sri Lanka don't require transparency, to the client, on rates and billable hours, and prohibit charges that are based on the performance of the lawyer: either in terms of speed or results. The false and hypocritical reasoning for this is that prospective earnings should not determine the quality of legal service. This means that lawyers on opposing sides could potentially collude to slow-down proceedings with postponements etc., and stand to benefit from it.

In contrast, in other countries, the permissible fee structures encourage lawyers to work out quick out-of-court settlements and to close court cases as quickly as possible, and even have their fees tied to the benefits to the client by the final result.

The Clock is Ticking

A "lawyer" mindset can lead to attempting solutions based on "rules" and "dictates". The economist's approach would revolve around aligning incentives and designing smart coordination structures. Perhaps it is time to let the economists approach this problem.

Warren E. Burger, a former Chief Justice of the U.S once observed that a sense of confidence in the courts is essential to "maintain the fabric of ordered liberty for a free people." If people come to believe that delays and perverse practices will drain an application to the Courts of any value, public support for the judiciary and the law will diminish causing incalculable damage to society.

The clock is ticking. Already those who refuse to kill ants are endorsing the extra-judicial killing of suspected criminals in Sri Lanka: "because cases will drag through the courts forever and be derailed". Justice delayed and denied is steadily corroding the social fabric. The economic and social consequences come slowly, but they are inexorable and huge. Sri Lanka cannot afford them.

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