

# Bargaining with Govt under the shadow of Litigation

Ram Singh

Lecture 6

# Disputes and Litigation with Govt

12/12/2017

Frivolous cases to land officials in trouble - The Economic Times

THE ECONOMIC TIMES

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## Frivolous cases to land officials in trouble

BY RAGHAV CHHIL ET BUREAU | UPDATED: DEC 12, 2017, 02:23 AM IST

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NEW DELHI: The Centre is planning to introduce a clause in the national litigation policy to discourage unnecessary government litigation.

Officers found guilty of encouraging unwarranted litigation would face departmental action, according to the plan. The government is the country's biggest litigator with recent data suggesting 46% of all litigation involved the government.

"It has been noticed that in several cases, unwarranted litigation is endorsed by government officials without the application of mind. Ordinarily, this is to avail all appellate forums, little realising the burden put on the state exchequer and increase in litigation to boot" said a top government official requesting anonymity.

Elaborating on the official added: "Each time a lower court refuses to find force in a case involving the government, the right to appeal lies with the government. It is at this stage that some of its officials mindlessly endorse filing of appeal. The proposal aims to fasten responsibility on officers found casually encouraging such unwarranted litigation".

"It is found that despite lack of a merit, an appeal was recommended to be filed, the concerned officer should be asked to explain. If he fails to submit a satisfactory response, the department head can take suitable action against him to ensure it does not recur," said another top government official privy to the development.

The government is yet to take a final call on the inclusion of the new clause in the national litigation policy, which is hanging fire for the past few years. When asked about the proposed punitive action to be taken against delinquent officers, a government official said: "It will depend on a case-by-case basis. Depending on the degree of dereliction of duty and application of mind, the concerned ministry/department will be entitled to take action against the officer, which can even include dismissal."



Right from its inception, the Narendra Modi government had been advocating a reduction in government litigation.

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Right from its inception, the Narendra Modi government had been advocating a reduction in government litigation. Last year, Prime Minister Modi also underlined the immediate need to lessen the burden on judiciary which, he said, spends most of its time in deciding government litigation.

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Ram Singh (DSE)

Government Litigation

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Railways biggest government litigant with over 66,000 cases: Law Ministry - The Economic Times

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## Railways biggest government litigant with over 66,000 cases: Law Ministry

BY PPT | UPDATED: JAN. 16, 2017, 11:48 AM IST

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NEW DELHI: The railway ministry is the biggest litigant among the government departments as it is a party to over 66,000 cases pending in courts across the country, the law ministry says.

Government litigation includes service matters, disputes with private entities as well as disputes between two government departments and two PSUs, according to a law ministry document of June 2017.

Citing data available on the LIMBS – Legal Information Management and Briefing System – website, the document states that as on June 12, 1,35,000 government cases and 369 contempt cases against government or its officials were pending in courts.

Railways with 66,685 cases pending has the highest number of pending cases. Out of the total, 10,454 cases are pending for more than 10 years.

The Ministry of Panchayati Raj with three pending cases has the least number of pendency among government departments.

The document clarifies that as the LIMBS is a dynamic website, the data is constantly changing.

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Railways with 66,685 cases pending has the highest number of pending cases. Out of the total, 10,454 cases are pending for more than 10 years.

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The finance ministry follows the Railways with 15,646 cases. The Ministry of Communication has 12,621 cases pending in courts.

The Ministry of Home Affairs is the fourth biggest litigant with 11,600 cases, the document states.

In a letter addressed to his cabinet colleagues heading various ministries, Law Minister **Ravi Shankar Prasad** had recently said that "government must cease to be a compulsive litigant...the judiciary has to spend its maximum time in tackling cases where the government is a party, and the burden on the judiciary can only be reduced if the cases are filed after taking a careful and considered view".

The law minister's letter to his cabinet colleagues and the chief ministers came at a time when the Centre is working to bring out a national litigation policy since 2010. Several states have already adopted their separate litigation policies.

Prime Minister Narendra Modi had in October termed the government as the "biggest litigant" and had pushed for a need to lessen the load on the judiciary which spends its maximum time in tackling cases where the government is a party.

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# Disputes and Litigation with Govt

8/29/2017

Pick lawyers from our panel, Law Ministry tells autonomous bodies - The Economic Times

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## Pick lawyers from our panel, Law Ministry tells autonomous bodies

BY VASUDHA VENUGOPAL, ET BUREAU | UPDATED: AUG 29, 2017, 01:01 AM IST

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NEW DELHI: In a significant decision that will likely change the legal strategies of high-powered institutes and bodies such as the Telecom Regulatory Authority of India, University Grants Commission, Indian Institutes of Management, Indian Institutes of Technology, and government medical and defence institutes, the law ministry has directed that these autonomous bodies must be represented only by lawyers empanelled by the department of legal affairs in cases where both the Union government and these bodies are parties.

The law ministry's letter, reviewed by ET, has been sent to all ministries. It marks a big shift in the way autonomous bodies can pick lawyers.

There are over 500 autonomous bodies that come under the administrative jurisdiction of various ministries. The law ministry letter raises the issue of the quality of lawyers representing these autonomous bodies.

A senior law ministry official explained to ET that this directive is to impress upon the autonomous bodies that their choice of lawyers needs to improve and that the burden on ministries in terms of filing appeals for lost cases must be reduced.



A senior law ministry official said that this directive is to impress upon the autonomous bodies that their choice of lawyers needs to improve. Representative Image.

**Big Change:**  
The end of Five-Year Plans: All you need to know

# Disputes and Litigation with Govt

In several contexts,

- Bargaining between 'Govt' and Private Person takes place under the shadow of litigation.
- Govt makes a written and 'official' offer
- That is, if bargaining fails, the parties go for litigation.

Example: Consider dispute/bargaining between

- Govt (G) and Land owners (L) over compensation for land acquired by G
- Government as Injurer and a Victim of an accident. Negotiating over
  - compensation for the harm suffered by the victim,
  - or the income forgone due to injury.
- Tax authority and Tax-payee. Negotiating over
  - the amount of undeclared income
  - or tax rate applicable to the declared income.

# Assumptions

During litigation, the parties

- Choose litigation efforts to produced evidence - depending on the stakes involved, their ability, etc.
- They do so (presumably) hoping that the litigation efforts affect the outcome (court decision)
- So, it seems the evidence/information produced by parties is 'soft'.
- As efforts are costly, parties essentially choose the level of litigation costs.

# Model: Features and Contexts

We

- allow litigation efforts to be endogenous choices.
- allow for informational asymmetry between litigant.

Our results apply to any bargaining situation where:

- First party makes the *last* 'take it or leave it' (TIOLI) offer
- If offer rejected, parties get 'disagreement payoffs' - litigation awards
- The disagreement payoffs are
  - stochastic - there is uncertainty about the litigation outcome
  - interdependent - the higher are payoffs for one party, the lower will be the payoffs of the other.
  - endogenously determined by each party's effort.

# De-jure Entitlements Vs De-facto Payoffs I

The L and G negotiation over compensation:

- Compensation is required to be based on (equal to) the 'Market' value.
- Instances of litigation over compensation are frequent.
- The differences between the compensation received, on one hand, and the market value, on the other hand, is significantly large, especially for very low and very high value properties, Munch (1976) and Chang (2008);
- Compensation for high-value properties is much greater than their market value;
- Compensation for the low-value properties is significantly less than the market value.

## De-jure Entitlements Vs De-facto Payoffs II

- The regressive nature of compensation persists, regardless of whether the compensation is received by accepting the official offer or through the litigation process.
- A study of 798 properties in Chicago by Munch (1976) concludes:  
*“low-valued properties receive less than market value and high-valued properties receive more than market value,” and “[a]s a rough approximation, a 7,000 parcel receive about 5,000, a 13,000 property breaks even and a 40,000 property may get two or three times its market value.”*
- For New York City, Chang (2010) shows similar results.



# Inequity in Compensation: Existing explanations

- The ignorance of low-valued property owners: (Chang, 2012)
- Poor quality of government lawyers: (Munch 1976; and Bell and Parchomovsky, 2007)
  - No match with lawyers of high value property owners
- Judicial Bias: Different precedent values of court awards (Posner, 2003)
- Why Litigation in Equilibrium? - different beliefs about litigation outcome or asymmetric information between the parties parties involved. Bebchuk (1984), Schweizer (1989), Spier (1992) and literature see Shavell (2004).
- We show that litigation with Govt is possible even under symmetric information

# Litigation over Compensation: India

**Table:** Summary Statistics of ADJ Courts (Delhi) awards delivered in 2008, 2009 and 2010

Land Type	Number	% Increase in Compensation by Court			
		Mean	Std. Dev.	Min	Max
Agriculture	470	18.36	49.53	0	427.63
Residential	12	29.47	38.72	0	109.09
Commercial	13	33.09	45.66	0	109.09
Others	30	49.21	131.91	0	514.28
Total	525	20.57	56.68	0	514.28

Source: Singh (EPW, 2012)

# Litigation over Compensation

## Punjab and Haryana High Court Orders (2010 and 2011)

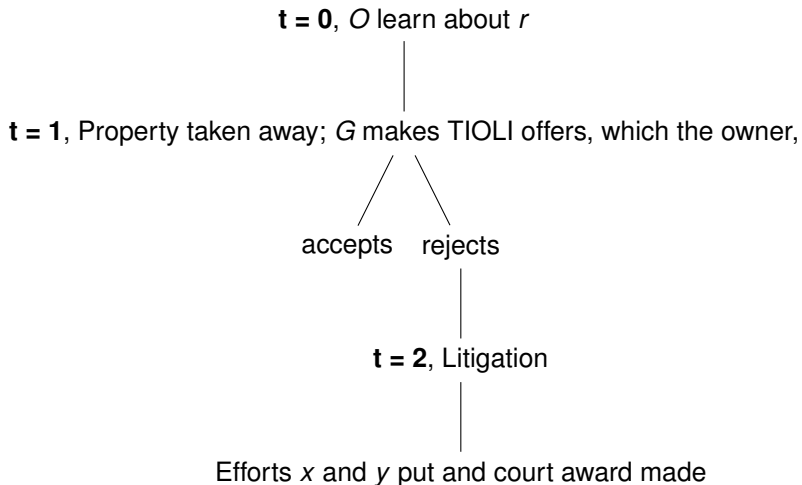
COMBINED	Compensation by ADJ over LAC	Compensation by HC over ADJ	Compensation by HC over LAC
	% increase	% increase	% increase
Mean	214.26	42.02	290.16
Std. Deviation	11.4826	2.0051	11.6957
Min	0.00	0.00	0.00
Max	38400.00	5205.85	38400.00
Number of observations	1231	1361	1231

# Model: Basics I

- Two parties: Owner,  $O$  and Government,  $G$ .
- $O$  has property of value  $r$ .
- At  $t = 0$ ,  $O$  learns about  $r$ .
- At  $t = 1$ ,  $G$  takes away  $O$ 's property
- The law entitles  $O$  to claim compensation  $r$  from  $G$ .
- At  $t = 1$ ,  $G$  makes a Take-it-or-Leave-it offer, denoted by  $r^o$  to  $O$ .
- If offer is rejected, litigation takes place at  $t = 2$ .
- $x$  denote the litigation effort put in by  $O$ ;
- $y$  denote the litigation effort put in by  $G$ ;

## Model: Basics II

### The Game Tree



## Model: Basics III

- During litigation the two parties choose litigation efforts to play Nash equilibrium.
- $r^c$  denote the court awards.
- Fixed cost of litigation efforts is  $x_0$  and  $y_0$ .
- The cost of effort function is given by  $\psi(\cdot)$ . Assume  $\psi'(\cdot) > 0$  and  $\psi''(\cdot) > 0$ . Let,

$$\psi(x) = \frac{x^2}{2} \text{ and } \psi(y) = \frac{y^2}{2}$$

- At  $t = 1$ , uncertainty about the court awards.

## Model: Basics IV

- $r^c$  is a random variable with support  $[\underline{r}^c(r), \bar{r}^c(r)]$ ,
- Let  $E(r^c|r, x, y)$  denote the expected court award
- Plausibly,  $\frac{\partial E(r^c|r, x, y)}{\partial r} > 0$ ,  $\frac{\partial E(r^c|r, x, y)}{\partial x} > 0$  and  $\frac{\partial E(r^c|r, x, y)}{\partial y} < 0$ .
- Marginal gains from litigation effort decrease with effort levels, i.e.,  $\frac{\partial^2 E(r^c|r, x, y)}{\partial^2 x} < 0$  and  $\frac{\partial^2 E(r^c|r, x, y)}{\partial^2 y} > 0$ .

### Optional Specification:

We can write

$$E(r^c|r, x, y) = \int_{\underline{r}^c(r)}^{\bar{r}^c(r)} r^c f(r^c|r, x, y) dr^c$$

where  $F(r^c|r, x, y)$  and  $f(r^c|r, x, y)$  as the conditional distribution and density function, respectively.

$F$  satisfies FOSD w.r.t.  $r$  and  $x$ .

# Equilibrium I

Suppose,

- during litigation each party is represented by a lawyer
- $\lambda_O$  is the incentive power of the contract/agreement b/w the O and his lawyer
- $\lambda_G$  is the incentive power of the contract/agreement b/w the O and his lawyer

Given  $y$  and  $r$ , the lawyer of  $O$  will solve:

$$\max_x \{ \lambda_O [E(r^c | r, x, y) - x_0] - \psi(x) \}, \text{ i.e.,}$$

For given  $x$ , the lawyer of  $G$  solves:

$$\min_y \{ \lambda_G [E(r^c | r, x, y) + y_0] + \psi(y) \}$$



## Equilibrium II

Clearly,  $\lambda_O > \lambda_G$ . Suppose,

- $\lambda_O$  is normalized to 1.

Let

$$\lambda = \frac{\lambda_G}{\lambda_O} = \lambda_G < / > 1, \text{ i.e.,}$$

$\lambda$  denoted the relative incentive for the lawyer of G.

So, given  $y$  and  $r$ , the  $O$  will solve:

$$\max_x \{E(r^c | r, x, y) - \psi(x) - x_0\}, \text{ i.e.,}$$

$$E_x(r^c | r, x, y) - \psi'(x) = 0.$$

For given  $x$ , G solves:

$$\min_y \{\lambda [E(r^c | r, x, y) + y_0] + \psi(y)\}, \text{ i.e.,}$$

# Equilibrium III

$$-\lambda \frac{\partial E(r^c | r, x, y)}{\partial y} - \psi'(y) = 0;$$

Suppose, the above FOCs give the solution to be:

$$(x^*(r, \lambda), y^*(r, \lambda))$$

That is  $x^*$  solves

$$E_x(r^c | r, x, y^*) - \psi'(x) = 0.$$

and  $y^*$  solves

$$-\lambda \frac{\partial E(r^c | r, x^*, y)}{\partial y} - \psi'(y) = 0;$$

$$\lambda \rightarrow 0 \Rightarrow y^*(r, \lambda) \rightarrow 0$$

$\lambda < 1? |$ 

- Smt. Poonam v. State of Haryana and another (R.F.A. No. 3008 of 2008), the HC of P and H observed

*“This court is constrained to comment upon the conduct of the State as well as HUDA ...*

*even though they had notice of the fact that the land owners had produced on record various sale deeds showing the consideration paid therein ranging from Rs. 12,00,000/- to Rs. 80,00,000/- per acre, no documentary evidence was led by the State or HUDA to rebut this evidence. ...*

*What is generally seen is that practically no evidence is led by HUDA in any of the cases before the Reference Court and similar is the position with regard to addressing arguments before the higher courts...”*

;

$\lambda < 1? \text{ II}$ 

- State of Haryana and another Vs. Gram Panchayat of village Jharsa and another (R.F.A. No. 2125 of 2010), the HC of P and H observed

*“ What has been experienced in number of cases, which came before this court is that in none of the case(s), wherever HUDA was represented by a counsel, anything was done by him except getting his presence marked.*

*The position is not different even in the proceedings before the court below.”*

# Expected Court Awards

For symmetry and simplicity, let

$$\frac{\partial^2 E(r^c | x, y)}{\partial y \partial x} = 0.$$

$$E(r^c | r, x, y) = \phi(r)(ax^{\frac{1}{k}} - by^{\frac{1}{j}}),$$

where  $j, k > 1$ . Note:

- $k = j$  and  $a = b$ : lawyers of O and G are equally capable.
- $k = j$  and  $a > b$ : lawyer of O is more capable than that of G.
- $k = j$  and  $a < b$ : lawyer of G is more capable than that of O.
- $a = b$  and  $j > k$ : lawyer of O is more capable than that of G.
- $a = b$  and  $j < k$ : lawyer of G is more capable than that of O.