PART - VI
Mounting Arrears And Lack Of Judicial Activism

The India Judicial system, at present is under great stress and strain and is almost in the grip of a crisis. The mounting arrears in High court and even in the Supreme Court are becoming a cause of real anxiety to the Notion. The prestige of the Indian Judicial is seriously impaired by unprecedented accumulation of case. It seems that the main reason for decline in the rate of disposal in the Apex Court in its pre-occupation with constitutional and public interest litigation. Similarly, in the High Courts, the judge’s pre-occupation with Article 226 litigation and a criminal appeals is the main cause of the accumulation of arrears in the disposal of cases. There is also the problem of vacancies of judges and our lack of knowledge as to manpower needed for our judicial institutions. Some of these vacancies have not been filled up for years. Both the Bench and the Bar are also to a great extend responsible for the delays. Advocates seek frequent adjournments, which are usually granted.

The problem of mounting arrears and the increasing rate of institution of suits and the delay involved the disposal of such cases has, lately, become a subject of debate and different views and opinions have been expressed by various authorities and scholars. Prof: Baxi suggests the “total transformation on the system “ as a remedy to solve the crises of the Indian Legal system. The solution, however, lies within the system and not outside the system. If at all change has to come that must come from within the system and to look to out side would mean inviting a revolution which will not only restructure the legal system but also the entire set-up of the state envisaged under the constitution of India. Some people are of the view that the present strength of the Apex Court and the High Courts should be increased to cope with its work load. On the other hand, there are others who hold the view that increasing the number of judge would not solve the problem of accumulation of arrears in future but would only add to the number of conflicting rulings already manifest in the working of the court. They
ask: What sort of Supreme Court would it be if, sitting in Division, it speaks in conflicting language in like cases? Would not such a court, rendering conflicting decision in identical cases, necessitate creation of still higher court to resolve the conflicts? And what would be the financial implications of the personal to increase the number of judges and its impact or priorities in allocation of national revenues? No single court of last resort, irrespective of the number of judges, could dispose of all the cases arising in a vast country like India and which litigants would seek to bring up before it, if the right of appeal were unrestricted. To take an example in revenue matters, there are sometimes as many as five appeals beginning from the Assistant Collector to the financial commissioner. When an appeal does not lie ways are found to treat it as a revision. There is then the remedy by way of a write under Article 226, and thereafter a Letters Patent Appeal in the same High Court. Then there may be a certificate by the High Court, for leave to appeal to the Supreme Court and finally a Special Leave Petition Under Article 136. Prof. Rajeev Dhawan has advocated creation of a new Court of co-equal jurisdiction called the Federal Constitutional Court with jurisdiction to deal with all constitutional and administrative law cases. In his view, the Supreme Court should remain a Court of Appeal in ordinary civil and criminal matters. In the event of difficulties being encountered in the creation of parallel court, he has suggested creation of two clear division within the existing Supreme Court. Here again the suggestion of another Court of Appeal does not seem to be feasible enough. Justice Krishna Iyar has suggested that the Supreme Court may have two permanent wings a) one to deal with constitutional law matters. And (b) the other with matters other than constitutional law matters. Justice wants both the wings under the same Chief justice. It is submitted that apart from the fact that it will increase greatly the administrative lead of the Chief Justice, it will organizationally and otherwise not be conductive to the objective we want to chive.
It seems rather absurd that higher judiciary should entertain and adjudicate the cases which litigants, at their sweet will, may wish to thrust before them. This seems to have been attempted day in and day out and our present lis are primarily its result. We must realize that ours is a country of thousand million people. Can one possibly imagine a single final court to deal with all the load of litigation that may be laid at its door by such a vast multitude? The very idea seems to be utopian and dangerous in the extreme. The Founding Fathers of the Constitution realized that the country was too big for any unitary form of government and expressly opted for the Federal system such as we have. One cannot have a unitary system of Justice and a federal from of government. It seems to be obvious that the Final Court of one thousand million people can, at best, and must indeed, deal only with the construction of the Constitution and the interpretation of the Central or the Federal laws, to the total exclusion of the State laws. Today the Supreme Court is being cluttered with bail matters; not only with that, even cancellation of bails, rent matters, refusal and grant of stay, and question of minor sentences are also brought before it. These are trivial matters, which indeed should have no place in the Apex Court of a country. Three days out of five in a week are vitally lost in the consideration of Special Leave petitions alone in the Supreme Court and the tide is still rising. The issue thus seems to be beyond self-restraint and calls for legislative correction by bringing Article 136 in line with Article 132 restricting the jurisdiction of the Apex Court to questions of law of national importance only. Our system, as has been mentioned already, also provides for the many appeals, which obviously delay the final disposal of cases. Most countries of the world now provide only for one appeal, and the right of second appeal is very much restricted and is confined to substantial question of law. There is no guarantee that a decision of the Appellate court is necessarily correct. There need not be any doubt if a right of appeal were provided from the judgment of the Apex Court, a number of its decision would be reversed. It has been rightly said that the Supreme Court is not final because it is infallible; it is
infallible because it is final. The argumentative petitions and affidavits in reply and in rejoinder also contribute in no small measure to the delays in disposal of writes. The courts, therefore, should exercise the power to refuse to entertain petitions which do not set out expressly the right to relief and the nature of relief claimed.

Restriction on the practice of indiscriminate is urgently required. The legal profession should act with a sense of responsibility and seek very few adjournments. Ordinarily the number of adjournments in a given case should not exceed two or three. It will certainly facilitate the disposal of a great number of cases. If oral arguments are restricted to half an hour to one hour on each side. The advocates should extend full cooperation in eliminating delays by avoiding long arguments. The system of written briefs and limited allotment of time to the advocates for oral arguments should be devised and introduced. A time limit should be prescribed within which the courts should dispose of case. The judgments of the courts need not be very long. These have to be precise and clear and must communicate to other courts, lawyers and litigants the law that has been laid down therein. The judges should, therefore, be persuaded to give brief judgments instead of entering into learned discussions of nonessentials. Apart from the malady of frequently adjournments, the Bar uses the jurisdiction of the Courts in such a manner that it increases the load of the Courts unnecessarily. Appeals after increase the workload of the courts. Most of the appeals are filed with sole objective of obtaining a stay order. The litigants are also themselves responsible for the delays. Some times their object of going to a Court is to harass the adversary. This is certainly an abuse of judicial process. The Bench structure in the High Courts also causes delay. Many a time the Benches are constituted without keeping in view the special interest of the judges.
In order to ensure a very high quality of efficiency and legal acumen of the judges of the Supreme Court and the High Courts, the source of manpower needs further diversification.

The power to appoint judges is often criticised for its abuse. The machinery for appointment of judges, therefore, should also change.

The requirement of consulting the Governor in the appointment of the High Court judges is a provision, which, in practice, makes the Chief Minister to influence such appointments. It is now we known that appointments are held up because of the differences between the executive and the judiciary. The quality of candidates for appointment of judges is another question. The fifteenth of the Law Commission pointed out that the ulterior considerations such as political influence, communal and caste factors were intruding in the appointment of judges at the cost of quality. We must depositaries the judicial appointments and leave them to the care of a high powered and independent body, which will appoint independent, fearless and well-informed judges.

Another important issue which needs serious attention is the question of physical facilities of judges of all delays which hamper the administration of justice, other caused by the inefficiency and inadequacy of the services attached to the courts are intolerable. Higher judiciary has not been provided with research staff. Some arrangements in this regard were made in the Supreme Court on trial basis but were abandoned. To enable the judges to preserve high standards of judicial craftsmanship and creativity, a research service should be part of the auxiliary service attached with the Supreme Court and the High Courts. The judges need easy access to the relevant non-legal and comparative legal literature. The availability of such a research service will certainly contribute to efficiency and save time of the judges who have no alternative but to make individual research themselves, as they do not get any assistance for this purpose.

Finally, we must mention that the government is the most prolific litigant in this country before appellate courts. The Government must ask its
Litigation departments to consider how it can reduce the volume of litigation it instates. Inevitably this is a matter also for counsel who acts for the government.

Judiciary: After the 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.

You shall not give bribe, you make take bribe. That seems to be the message that may have derived from the Supreme Court Judgement in the JMM bribery case. Bread 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 non confidence motion would now stand rail 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 it hands of cleansing the Augean stable of public life? The judiciary’s activist past helped build up an inquisitional atmosphere, when the people began to expect that every corrupt politician was going to be thrown behind bar. Presided over by benches of ‘no-nonsense’ activist judges, the court had come to 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 laywers 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, stipled 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 for conducting 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 be 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 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 recomending
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 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.

**Judicial Activism At A Halt**

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 disinvestments plans will also benefit in a big way.
It is therefore submitted that the judiciary at all levels need to take extra ordinary initiatives and measures to decrease the mounting arrears. The pendency of civil and criminal cases for long duration has adverse effects on the minds citizens regarding efficacy of the judiciary. It is therefore necessary to evolve methods and take necessary step to retain the unshaken faith and confidence in the efficacy of judiciary.