NOTES AND COMMENTS

RIGHT TO SPEEDY TRIAL: GEESE, GANDER AND JUDICIAL SAUCE (*STATE OF MAHARASHTRA V. CHAMPALAL*)

I

ALTHOUGH THE leaders of the Supreme Court bar noticeably failed to respond to the judicial call for assisting the court in the *Hussainara* cases[1] they have not been slow at all in attempting to exploit the capital constitutional gain of a *Hussainara*, namely, the recognition that article 21 entails a right to speedy trial.[2] Justice Krishna Iyer's aphorism in *Nandini Satpathy*[3] that "when the big fight forensic battles the small gain"[4] is of problematic import. But *State of Maharashtra* v. *Champalal*[5] neatly illustrates how the law laid down in the course of social action or public interest litigation for the dispossessed and the deprived can be conveniently invoked for other causes and by other classes.[6]

Champalal raises questions of fair and speedy trial, but in a context vastly different from the *Hussainara* cases. No undertrial prisoner rotting in Bihar jails had the services of a lawyer of the eminence of Ram Jethmalani as in *Champalal*. Undoubtedly, in *Champalal* the accused had the inconvenience of a trial lasting for about five years; in *Hussainara*, trials had to begin even after that lapse of time. The *Champalal* accused were throughout on bail; the *Hussainara* victims were in continuous incarceration without any form of trial. None of the *Hussainara* victims had, for

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1. See Upendra Baxi, "The Supreme Court Under Trial: Undertrials and the Supreme Court", (1980) 1 S.C.C. (*Jour.*) 35. The Bihar undertrial cases have been reported as *Hussainara Khatoon* v. *State of Bihar*, (1980) 1. S. C. C. at 81, 91, 93, 98, 108 and 115 respectively. These six cases, so far reported, are numbered serially. The judicial call to the Supreme Court Bar Association was reiterated in *Hussainara* IV where Bhagwati J. expressed "hope and trust" that the association, to which a notice had been issued, will "assist the Court at the hearing of the writ petition." *Id.* at 108. In the event, the hope was belied and the trust misplaced.

2. See, for detailed analysis, Baxi, *supra* note 1.

3. *Nandini Satpathy* v. *P. L. Dani*, (1978) 2 S.C.C. 424.

4. *Id.* at 459.

5. A.I.R. 1981 S.C. 1675.

6. Referred to by the Supreme Court as "the rich and the reluctant accused." *Id.* at 1677.

these reasons, any opportunity to move the High Court; in *Champalal* the respondent obtained reversal of his conviction. For another six years, until the state's special leave petition was heard, the respondent was not in jail, though he was preventively detained for about two and a half years after the acquittal verdict by the High Court. In every material respect, *Champalal* situation was different from that of the Bihar undertrials. But the latter did produce an interpretation of article 21 which could be invoked readily in *Champalal*.

II

A principal argument raised by Ram Jethmalani, counsel for the respondent Champalal, was that speedy trial was denied to him. The various offences sunder the Customs Act 1962 and Indian Penal Code 1860[7] took place in 1965, the complaint was filed in 1966 and the charge was framed only in April 1969 as Champalal moved the High Court as well as Supreme Court in the matter.[8] The withdrawal of prosecution against one of the co-accused was also challenged by the respondent before the High Court in July 1969. The trial court pronounced judgment on 13 December 1971, in roughly about 18 months time. The High Court reversed the conviction in a judgment delivered on 19-20 February 1974, in about 27 months time. The special leave petition which was admitted on 15 April 1975 was finally disposed of on 12 August 1981, after little over six years.

Counsel argued, both in the principal and the review petitions, that the matter was delayed at every stage. The investigation took about 18 months; and after the commencement of the trial the court did not proceed day to day as required by section 344 of the Criminal Procedure Code 1898. Similarly, the time taken by the Bombay High Court in reviewing the trial court's verdict was not to be attributed to adoption of any stratagem by the respondent. And the same has to be said about the Supreme Court's taking six years for the disposal of the special leave petition preferred by the state. Counsel urged the court in 1981 that it should either revoke the special leave in view of the long delay or refuse to interfere with acquittal under article 136 proceedings which were, after all, discretionary. In the event the court did neither. Counsel submitted that given the exceptionally long period of time since the commission of the offence, justice required the court to do no more than record the finding of the guilt, without any punishment.

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7. The accused were charged with the offences involving smuggling of 11,000 tolas of gold slabs with foreign markings under section 120B of the Indian Penal Code read with section 135 of the Customs Act and the Defence of India Rules 1962. *Id.* at 1678.

8. This information is derived from paragraph 24 of the High Court judgment (unreported).

Justices O. Chinnappa Reddy, A.P. Sen and Baharul Islam (all participants, at one stage or the other, in the *Hussainara* proceedings) reaffirmed in *Champalal* that article 21, of necessity, confers a right to speedy trial. They invoked the holding in *Hussainara I* that "reasonably expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."[9] And Justice Chinnappa Reddy, for the court, reinforced this position with the helpful observation that the denial of "a speedy trial may with or without proof of something more lead to an inevitable inference of prejudice and denial of justice. *It is prejudice to a man to be detained without trial. It is prejudice to a man to be denied a fair trial.*"[10] Further, "[a] fair trial implies a speedy trial."[11]

The reaffirmation of the right to speedy trial is to be welcomed, especially as it occurs outside the boundaries of the interlocutory formulations of *Hussainara*, awaiting since 1979 a final disposal on merit. In *Champalal*, the very existence of the right to a speedy trial is the basis of the whole proceedings; and the right to a speedy trial is considered again in the review petition as well. In other words, this right is now placed on a sounder footing than the interminable nature of the *Hussainara* proceedings would otherwise allow. And the fact that Justice Bhagwati was not on the *Champalal* bench also enables one to say that the court as a whole, as distinct from one senior justice who led all *Hussainara* proceedings, has accepted an interpretation of article 21 as conferring a right to a reasonably expeditious trial.[12]

But *Champalal* is significant because it goes beyond the reaffirmation of the right. It achieves three additional results: First, the holding establishes that the right to reasonably expeditious trial, although enunciated in 1979, is a right which was integral to article 21 since the inception of the Constitution. The *Hussainara* interpretation has been construed, in the best libertarian tradition, as retrospective and not merely a prospective ruling. If that were not done, *Champalal* would simply not have attracted the right to speedy trial since all material facts and proceedings had commenced much before 1979; by happenstance only the hearing on merits of the special leave occurred in 1981. In this sense, *Champalal* places the right to a speedy trial as an integral aspect of article 21 on a more explicitly extended basis than warranted by the immediate framework of *Hussainara*. Second, *Champalal* more explicitly faces the question of consequences of violation of this right. Third, in so doing, it defines the contours of this newly discovered (or invented) right. Both these closely interrelated, though distinct, aspects raise matters of continuing constitutional significance, transcending *Champalal*. Justice Chinnappa Reddy notes that in the

9. *Champalal* at 1677.
10. *Ibid.* Emphasis added.
11. *Ibid.*
12. *Id.* at 1677-78.

United States, where the right is explicitly guaranteed by the Sixth Amendment, the denial of speedy trial entitles the accused to "the dismissal of the indictment or the vacation of the sentence."[13] The respondent had argued precisely on this basis invoking the exposition in *Strunk* v. *United States*.[14] The learned judge was prepared to concede such results of the right read into the text of article 21, to be determined on the facts and circumstances of the case.[15] The *Hussainara* formulations of the right to speedy trial have resulted in the commend: "Expedite the trial now." The *Champalal* formulation in contrast goes much further.

A consideration of the facts and circumstances in each case would include an examination of whether the accused himself was responsible in unduly delaying the proceedings. That this does happen in India is well known, and this sociological impression weighs so heavily on the court that the very judgment begins with a sharp delineation of how the judicial process is often manipulated by the accused to delay proceedings:

> It is one of the sad and distressing features of our criminal justice system that an accused person, resolutely minded to delay the day of reckoning, may quite conveniently and comfortably do so, if he can but afford the cost involved, by journeying back and forth, between the Court of first instance and the superior Courts, at frequent interlocutory stages. Applications abound to quash investigations, complaints and charges on all imaginable grounds, depending on the ingenuity of client and counsel. Not infrequently, so soon as a Court takes cognizance of a case requiring sanction or consent to prosecute, the sanction or consent is questioned as improperly accorded, so soon as a witness is examined or a document produced, the evidence is challenged as illegally received and many of them are taken up to the High Court and some of them reach this Court too on the theory that "it goes to the root of the matter."[16]

What is more, there are "always petitions alleging 'assuming the entire prosecution case to be true, no offence is made out.'"[17]

If delay on the side of defence is a known tactic, the court also concedes that "delays [are] caused by the tardiness and tactics of the prosecuting agencies."[18] Trials are "overdelayed because of the indifference and somnolence or the deliberate inactivity" of these agencies resulting into gross deprivation of liberty of the "poverty-struck", "dumb" accused persons "too feeble to protest."[19] Not merely is the long pre-trial incarceration

13. *Id.* at 1677.
14. (1973) 17 L. Ed. 2d 56.
15. *Champalal* at 1678.
16. *Id.* at 1676.
17. *Ibid.*
18. *Id.* at 1677.
19. *Ibid.*

the result of such tactics, the accused is further "seriously jeopardized in the conduct of his defence with the passage of time."[20] In such situations "we may readily infer an infringement of the right to life and liberty guaranteed by Article 21 of the Constitution."[21]

This is, perhaps, the most succinct judicial narration of standard devices through which time is manipulated as a resource by defence or prosecution in the criminal proceedings. *Hussainara* presented the court with the exploitative somnolence of prosecuting agencies affecting thousands of poverty stricken people. It is clear that poor persons affected by long pre-trial detention through prosecutorial or judicial somnolence have a constitutional right to speedy trial. Nothing in *Champalal* weakens this contribution of *Hussainara*; rather, every observation in it reinforces *Hussainara* on this score. *Champalal* even goes further when it holds that the facts and circumstances of such cases may well yield the remedy of the "dismissal of the indictment or the vacation of the sentence."[22]

But true to his approach differentiating between complaints of injustice by the poor and the helpless and of the rich and the resourceful,[23] Justice Chinnappa Reddy shows a marked reluctance to extend the remedies for the violation of the right to reasonably expeditious trial to cases where the accused has the services of defence lawyers, who can be shown to have demonstrated their proven skills to stall the criminal proceedings by deft manipulatian of time. If, as a matter of record, the accused has resorted to strategems of all kinds to prolong trial process, then the trial might in fact be delayed but in law does not constitute a denial of the right to speedy trial. The learned judge observes:

> While a speedy trial is an implied ingredient of a fair trial, the *converse is not necessarily true.* A delayed trial is not necessarily an unfair trial. The delay may be occasioned by the tactic or the conduct of the accused himself. *The delay may have caused no prejudice whatsoever to the accused.*[24]

The right to speedy trial does not now mean only the *Hussainara* right to reasonably expeditious trial. It is no longer enough to demonstrate that the trial has taken 10, 15 or 20 years. It has further to be demonstrated that the delay has caused prejudice to the accused. In certain

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20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *E.g.*, *Swadeshi Cotton Mills* v. *Union of India*, A.I.R. 1981 S.C. 818 at 846 where Chinnappa Reddy J. expressed a categorical reluctance to extend the rules of natural justice to "protect vested interests and to obstruct the path of progressive change." See, for comment, Upendra Baxi, "Swadeshi: Buried in Hurry", *National Law Review* 6 (9-15 February 1981), and "Swadeshi—Buried in Hurry-II, *id.* at 6 (16-22 February 1981).
24. *Champalal* at 1678. Emphasis added.

cases, where the accused has been exposed to long pre-trial detention without any contribution by himself to the time taken by trial, the court will readily infer, as in *Hussainara*, prejudice to him. Also, when the prosecution has been somnolent or has deliberately used slow motion techniques to harass the accused, the right to reasonably expeditious trial is violated.

In all cases where the right is invoked, there must be "circumstances entitling the Court to raise a presumption that the accused had been prejudiced."[25] When such circumstances are demonstrated, the court will have jurisdiction "to quash the conviction on the ground of delayed trial only."[26] It needs stressing that the court is not merely redefining the scope of the right to expeditious trial, it is also laying down the precise consequences of violation of the right. If by reason of the delayed trial "the accused is found to have been prejudiced in the conduct of his defence" and "it could be said that the accused had thus been denied an adequate opportunity to defend himself", then "*the conviction would certainly have to go.*"[27]

The *Champalal* holding now requires one who claims the violation of article 21 right to a reasonably expeditious trial to demonstrate the following propositions to the satisfaction of the court:

(1) The trial has been unreasonably delayed, that is, more than usual time has been taken or that the trial has taken inordinately long time.
(2) The accused has not contributed to the time consumption by recourse to any stratagem to delay investigation or judicial proceedings.
(3) The accused has been, as a result of proposition (1), prejudiced in the conduct of his defence and has been thus denied an adequate opportunity to defend himself.
(4) Owing to prosecution somnolence or long periods of time taken by the trial judiciary itself, the trial has not even begun.

The relief in cases where propositions (1) to (3) are established is quashing of the conviction. The relief where proposition (4) is established is quashing of the proceedings. Propositions (1) to (3) are products of *Champalal;* proposition (4) arises as a joint or combined effect of *Champalal* and *Hussainara.*

III

When we apply these formulations to the fact situation of *Champalal,* we find that the accused did move the High Court and Supreme

25. *Ibid.*
26. *Ibid.*
27. *Ibid.* Emphasis added.

Court after the complaint was filed in 1966. The charge could only be formulated upon the completion of these proceedings and the trial court did so on 1 April 1969. Thereafter, the accused moved the High Court in revision against the trial court's order approving the withdrawal of prosecution against a co-accused. The available record does not disclose the precise time taken by revision proceedings. Beyond this, there is no showing of delay by the accused; the record does not disclose any tactics of other kind, including unreasonable adjournments. In the context, therefore, the court's observation that the accused "himself was responsible for a fair part of the delay"[28] could only refer to his resorting to the courts of superior jurisdiction on these two occasions. And it would not be a wild surmise to say that what the court has primarily in mind when it refers to the "fair part" is the time taken in moving the High Court and Supreme Court before the charge could be framed by the trial court.

If the accused had not contributed a "fair part" to the time taken, it is conceivable and likely that the trial might have begun in 1966 or 1967 and been completed by 1969, instead of 1971 as actually happened. Assuming that the High Court had taken the same 27 months, its verdict of acquittal would have been in hand by late 1971 or early 1972; and on the same scenario, the state would have moved in appeal by special leave in 1972. The Supreme Court would have then proceeded on merits by 1978.

Many questions arise with this "fair part" approach. It is a pity that not a single one was raised by counsel in the review petition. Counsel in India are not given to close textual study of judicial decisions even when judgments are so brief as *Champalal* (about five pages!). Given this proclivity, which in all justices should constitute professional negligence and at least entitle the client to the recovery of fees, the law would not even develop the way it has so far but for the fact that justices are conscientious in their daily jobs of adjudication.

First, it should have been argued that the "fair part" approach to delay is itself unfair. It is unfair because it enables individual justices to superimpose their own value preferences over the values specifically expressed in statutory law, reinforced by decisional law as well. The criminal law and procedure in India presents a finely honed opportunity-structure for any person caught in the network of law enforcement. This opportunity-structure is provided to ensure that the might of the state does not overbear an individual confronted with serious criminal charges.

Thus, the law allows that an individual can move for quashing of an investigation against him or the first information report implicating him in a possible offence. This is a safeguard against abuse of powers by police and law enforcement authorities. Similarly, the law which allows withdrawal of

28. *Id.* at 1680.

prosecutions also allows scope for the review of such withdrawals, especially when, as in *Champalal*, the withdrawal is granted to one of the co-accused. The same could be said about the other factors mentioned by Justice Chinnappa Reddy.[29]

When an individual seeks to use thus opportunity-structure either to establish his own innocence or to put the prosecution to the acid test of discharging its burden adequately, he thereby prolongs his trial. Here, the accused Champalal was all along trying to establish that he was accidentally present at the raided premises, that he was there to negotiate the purchase of a scooter, that the keys found on him were keys given to him for the use of the scooter, that he himself was not aware that the same keys could open any almirah on the premises and that he was totally unaware of any contraband gold on the premises. The trial court did not believe his version; the High Court did; the Supreme Court agreed with the trial court.[30] But Champalal had in 1966 no idea of what the trial court, High Court or Supreme Court would eventually decide. All that he and his counsel were trying to do was to stop investigation which the law entitled them to do. Assume that in 1982 the Supreme Court had upheld the Bombay High Court's acquittal. Would the Supreme Court have felt and held that Champalal was unncessarily prolonging his trial by activating his entitlements? Not that the question would have *legally* arisen in that case but it does *logically* arise. And the answer to that is, in all likelihood, in the negative.

If that were indeed so, the "fair part" criterion becomes doubly problematic. Firstly, as pointed out, it superimposes an individual judge's value preferences over those expressed in the law of the land. Secondly, whether or not the accused had contributed a "fair part" to the delay would now ultimately take its colour from whether or not the appeallate court and Supreme Court ultimately hold him guilty. This is surely an extraordinary way of looking at the entire problem.

Second, it could have been argued in the review petition that if the accused had contributed his "fair part", so had the prosecution. It took about a year after the offence for a complaint to be filed, and the prosecution took about three years to withdraw charges against one of the three defendants. Finally, the State of Maharashtra took its own time, of course within the limitation period, for special leave in criminal matters to file the special leave application against the acquittal. Even if one may concede that the time taken in investigation was wholly justified, can the same concession be made concerning the time taken to file the special leave petition? This question assumes greater sharpness when we realize

29. Such as those quoted in the text accompanying *supra* note 16. See also *State of West Bengal* v. *Swapan Kumar Guha*, A.I.R. 1982 S.C. 949 (*Sanchaita chit fund* case).

30. See the High Court judgment referred to in *supra* note 8.

that the state was all along convinced of Champalal's guilt; even after the acquittal, he was held in preventive detention for about two and a half years. And one reason for which he was so held was his involvement in gold smuggling in this very case. What prevented the state from moving the Supreme Court in six to eight weeks time rather than on the last day of the prescribed limitation period? If an accused person is accountable for the way in which he strategizes the use of his trial time, in accordance with the available opportunity-structure, why is the state not accountable in a similar way?

The answer to all this may be that the delay in the context of a right to reasonably expeditious trial means only delay in trial, and not in appellate, proceedings. Certainly, the fact that Justice Chinnappa Reddy nowhere refers to the time taken in investigation or filing special leave application in *Champalal* suggests so. In that case, the review petition should have sought a review on this very aspect and that too by a larger bench, as a special case. The concept of fair trial can be logically limited to a trial at first instance. But should it be so limited in strict law? Our law allows, in the felicitous words of the learned judge himself, "journeying back and forth, between the Court of first instance and the superior Courts, at frequent interlocutary stages."[31] Because this is so, the Supreme Court was able to characterize the accused's journeyings to the High Court and Supreme Court as contributing to "fair part" of delay. If we excluded this period from the trial period, narrowly conceived, where does one find the accused contributing a "fair part"?

Aside from the strict grounds of law, there are weighty policy arguments against a narrow conceptualization of the process of trial. The right to reasonable expeditious trial under article 21 links it to the wider notion of deprivation of life and personal liberty without (now to all intents and purposes) the due process of law.[32] As a constitutional right, the right is all about personal liberty and conferring upon persons an immunity against deprivation of their life or personal liberty without due process of law. It would be startling if the much vaunted right to reasonably expeditious trial were to be confined only to trial at the courts of first instance.

Third, the review petition should have argued that all that an accused person could do is to initiate proceedings in exercise of his statutory rights and privileges in courts of superior jurisdiction. He cannot insist on an expeditious disposal; he may pray for it. The accused or his counsel have no control over the calender of the court of superior jurisdiction. If this is so, how can it be said in *Champalal* that he contributed to the "fair part"

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31. *Champalal* at 1676.

32. See *Maneka Gandhi* v. *Union of India*, A.I.R. 1978 S.C. 597, and analysis in Upendra Baxi, *The Indian Supreme Court and Politics* (Mehr Chand Mahajan Memorial Law Lectures) 157-67 (1980).

of delay when he approached the High Court and Supreme Court to prevent the charges from being framed? Surely, the accused did not, as he could not, request the court to take its own time or to delay, as much as possible, the decision. Nor does the law cast a duty upon him to keep pressing for an expeditious outcome. Further, it would be reasonable to expect that the prosecution would urge an expeditious disposal at this stage. If the prosecution so urges, and the accused opposes it or resorts to some tricks of dubious kind (which then need to be proved, such as asking for unnecessary adjustments of hearing schedule) then the doctrine of "fair part" becomes quite relevant. But, absent such a showing, how does the inference of "fair part" to the delay arise, merely on the basis that the accused is availing the opportunity-structure provided by the law of the land?

Fourth, the review petition could have made the capital point that the judgment as to what strategies to adopt in defence has to be one made by the defence lawyer; rarely, does the accused shape the legal strategy for defence. The average accused, even if affluent or positively wealthy, has no understanding of subtleties of the law and its procedures. He must, of necessity, depend on counsel. A well off accused naturally seeks the most reputed counsel. He may know that a counsel enjoys high reputation in the sense that he is able to satisfy those who hire him; or, in complete plain words, he knows how to take off people from the hook. He may haggle about the fees and make a good or bad bargain, but he understands that he has to be a loyal client, that is to say, he must carry out whatever instructions his lawyer gives him. The framework of lawyer-client relationship is normally such that the client is dependent on the lawyer for all practical purposes; he has no autonomous role to play.

If this sociological impression is broadly correct, the question arises whether it is fair in the first place to speak of the accused contributing a "fair part" of the delay. The real meaning of the statement that the accused contribtuted his "fair part" is to say that counsel did so. In other words, the court has to sit on judgment on the professional competence and integrity of the lawyer hired by the accused. The *Champalal* court is doing just precisely this, albeit implicitly, when it says that the accused was responsible for a "fair part" of the delay. It is expressing its conclusion that counsel should not have advised, nor the accused consented to, recourse to courts of superior jurisdiction. The court is, in fact, saying that right to expeditious trial accrues only when counsel adopts responsible forensic strategies and that it would judge, in facts and circumstances of each case, whether the counsel has actually done so.

The implications of all this are worth pondering:

First, accused must take legal profession as they find it; the market for legal services is a seller's market. The greater the fees the more eminent lawyer one can hire. If the lawyer thus hired engages in "sharp practices" at the bar or if he makes bona fide errors of judgment concerning the

correct strategies to follow must the accused forfeit the right to speedy trial? Note that the person whose personal liberty may not be deprived without due process of law is the accused, not his counsel.

Second, "the sad and distressing features of our criminal justice system,"[33] referred to in the very first sentence of the judgment which lead to irresponsible lawyering, arise not just because lawyers are what they are but also because judges are what they are.[34] There is no reason why wasteful litigation should be allowed too long on the docket. There is no reason why lawyers should be unduly able to defeat the aims and objectives of the criminal justice system.[35] In all these respects, if the bar lacks discipline, it is the job, however difficult, of judges and courts to attempt to discipline the bar. If, after all this is done, interlocutory proceedings raise genuinely complex issuse of law, their consideration would take time, and it would be wrong to characterize time spent in such activity as delay. In either case, the accused is not doing anything blameworthy in following his counsel, absent contrary specific evidence of dishonest manipulation of time.

Third, the inference that the accused is responsible for "fair part" of delay proceeds on a subconscious assessment of his motivations. Indeed, a powerful case can be made out that constitutional rights, privileges, immunities and powers should not flow as a result of action which is itself unconstitutionally motivated.[36] But this kind of analysis has yet to develop fully in India.[37] And in relation to *Champalal* type situations it has to be more cogently articulated. Even such an effort, were it to be undertaken, would face formidable difficulties. In the first place, how are we to characterize an individual's motivation as unconstitutional, more so when he or she is availing of the opportunity-structure provided by criminal law and procedures? Second, does our constitutional theory of fundamental rights have as its premise disentitlement of the individual depending on his behaviour or motivation? Note that in strict law the proposition has emerged that individuals may not waive their fundamental rights.[38] Nor has any equity doctrine or maxim of "clean hands" so far been applied to fundamental rights domain.

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33. *Champalal* at 1676.

34. See, for an analysis of the court caused delays, Upendra Baxi, *The Crisis of the Indian Legal System* 68-74 (1982).

35. *Id.* at 74-77.

36. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 70-170 (1980).

37. The doctrines of "colourable legislation" and "fraud on the Constitution" come close to the doctrine of "unconstitutional motivation". Mathew J. endeavoured to further develop it as the motion of "unconstitutional conditions" in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 S.C.C. 717 at 795.

38. See, *e.g.*, *Basheshar Nath* v. *Commissioner of Income-tax*, A.I.R. 1959 S.C. 149.

Apart from the test of "fair part", *Champalal* court lays down the test of "prejudice", namely, whether the defendant was "prejudiced in the preparation of his defence by reason of the delay."[39] There are no clear indications of what the court has in view here. Inordinate delay resulting in prolonged pre-trial detention of poverty stricken accused will clearly be held to prejudice the defendant on a close reading of *Hussainara* and *Champalal*.[40] The "deliberate inactivity of the prosecuting agency" or their "indifference and somnolence" can also be invoked to show prejudicial impact on the defendant's case.[41] But beyond this, there is no clarity on the range of meanings and situations to which the "prejudice" test extends; more so, since the court has ruled that a "delayed trial is not necessarily an unfair trial."[42]

The "prejudice" test is conceived narrowly. We may extend it to mean prejudice not just in the preparation of defence but also in the conduct of it. Even so, the "prejudice" test remains confined to the trial level. If there is delay in the revision and appellate proceedings, it is doubtful that this test will really apply. And it seems tolerably clear from the summary rejection on this aspect of the review petition that the Supreme Court will simply not consider a six year maturation for a special leave petition, resulting in a reversal of an acquittal by the High Court, as prejudicial to the defendant!

We have earlier shown[43] why the right to reasonaly expeditious trial should not be a constitutional right confined to trial at first instance and why it must embrace all criminal proceedings, directly or indirectly, immediately or ultimately, affecting the fundamental right to life and personal liberty. Insofar as the "prejudice" and the "fair part" tests function to deny at the threshold the claim that the right to expeditious trial is violated, the *Champalal* decision merits a thorough review. It mocks at the newly proclaimed right to expeditious and fair trial. If the expression "due process of law" is to include, as it must, also the judicial process, is there any justification for identifying only the trial process as the judicial process for the purposes of the right to expeditious trial?

The mockery of the right by the present formulation of the "prejudice" test reaches intolerable and unjust proportions when we closely attend to what is but one small sentence in the judgment. It reads: "The Court is also entitled to take into consideration whether the delay was *unintentional* caused by over-crowding of the Court's Docket or under-staffing of the Prosecutors."[44] This clearly means that even when the defendant may

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39. *Champalal* at 1677.
40. *Id.* at 1676-77.
41. See *supra* note 39.
42. *Champalal* at 1678.
43. See part III of this paper.
44. *Champalal* at 1677-78. Emphasis added.

successfully show prejudice on preparation of his defence and his conduct of it, the state can argue back that this prejudice was the unintentional result of overcrowding and understaffing! And the court is entitled to take that into consideration. What then remains of the right to reasonably expeditious trial?

That so imaginative and constructively radical Justice Chinnappa Reddy should have made or allowed such an observation (quoted above) in the judgment shows how difficult it is for justices to apprize justicial process as objectively as they evaluate legislative and executive decision making process. For example, the extension of the rules of natural justice in recent years have made a short shrift, and rightly so, of arguments of administrative convenience arising from overcrowding and understaffing in administrative agencies.[45] The emerging standards safeguarding the rights of prisoners and inmates in incarcerating institutions have been relatively insensitive to the problems of overcrowding and understaffing in prisons and related centres of detention.[46] The legislature is, from time to time subjected, rightly so, to strict scrutiny for acting within the limits on its power set by the Constitution.[47] And the judicial exactitude on this count, and again rightly so, has even reached the exercise of the constituent power.[48]

But when it comes to the application of the same types or strict standards to judicial process, the Supreme Court has noticeably pulled back and thus sacrificed the fundamental rights of the citizen.[49] In fact, this tendency has become a pre-eminent aspect of the court's institutional culture of which the observation under discussion is a more recent manifestation. Even so sensitive and sophisticated a judicial mind like that of Justice Chinnappa Reddy succumbs to this institutional culture.

The issue must be squarely raised: In what sense is the overcrowding of the courts and understaffing of prosecution unintentional ? To take a most glaring example, the Supreme Court has yet to fill two additional positions out of four created by the Supreme Court (Number of Judges) Amendment Act 1977, not to speak of vacancies which have arisen upon retirement of justices since 1980-81. In the High Courts as against the total sanctioned strength of 405 justices, the actual strength is of 320! A country of the size and population of India has only 1973 district and sessions level

45. See, *e.g.*, M.P. Jain, "Mr. Justice Bhagwati and Indian Administrative Law", 16 *Ban. L.J.* 1 (1980); Upendra Baxi, "Introduction" to I.P. Massey, *Administrative Law* (1980); Upendra Baxi, "Developments in Indian Administrative Law", in A.G. Noorani (ed.), *Public Law in India* 132 (1982).

46. See Baxi, *supra* note 34 at 144-63.

47. Both on the counts of fundamental rights and law making competence. See, *e.g.*, H. M. Seervai, *Constitutional Law of India* 158-98 (2nd ed. 1975).

48. See Upendra Baxi, "Some Reflections on the Nature of Constituent Power", in Rajeev Dhavan and Alice Jacob (eds.), *Indian Constitution : Trends and Issues* 122 (1978) (Indian Law Institute).

49. See Upendra Baxi, "Laches and the Right to Constitutional Remedies : *Quis Custodiet Ipsos Custodes*?", in Alice Jacob (ed.), *Constitutional Developments Since Independence* 559 (1975) (Indian Law Institute).

courts and 4,351 magistrate and *munsif* level courts.[50] The Shah committee on judicial arrears has succinctly highlighted facts about the conduct of proceedings, competence of justices and leadership weaknesses of chief justices as causes of judicial arrears.[51] A substantial part of the overcrowding in appellate courts, including the Supreme Court, arises out of a lack of effective supervision of the courtroom bureaucracy which is very much an aspect of judicial administration.[52]

If successive chief justices of the Supreme Court and High Courts have allowed a situation to exist and to expand in which substantially delayed appointment of justices has become the rule rather than exception, can this feature of our judicial system be at all considered unintentional? The chief justices conference has never examined the need for quantitative and qualitative expansion of trial judiciary, and submitted no plan of action. And it has also failed to act as a powerful lobby for the cause of judicial administration and reform. Can the consequences of this failure be called unintentional? And, when presented with a fine opportunity to issue a mandamus to the President to fill all judicial vacancies in the High Courts, if six out of seven justices consciously refuse to exercise their power, some on most flimsy grounds, is the resultant situation for the defendants unintentional?[53] Finally, without being exhaustive, if the courts fail to assign priority to matters involving citizen's fundamental right to life and liberty in the organization of the day to day work, is the resultant situation an unintentntional situation?[54]

50. See Baxi, *supra* note 34 at 63.

51. *Report of the High Court Arrears Committee* (1972) under the chairmanship of Justice J. C. Shah, former Chief Justice of India, and see its analysis in Baxi, *supra* note 34 at 58-83.

52. *Ibid.*

53. In *S. P. Gupta* v. *President of India*, A.I.R. 1982 S.C. 149, only Venkataramiah J. issued mandamus; other justices felt that judicial appointment processes raised policy issues of some complexity and were not susceptible to mandamus. The flimsy grounds adduced for not issuing mandamus notably by Bhagwati J. included the lack of availability of facilities such as chambers for justices. In the Hungarian Supreme Court, four justices share a chamber! Dispensation of justice has not suffered unduly there by justices having to share chambers. Why should it be so otherwise in "socialist" India? Nearer home, a large number of trial judges do not have special chambers or any chambers at all. See Upendra Baxi, "Judiciary at the Crossroads", IX *J.B.C.I.* 231 (1982).

54. Surely, if the right to speedy trial is an integral part of article 21, the High Courts and Supreme Court violate it when they fail to provide priority to cases affecting the right to speedy trial in matters of right to life and personal liberty. Logically and legally the import of the new right is that courts shall so order their dockets as to achieve reasonable expedition of criminal appeals. The impact of the newly propounded right is logically at least of the same order as that of a statute like the Representation of the People Act 1951, directing courts to give priority to the hearing of election matters. It, unarguably, also becomes the duty of the state to enact a speedy trials Act—a duty that ought to be made enforceable through the writ of mandamus.

A similar set of questions can be presented about the prosecuting agencies. Certainly, it is the duty of the courts not to tolerate shortfalls in the conduct of prosecution. Article 21 now confers a right to reasonably expeditious trial; it casts a correlative duty on the state, including the judiciary, to ensure conditions under which prosecuting agencies may not work in a manner that would defeat the right.

If one thinks that these submissions stretch things too far, attention is invited, by way of example, to the way criminal law treats the notion of intention. Take, for instance, clauses "thirdly" and "fourthly" to section 300 of the Indian Penal Code. If a person has the "intention of causing bodily injury" which is "sufficient in the ordinary course of nature to cause death" or if he knows that "it is so imminently dangerous that it must, in all probability, cause death", and if there is no "excuse for incurring the risk of causing death or such injury", then culpable homicide is murder. Similarly, the tort liability is generally based on the premise that a person must so act with reasonable foresight that his conduct may not harm the community.

If one applies the same standards, which the law applies rather relentlessly to citizens, to judges in their task of administration of justice, the argument that overcrowding and understaffing are unintentional loses much, if not all, of its cogency. Surely, we must expect our justices, including chief justices, to know that their own somnolence in their vocation is likely "in the ordinary course of nature" to make reasonably expeditious trial a chimera. Surely, we can expect them to have the understanding that the same result will ensue if the ways in which they schedule hearings, tolerate delays on part of prosecution and defence, allow paperbooks to grow to unreasonable dimensions and tolerate the loss of judicial mandays by continuous non-appointment of judges. All these actions are indeed so imminently dangerous that they must in all probability cause delay. And there is no excuse for incurring the risk of causing arrears.

The right to reasonably expeditious trial entitles all persons to speedy trial. It does not (contra Justice Chinnappa Reddy) entitle the court to take delays caused by unintentional factors in consideration of cases which claim serious violation of the right. It is a fallacy to say that an expanded interpretation of rights in article 21 creates any entitlement for the court; if anything, it creates duties (or more strictly, power coupled with duties) on the court to ensure that this right is not violated.

V

The review petition in *Champalal* was right in questioning the "prejudice" test. It was right in insisting that this matter be placed before a larger bench. But it was vacuous in its substantiation as to why such a review was essential. It, therefore, received, even if did not merit, a summary dismissal on this score in one sentence saying that "[w]e see no merit in these

contentions."[55] The inability of even so eminent a counsel as Ram Jethmalani to raise these kinds of questions typifies the high cost misfortune of the Indian accused. But in the interest of constitutional values it is here submitted that the right to speedy trial should be so judicially developed as to ensure that the existing legal profession and judicial system do not thrive at the expense of the individual who, rightly or wrongly, is caught in the web of criminal law enforcement.

An additional observation is justified in conculsion. Two justices of the Supreme Court, namely, Justices Chinnappa Reddy and D.A. Desai, have, from time to time, shown their displeasure at the manner in which the rich and the resourceful invoke provisions of law in their favour. They have consistently tried to reverse the structural bias of the legal system which naturally favours people who can afford to pay exorbitant fees to eminent counsel. They have valiantly endeavoured to develop a new predisposition towards the weaker sections of society by propagating the conception that "justice according to fees" is not the only justice that the Constitution promises to the people of India. If in all this they are biased, it is the bias enjoined upon the judges by the Constitution and their oath to uphold the Constitution. All this is necessary and desirable. And one would go so far as to say that one must apply exemplary standards of legal and juristic scrutiny when eminent counsel hired on exorbitant fees appear before them as well as before the courts.

But *Champalal* shows that the attempted reversal of the double standards of justice in our adjudication has to be done with great caution and with considerable "malice aforethought". It may be justifiable to say, generally, that what is sauce for the gander is not sauce for the geese. But the proverb may not serve as a sure guide to constitutional interpretation. *Champalal* demonstrates the truth of this observation. In trying to demarcate the boundaries of the right to expeditious trial for the resourceful, the court might have also shrunk, unwittingly, the boundaries of that right for the resourceless as well.

*Upendra Baxi**

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55. See *Champalal Poonjaji Shah* v. *State of Maharashtra,* A.I.R. 1982 S.C. 791 at 792. The review petition largely deals with the other question argued (it seems more vehemently, though equally ineffectively) concerning set off from the sentence of three years imprisonment of the time already served under preventive detention.

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