PART - V
Judicial Activism In Procedural Law

Inspite of asserting its dominant role in providing justices to the common man in India the judiciary still needs to do a lot in mitigation of rigors of procedural law.

Latches and Delays:

The accumulation of arrears in the adjudicating institutions of any society do not just reflect on the working methods of these institutions themselves. The presence of arrears reflect also on the litigating habits of the people as a hole. They also reflect on the relationship between the people and their go-betweens, the lawyers. India is a fairly large country with huge population. To some extent, it is inevitable that the volume of litigation shall be high. At the same time, Indians are fairly litigious people. They have been known at create adjudicating institutions (like nyaya panchayat and lok adalats) at grass root live. They have also been able to adapt ostensibly non-Indian adjudicating methods for their litigation uses. Litigation is perpetuated for a great number of social, economic, personal and therapeutic reasons. In the long run, checking arrears in the Supreme court is no enough. Arrears breed at various hierarchical levels below the Supreme Court.

The system suffers from the ailment of adversial processes, deterioration in its prestige, maximization of quantity and minisation of quality, corruption, delay etc. The menace of delay not only discerns justice denied, but it is now visioned as justice circumvented, justice mocked, and the system of justice undermined. Delay culminates a sense of injustice; long periods of denial emanates uncertainty. The problem of judicial delay seems to have reached such a climax of notoriety that one hardly can escape from its vice.

The vice of delay has affected the criminal justice process. The interstices of criminal justice process involve investigation process, court process, adversial procedure (i.e. procedural bottlenecks, suffering from technicalities),
delivery of judgment, and the time consumed therein. All these processes cause delay thus making the entire process a riddle wrapped in a mystery inside an enigma. The vice of delay has developed into an open hostility in a much as the criminal justice system has become a focal point of dissatisfaction, it brings our courts into disrepute, its worst effect is on the complainant or victim to whose traumatic suffering the system appears to be heartless, it is more prone to error (possibility that witness will either die or disappear and that memories will fade), it paves way for undesired or unwarranted opportunities to suborn witnesses or to cause material evidence to disappear, to create defence by way of alibi, etc.

In order to overcome this sort of dissatisfaction, various reports of the committees and research works of the academia have prescribed recipe either to minimise or to ameliorate the AIDs of delay. The judicial response in this perspective is also imperative. However, the diagnostic measures to cure this ailment have left no remarkable dent, and the problematic-delay-disease continues to survive. It may be no exaggeration to say about the delay. What was true then concerning the complaint on delay is true now and may be true tomorrow, if some adequate or sufficient as well as efficient measures are not taken to minimize or ameliorate the delay.

Immediately after the Independence, the Government of India entrusted to the Law commission of India the task to plug loopholes in the criminal justice system and suggesting measures to correcting the system by turning it to the avowed principles of liberty and equality shorn of inefficiency, incorruptibility, and inordinate delay. Unequivocally, the law commission of India has been making in-depth examinations of the system contained in the statutory books. Its works indeed have staggering as well as telling with at length the administration of justice, and, a fortiori, suggested reformatory measures in improving the criminal procedure code thus making the criminal justice process (investigation as well as trial) speedy; inexpensive; lessening bottleneck,
minimizing adversaries, and redacing-if not completely eliminating the official serfdom14. Consequently, the code of criminal procedure, 1989 was extensively reformed on the lines recommend by the Law commission of India and ultimately re-enacted the Cr.P.C. in 1973.

The Law Commission again took an opportunity to look into the question of delays and arrears, and made certain penetrating suggestions in the Seventy-Seventh Report in 1977 34aa Viz. To secure elimination of delay speedy clearance of arrears. The commission noted that because of heavy backlog of cases pending before the courts the problem of law's delay has assumed gigantic proportion; has subjected the judicial system to severe strain; and has shaken in some measures, the confidence of the people to redress their grievances and togrant adequate and timely relief. The commission emphasised: "The community has a tremendous stake in the preservation of image of the courts as dispensers of justice. The weakening of the Judicial system in the long-run has necessarily the effect of undermining the foundation of the democratic structure. Due and proper dispensation of justice is one of the most essential functions and obligation of the State. "The commission reiterated its stand by quoting from Rankin Report." Unless a court can start with clean state, the improvement of method is likely to tentalise only. The existence of a mass of arrears take the heart out of a presiding judge. He can hardly be expected to take a strong interest in the preliminaries, when he knows that the hearing of the evidence and decision will not be by him but by his successor after his transfer. So long as such arrears exist, there is temptation to which may presiding officers succumb, to hold back the heavier contested suits and devote attention to lighter ones. The turn out of decisions in contested suits is thus maintained somewhere near the figure of institution, while the really difficult work is pushed further into the background.

Herein a reference to the Report of Arrears committee-headed by Justice V.S. Malimath 34a becomes imperative since it has identified various causes
for the accumulation of arrears in the High Court, which inter alia, tell the woeful tale of incidence of delay in the disposal of cases. The chief factors which contributes in this direction are: Litigation explosions, radical change in the pattern of litigation; increase in the litigative activity, accumulation of first appeals; additional burden on account of election petitions; continuance of the ordinary original civil jurisdiction in some High Courts, inadequacy of judge strength, delays in filling up vacancies in the High Courts, unsatisfactory appointment of judges, inadequacy of staff attached to the High courts; inadequacy of accommodation; failure to provide adequate forums of appeal against quasi-judicial orders; inordinate concentration of work in the hands of some members of Bar; lack of punctuality amongst judges, Civil Revisions-indiscriminate exercise of jurisdiction; second appeal- ignoring the limitation on exercise of jurisdiction; long arugments and prolix judgements; lack of priority for disposal of old cases, failure to utilise grouping of cases and those covered by rulings; granting of unnecessary adjourments, unsatisfactory selection of Government counsel; lawyers not appearing in courts due to strike, etc; population explosion, hasty and imperfect legislation; plurality of appeals and hearing by Division Benches, inordinate delay in the supply of certified copies of Judgements/order; indiscriminate resort to writ jurisdiction; letters patent appeals, inadequacy in classification and grouping of cases, constitution of benches and their frequent changes, indiscriminate closure of courts; appointment of sitting judges as commission of Inquiry and printing of papers book in criminal matter.

The Malimath Committee, therefore opined that before the ailment of delay as well as arrears takes the shape of a grave malignant it would be imperative that an urgent attention is required to paid to the resolution of chronic problems of arrears by taking appropriate remedial measures before the situation deteriorates beyond repair and the system collapses under its weight. The problem of arrears and delay is interwoven and as such the lessening the arrears
would naturally be a pointer to ameliorating delay. Broadly, the Malimath Report submits a number of recommendations to adapt remedial measures to systematise the judicial process\textsuperscript{34c}. Succinctly, these recommendations are

i) There is no justification to amend Article 139-A of the constitution of India,\textsuperscript{34d}

ii) Judges must sit in court punctually and for at least five hours on every working day to obtain maximum turn over;

iii) Utmost care should be taken to ensure that judicial time is not wasted. Casual absence from court hour, absenting on account of strike or absention from court by lawyers, keeping cases part-heard for unduly long time and inordinate delay in pronouncing judgements are matters of introspection’s and self correction by judges.

iv) If an Advocate appearing for a party is absent without reasonable cause and if the judge dispose of the case recording a finding this behalf against the lawyer such a finding should be deemed to amount to misconduct on the part of the advocate, and copy of such misconduct should be sent to the Bar Council for appropriate action being taken under the Indian Advocates Act. The suggestions seems to aim at lessening delay

v) A convention be established that once counsel has commenced the arguments, no other counsel shall be allowed to take over and that the engagement of another counsel shall not be a ground for adjournment of the case.

vi) Efforts should be made to discourage the negative practice adopted for avoiding the Benches

vii) The sitting hours of each High court may be increased by half an hour on each day or total number of working days of the courts increased by twenty-one days, and preferring to either of the alternatives may be devised taking into consideration the views of the Bar.
viii) An immediate attention is required to be paid by introducing a provision in the relevant statutes, regarding the non-appointment of a counsel by the State, statutory authorities and public sector undertaking without the concurrence of the Chief Justice of the High Courts;

ix) Ordinarily, High courts be closed as a mark of respect of the demise of dignitaries such as the President of India, the Prime Minister, the Governor, the Chief Minister, the Sitting Chief Justice and Judge of Supreme court or of the High Court.

x) No unilateral decisions to abstain from the work should be taken by the Bar without prior consultation with state, the Chief Justice should be offered the fullest support and cooperation by every puisne judge of court.

xii) The services of retired judges should be utilised for appointments of commissions rather than of sitting judges of High Courts and as such the commission of Inquiry Act should be suitably amended.

xiii) A convention should be adopted for striving to lay down the distinctive norms in regard to the work turnover for the different sections of registry and determine the strength of staff, and the Chief Justice of the state High Court should give intimation to state Government in that behalf for inclusion of provisions in the budget as a “Charged” item.

xiv) The utilization of modern scientific technology be effectively made for promptness of the work such as use of computers both on the administration and the Judicial side, Xerox copiers, telex machines, word processors, electronic typewriters, calculators, dicta-phone, microfiling equipment’s for preservation of records, and the Government at the centre and state should allot necessary funds for the purpose.

xv) The conciliation courts should be established on the model of the scheme evolved by Himachal Pradesh High Court all over the country with power, authority and jurisdiction to initiate the conciliation proceedings in all types of
cases at all levels, e.g. amending order X and order XXVII of code of Civil Procedure, Motor Accidents Claims Tribunals under Motor Vehicles Act, matrimonial disputes under the appropriate personal laws as well as family courts' legislations, be amended suitably to make the scheme function more effectively and efficiently, etc.

The above mentioned recommendation of Malimath committee are appertaining to the High Court alone. But it may not be forgotten that problems of arrears as well as delay emanate very much from the subordinate judiciary as well. Punctuality both by the members of Bars and the presiding officers is imperative at the level of subordinate judiciary inasmuch as it is paertinent at the higher level; the keeping of records in utmost disarray condition is as much visible and alarming in the records rooms of subordinate judiciary as observed in the case of records rooms of higher judiciary, promptness of record production as well as record maintenance through scientific techniques such as computers, xerox, dictaphones, microfilming, word processors, etc. is as much demanding as well as desirable as in the case of higher judiciary. It, therefore, seems expedient that introspection as well as self-correction at the level of subordinate judiciary is the need of the hour.

The Judicial Diagnosis of Delay:

The Supreme Court of India, as the guardian of the fundamental rights of the people, has obligations as well as powers of wider amplitude to ensure a speedy trial for the accused, and as such while adopting an activist approach in Hussainar Khatoon V. State of Bihar the Apex Court held by
following the dynamic interpretation placed on Article 21 of the constitution of India in the case of Maneka Gandhi V. Union of India 36 that.

Speedy trial is the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that the United States, speedy trial is one of the constitutionally guaranteed rights... so also Article 6 of the European Convention of Human Rights provides that everyone arrested or detained shall be entitled to trail within a reasonable time or to release pending trial... No procedure which does not ensure a reasonable quick trial can be regarded as "reasonably, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.

The Apex court has also revisited its obligation when in Antualay's case 37 it has reiterated its stand by issuing the necessary directions as well as guidelines to the State for the minimisation of delay in the domain of criminal justice process. The Supreme Court issued directions for the speed trial of the case against the former Chief Minister of Maharashtra, Mr. A.R. Antulay, on the charge of corruption pending before the Special Judge, Bombay. It however did not agree with the contention of petitioner seeking quashing of decade old corruption case on the ground of inordinate delay. The court, however, opined that it is not possible in the very nature of things and present day circumstances to draw a time limit beyond which a criminal proceeding will not be allowed to go 38. It seems that the court has adopted a novel approach to the plagueing problem of delay, because there is no invention/discovery apparent of any apparatus or the barometer to measure the delay. There may be different considerations to evolve the principles whether there occurred delay, and every case has to be decided on its own facts having regard to the principles enunciated herein-after; whether in fact the proceedings have been pending for an unjustifiable long period; the
accused may himself have been responsible for delay in many cases, in some cases
the delay may occur for which neither the prosecution nor the accused can be
blamed by the system itself. The Supreme court, how resolutely expressed that
where the accused himself may have been responsible for the delay he cannot be
allowed to take the advantage of his own wrong 39. Be that as it may, the Apex
court opined that the plea for speedy disposal of cases to minimising or
ameliorating the delay cannot be emanated from article 21, because Article 21 of
the constitution of India prescribes the recipe of adopting uniformity, each case has
to be decided on its own facts; obviously, the matters/issues of delay have to be
resolved under section 468 of code of criminal Procedure 40. However, the
Supreme court has issued the following guidelines for the speedy trial for
frewarning that these guidelines are not exhaustive since it is difficult to foresee all
situations and to lay down any hard and fast rules. The guidelines are:

1. Right to speedy trial is the right of the accused. The right to speedy trial
emanates from Article 21 of the constitution of India. Speedy Trial is also in
public interest or that it serves the societal interest, it is in the interest of all
concerned that the guilt or innocence of the accused is determined as quickly as
possible.

2. Right to speedy trial flowing from Article 21 encompasses all stages, namely,
the state of investigation, inquiry, trial, appeal, revision and re-trial. That is
how this court has understood this right and there is no reason to take a
restricted view.

3. The concerns underlying the right to speedy trial from the point of view of the
accused are:

   a) The period of remand and pre-conviction detention should be as short as
      possible. In other words, the accused should not be subjected to unnecessary
      or unduly long incarceration prior to his conviction.
b) The worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal and

c) Undue delay may well result in impairment of his ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

4. One cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings, because “delay is a known defence tactic”. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. The prosecution also, for whatever reason delays the proceedings. Obviously right to speedy trial alleged of infringed give rise to the a question. Who is responsible for the delay? It may be the delay tactics of either party to the proceedings, it may be frivolous proceedings or proceedings taken merely for delaying the day of reckoning, it may be the system etc.

5. While determine whether undue delay has occurred one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work load of the court concerned, prevailing local conditions and so on – what is called, the systematic delay… a) realistic and practical approach should be adopted in such matter instead of a pedantic one.

6. Inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecutions should not be allowed to become a prosecution. But when does the prosecution becomes persecution again depend upon the facts of a given case.

7. An accused’s plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did
make such a demand and yet he was not tried speedily, it would be plus point in his favour, but the mere non-speaking order for a speedy trial cannot be put against the accused.

8. The court has to balance and weight the several relevant factors – balancing test or “balancing process” – the determination in each case whether the right to speedy trial has been denied in a given case.

9. Where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction; as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case it is open to the court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence. Where the trial has concluded – as may be deemed just and equitable in circumstances of the cases.

10. It is neither advisable nor practicable to fix any time limit for trial of offence. Such rule cannot be evolved merely to shift the burden of prevailing justification on the shoulders of the prosecution. In every case a complaint of denial of right to explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The supreme court of U.S.A. too has repeatedly refused to fix any such outer limit in spite of the Sixth Amendment. Nor do we think that no fixing any such outer limit ineffectuates the guarantee of right of speedy trail.

11. An objection based on denial or right to speedy trial and for relief on that account, should first be addressed to the High courts. Even if the High court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High court must, however, be disposed of on priority basis 41.
12. While examining the outcome of judicial attitude, one discerns that the Apex Court seemed to be vacillating on the debate of right to speedy trial. Would it not be safe to submit that this vacillating attitude be contributory to piling of cases resulting into arrears and, ultimately, culminating to delay in disposal of cases, collapsing of judicial process under its own weight; and the deathknell of the Indian legal system? From the type of attitude one may gather the impression that the problem of speedy disposal of cases seem to remain at the same juncture where it was originally, and the several reports 42 and judicial pronouncements have been able to lessen the bottlenecks of the problems.

Ways and means must be devised so that disputes can be settled out of court at all levels. Litigants and their counsel must be persuaded to try and adapt their dispute resolution methods without taxing the formal adjudication machinery, other than as a last resort. The Bar Council could take a lead in this matter by setting up conciliation cells. The Government could also take a lead in this area. The Government both at the center and in the states, is by far the largest litigant in the country. The various Governments departments, the autonomous corporations and semi-government organizations pursue a very active litigation policy. The government itself can counsel restraint in larger number of cases. Ultimately, arrears at all levels can only decrease if the litigation activities of the people of India find other avenues for expression and non-expression.

Law does not entertain state claims. Maxims such as “delay defeats equity” embody this principle. Latches is reprehensible delay. As far as ordinary civil suits are concerned the Limitation Act clearly lays down the maximum period within which such cases should be brought to judicial settlement. The provisions of the Limitation Act are, however, not applicable to writ proceedings and the rule applied is that writs being equitable remedies the party should approach the court expeditiously. Whether a party has approached the court in a particular matter
expeditiously is to be decided on the particular facts of the case. Hence understandably the constitution has not prescribed any time limit within which a writ petition has to be filed. It is wisely left to the discretion of the Judiciary. The limitation on the exercise of writ jurisdiction by courts based on the equitable principle of delay and latches are, therefore, self-imposed.

As a matter of general principle, courts insist that a petitioner should be diligent in pursuing his remedy and file his petition within a reasonable time from the date of order challenged and an under delay on his part will debar him from getting relief. 66. It has, at the same time been recognized that his "is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay, the court must reasonably refuse to entertain the petition. 67

The need for flexibility of approach is exercising the judicial discretion in this area has been repeatedly emphasized 68. But a judicious and reasonable exercise of discretion seems to be unnecessarily fettered by the tendency to measure the delay with reference to the period of limitation under the Limitation act for filing suit under similar suits under similar circumstances. The decision of the Supreme Court in Madhya Pradesh V. Bhailal Bhai 69 contains an authoritative formulation and application of this rule. It was observed 70.

The maximum period fixed by the legislature as the time within which the relief by a suit in a civil must be brought may ordinarily be taken to be a reasonable standard by which delay is seeking remedy under article 226 can be measured. This court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy Under Article 226 can be measured. This court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy, but where the delay is more than this period, it will almost always be proper for the court to hold it is unreasonable.
Thus the Supreme Court allows the High Court to reject a petition even if it is within the period of limitation prescribed for a civil action, but lays down that when the delay exceeds that period it must almost always be rejected. Following this decision, the period of limitation prescribed by the Limitation Act has been held to be the outer limitation and even petitions filed with the statutory period of limitation have been rejected. But the fact that Bhailal Bhai has not been able to persuade all High courts to accept the period of limitation prescribed by the Limitation Act as the outer limit is clear from the decision of the Gauhati High Court in Sachindra Nath V. N.E. Railway 73. Turning down the contention of the respondent that the writ petition be rejected applying the period of Limitation Act, the court observed that the Supreme Court has not “made it an inexorable rule that in no case even when justice would require it, an application under Article 226 of the constitution cannot be entertained beyond the period of limitation applicable in a suit. 74. The view is correct because the petitioner may be seeking redress before higher administrative authorities and time seeking redress before higher administrative authorities and time spent on such course of action may not be excluded under the Limitation Act.

Though Bhailal Bhai held that a person may invoke the extraordinary constitutional jurisdiction to recover tax collected by the state illegality when he comes to know that such collection was illegal the court refused to extend the privilege to a person when there was no decleraration of illegality of the statuary provision 75. In Tilokchand Motichand V. H.B. Mushi 76 the matter was again fully considered. The facts show that a refund of tax was allowed to the petitioners on condition that the firm should pass it to the customers as the collection was not authorized by law. The petitioner did not comply with this and the amount was later forfeited under section 12A(4) of Bombay Sales Tax Act. 1946. This order was passed on 17.3.1958. The validity of the order was challenged before the Bombay High Court. The petition was dismissed on the
ground that interference with the order could not be in the interest of Justice. The firm finally paid up the amount by 8.8.1960. Section 12A(4) of the Sales Tax Act was later held ultra vires in Kanthilal Babulal V. H.C. Patel 77 by the Supreme Court on 29.9.1967. the petitioner filed a writ petition before the Supreme Court under Article 32 claming refund “Under Section 72 of the Indian Contract Act 1972”. So viewed, the case did not present any problem of enforcement of fundamental rights and civil suit was the appropriate remedy. In such a case if a civil suit is filed the party will have to pay courtfee and may have to face the defence based on limitation. So issue before the court was whether the petitioner should be allowed to circumvent the law of limitation by resorting to the device of pursing of Bhailal Bhai, since the petitioner should be allowed to a constitutional remedy. The case could have been decided on the basis of months from the decision of the Supreme Court. However the decision Bachawat apparently 79 by Justice Sikri as one applying to Art 226. Justice showing that the claim would have been barred if raised in a civil suit.80. Justice Mitter took a similar view on the merits of the case 81. The dissenting judge, Justice Hegde, alone insited on the application of Bhailal Bhai rule.

It is submitted that the simple fact that the civil suit was the appropriate remedy and might have been barred under the law relating to the limitation had induced the Court to consider the relevancy of the period of limitation prescribed for civil suit to a petitioner under Art.32. If the law of limitation is made applicable, then thorny problems, like when the period of limitation starts to run, also may arise.

A close reading of the five separate opinions in Tilokchand reveals the following lines of thinking on the question of laches.

a) The court should not lay down any rigid rule either with reference to the limitation Act or otherwise. Each case has to be considered on its own facts. A
case within the period prescribed by the Limitation Act may be rejected and one brought beyond that period may be entertained.\textsuperscript{82}

b) If a claim is barred under the Limitation Act, unless there are exceptional circumstances, prima facie it is a stale claim and should be entertained. But even if it is not so barred, it may not be entertained by the court if on the facts of the case there is unreasonable delay. When the delay is beyond one year, there should be satisfactory explanation for that. Time spent in making appeals and representation to higher authorities may be taken as good explanation.\textsuperscript{83}

c) When the remedy in a writ application under Article 32 or Article 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of statute of limitation, the court in its writ jurisdiction acts by analogy to the statute, and adopts the statute as its own rule of procedure and in the absence of special circumstances, imposes the same limitation on the summary remedy in the writ jurisdiction. In other words the period fixed by the Limitation Act should ordinarily be taken to be a true measure of the time within which a person can be allowed to raise a plea under Article 32 of Article 226.\textsuperscript{84}

d) A relief asked for under Article 32 cannot be refused on the ground of laches. The provisions of the Limitation Act have no relevance either directly or indirectly to proceedings under Article 32.\textsuperscript{83}

It is submitted that a desirable judicial policy in relation to laches would be judicious combination of the views in (a) and (b) above. The matter should be predominately left to the discretion of the court, in exercising the discretion the court may be guided, but not controlled by the provisions of the Limitation Act, and should give due emphasis to the explanation for the delay.\textsuperscript{86} The narrow and technical approach in (c) would impose unnecessary limitations on the freedom of judicial choice in an area left to judicial discretion by the constitution. The extreme view in (d), on the other hand, would cause public inconvenience. The court was persuaded to come round to this view, but an
unanimous opinion of a Five-Judge Bench refused to do so. Stating that it was not the intention of the constitution makers that “this court should discard all principles and grant relief in petitions filed after inordinate delay. 87

Under Article 226 the law remains to be what is stated in Bhailal Bhai. The decision was approved by a seven judge Bench in Kerala v. Aluminium Industries 88. In D. Cawasji & Co. v. Mysore 89, Justice Mathew felt the injustice and inexpediency of the situation. He observed; 90

A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in part expanded, which would often be the case, if the suit or application could be brought at any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment.

The learned judge pointed out that in U.S.A. the law was that the voluntarily paid under the mistake of law with knowledge of facts were not recoverable. He suggested enactment of suitable legislation in the respect.

With the social perspective in mind the learned judge disallowed the claim on the ground that the appellant in his earlier writ petition had not claimed the refund of the tax. Such a view in effect imports another technical rule from the code of Civil Procedure that the plaintiff should bring the suit for the whole cause of action. 91.

It is to be said that Tilokchand and Bhailal Bhai can be relevance only where money claim enforceable through civil suits are involved in the writ petition. Seervai 92 maintains the view that ordinarily the extraordinary jurisdiction under Article 32 and 226 is analogous to the appellate or revisional jurisdiction exercised by the High Court, where the period presecribed by the Limitation Act in 90 days, and recommends its adoption as a normal rule within which a person should approach the Supreme Court or the High Court. The view is sound because the Limitation act allows condonation of delay only in cases of
appeal and revision. In the case of Civil Suit if the prescribed time is over there is no powers in the courts to condone the delay.

A liberal attitude is necessary when the petition is in the nature of class action and the petitioner does not seek any relief personal to hi. Applying this principle, the Supreme Court observed that the High Court was wrong in dismissing the petition merely on the ground of laches.\(^{93}\)

Once the rigid application of he provisions of the Limitation act is abandoned\(^{94}\), the doctrine of laches always presents leeways of choice to judge. Even if application of the Limitation Act is retained as one of the alternative courses of action, it makes no great difference because "laches" belongs to the single legal category with competing versions of reference, i.e. a single verbal entity which covers only one fact situation, but offer more than one version for governing it which may in a given situation yield opposite results.\(^{95}\) Even after agreeing on the general rule that 'laches' should be applied to writ proceedings judicial choice arises in deciding which particular version of 'laches' should be applied. Then again there is the question of measuring the time from which limitation begins to run. Over and above all these, there are further choices available to the judge in classifying the fact situation. In Tilokchan's case, for instance, the petitioner paid tax; but later the statutory provision under which it was collected went illegal by the court. Justice Bachawat and Justice Mitter would bring it under the category of money paid under 'coercion' and would thus count the period of limitation from the date of payment. Justice Sikri on the other hand, considered it as payment under 'mistake of law' and would measure the period from the date of the judgement invalidating the law. It is thus clear that the application of the doctrine of laches is an area where judicial discretion looms large. It is certain undesirable to restrict the discretion by self-imposed rigid limitations.
DEGNIFIED RESTRAINT OR JUDICIAL ACTIVISM IN REVERSE GEAR!

Judiciary: After a period of judicial activism, the Supreme Court seems to have realised, as many recent judgements show, that it ought not to step into the domain of the executive and the legislature.

Your shall not give bribe; you may take bribe. That seems to be the message that may have derived from the Supreme Court Judgement in the JMM bribery case. Bred on a regular diet of moralistic posturing by an activist judiciary, the chattering classes baying for the politician's blood are naturally shocked.

Has the court made bribe-taking legal by quashing charges against the bribe-takers? The material effect of the majority judgement is that Narasimha Rao and company, accused of having bribed MPs to secure their votes in a no-confidence motion would now stand trial before the lower court. Those who were accused of having received the money have been discharged.

After all the sabre-rattling over political scams, espousing of radical social justice philosophies and formation of green benches, has the court suddenly washed its hands of cleansing the Augean stable of public life? The judiciary's activist past helped build up an inquisitorial atmosphere, when the people began to expect that every corrupt politician was going to be thrown behind bars. Presided over by benches of 'no-nonsense' activist judges, the court had come to be perceived as capable of righting every wrong and wiping every tear. Now when the court has, in a dignified demonstration of restrain, expressed its helplessness, there is either frustration or confusion.

The judges, in their wisdom, seem to have anticipated the righteous indignation. "We are acutely conscious of the seriousness of the offence that the
alleged bribe-takers are said to have committed, "explains the majority judgement."... If true, they bartered a most solemn trust committed in them by those they represented. "Yet the court was restraining itself." Our sense of indignation should not lead us to construe the constitution narrowly, impairing the guarantee to effective parliamentary participation and debate."

The activism was seen in the bar too. Justice Punchhhi, known for his restraint, was maligned by activist lawyers who did not like his elevation as C.J.I.

In effect the court has passed the buck to Parliament. Explains senior advocate Arun Jaitley. "The majority does not make bribery legal but holds that the proper forum to deal with such issues would be Parliament itself." To that extent, the judgement might turn out to be a benchmark in the evolution of Indian constitutional law. A restrained court has conceded to Parliament what has traditionally been its domain before the activist frenzy threatened to obliterate the finely demarcated jurisdictional boundaries between the executive, the legislature and the judiciary.

Acutely aware of the danger of unwarranted judicial activism, the court has emphasised restrain in many of the recent judgements. In the MP Oil Extraction case the Supreme Court held recently that "Policy decision is in the domain of the executive authority of the state and the court should not question the efficacy or otherwise of such policy so long as the same does not offend any provisions of the statute or the Constitution of India.

"The power of judicial review of executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of the judiciary in outstepping its limit by unwarranted judicial activism."
Judicial activism was most pronounced in public interest cases and had come to be identified with individual judges such as Kuldip Singh (Right).

The judges were apparently aware of the situation in which litigants were running to the court at the drop of virtually every executive hat. When the Delhi administration failed to clear garbage from the streets, when the Taj was threatened by industrial pollution, when parks were being converted into house plots, when the CBI failed to register case against hawala-accused, public-spirited men agitated the courts. In its honest anxiety to right all the wrongs, the court issued hundreds of directives, hauled up government officials and issued warnings to the executive.

On most issues, the executive were merely complying with the court directives. It even appeared that the sole job of the authority was to file compliance report on the directives. Apart from individual outbursts, the executive and the legislature seemed either too weak to hit back or made full use of judicial proceedings to defer decisions citing sub justice. This was most pronounced in public interest cases like shifting of polluting industries, cleaning streets of hawkers and allotment of houses. In most such cases, the decision-makers sat tight, leaving their job to the courts.

The activist period also witnessed unprecedented directives from courts all over the country. If a judge of the Kerala high court offered his own services to eradicate mosquitoes in Kochi, the Delhi High Court, acting on its own, served notices on the executive authorities when dengue fever broke out in the capital.

Some of the directives had unforeseen and, at times, disastrous consequences. Hundreds of Industrial workers were rendered jobless following the Supreme Court’s order to shift polluting industries out of Delhi. As the starving workers agitated and one of them even immolated himself, the executive authorities looked on indifferently.
The court’s summary handling of out-of-turn allocation of government houses led to a situation in which a large number of legitimate occupants too could have been thrown out in the streets. Realising their plight, the government attempted to overcome the court ruling through an ordinance.

Judicial activism was most pronounced in public interest cases and had come to be identified with individual judges. “The manner of handling of cases by Justice Kuldip Singh of the Supreme Court deserves particular mention” Say Supreme Court lawyer S. Muralidhar. “Court Hall No.2” where he presided was the ‘environment court’ and every Friday afternoon the courtroom would be packed with lawyers and litigants witnessing an involved judge tackle seemingly complex environment issues. Undaunted by the ingenuity of lawyers to deflect the cases from their course, Justice Kuldip Singh firmly disallowed pointless adjournments to the government and private litigants alike.

The point is that activism often looked like a judicial crusade on particular causes. There was unprecedented impatience by individual judges to right the wrongs. In one public interest case the petitioner sought education institutions for children of prostitutes. Justice K. Ramaswamy gave direction for constituting a committee to examine the prostitutes plight and devise mean to ameliorate them, and eradicate prostitution. The other judge on the bench Justice D.P. Wadhwa, while agreeing with the direction of the children’s plight, dissented on the directions on eradicating prostitution as the issue had not been raised and the parties had not been heard.

Despite the dissent, Justice Ramaswamy held that since PIL was not adversarial and since the matter was pending for a decade, reference to a three-judge bench would cause further delay, and so under Article 142, he could issue directions to enforce his orders.

When the matter came up for review last month a bench of Justice Sujata Manohar, S.P. Kurdukar and D.P. Wadhwa set aside Justice Ramaswamy’s
directions. An apprehension of delay “cannot be a ground for not following the provisions of the constitution under Article 145”, the bench said. “Whenever a matter has to be referred to a larger bench, there is bound to be some delay. But such a reference is necessary in the interest of Justice.

As a senior Supreme Court lawyer observed, “often it seemed to be individual notions of justice that were prevailing over the written law. “The Judge’s own philosophies came to be pronounced through judgement especially in matters of public policy and certain judges began to be identified with particular causes. Some of them were even honoured by groups wedded to a particular philosophy, or criticized by those opposed to it. If one Supreme Court judge was honoured by the International Bar Association, a High Court judge cam to be honoured as one of the 10 best judges in the world.

The activism was reflected in the bar too. Justice Punchhi, a judge known for his judicial restraint, was embarrassingly maligned by a group of activist lawyers who did not like his elevation as chief justice of India. Fortunately for the judiciary, such honours and criticisms (there have been instances of public agitation organised by affected parties) did not encourage a competitive activism. On the contrary the court seem to have rediscovered the value of restraint, as manifest in a series of recent judgements.

“There is now a self-imposed curb on excessive activism” Say former Bar Council of India Chairman V.S. Mishra. “The Judiciary now realises that it should command respect and not order respect.” Apart from the JMM cases, there has been a spate of restrained judgements from the Supreme Court, some them reversing decisions of the activities period, as in the case of Mishra himself.

While arguing a case in the Allahabad High Court, Mishra allegedly threatened a judge. A three-judge bench of the Supreme Court sentenced him in 1995 to a suspended term of six weeks in prison, stripped of his position and cancelled his license to practise for three years.
The judgement enraged most of the lawyer community with argued that under the Advocates Act, the Bar Council alone had the power to cancel a lawyer’s license. Even lawyer who agreed that Mishra had committed contempt disagreed with the court appropriating a power which was vested in the Bar Council.

Last month a five-judge bench of Justice S.C. Agrawal, G.N. Ray, A.S. Anand, S.P. Bharucha and S.Rajendra Babu laid down the special jurisdiction of punishing for contempt should be exercised “sparingly and with caution” and that “it cannot be expanded to include the power to determine whether an advocate is guilty of professional misconduct, giving a go-by to the procedure under the Advocates Act.”

The practice of the court monitoring investigation seems to have started similar trend in many cases. The Patna High Court came in for much criticism in the matter, particularly after it barred the CBI director for supervising the investigation on a complaint by Joint Director U.N. Biswas. Finally, the Supreme Court set matters right by directing that any dispute between the two would be referred to the attorney-general.

Much less reported was a case in Calcutta where the High Court, which was not actually monitoring the case, even fixed the dates, time and place of interrogation of the accused by the enforcement of directorate. “Such kind of supervision of the inquiry or investigation under a statue is uncalled for,” observed the bench of Justice M.K. Mukerjee and K.T. Thomas, deciding on an appeal by the enforcement directorate. “We have no doubt that such type of interference would impede the even course of inquiry or investigation into the serious allegations now pending. It is not the function of the court to monitor investigation processes so long as such investigation does not transgress any provisions of law.
Apparently, the court’s tendency to legislate, witnessed during the activist period, has been misunderstood by a host of litigants. In one case the public interest petitioner wanted Rajasthani language to be included in the eighth schedule of the Constitution. The court dismissed the petition stating that it was a policy matter of the state in which the court need not interfere unless the policy violated the mandate of the Constitution or was actuated by mala fide.

Similarly, in the case Amitabh Bachchan Corporation V. Mahila Jagran Manch, the court found that the desirability to conduct beauty pageants and how to deal with the protests against them were not matters which could be judicially assessed and “the pressure which the agitators bring to bear ought not to sway the court into exercising jurisdiction.”

In other words, the courts are once again leaving matters to the legislature and the executive. If bribe-taking MPs are to punished, Parliament is fully empowered. If Rajasthani language is to be included in the eighth schedule, effective public opinion may be mobilised by men in public life to force the legislature and the executive. Public perceptions of guilt and innocence are not what the courts are guided by.

As the Supreme Court observed in the case of High Court of Judicature at Bombay V. Shirishkumar Rangarao Patil last year, “In times of grave danger, it is the constitutional duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived), undisturbed by the clamour of the multitude.”

Getting tough on ‘criminal’ politicians

In the recent period of restraint the court has effectively, at lest in one case, come down heavily on criminalisation of politics. Doodh Nath, and MLA in Uttar pradesh, was convicted for murder and subsequently unseated. After serving hardly two years of his life sentence, mostly on parole, Doodh Nath petitioned the
Governor for reprieve and remission of sentence. The plea was rejected, but within five months he petitioned the Governor again on almost the same grounds without mentioning that his earlier plea had been rejected.

The Governor asked for a police report which was unfavourable to Doodh Nath. But a week later the police sent another report recommending remission on "humanitarian grounds." Despite a plea by the murdered man's widow, the Governor granted reprieve. The murdered man's son, Swaran Singh, moved the Allahabad High Court which dismissed the petition saying that a decision of the Governor under Article 161 was not justiciable.

On his appeal by special leave, the Apex Court called for the files concerning grant of remission and noted that the Governor was not told of certain vital facts such as Doodh Nath's involvement in five other cases, the earlier rejection of his plea, the report of the jail authorities that his conduct inside the jail was far from satisfactory and that he was on parole during a substantial part of the two years he had served in prison.

Doodh Nath's counsel argued in the Supreme Court that any order issued by the President under Article 74 or by the Governor under Article 161 (which gives him powers to grant remission of sentence) was non-justiciable and that the court could not look into the reasons which persuaded the constitutional functionary to grant reprieve or remission of sentence.

Citing a constitution bench judgment of 1981 the Supreme Court bench of Chief Justice M. M. Punchhi, Justices K. T. Thomas and M. Srinivasan reiterated that "all public power, including constitutional power, shall never be exercised arbitrarily or mala fide, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power." The bench rejected "the rigid contention... that this court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of

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constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it. "It quashed the Governor’s order.

End of judicial activism:

In a landmark judgment the Supreme Court has shrunk its jurisdiction to decide only on constitutional and statutory issues. This is the implication of its judgment on the Balco case initiated by the one-year-old government of Chhatisgarh and some individuals. It says economic policy lies in the realm of the government in power, and the judiciary has no role in shaping the policies or testing their validity. The right forum is parliament. This means that the Supreme Court has drawn a clear dividing line between its area of arbitration and that of the legislature and the executive. This marks a major departure from the earlier days of exuberant judicial activism when the apex court acted as the third chamber of legislature to set down rules on air (CNG) and industrial (dispersal of thousands of units) pollution and water pollution (Yamuna). A three judge Bench of the Supreme Court has realised that making rules from the court does not always work well and complex social and economic policies are best left to political and other experts.

This observation is based on sound judicial principles. The order says that the Chhatisgarh government has failed to prove that there was way grave constitutional or statutory violation in the valuation of the assets of Balco and he issue was debated in the Lok Sabha and decided in favour of selling 51 percent of the shares to Sterlite for Rs. 551.5 crore. Sterlite was the highest bidder and others had not raised any reasoned objection. For the state government to oppose the sale on three grounds is wrong; it was not a hush-hush deal, the price was properly valued and the highest bidder got the plant. The other objections are perfunctory and do not deserve serious consideration. The important fallout is that the Supreme
Court has raised a wall of non-interference in executive power unless it is convinced of grave constitutional and statutory laws.

The impact will be dramatic in the process of disinvestments. Two cases in South India challenging the hiring out of two hotels belonging to the ITDC (Indian Tourism Development Corporation) will abate. The employees will have no right to legally question the right of the management to set the terms of hiring or the selection of the bidder. They are on strike and will have to return after the judgment. Future disinvestment plans will also benefit in a big way.