R.K.JAIN MEMORIAL LECTURE

TOWARDS A HOLISTIC RESTRUCTURING OF THE SUPREME COURT OF INDIA

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It gives me great pleasure to deliver the first R.K. Jain Memorial Lecture. Shri R.K. Jain was a great friend of mine and it was a tragedy that he suddenly passed away at the age of 62. His passing away was a loss not only to the Supreme Court of India, where he had carved a unique place for himself as a human rights activist as well as a leader of the Bar, but also to the large number of friends and colleagues whom he left behind.

The topic that I have selected is, "*Towards Holistic Restructuring of the Supreme Court of India*". We have watched the Supreme Court of India, over a period of 60 years, growing into an institution wielding enormous power in every sphere of human activity. After an initial resistance, the Executive and the Legislatures yielded to the will of the Apex Court of the country, which gradually attained a position of pre-eminence among the three organs of State. The most noticeable aspect of the progress of the Supreme Court of India is that it shed along the

way the limitations inherent in the exercise of judicial powers. It, consequently, became a powerhouse of judicial activism.

The awesome power exercised by the Supreme Court could be seen by the judgments delivered by it encompassing every sphere of the nation's activity – political, economic, social and even policy making. There was no grievance too insignificant to attract the Court's palliative and curative jurisdiction. Striking down laws and executive action was part of its prerogative. But the founding fathers never dreamt that Parliament would be rendered accountable to the Supreme Court of India for exercising its plenary power of amending the Constitution, which according to Parliament was a constituent power, by the Court evolving the novel doctrine of "basic structure of the Constitution"; nor did Parliament ever contemplate that a day would come when the Executive would no more have a significant voice in the appointment of Judges to the High Courts and the Supreme Court, contrary to the Articles of the Constitution, which expressly vested the power of appointment in the President of India in consultation with the Chief Justice of India. But, unfortunately, one single factor totally eclipses this grandiose picture which I have just painted of an outstanding

institution; and that is the inability of the Court to deliver justice within a reasonable time frame.

To go to the root of this problem one has to project oneself to the beginning of the Constitution i.e. in 1950. Taking a holistic view of the powers and functions conferred by the Constitution on the Supreme Court of India, one has to ask - what should have been the matters with which the Apex Court of a country should concern itself in exercise of its judicial powers. It will be useful, in this context, to refer to the views of a few jurists.

Paul Freund has set out Justice Brandeis' opinion in the following words, that he –

> "...was a firm believer in limiting the jurisdiction of the Supreme Court on every front as he would not be seduced by the Quixotic temptation to right every fancied wrong which was paraded before him. ..... Husbanding his time and energies as if the next day were to be his last, he steeled himself, like a scientist in the service of man, against the enervating distraction of the countless tragedies he was not meant to relieve. His concern for jurisdictional and procedural limits reflected, on the technical level, an essentially stoic philosophy. For like Epictetus, he recognized 'the impropriety of being emotionally affected by what is not under one's control'."

Justice Jackson says –

> "The only way found practicable or acceptable in this country (U.S.A.) for keeping the volume of cases within the capacity of a court of last resort is to allow the intermediate courts of appeal finally to settle all cases that are of consequence only to parties. This reserves to the court of last resort only questions on which lower courts are in conflict or those of general importance to the law."

Justice K.K. Mathew, an eminent Judge of this Court, in an article published in (1982) 3 SCC (Jour) 1, has referred to Chief Justice Vinson saying:-

> "If we took every case in which an interesting legal question is raised, or our prima-facie impression is that the decision below is erroneous, we could not fulfill the constitutional and statutory responsibilities placed upon the court."

And that is exactly what has happened in India. According to Justice Mathew, the Supreme Court, to remain effective, must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. It is Justice Mathew's opinion and I say so, with respect, a correct opinion, to the effect:-

> "To say that no litigant should be turned out of the Supreme Court so long as he has a grievance may be good populistic propaganda but the consequence of accepting such a demand would surely defeat the great purpose for which the Court was established under our constitutional system. It is high time we recognize the need for the

> Supreme Court to entertain under Article 136 only those cases which measure up to the significance of the national or public importance. The effort, then, must therefore be to voluntarily cut the coat of jurisdiction according to the cloth of importance of the question and not to expand the same with a view to satisfy every litigant who has the means to pursue his cause."

If this were to be the correct approach to the jurisdiction of the Supreme Court, I would conceive of the following matters mainly being within the true scope of the jurisdiction vested in it by the founding fathers.

i) All matters involving substantial questions of law relating to the interpretation of the Constitution of India or of national or public importance;

ii) Validity of laws, Central and State;

iii) After Kesavananda Bharati, (1973) 4 SCC 217, the judicial review of Constitutional Amendments;

iv) Resolving conflicts between States and the Centre as well as the original jurisdiction to dispose of suits in this regard;

v) To settle differences of opinion of important issues of law between High Courts.

vi) Additionally, Presidential References and Art. 131 of the Constitution.

You may notice that I have deliberately omitted Article 32 of the Constitution. So too, many other provisions which confer jurisdiction

on the Supreme Court of India. It will be my thesis, for reasons to be stated presently, that all such matters will have to be finally heard and decided by intermediate courts which are to be created by amendment to the Constitution for absorbing the vast volume of cases which the Supreme Court of India had been dealing with up till now, which has been responsible for the vast accumulation of cases. It is obvious that even with a progressive addition to the judge strength of the Court, the Court has been unable to reduce the pendency and it is unlikely, that it will be able to dispose of cases within a reasonable time in the foreseeable future.

It is true that there is a significant difference between the Constitutions of other common law countries and that of India. Our Constitution is a socialistic one and the Directive Principles of State Policy intended for the benefit of the common man and the weak and the down-trodden have to be borne in mind by the Courts in exercising its jurisdiction. At the same time we have judges who are human beings, who are swayed by the distress of the litigants who came before them. What Justices Brandeis and Robert H. Jackson say would require them to act more like robots, who are totally indifferent to the tragedy and plight of the

poor and weaker sections of society. This is what our judges have not been able to resist during the last few decades, as a result of which there is no area of human endeavour in regard to which the Supreme Court judges have not sought to exercise their jurisdiction, appellate or original.

However, laudable the intention may be, the final result has been that the Supreme Court had gradually converted itself into a mere Court of Appeal, which has sought to correct every error which it finds in the judgments of the 21 High Courts of the country, manned by about 632 judges, as well as the errors committed by the vast number of Tribunals from which direct appeals to the Supreme Court of India are provided for. It is only if one examines the categories of cases which the Supreme Court itself has displayed on its website, for the purpose of classification and allotment to the different benches of the Court for disposal, that one realizes how far the Court has strayed from its original character as a Constitutional Court and the Apex Court of the country.

The list of sub-categories annexed to the Supreme Court of India Practice and Procedure Handbook would disclose there are 45 heads or

subjects with as many as about 140 sub-categories. These include labour matters, rent act matters, direct tax matters, indirect tax matters, land acquisition matters, service matters, matrimonial matters and so on. The sub-heads themselves disclose the distance how far the Court has lost its direction as a Constitutional Court, in seeking to exercise vast appellate powers, by seeking to rectify perceived injustices, whenever it exists. For the purpose of allotment to the different Benches, eviction cases under the rent acts are divided into different sub-heads; under family law matters, we have divorce by mutual consent, restitution of conjugal rights, alimony and so on. There are at least 22 sub-headings under service matters. Surely, however generous one may be in seeking to render justice to all, it will be obvious to anyone that if an Apex Court seeks to deal with all such cases, it necessarily has to accumulate vast arrears over a period of time which it will be impossible to clear in any foreseeable future. According to me this is a self-inflicted injury, which is the cause of the malaise which has gradually eroded the confidence of the litigants in the Apex Court of the country, mainly because of its failure to hear and dispose of cases within a reasonable period of time.

=It is a great tragedy to find that cases which have been listed for hearing years back are yet to be heard. It is equally tragic to see long queues of lawyers begging for dates which the Chief Justice of India is unable to accede to, because the Court is struggling to cope with the workload. It is saddening that a civil suit between two States is pending for over 16 years, and a Presidential Reference for six years. Writ Petitions invoking Fundamental Rights filed under Article 32 of the Constitution, which itself is a Fundamental Right, keep stagnating for 4-5 years, rendering Article 32 itself an ineffective weapon for delivering real justice.

As a matter of fact, things had come to a pass, when Justice E.S.Venkataramiah (as he then was) in P.N. Kumar v. Municipal Corporation of Delhi, (1987) 4 SCC 609 relegated the writ petitioner under Article 32 to the High Court, without deciding whether fundamental rights were violated or not, giving among others, the following reason:

> "This Court has no time today even to dispose of cases which have to be decided by it alone and by no other authority. Large number of cases are pending from 10 to 15 years. Even if no new case is filed in this Court hereafter, with the present strength of Judges it may take more than 15 years to dispose of all the pending cases."

There was a huge hue and cry at the Bar which alleged that the Judge was violating his oath of office in refusing to entertain petitions under Article 32, which itself was a sacrosanct fundamental right.

We have, however, to sympathize with the judges. They are struggling with an unbearable burden. The judges spend late nights trying to read briefs for a Monday or a Friday. When each of the 13 Divisions or Benches have to dispose off about 60 cases in a day, the functioning of the Supreme Court of India is a far cry from what should be the *desiderata* for disposal of cases in a calm and detached atmosphere. The judges rarely have the leisure to ponder over the arguments addressed to the court and finally to deliver a path-breaking, outstanding and classic judgment. All this is impossible of attainment to a Court oppressed by the burden of a huge backlog of cases. The constant pressure by counsel and the clients for an early date of hearing and a need to adjourn final hearings which are listed, perforce, on a miscellaneous day i.e. Monday or a Friday, where the Court finds that it has no time to deal with those cases, not only puts a strain on the Court, but also a huge financial burden on the litigant.

I wonder what a lawyer practising in 1950 would feel if he were today to enter the Supreme Court premises on a Monday or a Friday. He would be appalled at the huge crowd of lawyers and clients thronging the corridors, where one finds it extremely difficult to push one's way through the crowd to reach the Court hall. When he enters the Court hall he finds an equally heavy crowd of lawyers blocking his way.

I do not think that any of the senior counsel practicing in the Supreme Court, during the first 3-4 decades of the existence of the court, would be able to relate to the manner in which we as counsel argue cases today. In matters involving very heavy stakes, 4-5 Senior Advocates should be briefed on either side, all of whom would be standing up at the same time and addressing the court, sometimes at the highest pitch possible.

All these are aberrations in the functioning of an Apex Court of any country, whether a developed nation or a developing one. I know that in Pakistan, a podium is kept in the aisle and the counsel can address the court only from the podium, as a result of which, the question of more than one counsel addressing the court simultaneously, does not

arise. In India, interruptions by the opposite counsel in the Supreme Court, are common. As a matter of fact, a retired Judge of the Supreme Court once told me that he believes one minute of interruption is equal to 15 minutes of argument! I have no doubt, that the present environment has come to stay, as the judges themselves function under tremendous pressure and the lawyers feel that within the very short time available for arguing admissions and interlocutory orders one has to adopt these methods of advocacy for getting results for the client.

The large pendency of cases also brings about very many other consequences. Believing that increasing the number of judges would be a panacea, the original strength in 1950 of 7 plus the Chief Justice has progressively been increased by amendments to the Supreme Court (Number of Judges) Act, 1956. The judge strength was increased to 10 plus Chief Justice in 1956, 13 plus Chief Justice in 1960, 17 plus Chief Justice in 1977, 25 plus Chief Justice in 1986, and today 31 plus Chief Justice of India. Where would this end? If Justice K.K. Mathew were to be believed, we could one day have more than 100 judges. He had said in his article –

> "If, in a country as small as Hungary, there could be 70 judges in its highest court, it is being asked, what is wrong

> in raising the number of judges in our Supreme Court to a hundred or even more?"

Surely, we would not like for the Supreme Court of India to have 100 Judges.

It is rather unfortunate that one did not see the writing on the wall in the early seventies itself. We had only 680 cases pending at the end of 1950, but by 1989 the arrears had crossed to over 100,000, and, then had steeply came down to 50,000 by 1993 by merely eliminating the numbering of civil miscellaneous petitions year-wise and converting them into interlocutory applications under each pending petition or appeal so that it was no longer counted separately. Finally, the pendency of cases came down to 19,000 in the year 1997. But today we find that the total pendency is in the region of 53,221 in September, 2009. What is worrisome is that if the total pendency has gone up from 19,000 in 1997 to 53,221 in 2009, an increase of over 150% in about 12 years. An increase at the same rate would bring the total pendency of cases to 1,25,000 over a period of the next ten years. I may be exaggerating, but, nevertheless, it is obvious that one has to sit back and take stock and decide as to whether one is merely going to add to the number of judges, which according to certain authorities may only

perhaps bring about a certain element of inefficiency, and would not be the real solution to the very serious problem that is being faced by the Supreme Court of India.

It is obvious that access to justice would stand denied unless such access is swift and cheap. One has to remember that the problem is not merely with the Supreme Court of India but there are about 27 million cases pending in the subordinate courts and 3 million in the various High Courts. The period taken for disposal of cases is about 7-8 years in the subordinate courts and about 5-7 years in many of the High Courts. Criminal cases of 2005 are pending today in the Supreme Court of India and Civil Appeals of 2003 are pending in large numbers. These cases had their origin in the trial courts 10 to 15 years earlier. If ordinary cases filed in India today would take about 20 years to reach any sort of conclusion, it is frightening to imagine what the future situation will be.

It is in this background that I suggest that instead of adding more judges to the Supreme Court of India, one should create four Regional or Zonal Courts of Appeal which would absorb the 140 categories of

=cases which are today pending in the Supreme Court of India being matrimonial, rent control, labour, service, land acquisition and other such like cases. These cases would belong to the exclusive jurisdiction of the Courts of Appeal which would be established in the four regions of the country. The Chartered High Courts themselves could well be the seats of these Courts of Appeals which would be manned by judges of the same calibre as the judges who would otherwise be elevated from the High Courts to the Supreme Court. The age of retirement of the Judges of the Court of Appeal would be 65, as logically, they would have to have a higher age of retirement. Correspondingly, the age of retirement of the Supreme Court Judges may have to be enhanced to 68 or even 70. The Supreme Court would then be left with only those cases which, as pointed out earlier, would fall within the true jurisdiction of the Apex Court of the country. The Court of Appeal would finally decide all cases arising from the High Courts relating to the 140 sub-categories mentioned earlier, without any further appeal. The Constitution would be amended by adding Article 136A, whereby the Zonal Court of Appeal would exercise the powers which were hitherto being exercised by the Supreme Court under Article 136 of the Constitution. On the other hand, the Supreme Court would thereafter

entertain appeals from the High Courts by restricting the scope of Article 136 to cases involving constitutional issues, validity of Central and State laws, difference of opinion between High Courts or between Courts of Appeal and Presidential References and suits between States or States and the Centre. If, however, any question arises before a Court of Appeal, which would fall within the curtailed jurisdiction of the Supreme Court, it would refer the same to the Supreme Court of India for decision.

I have to point out that the idea of having Courts of Appeal in India, for relieving the Supreme Court of India of its huge burden, is not something new. In the 1982 article, Justice K.K.Mathew had contemplated Courts of Appeal to relieve the huge backlog of cases pending in the Supreme Court of India. Later, Justice Bhagwati in the Bihar Legal Support Authority v. Chief Justice of India and Anr., (1986) 4 SCC 767 had this to say –

> "The Supreme Court of India was never intended to be a regular court of appeal against orders made by the High Court or the sessions court of the magistrates. It was created for the purpose of laying down the law for the entire country and the extraordinary jurisdiction of granting special leave was conferred upon it under Article 136 of the Constitution so that it could interfere whenever it found that the law was not correctly

> enunciated by the lower courts or tribunals and it was necessary to pronounce the correct law on the subject."

The Constitution Bench has itself felt the need of setting up of the National Court of Appeal, and has observed in the very same judgment:

> "We think that it would be desirable to set up a National Court of Appeal which should be in a position to entertain appeals by special leave from the decisions of the high courts and tribunals in the country in civil, criminal, revenue and labour cases and so far as the present apex court is concerned, it should concern itself only with entertaining cases involving questions of constitutional law and public law."

It would therefore be seen that the idea of establishing Courts of Appeal for the purpose of relieving the Supreme Court of India of its tremendous burden has always been there. As a matter of fact, the Law Commission of India in its 229th Report had recommended the setting up of four *Cour de Cassation*, in each of the regions - north, south, east and west, to have these Courts of Appeal as final courts in regard to the matters entrusted to them. Recently, the Chief Justice of India, Justice K.G. Balakrishnan also had thought on the same lines by suggesting that there could be Courts of Appeal in the different regions in the country.

Statistically, it is seen from a paper published by Nick Robinson, a Research Fellow at the Yale Law School, that 10% of the cases filed in the Supreme Court emanate from Delhi, 6.2% from Punjab and Haryana and 6.2% from Uttarakhand, with only 1.1.% and 2.4% from large States like Tamil Nadu and Karnataka. All this would mean that the distance of the Supreme Court from the Southern States would in fact be an impediment to having access to the Supreme Court of India.

If Courts of Appeal were to be established in each one of the regions in the precincts or in the vicinity of the buildings of the chartered High Courts and of the Supreme Court, then in such a case the Bars of these and neighbouring states as well as their clients would be able to access these Courts of Appeal at far less expense than if they were to travel all the way to New Delhi. The close proximity of the Courts of Appeal which would then be a real boon to the common man.

I would contemplate the Courts of Appeal as having 15 judges each. They would sit in divisions of three. This would mean that five benches would be functioning at all times with the total number of judges in all the four courts together being 60. Instead of therefore increasing the

strength of the Supreme Court of India, one would, on the other hand, have established convenient courts in each one of the regions which are easily accessible to the litigants and Counsel in those regions.

The enormous pendency of arrears in the Supreme Court of India has resulted in the Judges sitting in divisions of two or three with 12 or 13 benches functioning simultaneously. The judgment of each such bench has the efficacy of the judgment of all the 31 judges of the Supreme Court of India. We find, in practice, that over the years a convention appears to have grown where the junior judge mostly yields to the wisdom of the senior one on the Bench. If at all, we find the junior judge expressing his views to the senior judge without directly questioning counsel. Of course, there are exceptions. Virtually, therefore, the fate of a case which has gone on through 2-3 lower courts over a period of about 15 years is decided by a single judge of the Supreme Court or, at best, by two judges. It is necessary, for laying down the law for the entire country, the wisdom, learning, experience, statesmanship and independence of five judges or at least three should come to bear on the decision of every case.

It is necessary to have judges of the highest calibre possible to man the Courts of Appeal as well as the Supreme Court of India. They should be selected not merely on the basis of seniority but also on the basis of the qualities, which go to make up excellence in a judge of the Superior Courts. Justice Raveendran in a recent article in the journal section of the Supreme Court Cases entitled 'Rendering Judgements – Some Basics', has said that judges should have impartiality, by which he meant "integrity, perseverance, humility, equanimity, patience and an open mind". Chief Justice Dixon has listed the five qualities of a good Judge being "integrity, equanimity, legal knowledge, patience and common sense". Socrates said – "four things belong to a Judge: to hear courteously; to answer wisely; to consider soberly, and to decide impartially."

I have been advocating that the Supreme Court should have a separate cell, which would analyze a few judgements of each High Court judge for the purpose of finding out the quality of the Judge. The judgments would disclose, in a controversial case, as to whether he possesses statesmanship, legal knowledge, experience, and perhaps even as to whether the Judge is balanced and impartial. If all these factors,

=which go into the making of a good judge are present, then, according to me, the inputs of each of the five judges in the Supreme Court would ensure that it is not the subjective viewpoint, or the background or philosophy of a particular judge or judges which alone would decide the fate of a case which has gone through a tortuous journey finally ending up in the Supreme Court of India. If all this is done, then we can look forward to a glorious future for the Supreme Court where the judges will be able to listen to arguments with detachment and patience, and perhaps be able to even devote themselves to the reading of legal classics.

Were the proposal for Courts of Appeal in the four regions of the country to be accepted, then I would anticipate that the Supreme Court of India would be left with only 1000 - 2000 cases involving Constitutional and other issues mentioned by me earlier. In such a case, I do not think the Court would need more than 20 judges sitting in Benches of 5, dealing with both admissions and the final hearing of cases. The Judges would then have leisure to study the cases and briefs long before coming to the Court. The practice of the United States Supreme Court to obtain written briefs in advance from counsel would

result in the judges, who are thorough with the briefs, restricting counsel to the main issue in the case. Cases would be disposed off far more expeditiously than what is happening today. I have no doubt that a newly transformed Supreme Court dealing only with Constitutional cases and cases of far-reaching national importance would thereafter be able to dispose off the cases filed during a year, in the year of filing itself, without any difficulty.

Today the Supreme Court is disposing off about 50,000 cases a year, but nevertheless falling short of the filings that year, by about 3000-4000 cases every year. The US SC with 9 judges sitting *en banc* is able to dispose off only 80-100 cases a year. The Judicial Committee of the House of Lords, or the Supreme Court of the United Kingdom, after the Constitutional Reforms Act, 2005 [which has come into existence from 1st October 2009] is able to dispose off only about 180 cases a year. In the case of the Supreme Court of India, I have no doubt that it will easily be able to deal with 1000 - 2000 cases a year without the lawyers or clients feeling that they have not been given a full and complete hearing in the matter.

I believe that we can no more afford to be complacent. If one has to beg for a hearing date even after 3-4 years have elapsed after filing of a case, and still cannot get a date within a month or two, it means that the system has failed. No other solution has been found so far and it does not appear that the increase of the judge-strength by 5 judges would miraculously make the arrears of 50,000 cases disappear. It is time to take bold decisions, and if we hesitate any more, without finding a solution, one would have failed the nation and the litigant public.