LAW COMMISSION OF INDIA

99TH REPORT

ON

ORAL AND WRITTEN ARGUMENTS IN THE HIGHER COURTS

APRIL, 1984

Justice K. K. MATHEW

D.O. No. F. 2(5)/84-LC

SHASTRI BHAVAN
NEW DELHI-110001

Dated, the 26th April, 1984

My dear Minister,

I am forwarding herewith the Ninety-ninth Report of the Law Commission on "Oral and Written Arguments in the Higher Courts".

As has been explained in Chapter I of the Report, the subject was taken up for consideration as a part of the exercise undertaken by the Commission on the functioning of the Supreme Court and certain other aspects of the Higher Judiciary in respect of which the Commission had already forwarded earlier its 95th Report, which mainly dealt with the creation of a Constitutional Division in the Supreme Court. The present Report is in continuation thereof dealing with some of the other aspects arising out of the Questionnaire issued by the Commission in 1982.

The Commission is indebted to Shri P. M. Bakshi, Part-time Member and Shri A. K. Srinivasamurthy, Member-Secretary, for their valuable assistance in the preparation of the Report.

With regards.

Yours sincerely,
Sd/-
(K. K. MATHEW)

Shri Jagannath Kaushal,
Minister of Law, Justice and Company Affairs,
New Delhi.

Encl. : 99th Report.

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CHAPTER 1

INTRODUCTORY

Genesis.

1.1. Some time ago, the Law Commission of India issued a detailed questionnaire seeking the opinion of interested persons and bodies on certain important matters concerning the organisation and functioning of the higher judiciary.[1] The questions put forth in that Questionnaire related to a variety of matters, which it is not necessary to enumerate at this stage. It is sufficient to mention that three of the questions related to oral and written arguments in the higher courts. This Report seeks to express the Commission's recommendations on the subject, formulated on a consideration of the views received on the questionnaire and other relevant material.

The questions for consideration—Questions 21-22 and 23 of the Questionnaire

1.2. The questions for consideration were formulated as under, in the Questionnaire referred to in the preceding paragraph:—

"Q-21. Will it facilitate disposal of a greater number of cases if oral arguments are restricted to half an hour on each side ?

"Q-22. Will a procedural requirement making it obligatory on counsel to file written briefs cut down oral arguments ?

"Q-23. Should some appeals be disposed of without hearing oral arguments ?"

Objectives of inquiry

1.3. We shall give in brief at the appropriate place a gist of the views expressed on these questions[2]. At this stage, it may be mentioned that the principal object in eliciting views on the above questions was to enable the Commission to consider if the time taken in oral argument could be reduced, so as to make it possible for the higher courts to hear a larger number of cases on each working day. This reduction was not to be an end in itself. It was intended to secure greater disposal, speaking numerically. But, apart from the numerical aspect—the aspect of quantity—the Commission, in putting these questions, had also in mind another—and equally important—aspect. The Commission wished to have informed public opinion on the question whether the quality of presentation could also be improved by introducing a system of written arguments which might put forth a party's case in brief yet precise terms, supported by relevant—and *only the relevant,*—authorities and materials.

Common theme.

1.4. The three questions[3] from the Questionnaire issued by the Commission, though addressed to different parts of the problem, shared a common theme, namely, improvement in the mode of presentation of the case before the higher judiciary and evolving the best method of presentation, which would ensure speedy and yet effective justice, and which would enable the higher courts to discharge their adjudicatory functions effectively, at the same time inspiring and maintaining, in the litigants and their counsel, the confidence that justice had been done to their cause.

Views received on the Questionnaire.

1.5. That the objective set out above is not one easy to accomplish, is not to be doubted. And the Commission did not expect that the views that might be expressed on the questionnaire would take only one line of approach, or that the views might all support or reject any far-reaching changes in the present system. The opinion has been divided—and divided in more directions than one[4]. But the Commission is grateful to all those who have responded to its Questionnaire by sparing their valuable time and taking the trouble of reflecting on the issues and putting their views in writing for the benefit of the Commission.

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1. Questionnaire issued in 1981.
2. Chapter 2, 3 and 4, *infra.*
3. Paragraph 1, 2, *supra.*
4. See for example, paragraph 2·3, *infra,*

1.6. Before concluding this introductory Chapter, it seems proper to mention that on a few other questions included in the Questionnaire or arising therefrom[1], reports by the Commission have been separately prepared.

Other questions of the Questionnaire.

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[1]. E.G. Litigation by, and against, the Governments See also Report on Proposal to create a Constitutional Division in the Supreme Court.

CHAPTER 2

LIMITING ORAL ARGUMENTS

The common theme of the questions.

2.1. The three questions with which Report is concerned, the text whereof has been already quoted[1], briefly relate to reduction of the time taken on oral arguments (Q. 21), total elimination of oral arguments in some cases (Q. 22) and the replacement of oral arguments by written arguments (Q. 23), respectively. As already stated,[2] their common theme is improvement of the mode of presentation of cases before the higher courts. With this prefatory remark, we proceed to indicate in brief the gist of the views expressed on the questions at issue.

Views on Q. 21.

2.2. We deal first with Q. 21, seeking opinion on the question whether it would facilitate disposal of a greater number of cases if oral arguments are restricted to half an hour on each side.

Sharp differences of Views expressed on Q. 21.

2.3. Let it be said at the very outset that replies received on the question of limiting oral arguments to half an hour on either side show an extremely sharp difference of views. Broadly speaking, there seem to exist three views on the question. There are, in the first place, those who are in favour of some such time limit (some of these replies, however, stipulate that written arguments should be allowed). Secondly, there are those who are strongly opposed to any change in this regard; they would not place any time limit on oral arguments as such. Thirdly, many of the replies take a middle view. They do recognise that there is need to place some limit on oral arguments. But they do not favour any hard and fast mathematical limit in this regard. They would leave the matter to the judge, having regard to the fact that the time that may be considered reasonable in each case must be assessed on a consideration of a variety of factors, such as the complexity of the case, the nature of the issues, the volume and character of evidence, the calibre of counsel and the judge and so on.

It is not our intention to give a precise numerical count of the replies that fall in each category mentioned above. However, we may state here, as a matter of information, that broadly speaking, the replies in the first and second categories almost equal each other in number. A small but sizeable number of replies fall in the third category, representing the middle view.

Difference of views cutting across classes of persons.

2.4. The difference of views, as mentioned above, seems to cut across professional and other boundaries. For example, of the retired Supreme Court Judges whose views on the question are available, one[3] has commented on the situation of arguments going on with orality unlimited, while another is opposed to the fixation of suggested time limit on oral arguments. According to him, the length of time necessary for oral arguments depends on the nature of a particular case and no hard and fast rule can be laid down in this regard. He does not favour the "rationing of time in court proceedings."[4]

Coming, again, to the retired and sitting Judges of the High Courts, while these are some who favour a time limit,[5] (though subject to relaxation in a particular case), there are others who regard it as highly impracticable.[6] Again, coming to members of the bar, while Shri H. M. Seervai is very strongly opposed to the idea put forth in the question,[7] there are a few members of the bar who think that some restrictions on the length of arguments might benefit the judicial system, though one may not be mathematical about it.[8]

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1. Paragraph 1·2, *supra*.
2. Paragraph 1·4, *supra*.
3. Law Commission Collection No. 21/1.
4. Law Commission Collection No. 21/19: Law Commission File, S. No. 124.
5. E.G. Law Commission Collection Nos. 21/4 ; Law Commission File S. No. 50.
6. E.G. Law Commission Collection No. 21/5.
7. See Paragraph 2·7, *infra*.
8. Law Commission Collection 21/13, Law Commission File No. 107.

Similarly, the United Lawyers' Association, New Delhi, agrees that oral arguments may be limited, if they supplement written arguments. However the Association is not certain if our Judges will be able to find time to carefully read, and digest the written arguments. Still, it considers the limiting of oral arguments (provided written arguments are allowed) as worth trying.[1] In contrast, the Bar Council of Gujarat is of the view that while restricting oral arguments would lead to greater disposal of cases, it will cause injustice.[2] Also, it appears that strong disapproval of the idea of limiting the time taken in oral arguments was expressed at a National Convention organised by the Bar Council of India Trust at Madras. The suggestion was regarded as misconceived and was likely to miscarriage of justice.[3]

Some points made in the replies.

2.5. We need not multiply examples and, of course, it is not our intention to catalogue all the replies. However, it may be of interest to mention here the important points made in some of the replies. The case for limiting the time for oral arguments has been forcefully put by a High Court Judge thus :—[4]

> "The proposal contained in Q. 21 is most opportune and it is high time that it is strictly enforced. Reasonable time of arguments for either side should be fixed for various stages; only in an exceptional case of great intricacy or length the Judge may exercise the discretion to allow some more time. This will have two-fold advantage. This will lead to economy of time and also impress upon the members of the Bar the desirability of concentrating only on the essentials during the limited time available to them."

Replies opposed to limiting oral arguments.

2.6. Of the replies that are opposed to limiting the time for oral argument, the most pithy is that of another High Court Judge,[5] which we quote in full :—

> "A Judge hears a case so long as he does not understand the point sought to be made by the learned counsel. As soon as the point is understood, the Judges do indicate to the learned counsel to proceed to the next point. It is not understood how it would facilitate disposal if the hearing is closed without the Judge having understood the point involved. I am against placing any limits. A case is a case. It has to be heard and then decided, and not to be merely disposed of".

Shri Seervai's reply.

2.7. Much more elaborate is the reply of Shri H. M Seervai. Limitations of space do not permit us to quote it in full. But the most important points made by him are, we believe, reflected in the following portions, which we have extracted[6] *verbatim* from his reply. (For convenience, we have put the rlevant passages in lettered paragraphs):—

(a) In the Court, for a large number of years, oral arguments took place. Judges made their own notes and written arguments were not permitted No doubt, the filing of a statement of the case for the Appellant and the Respondent was the rule in those days, and it apprised the Court of the case of the parties. This procedure secured close attention on the part of Judges for, in making their notes, they had to record the submission and their own reaction to it. In last few years, a practice has grown up of dispensing with the statement of the case in most cases, accompanied by a suggestion that notes of argument on either side may be put in. The statement of the case was abrogated because it was said that counsel did not know how to draw such statement, and that with rare exceptions, the statements of the case were useless. I find it difficult to believe that counsel who are unable to draw a statement of the case—which consists of a concise statement of facts, the grounds for the decision in the court or courts below, and submissions of law or fact to show why the decision is wrong,—would be capable of submitting a written argument which involves greater skill and labour than the statement of the case.

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[1]. Law Commission Collection No. 21/13 Law Commission File No. 107.

[2]. Law Commission Collection No. 21/24 (top). Law Commission File S. No. 137.

[3]. Law Commission Collection No. 21/24, bottom : Law Commission File S. No. 109.

[4]. Law Commission Collection No. 21/4 ; Law Commission File S. No. 1/14.

[5]. Law Commission Collection No. 21/34 ; Law Commission File S. No. 140.

[6]. Law Commission Collection No. 21/29 to 21/33 ; Law Commission. File S. No. 146 (Shri Seervai).

(b) The written note is supposed to cover the whole case. A note of argument for the Appellant is in one sense easy to prepare; for, he has to open and if he so minded, can set out his case in full. But when the case is argued in court, even for limited periods of time, the argument gets modified, qualified or enlarged, as a result of the questions from the Bench or in some cases, objections from the other side. The preparation of a written argument for the Respondent puts Counsel to intolerable strain, because they have to argue in Court for four and a half hours as soon as Counsel for the Appellant sits down and all the while they must prepare and be ready with the written notes stating their argument fully.

(c) Between a written argument and an oral argument, however brief, there is a vast difference. Not only does this procedure lead to delay both in the conduct of the case because few judges have the time to read notes as they are handed in, and also to delay in the delivery of the judgment, but it also involves grave injustice to the appellant. Secondly, it seems to me that it is an outrage to stop responsible Counsel from presenting a relevant argument on the ground of lack of time. This power is, it is said, intended to prevent repetition. Nothing is easier than to tell Counsel that his point has been noted and need not be repeated.

(d) It is said that in the Supreme Court of U.S.A., there is a time limit of half an hour for oral argument on each side. If the system can work in the United States, why can it not work in India ? The answer is two-fold. The mode of working of the U.S. Supreme Court is entirely different from the mode of work of our Supreme Court. The Judges sit for only 4 days in a week for a fortnight for hearing arguments. For the next fortnight they do not sit in Court at all. They are provided with research assistants; judicial conferences are held where all the judges are present where applications for certiorari and the judgment to be delivered are discussed. Written briefs are filed by big law corporations with immense research facilities, including computerised service, available repetition.

(e) In my opinion, to secure speedy disposal, reasonably early judgements and for improving the quality of judgments, the earlier practice should be restored. Written arguments should not be allowed, the judges should make their own notes, and firmly not courteously prevent repetition.

Replies taking the middle position.

2.8. As regards replies taking the middle position—i.e. replies which favour, in principle, limiting the time for oral arguments without committing themselves to specific rigid limits, we would like to quote the views expressed by Shri Narain Sinha, former Attorney-General of India,[1] and by the State Law Commission of Madhya Pradesh.[2] Shri Lal Narain Sinha, addressing himself to Questions 21 and 22, has expressed the following view:—

"A reform in this direction is extremely necessary".

The American practice of written briefs with estimated time for oral arguments would go a long way to cut down much avoidable repetition and irrelevant argument.

The Madhya Pradesh State Law Commission in its reply to Q. 21, states:—

"The fixation of time-limits should be reasonable according to the complexity of the case".

The view of a retired Chief Justice of High Court also takes the middle position:—[3]

"I am strongly of the view that a limit should be imposed for arguments. But in such a case there should be written briefs. Young lawyers of ability may be asked to assist the Judges concerned (like the Law Clerks in the

[1]. Law Commission Collection No. 21/17, Law Commission File S. No. 116 (Shri Lal Narain Sinha).

[2]. Law Commission Collection No. 21/17, bottom; Law Commission File S. No. 115.

[3]. Law Commission Collection No. 21/25, Law Commission File S. No. 126.

U.S. Supreme Court). They must be asked to take oath of secrecy and must be appointed purely on the basis of merit. I do not agree that any appeal should be disposed of without bearing oral arguments".

Professor McWhinney's views.

2.9. It may be of interest to mention that at the request of the Member Secretary of the Commission, Dr. Edward McWhinney, the eminent constitutional jurist,[1] was good enough to forward to the Commission his views of the Questionnaire. This is what he says in regard to Q. 21 (which sought views as to whether there should be imposed a time limit on oral arguments).

Q. 21. Certainly, the permitting of unrestricted oral arguments—often lasting hours or days—is an historically—derived, affectation of "Anglo-Saxon", British-patterned tribunals and increasingly unsuitable and irrelevant to busy modern Supreme Courts".

We should, of course, mention that in his reply on Q. 22 (written briefs) Dr. McWhinney, while stating that written briefs would improve the quality of counsel's argumentation and of the final court decision making, has added the following rider:—

"Of course, limitations on the length of written briefs may also be useful, to encourage succinctness and reduce unnecessary padding of briefs."

The pros and cons considered.

2.10. On a careful consideration of the views expressed on the question of limiting the time for oral arguments, we find that the re-action on the subject has been a mixed one. The reduction to time in oral arguments would—it is obvious—facilitate greater disposal, provided the parties have placed before the Court their submissions in clear and succinct—and not too prolix-manner. This, of course, pre-supposes that the written arguments are, on the one hand, not slip-shod or skimpy and, on the other hand, not long-winded or rambling. It further pre-supposes—and this a still more important consideration—that the Judges are given sufficient time to go through the written arguments, and (if they so desire) some research assistance in the shape of editing and checking the written arguments is made available. If these pre-requisites can be created and maintained, the case for limiting the time taken in oral arguments appears to be a fairly plausible one.

At the same time, we find that there is considerable opposition to such a proposal, from many quarters. There is an understandable feeling that something of the element of directness and immediacy that one finds in oral arguments would be lost, if time limits are imposed. It also appears from the replies received that many knowledgeable persons are of the opinion that to cut down the time for oral argument would lead to serious injustice.

We appreciate that any system that can be suggested regarding the mode of presentation of cases in court would be difficult to work effectively, if those called upon to participate in its working are not mentally attuned to it and have serious misgivings about its soundness on the merits.

Recommendation as to time limit for oral arguments.

2.11. Having considered all these aspects of the problem, we are not inclined to suggest any rigid or mathematically precise time limits for oral arguments. It may be difficult to lay down any hard and fast rule for determining the minimum time for oral arguments in all cases. However, it should still be possible for the court to obtain, from counsel appearing on both the sides, an estimate of the time that may be reasonably required for oral arguments and to request counsel to adhere to that time. Such a course, coupled with an insistance by the Court on provisions contained in the rules as to the filing of a proper statement of case[2] shall go a long way towards improving the rate of disposal, without seriously impairing the cause of justice. In this manner, the matter may be left to the good sense of the Judge who can, after consulting counsel, fix the time beforehand, keeping in mind the nature of the case and the issues to be argued. In fixing the time, the Judge can also bear in mind the fact that where the written arguments are well drawn, the time taken in oral arguments should not be very long, in the large run of cases. To suggest that half an hour is the usual limit would be going too

1. Letter from Dr. Edward McWhinney, Q.C. Professor of International Law and Relations, Simon Fraser University, Burnaby, B.C. Canada (18 January, 1981).

2. See also paragraph 3·14, *infra*.

far. But the dominant consideration should be to keep oral arguments within reasonable limits. We do not envisage any formal amendment of the law, but we recommend that such a practice should be evolved and constantly followed in the Supreme Court and in the High Courts.

Law Clerks.

2.12. Connected with the above recommendation, and with the idea of having well-drawn written arguments, is the question of appointing law clerks, to which we have made a reference above.[1] This system has been regarded as successful in the United States, on the whole. Every institution has its critics, and this particular institution has not escaped its share of criticism in the United States. Still, our impression on a study of the writings that exist on the subject is that it has proved its utility. We think that the system has not been given a full and fair trial in India. It should be given such a trial. A beginning could be made by providing law-clerks to such of the Judges of the Supreme Court as may like to have them. The law clerks should be attached to particular Judges, and not merely to the Court as such. Each Judge has his own style of working, his own preference for source materials, and his own leanings as to the manner of reading earlier cases. All these elements, subjective as they may be, need not be disregarded when providing research assistance to the Judges. We do not think that there is any need for us to set out in detail what would be the qualifications of the ideal law clerks, what would be their proper remuneration, for what time they should be appointed, and so on. These and other allied matters of an administrative character can be best left to be taken care of by the Supreme Court.

It is needless to say that the institution of law clerks could prove to be useful for High Courts also, in cases of complexity.

Law Clerks use by Judge Wyzanski.

2.13. There is available an interesting account of the manner in which Judge Wyzanski in the United States untilised his Law Clerks.[2]

It is said that when he faced an especially complex anti-trust suit he hired, as his law clerk Care Kaysen, then a bright young economist at Harvard who, later became Director of the Institute for Advanced Studies at Princeton. Wyzanski use of Care Kaysen was undoubtedly a stroke of genius for this particular case. But if the next dispute on the docket involved (for instance) a question of "good moral character"—as did *Repouille* V. *United States*—then Kaysans' economic expertise would have been of no help.

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[1]. Paragraph 2.9, *supra*: Compare suggestion in paragraph 2·8, *supra*.

[2]. Murphy and Pritchett, Courts, Judges and Politics (2nd edition), page 353.

CHAPTER 3

WRITTEN BRIEFS IN PARTIAL SUBSTITUTION OF ORAL ARGUMENTS

written briefs.

3.1. We now come to the topic of written arguments. In the U.S.A. these are known as "briefs", and that is a convenient expression which we shall use frequently, hoping that the lay reader will not make a confusion between :—

(i) a "brief" in the sense of a set of instructions given by the client to his counsel (usually, through a solicitor) and

(ii) a "brief" in the sense of a statement in writing, (usually prepared in an elaborate form) of the legal propositions on which counsel seeks to rely, delivered by the counsel to the court.

The first is given *to the counsel* (by the client), while the second is given *by the* counsel (to the court). The emphasis in the first is on facts. The emphasis in the second is mainly on points of law—except that what has come to be known is the "Brandeis brief[1]" is expected to give certain sociological and economic data relevant for constitutional adjudication.

Question 22.

3.2. Question 22 in our Questionnaire sought views on the issue whether a procedural requirement : making it obligatory on counsel to file written briefs, would cut down oral arguments. Although not expressed in so many words, what was contemplated *in this question* was a system whereunder written arguments would supplement, or be supplemented by, oral arguments. In other words, written briefs in partial substitution of oral arguments were contemplated by the question. Written arguments as totally replacing oral arguments were not contemplated by this particular question,—though Question 23 did contemplate such a possibility[2]. At the moment, therefore, we are concerned with the question how far there could be introduced a system whereunder the main submissions of counsel would find a place in written arguments submitted to the court in advance, to be followed (at the hearing) by oral arguments which would then be limited to the minimum.

Views on Question 22.

3.3. In this sense, Question 22 is connected with Question 21, and goes with it. The important points of view expressed in the replies to Question 21 have been already summarised by us while dealing with that Question[3]—a fact which constitutes the background against which we shall now proceed to deal with the views expressed on Q. 22.

At the outset, it may be mentioned that the United Lawyers Association, New Delhi[4] has stated in its reply that the Supreme Court Rules already contain provisions for filing written briefs in writ petitions and for filing statements of case in civil appeals, but "those provisions are not taken seriously either by the bar or by the bench", according to the United Lawyers Association and statements of case are dispensed "with in almost all cases".

On the bare Question whether the filing of written briefs will cut down the time taken in oral argument, there is—rather unexpectedly—serious disagreement. While some replies forwarded on the Questionnaire agree that it would be so, a large number of replies either emphatically assert that written briefs would not cut down the time taken in oral agruments, or implicitly suggest that is their opinion, in view of certain pre-requisites which (according to them) are not satisfied.

Increased work for the Judge.

3.4. Thus, we have[5] the reply of a High Court Judge, answering question 22 in the negative, in these words :—

"No. Such a step would also cut down the measure of understanding of the case by the Judge. Probably, reading of written briefs would consume more time of the Judge, though not in Court."

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[1]. See paragraph 3·15, *infra*.

[2]. Chapter 4, *infra*.

[3]. Chapter 2, *supra*.

[4]. Law Commission Collection No. 22/16, Law Commission's File No. 137.

[5]. Law Commission Collection No. 22/3, Law Commission File 8, No. 55.

3.5. A retired High Court Judge states in his reply[1] that many times, the law (referred to in the written brief) stands changed by judgments pronounced in the intervening time. He mentions the rules relating to "statement of case" and says, "Unless the time between the filing of the case and the hearing is less than a year, it will not substantially help curtail time of hearing".

Effect of long interval.

3.6. The sitting Chief Justice of a High Court[2], while stating that the filing of written briefs should cut down oral arguments, adds the following very important qualifications to that assumption :—

Other difficulties.

(i) It would depend on the labour put in the briefs.

(ii) It would definitely increase labour of the Judges.

(iii) If a departure is to be allowed from written briefs, the purpose would be lost;

(iv) On the introduction of written briefs litigation may become a little costlier, as counsel might demand higher fees or extra fees for the written briefs.

He winds up his reply on this question by stating that the proposal is worth trying "with some safeguards".

3.7. The Advocate from Madras[3] suggests that written arguments, if at all they are to be provided for, must be *after* oral arguments. Otherwise (he says) they may become diffused, since all points, including minor ones, and including points which may ultimately be considered irrelevent, may have to be covered. "Judges often tend to approach cases with pre-dispositions and, in view of their heavy work loads, they may skip over most of what is given, in writing."

Written arguments whether to follow oral arguments.

3.8. The Advocate General of one State has forcefully expressed his view in these words[4] :—

Views of an Advocate General.

"I am against the suggestion of making it obligatory to counsel filing written briefs with a view to cut down oral arguments, because once oral arguments had to be allowed, the filing of written briefs, as a matter of experience, has in no way led to the cutting of the oral arguments in the Supreme Court of India. I would suggest the giving up of the practice of filing written briefs, so that cases can be decided entirely on the basis of oral arguments which, if controlled properly, can be confined to reasonable limits, not affecting satisfactory disposal of cases.

3.9. A High Court Judge[5] has said that written briefs should cut down the oral arguments provided the Judge reads the brief before the start of oral arguments.

The Judge's Work.

3.10. Another High Court Judge[6] has suggested that the best way is to dispense with oral hearing at the stage of admission. Admission matters will (he says) be disposed of by one or two (or more) Judges in Chambers. This will expedite disposal, as well as control admission. "Any appeal which on the face of it does not appear to be sustainable has of course to be respected, in limine,"

Oral arguments at admission stage.

"This is easier and faster to do in the absence of oral hearing. After all, the appellant has had his say in the courts below, and he does not deserve to be heard again unless the alleged error is glaring enough to be sighted without an oral hearing". He refers to the U.S. practice where there is no oral hearing at the admission stage.

3.11. A point of view has been put forth by the Chief Justice of a High Court that lawyers and the Bar in India, by and large, are not trained in filing written briefs, though some.......of them are. However, (he adds), if the Judges take pains to go through the briefs before the start of the case, it would help considerably in curtailing the oral arguments and disposal of cases[7].

Lawyers how far trained.

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[1]. Law Commission Collection No. 22/4.

[2]. Law Commission Collection No. 22/5, bottom.

[3]. Law Commission Collection No. 22/7.

[4]. Law Commission Collection No. 22/15. Law Commission File S. No. 128.

[5]. Law Commission Collection No. 28/29.

[6]. Law Commission Collection No. 22/30.

[7]. Law Commission Collection No. 21/20 : Law Commission File, Sl. No. 138.

The view of Shri H. M. Seervai has been already referred to, while discussing question 21[1].

Views of Professor McWhinney.

Limitations desirable on length of briefs also.

3.12. We have also referred to the view of Professor McWhinney,[2] the eminent constitutional lawyer, still, we would like to repeat his comment, since it indicates pithily the advantages, as well as the limitations, of written arguments. Answering question 22, he says as under :—

> "Yes, and certainly, on all the empirical experience of comparative constitutional law, improve the quality of counsel's argumentation and of the final court decision-making. *Of course limitations on the length of written briefs may also be useful, to encourage succinctness and reduce unnecessary padding of briefs.*"

Conclusion as to written briefs.

3.13. On a consideration of all aspects of the matter, we have come to the conclusion that since there is a strong feeling that a requirement to file written briefs containing detailed arguments may defeat its purpose by reason of various difficulties and deficiencies, the stage has not come for insisting on filing such briefs. We must note that there has been a strong opposition to the idea, and as will appear from the views expressed at length opposition to the idea, and practical problems might arise by a mandatory requirement introducing a system of written arguments. In the first place, while a note of arguments for the appellant may be easy to prepare, the argument gets modified, qualified or enlarged in the course of oral hearing, either as a result of the questions from the Bench or, in some cases, as a result of objections from the other side. Secondly, according to Shri Seervai, the Judges have generally no time to read notes as they are handed in, so that the object of submitting written arguments in advance is frustrated. Thirdly, as has been emphasised by Shri Seervai, a total or substantial reliance on written argument (as in the United States) postulates that Judges should sit only for four days in the week for a fortnight for hearing arguments (as in the United States, where for the next fortnight, they do not sit in the court.) Fourthly, as Shri Seervai has pointed out, written briefs in the United States are filed by big Law Corporations, with immense research facilities, including computerised facilities, available to them. Such facilities may not be available in India.

Statement of case-recommendation as to.

3.14. Having regard to all these difficulties, we are not inclined, at least at present, to recommend the introduction of a compulsory requirement of filing written arguments in all cases. At the same time, we think that the device of filing a "statement of case", if properly implemented, should go a long way towards reducing oral arguments in point of time, or at least in canalising oral arguments into proper directions and in focussing attention upon the central issues of direct relevance, which itself will lead to a saving of time. Our first recommendation, therefore, is that the statement of case/appeal,[3] properly prepared by counsel and filed in court, should be insisted upon. If counsel consider it necessary, they may be permitted to file written briefs, which naturally would be more elaborate than the statement of case/appeal.

It is proper to emphasise that written briefs, when filed, must be of reasonable length, as otherwise the process of reading of the briefs by the judges will be time-consuming. This recommendation is intended to apply to the Supreme Court. It can also apply to High Courts in regard to :—

(a) first appeals,

(b) capital cases and

(c) other complex cases

Recommendation as to constitutional cases (Factual briefs).

3.15. Our second recommendation is of special relevance to cases involving constitutional questions. In regard to such cases, the practice of filing briefs containing written factual material should be encouraged, where factual material forms the background of the case. What have come to be known in the United States as "Brandeis Briefs" are very useful in constitutional adjudication, and we

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[1]. Paragraph 2·7, *supra*.

[2]. Paragraph 2·9, *supra*.

[3]. Law Commission Collection No. 21/28 to 21/32, See Paragraph 2·7 *supra*.

[4]. See also paragraph 2·11, *supra*.

recommend that in cases involving constitutional questions, where factual material is of importance for the determination of the controversy, the filing of such briefs should be encouraged. Such briefs should contain facts relevant for constitutional adjudication (in addition to the affidavits filed on behalf of the parties) and should include extracts from published reports of committees and commissions, wherever appropriate.

This practice can be adopted in the Supreme Court and also in the High Courts.

Brandeis brief.

3.16. The most celebrated breakthrough involving use of this approach was the brief prepared by Louis D. Brandeis and presented to the Supreme Court in *Muller* v. *Oregon* (1908), in which Brandeis was defending the constitutionality of a state law setting ten hours as the maximum working day for women. This brief, the usefulness of which the Court specifically acknowledged in its opinion, gathered an enormous amount of information on foreign and American laws limiting hours for women and on governmental reports stressing the dangers to women from long hours of labour.[1]

As has further been pointed out, there is a difference between litigation involving disputes about individual action and cases dealing with entire classes or groups, where the subject of controversy is the application or validity of social or economic legislation aimed at establishing governmental control over conduct or where public policies are attacked in court as violating constitutional standards. In such cases, the "facts" often concern attitudes or opinion or social practices or economic conditions. When courts must find facts of such breadth, the usual practice of relying on testimony from the mouths of eye witnesses or participants becomes both inadequate and inappropriate. Different kinds of evidentiary— indeed, different kinds of evidence—must be available, if judges are to decide such issues intelligently.[2]

Irish practice.

3.17. In recent years, the Irish Supreme Court has shown readiness to accept sociological evidence. In 1965, for instance, the Court examined numerous scientific reports and reviewed the testimony of medical experts to sustain the constitutionality of a national statute requiring localities to fluoridate public drinking water The Chief Justice candidly admitted the difficulties that judges face when confronted by expanding—and changing—content of scientific knowledge.[3] This is what he stated, "These are not matters which are presumed to be within the knowledge of the Court, and, accordingly, the unconstitutionality of the Act, if it be unconstitutional, cannot be determined except by reference to the particular evidence which is furnished in the case. Since evidence may differ from case to case and as scientific knowledge may increase and the views of scientists alter, the Court's determination cannot amount to more than a decision that on the evidence produced the plaintiff has, or has not, discharged the onus of demonstrating that the Act is unconstitutional."

Constitutional cases agreed statement of facts.

3.18. Our third recommendation is that in constitutional cases, wherever practicable, an agreed statement of facts should be filed, so as to reduce the time taken at the hearing. It is obviously desirable that the higher courts should, as far as possible, deal with general issues, and their time should not be wasted over factual controversies. This practice can be adopted in the Supreme Court as also in High Courts.

Conferences recommended.

3.19. Our fourth recommendation is that in the Supreme Court, to the extent possible, a day may be set apart for the holding of conferences between judges, as in the United States. This should help in evolving coherent doctrines, in resolving differences and in removing overlaping in judgements to a large extent. Such a practice will facilitate maximum consultation and co-ordination among the judges, and help them in trying to produce one common majority judgement. Surely, such conferences will, at least in some cases, build an intellectual bridge between judges, and reduce the occasions for the appearance of separate and parallel

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[1]. Murphy and Pritchett, Courts, Judges and Politics (2nd ed.), page 350.

[2]. Murphy and Pritchett, Courts, Judges and Politics (2nd ed.), page 348.

[3]. Murphy and Pritchett, Courts, Judges and Politics (2nd ed.), page 352.

judgement—a situation not very conducive to the evolution of coherent doctrine. This recommendation is intended to apply to the Supreme Court. It can apply also to the High Courts in regard to cases heard by Full Benches.

A compromise between English and American models.

3.20. We hope that the recommendations made in this Chapter will, to some extent, help in effecting a saving of judicial time. In this connection, we are interested to note a suggestion made in a study of the House of Lords[1] published some time ago. Here is the relevant passage from the book, which we reproduce here as a matter of information. It describes the present English position and also makes a suggestion for improvement:—

> "Under the present system the appellant and the respondent in a House of Lords appeal are obliged to lodge a document called the case which contains a brief outline of the arguments which will be relied upon by the two parties, and a selection of documents, including the writ and transcripts (or reports) of the judgements delivered in the lower courts. However, unlike the U.S. Supreme Court where the elaborate printed 'briefs' form the basis of the proceedings before the court and oral arguments restricted by a time-limit are regarded merely as a supplement to the brief, the procedure of the House of Lords is geared wholly to oral argument. The case is merely regarded as a useful preliminary statement of the issues involved. Indeed it sometimes appears that their Lordships have not even read it."

Position in South Africa.

3.21. The same study deals with the position in South Africa. "As things stand at present, too little use is made of the Case. Our proposal is to adopt the procedure of South African courts whereby counsel are bound, within four days[2] of the hearing, to submit head of argument' which contain a full precis of proposition and authorities to be relied upon. In oral arguments there would still be no time-limit, but counsel would be expected to confine themselves to supplementing the material contained in the 'heads of argument' and not permitted to produce additional arguments without the leave (sparingly granted) of the court. Such a practice would obviate, the need to raise a new point for the first time at the hearing of the appeal.[3] It may be mentioned that in South Africa,[4] the procedure for argument in appeals before the Appellate Division of the Supreme Court seems to be compromise between the English system and that adopted by the U.S. Supreme Court. Four days before the hearing of an appeal by the Appellate Division, counsel must submit "heads of argument" which contain a full precis of propositions and authorities to be relied upon. There is no time-limit to oral arguments but counsel are expected to confine themselves to supplementing the material in the "heads of argument", and are not permitted to produce additional arguments without the leave of the Court.

Law Clerks

3.22. This brings us to the end of this Chapter. We need not reiterate in this Chapter the recommendation that we have made in our earlier Chapter[5] for providing Law Clerks to those Judges who wish to have such assistance.

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1. Louis Bloom-Cooper and Gavin Drewry, Final Appeal (1972), pages 403, 404.
2. This means four days before the hearing.
3. Louis Bloom-Cooper and Gavin Drewry, Final Appeal (1972), pages 403-404.
4. Louis Bloom-Cooper and Gavin Drewry, Final Appeal (1972), page 550.
5. Paragraph 2·12, *supra*.

CHAPTER 4

TOTAL ELIMINATION OF ORAL ARGUMENTS

Views expressed on Q. 23.

4.1. Question 23 in our questionnaire put the query whether some appeals should be disposed of without hearing oral arguments. In the notes accompanying the questionnaire, a practice followed in the Supreme Court of Iowa had been referred to.[1] In the Supreme Court of Iowa, in 1973, 66 cases were submitted to the court without oral argument; in 1974, the total number of such cases increased to 128. Even where oral arguments were permitted, counsel were allowed only fifteen minutes on each side, and an additional five minutes for the appellant's rebuttal. This fact was mentioned in the notes, and opinion was solicited as to whether some such practice could be adopted in India also, in appropriate cases.

Replies to the questionnaire.

4.2. The replies received in the Commission on the questionnaire issued by it do not favour any proposal to eliminate oral arguments totally. This reluctance to dispense with oral arguments totally is, if we may say so, in line with the trend of opinion expressed on the allied question whether oral arguments could be limited in point of time and replaced *in part* by written arguments.[2] We have taken due note of this state of opinion and are not recommending the total elimination of oral arguments as such. However, before stating our precise recommendation on the subject, it is desirable to deal in brief with one or two aspects of the matter that need express mention.

Conceivable cases for disposal without oral arguments.

4.3. At the outset, let us state, that at least hypothetically, it is possible to conceive of some cases in which properly prepared briefs (or even statements of cases) should be enough for setting out precisely the contours of the controversy. There are many controversies whose compass is very limited, and whose constituent points might have been thrashed out exhaustively in the decisions of High Courts, so that the main function of the Supreme Court would be only to settle the law on the point by making a definitive pronouncement. Such definitive pronouncements (in cases of the above nature) would be possible without oral arguments. As we have said, where the contours of the controversies are very well defined, oral arguments may not be needed at all. One example that comes to mind (though not in the field of constitutional law) is the narrow question whether, for the purpose of civil liability for defamation, Indian law at all recognises any distinction between libel and slander. The question happens to have arisen because of the state of the English law on the subject. The vast majority of rulings in India holds that there is no such distinction, but a very small segment of judicial opinion recognises the distinction. If this question is ever taken to the Supreme Court, written briefs setting out the relevant authorities and socio-legal arguments in support of either view should be enough to enable the Supreme Court to render a definitive pronouncement without the need for oral arguments. Some High Court decisions on the subject have thrashed out the matter at length. In the example given by us about libel and slander, the judgements of many High Courts (on the supposed distinction between libel and slander) have dealt with almost all the conceivably relevant legal aspects of the matter. Besides this, there is also available enough academic literature, setting out the pros and cons of the matter. This literature deals with the social aspects of the matter also. In this position, it would not be difficult for the highest Court in the country to make a definitive pronouncement on the basis of material of the nature mentioned above, which can be conveniently presented through the medium of a written brief.

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[1]. Hon'ble Marc McCormick, "Appellate Congestion in Drake Iowa : Dimensions and Remedies" (1975-76), Vol. 25 Iowa Law, Rev. page 133.

[2]. Chapters 2-3, *supra*, particularly paragraph 2·10 and 2·11.

View of Dr. McWhinney.

4.4. We may also note that Dr. McWhinney, in his reply to Question 23, has regarded such disposal (disposal without oral arguments) as practicable where no really consequential or new constitutional points are involved.[1]

No change generally as to final hearing.

4.5. However, in view of the very strong opposition as shown[2] in the vast majority of replies, we are not inclined to recommend any change in the present practice so far as the disposal of appeals for the purpose of final hearing is concerned.

Admission stage and oral arguments; recommendation.

4.6. At the same time, it appears to us that at the stage of admission, a different approach can be adopted without much difficulty. The principal task of a court at the stage of admission is to decide whether there is, in the material placed before it, a *prima facie* case that seems to justify invocation of the jurisdiction of the court. For coming to a decision on that issue, written arguments, presented properly in the form of a statement of case/appeal on the lines envisaged in this Report, should, in the vast majority of cases, be sufficient. It would be for the Judges who are called upon to rule, on the question of admission of the matter to decide whether they should call upon the party concerned to present oral arguments, or whether the question of admitting the case or appeal could be decided on the basis of written arguments alone. No doubt, by deciding *against admitting* the case or appeal, the Judges (where the matter is raised before the Supreme Court), would be practically putting an end to the life of the litigation, once and for all. (The very exceptional remedy of review of judgement may be disregarded, for the present purpose). But it seems to us that if a serious effort is to be made, to bring the arrears in the Supreme Court under control, some such change is almost inescapable. No doubt, dismissal of the petition or appeal at the admission stage without oral arguments may cause dissatisfaction to the litigant and to the members of the bar in many cases. This probable consequence notwithstanding, we recommend that at the stage of admission of a case or appeal in the Supreme Court, including those in which constitutional matters are raised, the Court may dispense with oral hearing unless it considers such a hearing to be necessary in special cases in the interests of justice. Such a change will, no doubt, require, for its proper implementation, the constitution of suitable machinery, such as an Admissions Committee or Committees, to decide whether the matter should be admitted or rejected with or without oral arguments.

Practice in USA, England and Canada.

4.7. In the context of the above recommendation, it may be mentioned that the Supreme Court of U.S.A. and the House of Lords in U.K. have been keeping their dockets clear by rigorous control on the admission of cases by the Judges. Mr. Justice Jackson of the U.S. Supreme Court has observed, "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."[3]

The Supreme Court of Canada has also been empowered by statute to choose and decide only those cases which it regards as constituting matters of national importance or involving important issues of law.[4]

View of Mr. Justice Brandeis.

4.8. The opinion of Mr. Justice Brandeis of the Supreme Court of U.S.A. in the matter is also worth referring to Paul A Freund has lucidly put it, "Mr. Justice Brandeis was a firm believer in limiting the jurisdiction of the Supreme Court on every front and he would not be reduced by the quixotic temptation to right every fancied wrong which was paraded before him. The time was always out of joint, but he was not born alone to see it right. Grievances set out in petitions for *certiorari* were examined with great despatch and if the petitions

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1. Dr. Edward McWhinney's reply dated 18-1-1984, sent to the Member-Secretary, Law Commission of India.

2. Paragraph 4·2 *supra*.

3. Robert H. Jackson: The Supreme Court in the American System of Government (1955), page 21.

4. Gerald Gall, Canadian Legal System, page 70.

did not carry on their face compelling reasons for granting them, they were promptly marked for denial. 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 procedural limits reflected on the technical level, an essentially Stoic philosophy. For, like Epictetus, he recognised "the impropriety of being emotionally affected by what is not under one's control."[1]

Shri Seervai's views on criminal appeals.

4.9. We would also like to quote the following comment[2] offered by Shri H. M. Seervai in his reply to the questionnaire issued by us. Dealing with criminal appeals, he says that article 136 of the Constitution vests in the Supreme Court the power formerly vested in the Privy Council when it was the final court of appeal from all courts in the British Empire. It was a residuary power, exercised by the Privy Council, to see that grave failure of justice was remedied. Stressing the point that a distinction must be made between Special Leave applications in criminal matters and other matters, he says "In criminal matters, the Privy Council rarely interfered when there was a concurrent finding of fact and the law had *not* been clearly misinterpreted. The Privy Council did not consider itself to be an additional court of appeal. It interfered with findings of law and/or fact, if they were perverse or so unreasonable that to allow the judgement under appeal to stand would be a miscarriage of justice, that is, it would shake the foundations of justice. This jurisdiction is now vested in the Supreme Court and both reason and expediency indicate that by and large, the view taken by the Privy Council should be adopted. This power is not to be exercised merely because a judge feels that some injustice has been done; for, the injustice in an individual case must be balanced against the much greater injustice which would be done to a large class of litigants if decision of their matters were indefinitely delayed. It seems to me that in admitting criminal appeals, specially where there are concurrent findings of fact, the Supreme Court imposes upon itself needless burdens, and inflicts a serious injury upon itself for being unable to dispose of matters with reasonable despatch. If the principle followed by he Privy Council in criminal matters is substantially adhered to by *all* the judges, there would be a two-fold benefit. It would discourage applications under Article 136 in criminal matters, and thus lessen the burden on the court on Mondays and Fridays. Secondly, the number of final hearings matters would be greatly reduced and the disposals speeded up. On certain occasions matters are admitted merely because the sentence is considered to be unduly severe. In such cases, the correct course is to grant leave only to appeal against the sentence or, if the question can be disposed of at the admission stage, to reduce the sentence after briefly hearing the parties."

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[1]. Paul A. Freund.: On Understanding the Supreme Court (1950), page 65.

[2]. Shri H.M. Seervai's reply to the Law Commission's questionnaire.

CHAPTER 5

SUMMARY OF RECOMMENDATIONS

We give below a summary of the recommendations made in this Report.

(1) No rigid or mathematically precise time limits for oral arguments is recommended. It may be difficult to lay down any hard and fast rule for determining the minimum time for oral arguments. However, it should still be possible for the court to obtain, from counsel appearing on both the sides, an estimate of the time that may be reasonably required for oral arguments and to request counsel to adhere to that time. Such a course, coupled with an insistence by the Court on provisions contained in the rules as to the filing of a proper statement of case, should go a long way towards improving the rate of disposal, without seriously impairing the cause of justice. In this manner, the matter may be left to the good sense of the Judge who can, after consulting counsel, fix the time beforehand, keeping in mind the nature of the case and the issues to be argued. In fixing the time, the Judge can also bear in mind the fact that where the written arguments are well drawn, the time taken in oral arguments should not be very long, in the large run of cases. To suggest that half an hour is the usual limit would be going too far. But the dominant consideration should be to keep oral arguments within reasonable limits. No formal amendment of the law, is envisaged, but it is recommended that such a practice should be evolved and constantly followed,[1] in the Supreme Court and in the High Courts.

(2) The system of providing law clerks should be given full trial. A beginning could be made by providing law-clerks to such of the Judges of the Supreme Court as may like to have them. The law clerks should be attached to particular Judges, and not merely to the Court as such.

Matters such as the qualifications of law clerks, their proper remuneration, for what time they should be appointed and other allied matters of an administrative character can be best left to be taken care of by the Supreme Court.

The institution of law clerks could prove to be useful for High Courts also, in cases of complexity.[2]

(3) No recommendation is made to introduce a compulsory requirement of filing written arguments in all cases, at least for the present. But the device of filing a "statement of case", if properly implemented, should go a long way towards reducing oral arguments in point of time, or at least in canalising oral arguments into proper directions and in focussing upon the central issues of direct relevance, which itself will lead to a saving of time. The recommendation, therefore, is that the statement of case/appeal, properly prepared by counsel and filed in court, should be insisted upon. If counsel consider it necessary, they may be permitted to file written briefs, which naturally would be more elaborate than the statement of case/appeal.

Written briefs, when filed, must be of reasonable length, as otherwise the process of reading of the briefs by the judges will be time-consuming.[3]

This recommendation is intended to apply—

(a) to the Supreme Court, and

(b) to the High Courts in relation to first appeals capital cases and other complex cases coming before the High Courts.

(4) In regard to cases involving constitutional questions, the practice of filing briefs containing written factual material should be encouraged, where factual material forms the background of the case. What have come to be known in

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[1]. Paragraph 2·11, *supra*.

[2]. Paragraph 2·12, *supra*.

[3]. Paragraph 3·14, *supra*.

the United States as "Brandeis Briefs" are very useful in constitutional adjudication. Such briefs should contain facts relevant for constitutional adjudication (in addition to the affidavits filed on behalf of the parties), and should include extracts from published reports of committees and commissions, wherever appropriate. This practice can be adopted in the Supreme Court, as also in the High Courts.[1]

(5) In constitutional cases, wherever possible, an agreed statement of facts should be filed, so as to reduce the time taken at the hearing. This practice can be adopted in the Supreme Court, as well as in the High Courts.[2]

(6) To the extent possible, in the Supreme Court a day may be set apart for holding conferences between Judges, as in the United States. The same practice can be held in High Courts in regard to cases heard by Full Benches.[3]

(7) In the Supreme Court, at the stage of admission of a case or appeal, (including those in which constitutional matters are raised), the Court may dispense with oral hearing unless it considers such a hearing to be necessary in special cases in the interests of justice. This will require the substitution of a suitable machinery (say, an Admissions Committee or Committees) to decide whether the matter should be admitted or rejected with or without oral arguments.[4]

(K. K. MATHEW)
Chairman

(J. P. CHATURVEDI)
Member

(DR. M. B. RAO)
Member

(P. M. BAKSHI)
Part-time Member

(VEPA P. SARATHI)
Part-time Member

(A. K. SRINIVASAMURTHY)
Member-Secretary

DATED :

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1. Paragraph 3·15, *supra*.
2. Paragraph 3·18, *supra*.
3. Paragraph 3·19, *supra*.
4. Paragraph 4·6, *supra*.

APPENDIX

WRITTEN BRIEFS IN THE UNITED STATES

It is proposed, in this Appendix, to deal briefly with the position in the United States as to written briefs. Before dealing with that particular topic, it will be convenient to provide a concise statement of the court structure in that country.

Court structure in U.S.A.

The complexity of the court structure of the U.S.A. stems largely from the multiplicity of more or less autonomous state jurisdictions which overlap the federal legal system. Although the American legal system was originally founded upon English common law, the written Constitution, in effecting a more or less rigid separation of powers, and with its entrenched liberation provisions such as '*due process*', coupled with nearly two centuries of independence, has resulted in the evolution of a system which bears little resemblance to that of contemporary Britain. The differences can perhaps be seen most clearly in the Constitution-orientation of the work of the Supreme Court and in a wholly different approach to the doctrine of *stare decisis*.[1]

So far as state jurisdictions are concerned, *only eighteen of the fifty states have two appellate tiers*. The states with two appellate courts are: Alabama, Arizona, California, Florida Georgia, Illinois, Indiana, Lousiana, Michigan, Missouri, New Jersey, New Mexico, New York, Ohio, Oklahoma (criminal appeals only), Pennsylvania, Tennessee and Texas. But is should be borne in mind that all the *principal* states have a two-tier system and that the eighteen states mentioned contain no less than 70 per cent of the United States population. Survey data (available for only eleven of the three-tier states) shows that in five states appeal to the second-tier appellate court in all categories of cases lies as of right, and in two other states all final appeals are subject to the granting of leave while, in four states[2] appeal, as of right lies only in certain categories of cases.

The federal appellate system is also basically two-tiered. The first tier of appellate jurisdiction is exercised by eleven district federal Courts of Appeal. The final appeal[3] lies to the U.S. Supreme Court which has jurisdiction in respect not only of appeals from federal courts but also of appeals from state courts in cases which involve a substantial federal element.

Appeal to the Supreme Court of the United States does not generally lie as of right, but is subject to the granting of certiorari by the court; exceptions (which do lie as of right) include cases where a state statute is said to be repugnant to the constitution, treaties or laws of the United States, but even these cases are carefully screened by the Court before it will grant a hearing.[4]

Presentation of arguments

The rules governing presentation of argument to the Supreme Court provide an interesting contrast to the procedure in the House of Lords. The emphasis is upon the argument presented by both sides in an elaborate (and costly) printed brief, a far more elaborate document than the "case" used in the House of Lords. Almost invariably, the oral argument supplementing the brief is confined to one hour on each side; exceptionally, the Court may allow additional time or schedule the case for summary argument, in which case each side will be allowed thirty minutes. Whereas much of the protracted oral argument of the House of Lords is devoted to the reading of the authorities and statutes, the U.S. Supreme Court frowns heavily upon advocates who read prepared material. In any event, the emphasis placed upon case law if less marked in the jurisdiction of the United States.[5]

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1. Bloom Cooper and Drewry, Final Appeal (1972), page 53.
2. Bloom Cooper and Drewry, Final Court Appeal (1972), pages 53-54.
3. There is a provision for a petition to the Supreme Court for a rehearing, but this is rarely granted.
4. Bloom Cooper and Drewry, Final Appeal (1972), pages 53-54.
5. Bloom Cooper and Drewry, Final Appeal (1972), page 54.

APPELLATE BRIEFS IN USA

Filing of appeals in USA

The "Brief" is an exceedingly important document in the United States in the appeal process. It contains the legal arguments upon which a party based his contention that the lower court's decision should either be reversed or upheld. Some appeals are decided on the basis of the contents of the brief, since oral arguments may be dispensed with, either at the request of the parties or by the Court on its own motion. The panel assigned to decide a case on appeal may consist of three, five, seven or nine judges, depending upon the court and the case. In the federal court of appeals, panels of three are common. In unusual situations, a court may *sit en banc* which means that a panel consisting of all the judges of that court will hear the case.[1]

Multiple copies of the brief are required to be filed with the clerk of courts, so that each judge will receive his own copy. The brief contains each attorney's statement of the questions to be decided by the court on review, the action he wishes the court to take, and—most importantly—the reasons to support his position. That rationale generally includes reference to authoritative sources, such as the precedent of prior court decisions, statutes, and legal treatises. Therefore, in the attorney's legal research, finding relevant authoritative support for his position is vital.[2]

Copies of the appellant's brief must be served on the appellee, who is given thirty days in which to prepare and file copies of his own brief with the clerk of the court of appeals. An appellant has the option of filing another brief in reply to that of the appellee.

Failure of either party to file a brief can be disastrous to his cause. If the appellant fails to file within the time provided, the appellee may move for dismissal of the appeal. If the appellee fails to file his brief, he cannot take part in the oral argument before the court except by special permission.

Contents of briefs

The required contents of brief include:—

1. A statement of the legal issues to be presented to the court for review.
2. A brief history of the case; the facts, the proceedings and disposition by the trial court.
3. Appellant's argument, contentions as well as supporting rationale.
4. A Statement of the relief sought in appeal.[3]

Specimen

The following specimens of briefs are given in an American book.[4]

FORM 11-4. Appellant's Brief.

IN THE SUPREME COURT OF GREAT STATE

STATE OF GREAT STATE,
Appellee
V
Harvey Worker, Appellant } BRIEF FOR APPELLANT

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Table of Cases

QUESTIONS PRESENTED FOR REVIEW

1. Where appellant, following warrantless arrest, was taken to police headquarters at 8.20 p.m. and where, after the administrative chores of booking were completed, appellant was interrogated by police until a confession had been obtained, resulting in delay of the initial appearance of appellant before a magis-

[1]. Kolasa and Meyer, Legal System (1978), page 207.
[2]. Kolasa and Meyer, Legal System (1978), page 207.
[3]. Kolasa and Meyer, Legal System (1978), page 207.
[4]. Kolasa and Meyer, Legal System (1978), pages 329—332.

trate until 10.00 p.m., is the delay between the time of the appellant's arrest and his initial appearance "unnecessary" and unreasonable within the meaning of the Great State Rules of Criminal Procedure § 118, thereby rendering appellant's confession and the evidence flowing from it inadmissible at trial?

2. When appellant has been interrogated by police without the presence of legal counsel and where appellant was in a state of apprehension after having been physically "roughed up at the time of arrest and neither understood nor appreciated the legal implications of statements made to the police in such circumstances, does the appellant's confession lack the voluntariness required by Miranda v. Arizona, 384 U.S. 436(1966), thus making it as well as any evidence flowing from it inadmissible against appellant?

3. When the trial court, in denying defense counsel's motions to suppress evidence, refers to defense counsel's statements as frivolous, does the interjection by the court of such remarks prejudice appellant's case and offend against the fundamental requirements of an unbiased and unprejudiced tribunal, thereby denying defendant a fair and impartial trial and thus constituting reversible error?

HISTORY

This is a direct appeal from the imposition of sentence to imprisonment for a maximum of three years made by Order of the Criminal Court of Local County, Great State, at No. 1246 of 19XX.

A. Circumstances of the criminal Conviction

Appellant was indicted in the Criminal Court of Local County at No. 1246 of 19XX on a bill containing counts of burglary and theft.

Motions to suppress evidences gathered following the arrest of appellant and search of his home were filed on July 10, 19XX. After a hearing before Judge Homer Grant, appellant's motions to suppress were denied on July 15, 19XX. While being represented by Henry law, Esquire, appellant pleaded not guilty to all counts. On August 28, 19XX, a trial commenced before Judge Wolfe and a jury of twelve. Bob Barrister, Esquire, was the prosecuting attorney. On August 29, 19XX, the jury found the appellant guilty of burglary and theft.

On October 3, 19XX, appellant was sentenced to undergo imprisonment for a maximum of three years at the Little Town Correction Center.

The facts of the instant appeal can be briefly and accurately summarized as follows:

On May 20, 19XX, appellant was arrested by Big City police at 7.30 p.m.,

B. Post-Trial Motions

On August 29, 19XX, the honorable trial court granted appellant leave to file a motion for new trial and in arrest of judgment which appellant filed on September 4, 19XX. After a hearing, *en banc,* before the Honorable Homer Grant, Richard Roe, and Shirley Wolfe, appellant's motion for new trial and in arrest of judgment was denied on September 16, 19XX. On October 3, 19XX, appellant was sentenced to imprisonment for a term of not more than three years. An appeal to your honorable court was filed on behalf of appellant on October 13, 19XX.

ARGUMENT

1. Under the circumstances of the case, delay between the arrest and initial appearance of appellant was unnecessary and unreasonable within the meaning of Great State Rules of Criminal Procedure § 118, thus rendering appellant's confession and the evidence flowing from it inadmissible at trial.

The mandate of Great State R. Crim. P. § 118 is clear: "when a defendant has been arrested without a warrant, he shall be taken without unnecessary delay before the proper judicial authority where a complaint shall be filed against him." In connection therewith, your honorable court has held: "All evidence obtained

during unnecessary delay between arrest and initial appearance in inadmissible ... that evidence which has no reasonable relationship to the delay whatsoever."

(Here, relevant cases are cited).

In the instant case, the initial appearance of the appellant before a magistrate was delayed after completion of the administrative processing associated with arrest and booking. This delay, of approximately one hour, was not caused by unavailability of a magistrate. Instead, the time was used for interrogation of appellant by the police without the presence of counsel and while appellant was in a state of apprehension after having being physically "roughed up" by police at arrest, and concluded with appellant's inculpatory statement.

Delay for the purpose of obtaining incriminating statements from an arrestee is clearly impermissible under Rule 118 as construed in Great State v. Futch where at 447 C.S. 392 your honourable court quoted from Adams v. United States, 399 F. 2d 574, 579 (D.C. Cir. 1968) (concurring opinion) as to what constitutes permissible delay between arrest and initial appearance :

> Necessary delay can reasonably relate to administratively process an accused with booking, fingerprinting and other steps and sometimes even to make same (sic) limited preliminary investigation into his connection with the crime for which he was arrested, especially WHEN IT IS DIRECTED TO POSSIBLE EXCULPATION OF THE ONE ARRESTED (Emphasis Added)

The one-hundred minute detention and delay before the initial appearance in the instant case was not consumed solely in "administratively processing the accused", nor was any of it "directed to possible exculpation of the one arrested." Instead, a delay of one hour was used to secure inculpatory statements. Such delay cannot be said to be either necessary or reasonable in terms of Rule 118. Thus it represents a clear violation of the requirements of that rule, and any evidence obtained as a result of the delay must be excluded.

2. ....
3. ....

CONCLUSION

For the reasons stated above, appellant submits that the verdict and judgment of the lower court must be reversed.

Respectfully submitted

789, Main Street
... City, Great State

THE MECHANICS OF PREPARATION OF JUDGMENTS IN U.S.A.

Whereas, in the U.K., the Law Lords produce highly individualised opinions which are circulated among their brother judges, the procedure adopted by the U.S. Supreme Court involves formalised judicial conferences and largely collective judgements. At these conferences, tentative conclusion are reached on the most recent cases and the task of writing the judgment of the court is assigned to a particular Associate Justice, or even to the Chief Justice himself; judgment already drafted and circulated will be formally approved for publication. Although a single judgment is prepared (the Justice concerned working in close collaboration with those of the brethren Judges who share the majority opinion) it is open to any judge, or groups of judges to prepare separate assenting or dissenting opinions and unanimous opinions are reached in only about 25 per cent of the cases considered on their merits by the Court.[1]

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1. Bloom Cooper and Drewry, Final Court of Appeal (1972), page 54.

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