CHAPTER V

RIGHT TO SPEEDY TRIAL AND FUNDING FOR THE JUDICIARY

5.1 Chapter outline

In the previous chapters, it was seen how the right to speedy trial plays out in determining the fate of the accused in the individual cases that come up for adjudication. In this chapter, we look at a broader, *institutional aspect* of the right to speedy trial i.e., how this fundamental right coupled with the doctrine of separation of powers can be articulated by judges to ensure adequate funding for the judiciary, by making inroads into the realms of fiscal planning and policy, usually the domain reserved for the executive and legislature. Using the right to speedy trial, one of the biggest reasons for delay i.e., inadequate judge strength- can be usefully addressed.

In this chapter the researcher argues that:

a. Scholarly sources confirm that one of the major reasons for delays in criminal cases is the inadequate funding for the judiciary in India and consequently, the inadequate judge-strength and infrastructure;
b. Historically, very little investment was made in the judiciary since colonial times, and this trend has unfortunately continued even after independence;
c. Little attention has been paid in independent India to court budgeting, manpower planning and infrastructure and this remains a much-ignored area of study;
d. International law and the law in countries like the USA recognize and require adequate funding for the judiciary as an important aspect of the *separation of powers* doctrine;

e. Indian courts have also of late, gradually begun to recognize and articulate their powers under the *inherent powers* doctrine, to ensure adequate funding for the judiciary; Indian courts have now begun to enforce the right to speedy trial by demanding adequate judges, staff and funding to meet this right;

f. Judicial Impact Assessment has now become a part of the judicial discourse in India and is a first step towards broader court budgeting and management techniques;

g. Scholars confirm that if there is enhancement of judge-strength and resources, the problem of delays and arrears is not an *insoluble* problem, as is sometimes sought to be made out;

h. Enforcing *proactively*, the institutional aspect of the right to speedy trial is indeed the way forward; the most useful manifestation of this right is the power it confers on courts to require sufficient funding from the State, in order to give effect to this right.

5.2 Inadequate judge strength is one of the primary reasons for delay

Scholars, judges, law commissions and others[427] have offered numerous reasons for the delays in the criminal justice system in India. Here, it is not intended to go into each of these reasons[428]. What is to be pointed out however, is that the best scholarly and other sources are tending towards the consensus that one of the primary reasons- if not *the* primary reason for delay, is that there are too many cases and too few judges to decide them.

[427] Including politicians and administrators.
[428] That would be beyond the scope of this thesis.

However, before going on to the issue of judge-strength, it would be useful to have a *broad overview* of the different types of reasons advanced by the Law Commission of India, other commissions and other entities, over the years.

(a) Other reasons for delays in criminal cases

Even before Independence, committees such as the *Rankin Committee (1925)*[429] and the *Arrears Committee (1949)*[430] had been set up to study the problems of delays and arrears.

After independence, the Law Commission of India has been occupied with the question of delays, arrears and speedy trial. Indeed, speedy justice was one of the reasons why the Law Commission was constituted in the first place in the 1950s: "This House resolves that a Law Commission be appointed to recommend revision and modernization of laws, criminal, civil and revenue, substantive, procedural or otherwise and in particular, the Civil and Criminal Procedure Codes and the Indian Penal Code, to reduce the quantum of case-law and to resolve the conflicts in the decisions of the High Courts on many points with a view to realize that justice is simple, *speedy*, cheap, effective and substantial"[431](italics supplied). On 05-08-1955 the Law

[429]The Committee was set up to study the question of delay in civil cases at High Court/Subordinate Court levels, under the Chairmanship of Justice Mr. Rankin of the Calcutta High Court.
[430]The High Court Arrears Committee was set up under the Chairmanship of Justice SR Das, for examination of ways to reduce arrears.
[431]Non-official resolution of the Lok Sabha dated 19-11-1954. However, in view of the statement of the then PM Jawaharlal Nehru that government had resolved to appoint a law commission, this resolution was withdrawn. Prior to this, on 02-12-1947 Dr. Sir Hari Singh Gour had moved a resolution in the Constituent Assembly recommending the establishment of a statutory law revision committee, but withdrew the same upon assurance by Dr. B.R. Ambedkar that government would try to devise some other machinery for revising laws, such as a permanent commission. On 27-06-1952 the advisability of creating a Law Commission was again stressed in the Lok Sabha by Sri N.C. Chatterjee. On 26-07-1954 the All India Congress Committee resolved that a Law Commission should be appointed as in England.

Minister then made a statement in the Lok Sabha announcing the decision to appoint a law commission[432]. The terms of reference were *inter alia*, to review the system of judicial administration in all its aspects and suggest ways and means for improving it and making it speedy and less expensive.

The *14th Report of the Law Commission on Reforms of Judicial Administration*[433], pointed out that apart from inadequacy of the numbers of judicial officers, the main cause of delay is not the procedure but unsystematic techniques adopted by the Bar and Bench and recommended better supervision by the appellate courts. Certain other suggestions were made and other problems were also pointed out, such as[434]:

(i) Separation of judicial from executive magistrates required so that judicial officers were not burdened with executive work[435];

(ii) The problem of absence of witnesses, counsel and failure to examine witnesses when present;

(iii) The problem of adjournments, and the absence of a system of day-to-day hearing;

(iv) The inadequacy of prosecution staff;

(v) Statutory recognition required for the inherent powers of all criminal courts.

The *77th Report on Delay and Arrears in Trial Courts*[436] was of the view that the system of administration of justice in India, inherited from the British, was

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See *14th Report of the Law Commission of India on Reforms of Judicial Administration*, Introductory Chapter, where the history of the formation of the law commission has been traced.

432 Statement of Mr. C.C. Biswas, the then Law Minister.

433 September 1958.

434 Chapter 36.

435 This has been executed subsequently.

436 November 1978.

basically sound. The same system was in operation in Commonwealth countries. However, it recommended *inter alia* that:

(i) The entire evidence should be recorded at a stretch (section 309 CrPC was referred to);

(ii) Persons of the right caliber needed to be appointed to judicial posts; &

(iii) Adequate training had to be imparted to judges[437].

The *78th Report on Congestion of Under-trial Prisoners in Jails*[438] emphasized that expeditious disposal could be obtained if:

(i) Long delays in filling up judicial vacancies were avoided;

(ii) Services of retired judges were taken to clear backlogs;

(iii) Bright youngsters were recruited from the Bar to clear arrears;

(iv) Some serving judicial officers were to deal exclusively with arrears;

(v) Sufficient additional courts were created to clear arrears in 3 years;

(vi) Prosecution was required to produce all material witnesses on one date;

(vii) Police officials concerned with investigation concentrate only on that work;

(viii) Separation of investigative police from law-and-order police is achieved;

(ix) Adequate numbers of prosecutors is ensured;

(x) Judicial officers do not handle civil and criminal work on the same day;

(xi) Preference is given to death sentence cases and cases where the accused are in custody;

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[437] Paras 1.11, 12.7, 13.1.
[438] February 1979.

(xii) The trial magistrate furnishes periodical statements of cases in which the accused are in custody for more than 4 months from the date of filing charge-sheet; &

(xiii) Adjournments are refused if accused are in jail[439].

The 79th *Report on Delay and Arrears in High Courts and other Appellate Courts*[440] observed that the question of delays was a complex problem involving not just the judicial system but society itself. Increase in the population and social complexity along with increased rights granted to citizens by legislation, all contribute to increase in litigation. It was further pointed out that appellate courts in India are streamlined and the causes of delay cannot be sought in their structure; appeals are necessary and inevitable and further, similar structures of appeals are present in other countries such as USA, UK, Canada and Australia. It was further observed that the rules of procedure on the whole, are simple and devoid of unnecessary technicalities – they were not the cause for delays. The government which was the litigant in the bulk of cases had a big responsibility to ensure speedy disposal[441].

The *124th Report on High Court Arrears: A Fresh Look*[442] was of the view that a multi-pronged approach was indispensable to annihilate backlogs. Under Article 224A retired judges could be asked to serve until the arrears were cleared[443].

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[439]Paras 3.3 to 3.8.
[440]May 1979.
[441]Paras 1.15, 1.19, 1.29, 1.35, 1.37 and 1.38.
[442]1988.
[443]Paras 2.1 and 3.14.

The *125th Report on the Supreme Court of India- A Fresh Look*[444]referred to H.M. Seervai'sbook[445] on delays in the Supreme Court and pointed out some more reasons for delay: statements of cases needed to be dispensed with, excessive intervention by judges should be avoided; judges lacked the requisite abilities; multiplicity of concurring or dissenting judgments added to the confusion and delays.

The *154th Report on the Code of Criminal Procedure, 1973*[446] is especially relevant. The commission is stated to have undertaken an extensive review of the Code with a view to eliminating delay and bottle-necks in the disposal of cases. The areas studied included the law of arrest, section 167 CrPC, bail, compounding of offences, plea-bargaining and set-off. Recommendations were made particularly from the point of view of speedy trials. A detailed list of factors responsible for delays was made, which included the following[447]:

(i) Litigation explosion;

(ii) Radical change in the pattern of litigation;

(iii) Increase in legislative activity;

(iv) Additional burdens due to election petitions;

(v) Accumulation of first appeals;

(vi) Continuance of original civil jurisdiction in some High Courts;

(vii) Unsatisfactory appointment of judges;

(viii) Failure to provide adequate fora of appeal against quasi-judicial orders;

(ix) Inordinate concentration of work in the hands of some members of the Bar;

[444]1988, para 3.11.

[445]*The Supreme Court: Its Working and the Problem of Delay, Constitutional Law of India*, H. M. Seervai, 3rd edn, Volume II, p 2454.

[446]1996.

[447]The Reports of the *Satish Chandra Committee* and *Arrears Committee 1990* were relied upon.

(x) Lack of punctuality amongst judges;
(xi) Long arguments and prolix judgments;
(xii) Lack of priority for disposal of old cases;
(xiii) Failure to utilize grouping of cases and those covered by rulings;
(xiv) Granting of unnecessary adjournments;
(xv) Unsatisfactory selection of government counsel;
(xvi) Lawyers striking;
(xvii) Population explosion;
(xviii) Hasty and imperfect legislation;
(xix) Plurality of appeals and hearings before Division Benches;
(xx) Inordinate delay in supply of certified copies of judgments;
(xxi) Indiscriminate resort to writ jurisdiction;
(xxii) Letters Patent Appeals;
(xxiii) Frequent bench changes;
(xxiv) Indiscriminate closure of courts;
(xxv) Appointment of sitting judges on Commissions of Inquiry;
(xxvi) Printing of paper-books in criminal matters.

The Committee on the Reforms of Criminal Justice System[448] was given very wide terms of reference: " To examine the fundamental principles of criminal jurisprudence including the constitutional provisions relating to criminal jurisprudence and see if any modifications or amendments are required thereto; to examine in the light of findings on fundamental principles and aspects of criminal jurisprudence whether there is a need to re-write the Code of Criminal Procedure and the Indian Evidence Act and the Indian Penal Code to bring them in tune with the demand of the times and in harmony with the aspirations of the people of India; to make specific recommendations on simplifying judicial procedures and practices and

[448]March 2003.

making the delivery of justice to the common man closer, faster, uncomplicated and inexpensive."[449] The Committee recommended several radical changes in the basic premises underlying the criminal system: instead of proof beyond reasonable doubt, a "clear and convincing" standard of proof; minimizing the right to silence; making evidence before a police officer admissible; making the system more inquisitorial and less adversarial, etc. None of these recommendations have been implemented yet.

Baxi[450]tries to understand delays by breaking down delays into five categories:

(i) Government-caused delays: due to delayed judicial appointments, lack of manpower planning, etc.

(ii) Court-caused delays: due to lack of court-management procedures, excessive appeal, review and revision opportunities, etc.

(iii) Legal-profession caused delays: due to inequitable distribution of professional work, prolix argumentation, etc.

(iv) Litigant-caused delays: due to deliberate tactics, etc.

(v) System-caused delays: due to too much legislation, complexity of the law, inadequate drafting skills, etc.[451]

(b) Inadequate judge strength is a major reason for delay

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[449]Para 1.1.

[450]*The Crisis of the Indian Legal System*, Upendra Baxi, 1982.

[451]See also *Solutionising Docket Overloading Through Attitudinal Change and E-Governance,* Justice G.C. Bharuka, PhD Thesis, National Law School of India University, March 2003, where it is argued that computerization would bring about major changes in the speed of the judiciary.

Inadequate judge strength and supporting infrastructure has consistently been recognized as being a *major* reason for delays in the criminal justice system, if not the *main* reason. The *14th Report*[452] noted that the root cause for the progressive accumulation of arrears in several states is that, in spite of the growing volume of work, the judge-strength was not proportionately increased[453]. It was recommended that:

(a) High Courts should be empowered by the State Governments to create additional courts[454];

(b) High Courts and district courts should keep close watch on the files of the subordinate courts: time-limits for disposals may have to be set;

(c) The strength of the subordinate judiciary should be adequate to dispose of suits, etc., within the specified time-limits;

(d) High Courts should undertake appraisals of the requirements of subordinate courts;

(e) The annual administration reports should specifically examine these features to ensure adequacy of judicial personnel;

(f) Temporary additional courts should be created wherever required to clear arrears[455]; &

(g) A new convention should be evolved that where a Chief Justice of a state makes a recommendation for additional judges and this is accepted by the Chief Justice of India, this should be acceded to[456]

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[452] The *14th Report on Reform of Judicial Administration*, September 1958.

[453] Chapter 8 para 16. It was noted that state-wise statistics revealed that existing strengths of Munsiffs/ Subordinate judges seemed to be adequate on the whole, however increased strengths were necessary to clear arrears. Similarly, the strength of district judges also needed to be increased. Temporary additional courts were also required in all the States. Chapter 8, paras 11 to 15. Judge-strength in the High Courts also needed to be increased. Chapter 6 para 4.

[454] Chapter 8, para 23.

[455] Chapter 8, Paras 23 to 26.

[456] Chapter 6, para 5.

The *77th Report*[457] pointed out that in some States, existing numbers of judges are inadequate even to deal with the cases being filed each year, let alone old cases; additional numbers of courts were recommended[458]. It was pointed out that it is primarily for the High Court in each state to ensure clearance of arrears in subordinate courts[459]. It was recommended that all arrears should be cleared within 3 years[460]. With increased numbers of judges, court rooms, furniture, staff and accommodation would all have to be proportionately increased[461].

The *79th Report on Delays and Arrears in High Courts and Other Appellate Courts*[462] pointed out that increase in the judge-strength of High Courts cannot be avoided; by-and-large, the solution for increasing disposal of cases, eliminating delays and clearing arrears lies in raising the judge-strength of the High Courts. It recommended that the permanent strength of the High Courts should be fixed keeping in view the average institutions during the preceding 3 years; additional and *ad hoc* judges should be appointed under Article 224A of the Constitution[463].

In the *120th Report on Manpower Planning in Judiciary: A Blueprint (1987)* the blame was placed squarely on the inadequate judge-to-population ratio in India. It was noted that judicial manpower planning is an area that has been ignored in India's planned development[464]. It was pointed out that India had 10.5 judges per million of the population whereas in advanced countries it

[457] *The 77th Report of the Law Commission of India on Delay and Arrears in Trial Courts*, November 1978.
[458] Para 1.7.
[459] Paras 9.11 and 9.12.
[460] Para 9.18.
[461] Para 13.3.
[462] May 1979.
[463] Paras 3.6 to 3.12.
[464] Para 1.

was to the tune of 107 judges per million[465]. The total judge strength of 7,675 (at that time) was held to be grossly inadequate, and it was recommended that India should have at least 50 judges per million in the near future[466] and 107 judges per million by the year 2000. Unfortunately, this goal was never achieved.

The *124th Report on High Court Arrears- A Fresh Look*[467] noted with approval, the two most important observations of the 1st Law Commission[468]:

(a) Delays in filling vacancies were the main reason for delays at the High Court level;
(b) The judge-strength of each High Court was not commensurate with the workload.

These aspects were reiterated in the *125th Report*[469].

The *127 Report on Resource Allocation for Infrastructural Services in Judicial Administration (1988)*, which is supposed to be a continuation of the 120th report, again stressing on the need to expand court resources, advocated the setting up of a National Judicial Service Commission to determine and finalise the financial needs and budgets of the courts[470]. This also, never saw the light of day.

The *Committee on Reforms of the Criminal Justice System*[471]again remarked about the poor judge-to-population ratio in India and advocated improvement[472].

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[465]Para 8.
[466]In the next 5 years.
[467]1988.
[468]Para 2.3.
[469]*125th Report on the Supreme Court –A Fresh Look 1988*, paras 3.4 and 3.5. However, it was noted that judge-strength might not make a difference at the Supreme Court level. This is considered later.
[470]Para 4.14.
[471]March 2003.

The most recent report of the law commission: *245th Report on Arrears and Backlog: Creating Additional Judicial (Wo) Manpower(2014),* was submitted as per the directions of the Supreme Court in *Imtiyaz Ahmed vs. State of UP*[473] wherein it was ordered *inter alia*, that the Law Commission undertake an enquiry with regard to the immediate measures that need to be taken by way of creation of additional courts to reduce delays and clear arrears. A stellar group of scholars from India and abroad pointed out that even though the system was in fact, processing cases *faster* at the end of 2012 than it was in 2002, the Central Government decision[474] to double the current judge strength was to be approved.

Other scholarly sources[475] also confirm the primary importance of increasing the judge-strength in order to meet the challenges of delays and arrears. *The National Commission to Review the Working of the Constitution (2001)* headed by Justice M.N. Venkatachalaiah lamented the fact that after Independence, little attention had been paid by the government to proper planning and budgeting for the judiciary. In the past 50 years, there had not been proper allocation of funds commensurate with the corresponding increase in population.

The *Report of the Task Force on Judicial Impact Assessment (2008)*[476] argues that whilst there can be no doubt that the manpower of the judiciary

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[472]Paras 1.23, 1.32, 9.1,9.2.
[473]Criminal Appeal Nos. 254-262 of 2012.
[474]*Central Government Conference of Chief Justices and Chief Ministers (5-6 April, 2013)* and the *Advisory Council of the National Mission for Justice Delivery and Legal Reforms* in its 2nd Meeting (15-05-2012), had all advocated doubling of the current judge strength.
[475]See also the Hazra Study, The *Report of the Task Force on Judicial Impact Assessment (2008); Law and Justice: A look at the role and performance of the Indian Judiciary, Madhava Menon,* http://indiandemocracy08.berkeley.edu/doc/Menon-LawANDJustice-ALook%20.pdf.
[476]Chapter 2.

has to be increased, the *causes* for the increased flows of work need to be identified so that we can address the problem meaningfully[477]. This is indeed, the kernel of the concept of *Judicial Impact Assessment*- assessing the likely increase in workloads due to particular legislations which are proposed to be brought into effect and consequently making resources available as per the needs.

The *National Court Management Systems: Policy and Action Plan*[478]released by the Chief Justice of India in 2012 pointed out that even though India had one of the largest judicial systems in the world with 18,871 judges as on 31-12-2011, in order to achieve the ratio of 50 judges to 1 million population, India needed 75,000 judges. In the last 3 decades, whilst the numbers of judges and courts had expanded 6-fold, the numbers of cases had expanded 12-fold.

Judges have taken note of the poor judge to population ratio even in their judgments. The seven-judge bench in *P. Ramachandra Rao vs. State of Karnataka*[479] opined that the root cause for delay in dispensation of justice in India is the poor judge-population ratio.

Outrage over the poor level of funding for the judiciary often spills into the media as well: “No consistent allocation of funds for the judiciary-CJI”[480], “SC

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[477]See also *Judicial Arrears , T.K. Vishwanathan*, The Hindu Online Edition Wednesday, Nov. 20, 2002 where the author, who is credited with having opened up the debate about Judicial Impact Assessment in India, acknowledges that judge strength is a basic factor for delays.

[478]On 27-09-2012: Prepared by the NCMS Committee in consultation with the Advisory Committee.

[479]2002(4) SCC 578.

[480]Justice KG Balakrishnan lamenting the fact that courts are not taken seriously whilst allocating funds; March 11, 2007, ZNews, http://zeenews.india.com/news/nation/no-consistent-allocation-of-funds-for-judiciary-cji_359446.html.

for separate judiciary budget"[481], "Only 0.4% of GDP spent on judiciary: Justice Lokur"[482], "States do not spend 1% of Judiciary Budget Allocated"[483]- these are the kinds of headlines one comes across.

The manpower in the judiciary is found to be inadequate in spite of the fact that judicial efficiency, measured in terms of the rates of disposal per judge, have constantly been increasing over the years. Consequently, delay in the system is often unfairly blamed on the judiciary and tends to bring it into disrepute. *Court News*[484],an online newsletter of the Supreme Court of India, shows that in the Supreme Court disposals rose from 20,334 cases in 1999 to 43,728 cases in 2007 even though the judge strength remained 26; in the High Courts disposals rose from 9.80 lakhs in 1999 to 14.50 lakhs in 2006 and in the subordinate courts disposals rose from 1.24 crores in 1999 to 1.59 crores in 2006. However, in spite of higher disposal rates, there were more filings than disposals each year, thereby increasing pendency. If filings are more than the disposals in a year, then the pendency is bound to increase each year unless the judicial strength is also increased. These figures clinch the fact that additional manpower is a *sine qua non* for meeting arrears and delays in the system[485].

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[481]Indian Express New Delhi August 17, 2010, http://archive.indianexpress.com/news/sc-for-separate-judiciary-budget/661149. Apparently, Justice Kapadia observed this in open court.
[482]ANI-ND, Jan 13, http://aninews.in/newsdetail2/story94159/0-39-only-0-4-percent-of-gdp-is-spent-on-judiciary-039-justice-lokr.html.
[483]The New Indian Express- Tuesday, March 25, 2014, by Kanu Sarda, ND- 23-12-2013.
[484]http://supremecourtofindia.nic.in/courtnews.htm.
[485]It is cautioned by some scholars however, that blind enhancement of judge strength without understanding the *nature* of court congestion may not always result in reduced delays and arrears. Conceding the point that increase in judge strength may still leave some areas "backlogged", it cannot be denied that increase in manpower *on the whole*, is an absolute necessity in Indian conditions. See *Maja B. Micevska and Arnab K. Hazra, The Problem of Court Congestion-Evidence from Indian Lower Courts,* ZEF Discussion Papers on Development Policy, Bonn, July 2004. Another caveat needs to be added to the proposition that India needs more judicial manpower: the Supreme Court, being the Apex Court in the country and not being a regular court of appeal, but a court that generally is supposed to exercise extraordinary jurisdiction, that too mainly on questions of law, cannot keep increasing its strength in proportion to the case-load and arrears. The very nature of the Apex Court is such; therefore the option of increasing judicial strength not being

The success of the Fast Track Courts Scheme promulgated by the Union Government, is instructive. The 11th Finance Commission recommended a scheme for creation of 1734 Fast Track Courts for disposal of long-pending Sessions and other cases. The Ministry of Finance sanctioned Rs. 502.90 crores in the year 2000 as a "special problem and upgradation grant" for judicial administration. The scheme was for a period of 5 years. Out of the 18.46 lakhs cases transferred to the Fast Track Courts, 10.66 lakhs were disposed of by the end of the scheme i.e., by 31-03-2005. In view of this success, the scheme was extended until 31-03-2010 with a provision of Rs. 509 crores as 100% central assistance. The scheme is widely acknowledged to be a success in clearing arrears[486].

5.3 Funding and planning for the judiciary in India has always been woefully inadequate

From colonial times, there has never been any political will to carefully plan and adequately provide for the judiciary[487]. The science of manpower planning until of late, has not attracted the attention of the policy-makers in

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available, the court has to handle delays and arrears in other ways such as reducing the scope of interference and defining its jurisdiction in a narrower manner. See : *The Supreme Court Under Strain: The Challenge of Arrears*, Rajeev Dhavan, ILI, New Delhi, 1978 Edition, where the central argument advanced is that the Supreme Court of India was given too wide a jurisdiction; the court can never clear its arrears until it radically alters its structure, jurisdiction and style of functioning.

[486] See for example the Speech of the then Chief Justice of India- Justice KG Balakrishnan, Presidential Address, *National Seminar on Delay in Administration of Criminal Justice System*, held at New Delhi on 17-03-2007, where he noted that the success of the Fast Track Scheme proves that inadequate judge strength is the reason for arrears. Also see *213th Report on Fast Track Magisterial Courts for Dishonored Cheque Cases*, November 2008, paras 3.2, 5.1. The *Committee on Reforms of the Criminal Justice System* also noted the success of the Scheme and advocated a similar scheme for eradicating arrears. Paras 13.1,13.6.1.

[487] *Law Commission of India 120th Report onManpower Planning in Judiciary: A Blueprint (1987).*

the judicial sphere. As *Upendra Baxi* points outs, all re-organisation proposals are basically patchwork, *ad hoc* measures[488]. The *120th LCI Report*[489] asked some very basic questions:

1. On what principles, since independence, have decisions been taken concerning the appropriate strength in each cadre of the judiciary?
2. Have these principles or norms ever been publicly articulated?
3. Have they changed over the last 4 decades, and if so, through what kind of discourse?
4. Does the Judicial Department keep proportional increase in workload in mind and propose any corresponding increase in strength of judiciary while proposing new penal offences?[490]

The answers to these questions being in the negative or non-existent, even a *basic* level of planning and resource-allocation for the judiciary has not been followed in our country.

The *127th LCI Report*[491] pointed out that administration of justice is not regarded as part of developmental activity and not promoted through 5-year or annual plans; Justice is thus a *non-plan expenditure*[492]. The first 8 Five-Year plans indeed did not even include judiciary as a plan subject! Only after the Supreme Court raised the issue in the *2nd All India Judges Case*[493]in 1993, the judiciary was treated as a subject in the Five-Year Plans. Only from the 9th Five-Year Plan onwards, meagre amounts were allocated to the judiciary – miserly allocations of 0.071%, 0.078% and 0.07% of the Plan

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[488] *The Crisis of the Indian Legal System*, 58-83 (1982), Upendra Baxi.
[489] On *Manpower Planning in Judiciary : A Blueprint* (1987).
[490] Para 4.
[491] On Resource Allocation for Infrastructural Services in Judicial Administration (1988).
[492] Para 2.13.
[493] 1993(4) SCC 288.

Outlay in the 9th, 10th and 11th Plans[494]. Even with regard to these meagre allocations, where the States were not able to provide matching grants, the Central Government assistance lapsed[495]. The court system therefore wholly depends on the non-plan budget which remains almost static. In respect of subordinate courts that handle nearly 90% of all the litigation in the country, their budgets come mostly from the State governments –but every State in India except Delhi allocates less than 1% of the State's annual budget to courts in the annual budgetary allocation[496]. The Registrar-Generals of the High Courts, who are generally ill-equipped, routinely prepare budget requirements only to maintain the existing strength of judges and courts; which proposals again need to be approved by the State governments[497]. Demands for increasing judge strength obviously come along with, corresponding demands for increase in infrastructure such as buildings and furniture, as well as support staff.

The question has been asked[498]: although there have been debates in Parliament and in the public regarding the scandalous delays and previous Law Commissions have examined the problem, these exercises have not given the necessary impetus for comprehensive restructuring of judicial administration in India : why? *Baxi*[499] responds that the answer to this question is at once inescapably both political and technical. Politically, the Indian State since the colonial period has self-consciously under-staffed the judiciary; after Independence too, this colonial situation has been allowed to

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[494]See *Report of the Task Force on Judicial Impact Assessment* (2008), covering letter dated 15-06-2008.
[495] Ibid.
[496]*Madhava Menon, Law and Justice, A Look at Role and Performance of Indian Judiciary*, Berkeley Seminar Series, Sept 2008.
[497]In the *Resolution of the Chief Justices' Conference in April 2008*, it was accepted that lack of expertise on the part of the High Court officials in preparing budgets resulted in the subordinate judiciary not getting enough funds. Times of India, New Delhi, 20-04-2008, page 14.
[498]*The Crisis of the Indian Legal System*, Upendra Baxi, pages 58-83 (1982).
[499]Ibid.

continue. Neither political parties, the press, social activists or the Bar have shown any effective will to campaign for adequate manpower planning for the Indian judiciary – nor have judges of the courts. The technical reason is that the developing science of man-power planning has not attracted the attention of policy-makers in the field of administration of justice in India. All re-organisation proposals are basically patchwork, *ad hoc*, unsystematic solutions to the problem[500].

It is noted that the nation pays a lot *more* due to the lack of manpower planning than it would have if a reasonable investment in judicial services had been made, because of:

(a) Stay orders operating for long periods of time against public revenue measures;
(b) Human rights and dignity costs to persons in custody;
(c) Costs of litigation to the State and private parties;
(d) Overall costs of maintenance of law and order; and
(e) Declining respect for the rule of law[501].

The further important aspect to be borne in mind is that the judiciary virtually pays for itself through Court Fees. The *14th Report on the Reforms of Judicial Administration*[502], observed that India is the only country under a modern system of government that deters a person whose rights have been infringed from seeking redress, by imposing a tax on the remedy he seeks[503]. It was

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[500]Ibid.
[501]*120th Report on Manpower Planning in Judiciary: A Blueprint*, July 1987.
[502]September 1958.
[503]Para 1,Chapter 22. Lord Macaulay had condemned the preamble to the Bengal Regulation imposing high court fees in 1795 with the avowed object of inhibiting litigation as "the most eminently absurd preamble that was ever drawn". But this was ignored by the Colonial government. See also Chapter 2, *The Crisis of the Indian Legal System*, 58-83 (1982), Upendra Baxi; the *Report of the Committee on Legal Aid (1973)* headed by Krishna Iyer.

noted, after analyzing the statements from several States, that receipts were greater than expenditures, both on criminal and civil sides[504]. Even if part of the surplus from Court Fees recovered had been used by the judiciary, it could have rendered better services.

5.4 Expenditure on the judiciary is investment

In a poor, developing, welfare State, the question may well be asked: why spend on judges and courts when we can spend the same money on roads, health care or poverty-alleviation programs? Again, there appears to be a general consensus of scholarly opinion on the answer to this question. World Bank President Mr. James D. Wolfensohn[505]:

> **<u>Without the protection of human and property rights, and a comprehensive framework of law, no equitable development is possible.</u> A Government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.(underlining supplied).**

There is the growing recognition that economic and social progress cannot be sustainably achieved without respect for the rule of law, democratic consolidation and effective protection of human rights – each of which requires a well-functioning judiciary that resolves cases predictably, in a reasonable time-frame, and that is accessible to the public[506]. Indeed, the

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[504]Para 26, Chapter 22.

[505]In his proposal for a Comprehensive Development Framework, January 1999.http://web.worldbank.org/archive/website01013/WEB/0__CO-87.HTM.

[506]See *Court Performance Around the World- A Comparative Perspective*. World Bank Technical Paper No. 430, *Maria Dakolias (1999).*

World Bank has stepped up its assistance to strengthen legal and judicial systems in many countries upon this understanding. The European Union also regularly includes human rights, democracy and rule of law clauses in its development and co-operation agreements[507]. Scholars such as *Armando Castelar Pinheiro*[508]have successfully argued that inefficiency in courts has a direct bearing on investment and employment levels[509]. The *National Commission to Review the Working of the Constitution* has also recognized this simple, yet profound truth[510]:

Human dignity, human rights, literacy, health, social security and other public goods are not to be seen as ultimate rewards of development, but are quintessentially crucial to the developmental process itself...
...Consideration of human rights, equity, equality, equal justice and the accommodation of diversity are central to the conceptualization, design, implementation, delivery, monitoring and evaluation of all developmental processes[511]...(underlining supplied)

In his article *The Economic Consequences of a Weak Judiciary: Insights from India*[512] Kohling examines the empirical relationship between the quality of the Indian judiciary and the economic development of the Indian States and Union Territories. By analyzing state-level per capita incomes and poverty rates, and defining quality in the judiciary to mean *speed* in deciding

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[507]Ibid.
[508]*The Hidden Costs of Judicial Inefficiency: General Concepts and Estimates for Brazil,* Address at the Seminar ""Reformas Judiciales en Amdrica Latina: Avances y Obstaculos para el Nuevo Siglo," Confederacion Excelencia en la Justicia, Santafe de Bogota, Columbia (July 29,1998).
[509]See *Judicial Systems and Economic Performance*, 34 Q.Rev.Econ. and Fin. 101 (1994) where it is argued that countries that attempt economic liberalization under a weak judicial system suffer at least 15% penalty in their growth momentum.
[510]Para 2.1.2. The Law Commissions have also recognized that expenditure on judiciary is investment. See Para 1, Chapter 3, *14th Report on Reforms of Judicial Administration* and the *125th Report on the Supreme Court- A Fresh Look*, para 4.10.
[511]Para 2.3.6
[512]Wolfgang K.C. Kohling, Centre for Development Research, ZEF, University of Bonn, November 2000.

trials and the *predictability* of judicial outcomes, he argues that a weak judiciary has a negative impact on economic and social development which leads to (a) lower per capita income, (b) higher poverty rates, (c) lower private economic activity, (d) poorer public infrastructure, (e) higher crime rates and (f) more industrial riots. Institutions like the judiciary, he argues, determine the framework of markets and all other mechanisms where goods, services and information are exchanged. The mechanisms can either be efficient, thereby stimulating the economy, or less efficient, thus constricting the market. A weak judiciary is an institution that is inefficient and ineffective due to contradictory, unclear or complicated mechanisms; consequently property rights are often inadequately protected and enforced; additional funds thus have to be spent to secure these rights; in this situation, complicated transactions such as long-term and specific investments as well as contracts with higher risks are not performed, or are subject to a risk premium.

David Webber, in his World Bank paper *Good Budgeting, Better Justice: Modern Budget Practices for the Judicial Sector*[513] also reiterates the increasing recognition by the World Bank and other developmental institutions that, to be successful, the development process must be comprehensive and supported by an effective judicial system- a view supported by empirical studies that indicate a strong correlation between indicators of development such as per capita income and infant mortality – and the rule of law[514].

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[513]Legal Vice-Presidency, the World Bank, Law and Development Working Paper Series, No. 3.
[514]For examples, see *Legal and Judicial Reform: Strategic Directions, Vice-Presidency*, The World Bank (undated), 16-17 available at www. Worldbank. Org/publications.

5.5 Separation of powers and financial independence of the judiciary: International perspectives

Judicial independence now does not mean only non-interference in the adjudication of cases: it also refers to the *institutional* independence of judges[515]. One of the important aspects of this concept is that the State should ensure that judges are not overburdened with unreasonable case-loads; the judicial branch which has neither "the swordnor the purse" in Hamilton's[516]words, should be allowed proper resources for its functioning.

Various international conferences have recognized the importance of this principle. The famous *Syracuse Draft Principles on Independence of the Judiciary*[517]state as follows:

Article 24

To ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfillment of its judicial functions.

Article 25

The budget of the judiciary should be established by the competent authority in collaboration with the judiciary. The amount allotted should be sufficient to enable each court to function without an excessive workload. Judiciary should be able to submit their estimates of their budgetary requirements to the appropriate authority.

Note: An inadequate provision in the budget may entail an excessive workload by reason of an insufficient number of budgeted posts, or of inadequate

[515]*Report of the Task Force on Judicial Impact Assessment*, 2008.
[516]*The Federalist* No. 78, The Judiciary Department, Independent Journal, Saturday, June 14, 1788, [Alexander Hamilton]http://www.constitution.org/fed/federa78.htm
[517]Adopted by the International Commission of Jurists at Syracuse, Sicily, 25th to 29th May, 1981.

assistance, aids and equipment and consequently be the cause of unreasonable delays in adjudicating cases, thus bringing it into disrepute.

Again, the International Bar Association in its 19th Biennial Conference at New Delhi, in 1982, adopted recommendations made by Professor Shimon Shetreet, known as the *Delhi Approved Standards*[518], which provide in para 10:

It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

Several other international fora have adopted similar provisions including the *7th UN Congress on the Prevention of Crime and the Treatment of Offenders*[519]*, the World Conference of Justices at Montreal*[520]*,* the *Lusaka Seminar on the Independence of Judges and Lawyers*[521]*, the International Commission of Jurists*[522]*, Conference of the Chief Justices of Asia and the Pacific*[523]and Dr. L.M. Singhvi's final report pursuant to UNESCO proceedings at the *38th Session of the UN Sub-Commission – Draft Declaration on the Independence and Impartiality of the Judiciary.*[524] It is thus seen that these principles have been developed and accepted by most

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[518]October 1982, Published later in CIJL Bulletin No. 11, p.53 and CIJL Bulletin 23 Jan 1989, page 18.

[519] Milan, August-September 1985, para 7, CIJL Bulletin No. 16, Oct 1985 p.53 and CIJL Bulletin No. 23, Apr 1989, p. 109)

[520]Universal Declaration on the Independence of Justice, Montreal 5- 10 June, 1983, CIJL Bulletin Vol. 12, Oct 1983 p. 27, paras 2.41 and 2.42

[521]November 1986 CIJL Bulletin Vols 19-20, Oct 1987, p.97 paras 23, 24, 29.

[522]Conference at Caracus, Venezuela, Jan 1989, CIJL Bulletin No. 23, Apr 1989 and CIJL Bulletin 25-26, Oct 1990, p.22

[523]6th Conference, Beijing, 19-08-1995, Articles 36,37,41 and 42. See also Dr. L.M. Singhvi's final report pursuant to UNESCO proceedings at the 38th Session of the UN Sub-Commission – draft declaration on the Independence and Impartiality of the Judiciary , para 33.

[524]Para 33.

of the countries governed by the rule of law[525]. It is crucial to note that the Universal Declaration of Human Rights (Article 10) and the International Covenant on Civil and Political Rights (Article 14(1)) proclaim, that everyone should be entitled to a fair and public hearing by a competent, independent and *impartial* tribunal established by law. An independent judiciary is indispensable to this right.

Dr. Simon Shetreet, Professor of Hebrew University, Jerusalem, and acclaimed as an expert on this issue, has recommended minimum standards of judicial independence[526] which include the following :

a) Judicial administration must be vested jointly with the Judiciary and the Executive and adequate financial resources should be made available;
b) The Judiciary as a whole, should enjoy autonomy and collective independence vis-à-vis the Executive;
c) The primary responsibility for judicial administration should be either with the judiciary alone or jointly with the judiciary and executive;
d) Court services should be adequately financed by the relevant government;
e) Judicial salaries and pensions shall be adequate and shall be regularly adjusted to account for price increases independent of executive control;
f) The position of judges, their independence, security and remuneration shall be secured by law; &

[525]Para 1.6 *Consultation Paper on Financial Autonomy of the Indian Judiciary*, National Commission to Review the Working of the Constitution, 2001.
[526]The Delhi Approved Standards; See also*Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, Shimon Shetreet, North-Holland Publishing Company, 1976 and *Judicial Independence: The Contemporary Debate,* S. Shetreet and J. Deschenes (editors), Martinus Nijhoff Publication, Dordrecht, 1985.

g) Judicial salaries should not be decreased during service except as part of an overall public economic measure.

The *Beijing Law Asia Statement*[527] provides:

An independent judiciary is indispensable for implementation of human rights as per the UN declaration of Human Rights and the International Covenant on Civil and Political Rights[528]. (underlining supplied)

The budget of the court should be prepared *by the Courts* or a competent authority in collaboration with the judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

India being a signatory to the UN Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the resolutions of Law Asia, has a bounden duty to conform to these resolutions and thus uphold its obligations to protect human rights. It is indeed interesting that in the international discourse, judicial independence and financial autonomy are seen as essential to *the protection of human rights.*

5.6 The Inherent powers doctrine in the United States and budgetary processes in other countries

American courts have developed the theory of *inherent powers* to issue directions to the executive for grant of the necessary finances for conducting

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[527] *Conference of the Chief Justices of Asia and the Pacific,* 6th Conference, Beijing, 19-08-1995, Articles 36,37,41 and 42.

[528] Article 2.

their normal affairs and also to meet the demands of access to justice and speedy justice. Though this power has been used *sparingly and in exceptional cases*, it is important to note that there exists such a principle[529]. Professor David J. Saari[530] has argued that each organ of the State has the *inherent power* to stop the others from shutting it down. The doctrine was initially used for covering *particular contingent expenses* by a Judge of the Pennsylvania Supreme Court in 1888, stating that the judge had the authority to draw directly on the public purse to cover contingent expenses of the court such as payment for jurors' lodgings, etc. Later on the jurisdiction was expanded to cover *direct general budgetary funding* necessary for the courts. Professors Whittington and Webb[531]: "the doctrine of inherent powers licenses the courts to take necessary actions to fulfill their constitutional functions *even when those actions are not specifically authorized by constitutional text or legislative statute".*

Several US instances can be given. In *Commonwealth ex rel Carrol vs. Tate*[532]the Supreme Court of Pennsylvania made orders appropriating some 1.4 million US dollars. In *US vs. Will*[533] the judges of the US Supreme Court effectively gave themselves and all other federal judges a pay-rise of 10% in a class action case. In *Cuomo vs. Wachtler*[534], the Chief Justice of the New York State Federal Court sued the Governor in the State Supreme Court, alleging that budget cuts by the Governor undermined the prompt administration of justice. The matter was settled.

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[529]Report of the Task Force on Judicial Impact Assessment, 2008, Chapter 4.
[530]*Separation of Powers, Judicial Impartiality and Judicial Independence: Primary Goals of Court Management Education* (Chapter 7 of Hayes' Book), *Handbook of Court Administration and Management*, Edited by Steven W. Hays, Cole Blease Graham Jr., Marcel Dekker Inc., 1993.
[531]*Judicial Independence, the power of the Purse, and inherent Judicial Powers*, Keith E. Whittington and G. Gregg Webb, Judicature, 1st July 2004.
[532]274A. 2d.193.
[533] (1980) 449 US 200.
[534] No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991) (settled Jan. 1992).

On the administrative side, in the 1920s Chief Justice Taft lobbied for judicial independence and financial autonomy of the Federal Court. In the year 1922 a bill was passed conferring powers on a *Judicial Conference* to make decisions. Justice Taft had felt that judges would be better suited to making policy decisions as to the number of judges required: *the question of number of judges needed should be under the control of one who knows what the need is*[535]. In the year 1939 the responsibility for court administration was statutorily transferred to the judiciary, to be performed as per the policies of the Judicial Conference[536]. The statute created the *Administrative Office of the US Courts* and the entire administration of federal courts was transferred to it from the Department of Justice. The result is that the centralized federal judicial administration system is largely autonomous in the conduct of its administrative and financial matters. Consequently, budgets estimates are not submitted to the Executive, but directly to Congress. In the State courts, the Chief Justice of the court, *en banc* (i.e., in full court) is responsible for court administration; the Court Administrator or Clerk of Court, prepares the budget of the court – which is then approved by the Chief Justice before submission to the proper authorities in the executive and legislative branches.

The position in Italy, Japan and other developed countries[537]also shows that there is great autonomy given to the judiciary in financial and administrative matters. In Latin American countries there is indeed a constitutional requirement of allocation of a fixed percentage of the country's total budget

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[535]Henry F. Pringle, *The Life and Times of William Howard Taft*, 993 (1939), American Political Biography Press, 1939.
[536]28 USCA$ 605 (p.592).
[537]*Report of the Task Force on Judicial Impact Assessment*, 2008.

to the judiciary: in Costa Rica it is at least 6% as per Article 177, in the Honduras 3% at least, in Peru at least 2% and so on.

It is unfortunate that in India, as pointed out by the *National Commission to Review the Working of the Constitution*[538]:

a) All the judges are not involved in the preparation of the budget;
b) Even though the Chief Justice of India and the Chief Justices of the High Courts prepare their budgets with the help of their Registrars, these are very routine budgets based on notional increases of previous years' figures; the budgets are then sent to the Executive and often suffer serious cuts;
c) On the theory that judiciary is not productive of "goods" or "utilities" , funding for the judiciary has always been very low priority;
d) There is no independent judicial council with statutory status that can prepare the budgets and independently spend the lump-sum allocations under various heads;
e) The judiciary has no say in any planning policies prepared by the Planning Commission or the State Planning Boards; the Finance Commission does not deal with the requirements of the judiciary as an institution.

5.7 First steps towards adequate court financing by the Indian Supreme Court

Excitingly, the Indian Supreme Court has been exercising the inherent powers doctrine since 1992 to issue specific directions to the executive for securing more funds and also to administer the justice system in the country.

[538]Consultation Paper on Financial Autonomy for the Indian Judiciary, Sept. 26, 2001.

In *All India Judges Association(I) vs. Union of India*[539] a writ petition under Article 32 was filed in the Supreme Court seeking directions *inter alia*, for the setting up of an All-India judicial service and for bringing about uniform conditions of service and perquisites to all the members of the subordinate judiciary in India. The bench of 3 judges headed by Justice Ranganath Mishra, issued various directions *inter alia* to the effect that:

(1) An All-India judicial service should be set up and the Union of India should take effective steps thereto;
(2) Retirement age of judicial officers should be raised to 60 years;
(3) The question of appropriate pay scales of judicial officers should be raised and considered when Pay Commissions are set up;
(4) Working library at the residence of every judicial officer to be made available;
(5) Residential accommodation to be provided to each judicial officer; and
(6) Transport facilities to be made available to the lower judiciary.

The observation was also made[540] that income from court-fees is in fact *higher* than the expenditure on administration of justice- as such, instead of adding the receipts from court fees to the general coffers of the States, the revenue should be made available to the courts. It was further pointed out that every High Court judge under Article 235 was required to look into the proper functioning of the subordinate judiciary. However, the Union of India thereupon filed review petitions seeking review of the judgment *inter alia* on the ground of financial constraints. This was decided in *All India Judges Association (II) vs. Union of India*[541] wherein the Supreme Court made some modifications to its earlier directions, whilst rejecting the plea of financial constraints on the ground that wherever the executive was *obliged by law to*

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[539] 1992(1) SCC 119.
[540] In para 54.
[541] 1993 (4) SCC 288

perform certain duties, the plea of financial constraints could not be entertained. In *All India Judges Association (III) vs. Union of India*[542]the Supreme Court monitored the implementation of its earlier directions. In *All India Judges Association (IV) vs. Union of India*[543] the Supreme Court held boldly[544]:

An independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient numbers of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure. It is well known that justice delayed is justice denied. Time and again the inadequacy in the number of Judges has adversely been commented upon. Not only have the Law Commission and the Standing Committee of Parliament made observations in this regard, but even the Head of the judiciary, namely, the Chief Justice of India has had more occasion than one to make observations in regard thereto.Under the circumstances, we feel it is our constitutional obligation to ensure that the backlog of the cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, we are of the opinion that time has now come for protecting one of the pillars of the Constitution, namely, the judicial system, by directingincrease, in the first instance, in the Judge strength from the existing ratio of 10.5 or 13 per 10 lakh people to 50 Judges per 10 lakh people. We are conscious of the fact that overnight these vacancies cannot be filled. In order to have additional Judges, not only will the posts have to be created but infrastructure required in the form of additional courtrooms, buildings, staff etc., would also have to be made available. We are also aware of the fact that a large number of vacancies as of today from amongst the sanctioned strength remain to be filled. We, therefore, first direct that the existing vacancies in the subordinate courts at all levels should be filled, if possible latest by 31-3-2003, in all the States. The increase in the Judge

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[542]1994(4) SCC 727
[543]2002(4) SCC 247
[544]*All India Judges' Assn. (3) v. Union of India, (2002) 4 SCC 247*, at page 269.

strength to 50 Judges per 10 lakh people should be effected and implemented with the filling up of the posts in a phased manner to be determined and directed by the Union Ministry of Law, but this process should be completed and the increased vacancies and posts filled within a period of five years from today. Perhaps increasing the Judge strength by 10 per 10 lakh people every year could be one of the methods which may be adopted thereby completing the first stage within five years before embarking on further increase if necessary. (underlining supplied)

These directions issued in 2002, are yet to be realised.

The approach of the court in *Brij Mohan Lal vs. Union of India*[545] decided in 2012, is indeed quite promising for the right to speedy trial and the adequacy of judicial funding. Several writ petitions and appeals had been clubbed together *inter alia* seeking a mandamus directing the executive to continue the Fast Track Scheme run by the government or to provide funds for it. The Union of India had initially created the FTC scheme for 5 years, but it had come to be extended up to 31-03-2011. The Union of India opposed the prayer on the ground that this was an issue of fiscal policy wholly within the discretion of the government, and that it was impermissible for the court to usurp these powers. The Supreme Court noted the success of the FTC scheme in reducing the pendency in criminal cases. It was held that decisions of policy can be classified into general policy decisions and fiscal policy decisions. In the latter, the scope for judicial interference would be narrower. However, where an issue of public interest has not engaged the attention of those concerned with policy, the courts can act as catalysts[546]. Any policy of the government that would undermine or destroy the independence of the judiciary would be opposed to public policy and would impugn on the basic structure of the constitution. It was thus held that:

[545] 2012 (6) SCC 502
[546] The decision in *Mohd. Abdul Khader vs. DGP* (2009) 6 SCC 611 was relied on.

It is the constitutional duty of this court to ensure maintenance of the independence of the judiciary as well as the effectiveness of the justice delivery system in the country. If the policy decision of the State is likely to prove counterproductive and increase the pendency of cases, thereby limiting the right to fair and speedy trial, it will tantamount to infringing their basic rights and constitutional protections[547]...(underlining supplied).

Given the success of Fast Track Courts in reducing pendency in the criminal courts, it was held that mandamus would thus lie to save the scheme. The plea of financial constraints was not a valid one to avoid basic human rights. It was further noted that the right to speedy trial under Article 21 *cannot be denied on financial grounds*[548]. Accordingly, directions were issued *inter alia* to the effect that the Union of India and the State Governments shall re-allocate and utilise the funds apportioned by the 13th Finance Commission and/or make provisions for such additional funds to ensure regularisation of FTC judges and creation of additional courts; an additional 10% posts shall be created – which burden shall be shared between the Central and State governments equally.

5.8 Judicial Impact Assessment and the Indian Supreme Court

Yet another manner in which the Supreme Court has made inroads into fiscal policy is through observations and directions relating to Judicial Impact Assessment (JIA). In his article in the *The Hindu*[549], T.K. Vishwanathanhad argued that whilst the numbers of judges undoubtedly need to be increased,

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[547]Para 111

[548]This aspect has indeed been affirmed in several other cases including *Hussainara Khatoon vs. State of Bihar (IV)*, 1980(1) SCC 98, para 10.

[549]*Judicial Arrears*, The Hindu, Online Edition, Wednesday, Nov. 20, 2002

in order to do this in a meaningful way the US concept of Judicial Impact Assessment could be adopted because this could make a strong argument for demanding adequate budgetary allocation, by indicating through statistics, the *particular* enactments that were choking the system. In *Salem Advocates Bar Association (II) vs. Union of India*[550]the Supreme Court first considered the need for JIAin India; a report was submitted by a committee consisting amongst others, of Justice Jagannadha Rao and Arun Jaitley, suggesting that like the US, whenever any legislation is introduced in Parliament or the State Legislatures, the financial memoranda attached to each Bill must detail the expenditure of additional cases, additional courts, judges and staff, and the infrastructure likely to be required to meet the litigation arising from the said enactment. The Supreme Court after referring to the report directed the Central Government to examine the suggestions and submit a report within 4 months, *having regard to the constitutional obligation to provide fair, quick and speedy justice.* Pursuant thereto, a Government Notification dated 15-02-2007 was issued constituting a Task Force for examining the feasibility of adopting Judicial Impact Assessment in India. The Task Force submitted its report on 15-06-2008 and the key findings and recommendations include the following:

(a) Judicial Impact Assessments must be made on a scientific basis for the purpose of estimating the extra case-load which any new Bill or Legislation may add to the burden of the Courts and the expenditure required for adjudication of such cases must be estimated by the Government and adequate budgetary provision must be made therefor; Such impact assessments must be made in respect of Bills that are introduced in Parliament as well as Bills introduced in the State legislatures;

[550]2005 (6) SCC 344

(b) The Government of India, in view of Entry-11A of the Concurrent List and Article 247 of the Constitution of India and the general scheme of the Constitution, must have such assessments made and make necessary financial provision, at the stage of the Bills, for implementation of Central laws in respect of subjects in the Union List or the Concurrent List (of the VII Schedule of the Constitution of India), in the Courts. The State Governments should not be made to bear the financial burden of implementing Central laws passed under the Union List or Concurrent List, through the Courts established by the State Governments. The State Governments must likewise make adequate financial provision for meeting the expenditure of the Courts, at the stage of the Bills, for the implementation of the Laws to be made by the State Legislature with respect to subjects in the State List and Concurrent List.

(c) The expenditure on the courts in respect of fresh cases that may be added to the "Supreme Court" and the "High Courts" by new laws must be reflected in the Financial Memoranda attached to the Central Bills under Clause (3) of Art. 117 or attached to the State Bills under Clause (3) of Art. 207 of the Constitution of India, as required by the respective Rules of Business.

(d) The High Courts must take the assistance of experts in planning, budget and finance for the purpose of preparing their budgetary demands for the High Courts as well as the Subordinate courts.

(e) The Central Government may also consider the various recommendations made by the Commission for Review of the Constitution, such as the constitution of Judicial Councils, preparation of budgets and appropriation of the funds for the courts.

(f) The Planning Commission and the Finance Commission must, in consultation with the Chief Justice of India, allocate sufficient funds for the Judicial Administration in the Country, particularly in regard to the

infrastructure, expenditure on judicial officers and staff in the Subordinate Courts and the High Courts to realize the basic human rights of 'Access to Justice' and 'Speedy Justice'.

(g) There must be constituted a Judicial Impact Office at Delhi to deal with the assessment of the probable number of cases and computing probable extra expenditure on courts in respect of the implementation of Central Bills/ Legislation on subjects in the Union List and the Concurrent List.

(h) There must be Judicial Impact Offices constituted at the level of the States located at the State capitals for assessment of the probable number of cases and computing the probable extra expenditure on the Courts in respect of implementation of the Laws made by the State Legislature in respect of subjects in the State List and the Concurrent List. Where the High Courts are not located at the State Capitals, the Judicial Impact Offices must be located at the place of the seat of the High Court. In respect of Union Territories which have a separate legislature, the Impact Offices must be located at the place of the seat of the Legislature[551].

The Report of the Task Force having been submitted to the Supreme Court, it is heartening to note that the Department of Justice website[552] indeed states that the new plan scheme for the *Study of Judicial Reforms and Assessment Statistics* is included in the 11th 5-year Plan at an outlay of Rs. 22.62 crores and has been approved by the Standing Finance Committee and the Minister for Law and Justice. The primary objective of the new scheme is stated to be to facilitate the study of the feasibility of Judicial Impact Assessment in India. Thus, Judicial Impact Assessment appears to have become a part of the planning and fiscal process in India.

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[551] Chapter 9.
[552] http://doj.gov.in/?q=node/106.

We may be celebrating too soon however, for two reasons. First, we need to bear in mind the caution voiced by Prof. Mohan Gopal (who was a member of the Task Force, but did not sign the report), who has categorically opined that Judicial Impact Assessment can prove to be a dangerous tool since it combines the legislative process with questions of fiscal policy[553]. If we look at the history of the evolution of human rights in India and abroad, articulating a right has never been concerned with the costs that might come with it. If that were the case, India would not have adopted its constitution in 1950, the ICCPR in 1948 or the ICESCR in 1966 since it did not even have 10% of the judicial capacity it has today to address rights flowing from these sources. Therefore, the costs involved in giving effect to legislation should never be a consideration to law-makers who seek to bring into force newer laws that empower people. Indeed, it is pointed out, the concept of JIA is closely linked with other Reaganite ideas that seek to constrain the use of courts to enable businesses to flourish. Second, Gopal argues, JIA may not be possible in India as a statistical tool since even the rudimentary statistics are not available – therefore it is simply not possible to estimate on a scientific basis and in a reliable manner the number of cases that might arise from a given piece of legislation. Whether the tool of JIA proves useful or not is thus yet to be tested in the Indian context. What we can surely be happy about is the fact that this is the first time the government is taking steps towards *comprehensive* judicial budgeting, court management and judicial statistics-something which has always been lacking in India.

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[553]*Dissenting Note: In place of judicial impact assessment, what India needs is "judicial use assessment" to measure to what extent people have actually used courts to enforce their rights*, G. Mohan Gopal, http: //www.hindu.com/fline/fl3008/stories/20130503300801700.htm.

5.9 The problem of arrears is not unsurmountable

If the statistical studies conducted by scholars on the subject are to be believed, then the problem of arrears and delays is not an impossible one- whether financially, administratively or in terms of manpower planning. Whilst the *245th Report*[554] approved the Government's plan to *double* the strength of the judiciary, *Micevska and Hazra*[555] suggest that relatively small increases- in addition to filling up sanctioned strengths- could have the desired effect of clearing arrears.

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[554] On *Arrears and Backlog: Creating Additional Judicial Wo(manpower)*, July 2014.
[555] *The Problem of Court Congestion-Evidence from Indian Lower Courts*, Maja B. Micevska and Arnab K. Hazra, ZEF Discussion Papers on Development Policy, Bonn, July 2004.