CHAPTER V

The Challenge and the Crisis–Concluding Comments

The Supreme Court of India is the highest court of the land. The Constitution of India has assigned to the Supreme Court an extremely important role. The Supreme Court has to ensure that all governmental institutions act within the law. The court discharges this role through its original and appellate jurisdiction and shares this responsibility with the High Courts. The Supreme Court has also been assigned the role of interpreting the law of the land. India is a vast country both in size and socio-cultural diversity. The Supreme Court's function is to ensure that there is a unified approach to the law and legal thinking in India. The Supreme Court has been given a very large jurisdiction to cope with these powers.

We have tried to show that the impetus for a Supreme Court grew out of the freedom movement. Towards the end of the nineteenth century, the idea of a Supreme Court was discussed as an important ingredient of the machinery of state of an independent India. This impetus continued with Hari Singh Gaur's attempt to establish a Supreme Court in the Governor General's Council in the nineteen-twenties and finds expression in the Nehru Report of 1928. The British accepted the need for a Federal Court to expound the constitutional law of a proposed constitution and to adjudicate between various constituent units of the proposed federation of states in India. They were not very keen to establish a Supreme Court with a wide appellate jurisdiction. Various British policy statements in the early thirties, however, countenanced the idea of a Supreme Court with a wide appellate jurisdiction. The idea of a Supreme Court parallel to the Federal Constitutional Council was abandoned silently. From 1937 to 1950 constitutional questions were dealt with by the Federal Court while ordinary civil and criminal appeals went to the Privy Council.

When the question of a Supreme Court came to be discussed in the Constituent Assembly, it soon became clear that the functions of the Federal Court and the Privy Council were both going to be vested in one court. This was partly because the whole impact of the freedom movement demanded the creation of an Indian court to deal with all of Indian law in an Indian way. As the discussions continued in the Constituent Assembly, it became clear that while the Assembly was distrusting of the

court on substantive issues and did not give the court a wide socio-economic due process jurisdiction or a decisive say in some property matters, the Assembly nevertheless felt that the Supreme Court had a decisive integrating role to play. So, the jurisdiction of the Supreme Court was widened. There is some indication in the speeches of the Constituent Assembly that this increase in the jurisdiction ef the court was not created simply to enable the Supreme Court to fulfil its assigned role to intergrate judicial and legal policy underlying India's vast and complicated legal system. The suspicion was aired that the increase in jurisdiction—especially in criminal matters—was taking place because the lawyers in the Constituent Assembly were carving out for themselves a lucrative practice in the Supreme Court to be established under the Constitution. The eminent lawyers in the Assembly denied that there was any force in these accusations. Hardly anyone however, paid much attention to whether the Supreme Court itself could handle such a wide jurisdiction, which was much greater than that of the Privy Council and the Federal Court combined. In fact, the jurisdiction of the Supreme Court has been greater than that of any highest appellate court anywhere in the world.

In 1950, the Supreme Court with a staff of seventy-nine and a small budget of approximately eight lakh rupees, faced the task of dealing with its jurisdiction. At first the court began to take an extremely wide view of its jurisdiction. In time, the court began to interpret its own jurisdiction quite narrowly.

A survey of the court's work load shows quite clearly that the court has never been able to cope with its extremely wide jurisdiction. Right from the very first year, the Supreme Court began to get a big back-log of pending cases. The back-log in the first few years shows a trend which suggests that the Supreme Court was carrying over to the next year a substantial part of its docket, even though in some years the court managed to deal with cases instituted before it and, to a marginal extent, some of the back-log of cases. But the institution of cases has piled up year after year. So has the list of pending cases. In particular, the original fundamental rights and special leave jurisdictions are being used more and more. The "special leave" docket before the court occupies a majority of the court's work. As the main work of the court has increased, the ancillary miscellaneous work of the court has also increased. This pile up of cases has flooded the court. There seems to be no way in which the court can clear this back—log. That is not all. If we examine the nature of pending cases in any kind of detail, it is evident that many of the cases before the court have been pending for a long time. Civil appeal cases have not been heard for eleven years. Writ petitions are not heard for four or five years. Criminal appeals are not heard for the same time or even longer. And yet the workload continues to mount.

This increase in workload has perpetuated what we have called the

'challenge of arrears'. It is important to consider exactly what our concept of arrears is. Technically, arrears arise whenever a case instituted before the court has not been dealt with immediately and is pending. Since no case filed before the court can be dealt with straightaway, arrears are inevitable. According to this technical definition, any case that is pending is a case in arrears. In this sense, most courts in the world have arrears. In our analysis of the workload of the court we have treated all pending cases as falling within the concept of arrears. Given the information before us, we had no other choice but to classify the figures in this way. Even so, there are other definitions that we can give to the concept of arrears. These definitions are linked up with notions of justice. The central idea behind these definitions is that pending cases become examples of arrears when their continued pendency before the court gives rise to individual and social injustice. Thus, when a case has been pending for five years during which a workman has been denied relief where he alleges wrongful dismissal, a manifest injustice has been created. It is difficult to evolve exact criteria to determine when exactly on the facts of a given case an injustice has been perpetuated. A working definition may be that a fundamental rights writ petition should not take more than six months and an appeal before the Supreme Court should not take more than one year. Judged by this standard a large part of the cases filed before the court take longer to decide. We have argued that the case load before the court its much too great and the court cannot, given its present jurisdiction and structure, rcope with this workload.

It is evident that as the workload of the court has increased, the staff and finances of the court have also increased. The increase in staff has largely been in the number of ministerial (junior clerks) and class IV (peons and such like) employees. This is, to some extent, inevitable because as the administration of any institution increases, it is inevitable that its clerical staff shall also increase. The increase in such staff, and in particular the class IV employees, has been so great that it merits attention. It is difficult to say that these increases have been made as a result of a reasoned policy or whether they are the *ad hoc* residue of a system of patronage (otherwise known as *sifarish* in Indian circles). While there is no doubt that the administration of the court has been adapted to deal with the increased work, there is some need to examine the working methods of the administration of the Supreme Court more fully. We have suggested that a management team should be appointed to review the management methods of the court's administration. Some mechanism to review the work of the Supreme Court constantly should also be devised. At the same time, there is little to suggest that the staff of the Supreme Court are trained to deal with the highly technical tasks which they are assigned and which they learn while they are in service. We have suggested that a training programme should be devised. This training

should cover a period just after a person has been appointed as well as in-service training.

Many of the working methods of the court are quite archaic. Much of the court's administrative work is paper work. The facilities to type and reproduce documents quickly and accurately are conspicuous by their absence. No provision has been made in the budget to deal with providing efficient facilities for this purpose. While the budget has increased proportionately to the increase in workload and the increase in staff, it has not been inflation proofed. This has not caused any great inconvenience because a large part of the budget has been concerned with the payment of salaries. Bearing in mind that the court-by way of court fees and otherwise—earns some, at least a third, of its budget, it is imperative that there be a review of the court's budget. A more realistic budget should be drawn up which specifically caters for a lay out of expenditure on equipment.

We have not commented, at any length, on procedural matters. We merely feel that the paradigm concept of the adversary system consisting of filing papers followed by full oral arguments might call for re-assessment.

Fresh management methods, an increased budget, trained staff and new procedures will, however, not by themselves clear the back—log of pending cases. In the past, serious attention has not been paid to the problem of dealing with arrears. At first the problem of arrears was simply ignored by Parliament and the courts. The Law Commission was acutely aware of the problem of arrears in its *Fourteenth Report* in 1958. It did not, however, provide a comprehensive solution. Since then no serious attempt has been made to look at the problem of arrears in the Supreme Court other than compile a better and more comprehensive list of figures of the performance of the court. When a committee, under ex-Chief Justice Shah, was appointed to look at the problem of arrears in the High Courts, the problems of the Supreme Court were not included in its brief. Parliament's remedy for the increased arrears has been to increase the number of judges in the Supreme Court. This was done in 1956, 1960 and in 1978 even though sitting judges are often appointed as chairmen of various commissions. We have argued that a marginal increase in the number of judges will not really be able to clear the arrears. The strength of the court would have to increase by three to four hundred per cent if all the workload is to be cleared and no further arrears are to be created. We feel that the creation of such a large court divided into small benches will be counter productive. The court will cease to be an integrated institution providing an un-equivocal lead of the kind envisaged by the Constitution.

The real solution to the problem of arrears lies in re-structuring the work and jurisdiction of the court. To begin with, the jurisdiction should

be reduced on the lines suggested by the Law Commission in civil and criminal matters. The Law Commission suggested that a case should only come to the Supreme Court if there is a substantial question of law of public importance which has to be decided by the Supreme Court. This alteration in the jurisdiction of the Supreme Court has already been made with respect to civil matters by the Constitution (Thirtieth Amendment) Act, 1972. It has not been extended to criminal matters even though a powerful plea for such a change has been made in the *Fifty-eighth Report* of the Law Commission in 1974. It is also a question for discussion whether this criterion for appeals should also be used in special leave matters. There is also a case for considering whether or not the ultimate choice as to which appeals should come to the Supreme Court should vest in the High Courts (who should grant a certificate to this effect) or whether it should vest with the Supreme Court which should grant special leave to appeal. The very fact that the Supreme Court itself has to consider whether special leave ought to be granted or not takes twenty per cent of the court's working time. At the same time it ensures that the Supreme Court has control on the number of admissions. Its record on this score has not been too inconsistent if we examine their work in these matters over the last seven years.

Quite apart from reducing the jurisdiction of the court, we have also argued that it is necessary to consider structural changes in the manner in which the higher judiciary in India operate. One of the ideas which was mooted before the Law Commission was to create four zonal courts of appeal. We believe that this would not reduce the litigation and call for an injection of resources which might be better utilised elsewhere. We support the idea of a National Appellate Tribunal system which would be self-contained and from which an appeal will lie to the Supreme Court only on a substantial question of law of public importance which needs to be decided by the Supreme Court. The Supreme Court's docket cannot, for an indefinite period, contain cases from the lowest tribunals in the land to decide matters pertaining to employment, rent and tax amongst other things.

Our main suggestion, however, is concerned with a complete reorientation of the working of the court. We have suggested that a new court or division has to be created so that the constitutional and the non-constitutional work of the court can be separated. This can take two forms. The first is that a new court is created which will be called the Federal Constitutional Court. Its job would be to deal with the interpretation of the Constitution (including matters of fundamental rights) and all administrative law matters. The Supreme Court would be left with an appellate jurisdiction in civil and criminal matters. Both courts would have a special eave jurisdiction within their sphere of

activity. The jurisdiction of both may be reduced on the basis suggested earlier.

The second alternative method of re-orienting the court's structure would be to create two separate divisions. One of the divisions would be concerned with constitutional and administralive law work. The other division should be concerned with normal civil and criminal appeals. The work of these divisions is to remain quite distinct. Each division is to have its own chairman. The Chief Justice of Jndia would be responsible for the work of both divisions even though he would—if appointed from any of these divisions—perform his judicial duties in the division from which he is elevated. Each division should, under present computations, have not more than fifteen judges. We prefer this divisional structure to the creation of a separate court. In this structure conflicts can be resolved, the work of the court will be contained by two relatively small divisions, and the work of the Supreme Court will also be effectively rationalised without the incipient possibility that arrears may arise.

We must end on an anthropological note. The accumulation of arrears in the adjudicating institutions of any society do not just reflect on the working methods of these institutions themselves. The presence of arrears reflect also on the litigating habits of the people as a whole. They also reflect on the relationship between the people and their go-betweens, the lawyers. India is a fairly large country with a huge population. To some extent, it is inevitable that the volume of litigation shall be high. At the same time, Indians are fairly litigious people. They have been known to create adjudicating institutions (like *nyaya panchayat and lok adalats*) at grass root level. They have also been able to adapt ostensibly non-Indian adjudicating methods for their litigational uses. Litigation is perpetuated for a great number of social, economic, personal and therapeutic reasons. In the long run, checking arrears in the Supreme Court is not enough. Arrears breed at various hierarchical levels below the Supreme Court. Ways and means must be devised so that disputes can be settled out of court at all levels. Litigants and their counsel must be persuaded to try and adapt their dispute resolution methods without taxing the formal adjudication machinery, other than as a last resort. The Bar Council could take a lead in this matter by setting up conciliation cells. The government could also take a lead in this area. The government both at the centre and in the states, is by far the largest litigant in the country. The various government departments, the autonomous corporations and semi-government organisations pursue a very active litigational policy. The government itself can counsel restraint in a large number of cases. Ultimately, arrears at all levels can only decrease if the litigational activity of the people of India finds other avenues for expression and non-expression.

The Supreme Court of India is flooded with work. This work has increased, is increasing and will not diminish even in the not too distant future. The possibility that the Supreme Court, as it is presently constituted, can clear the arrears that are piling up, is very remote. The structure of the court needs to be radically re-oriented. Uutil that is done, there is hardly any chance that the highest court of the land will be able to discharge its constitutional duty to offer an efficient and stable adjudicatory justice to those that seek and rely on its help.