



LAW COMMISSION OF INDIA

NINETY FIFTH REPORT

ON

**CONSTITUTIONAL DIVISION WITHIN THE
SUPREME COURT – A PROPOSAL FOR**

MARCH 1984

JUSTICE K.K. MATHEW



D.O. No. F. 2(4)/84-L.C.
CHAIRMAN

Shastri Bhavan,
New Delhi-110 001
March 1, 1984.

My dear Minister,

I am forwarding herewith the Ninety-fifth Report of the Law Commission on "Constitutional Division within the Supreme Court—A proposal for."

The subject was taken up by the Law Commission on its own. The need for taking up the subject is explained in Chapter I of the Report.

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,

(K. K. MATHEW)

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

Encl. : 95th Report.

CONTENTS

CHAPTER 1	INTRODUCTORY	1
CHAPTER 2	THE QUESTIONNAIRE ISSUED BY THE LAW COMMISSION AND THE REPLIES RECEIVED THERETO	4
CHAPTER 3	CONSTITUTIONAL ADJUDICATION AND THE NEED FOR SPECIAL DIVISION	7
CHAPTER 4	AMENDMENT OF THE CONSTITUTION WHETHER NEEDED .	19
CHAPTER 5	CONSTITUTIONAL COURTS ON THE CONTINENT	22
CHAPTER 6	RECOMMENDATIONS	29

APPENDIX

Appendix	Questionnaire issued earlier by the Law Commission of India.	
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CHAPTER I INTRODUCTORY

1.1. The subject with which this Report is concerned is one of fundamental importance in the judicial system of the country and of direct relevance to the determination of constitutional controversies. Shortly stated, the question that is proposed to be considered is, whether there is need for creating, within the Supreme Court of India, a Constitutional Division that shall be dealing exclusively with matters of public law or, more narrowly, matters of Constitutional Law. The subject has been taken up by the Law Commission of India of its own, having regard to its importance. Scope and genesis.

1.2. Detailed reasons for embarking upon an inquiry of this nature will be set out in due course.¹ At this stage, it will be sufficient to state that the topic has been taken up for consideration in view of the growing importance that constitutional adjudication has assumed in the country. Any perceptive student of the pattern of litigation that has come up before the Supreme Court in the last decade, and of the nature of questions that fall for consideration in such controversies, would agree that in point of both quality and quantity, constitutional adjudication has come to acquire a status of its own. It is not that this development was not anticipated by the framers of the Constitution. They did ensure that a question relating to interpretation of the Constitution must be allowed to find its way to the Supreme Court, whatever be the nature of the controversy or the branch of litigation in which the question might have arisen. They did ensure that in the Supreme Court, the minimum number of Judges who shall sit together for hearing and deciding such questions shall be five. They did see to it that that part of the Constitution which deals with the distribution of sovereignty between the Centre and the States, must receive an authoritative interpretation from the Supreme Court, and that if such a controversy happens to arise between the Centre and the States or States *inter se*, the dispute should be settled only by the Supreme Court, if there be a justiciable dispute. They further did take care to provide that so much of the Constitution as confers fundamental rights on the citizens and (in certain cases) even on a non-citizen, should be capable of being enforced by appropriate proceedings before the Supreme Court. In short, the Constitution makers did manifest an anxiety that a constitutional controversy should, in some form or other, come up before the Supreme Court, and should, in that forum, receive consideration at the hands of a minimum number of judges. Constitutional adjudication and its importance.

1.3. This concern of the constitution makers for a proper machinery for the determination of constitutional questions was not overlooked by our Parliament. Very soon after the commencement of the Constitution, Parliament showed its awareness of the importance of constitutional adjudication by amending the two procedural codes to provide that such questions, if they arose in Courts subordinate to the High Court, must be brought before the High Court for determination irrespective of the nature of the litigation in the course of which such a question arises. Parliamentary approach.

1.4. Underlying this concern shown by the Constitutional makers, and by our Parliament with reference to constitutional controversies, is the The underlying assumption.

1. Chapter 3, *infra*.

implicit assumption that the forum and machinery for adjudicating on such controversies merits special attention. As every student of legislation comes to realise sooner or later and as every judicial functionary who has had anything to do with the interpretation of statutes or constitutional provisions feels in his very flesh and bones—such assumptions are never spelt out in so many words. They are not elaborated in lengthy sentences. They, in fact, do not need to be elaborated. These unspoken postulates are as vibrant as the spoken word.

Need for further examination.

1.5. These implicit assumptions, always to be regarded as speaking, need to be adverted to for considering whether the developments, of which we have spoken above,¹ necessitate any further provisions in the realm of the forum and machinery of constitutional adjudication. That is precisely the broad objective of this Report.

Issues.

1.6. It is hardly necessary, in this introductory chapter, to set out the issues that need to be considered in the present inquiry, undertaken with the broad objective referred to in the preceding paragraph. These issues have been dealt with in the succeeding chapters of this Report followed by recommendations in the last chapter.² We would, however, like to make it clear that it is not the object of the present inquiry to make suggestions towards re-structuring of the judiciary for the sake of re-structuring. Nor is it its object to suggest any other changes for the sake of change. The inquiry is intended to examine how for the implicit assumptions with reference to the importance of constitutional adjudication, when approached in the light of the growing importance of such adjudication and the needs of society, render it desirable to devise further means for improving the efficiency of the process of such adjudication.

Prior stages of the inquiry—the questionnaire.

1.7. As a matter of record, it may be stated that prior to the preparation of this Report, the Law Commission had issued a questionnaire³ with the object of eliciting views on a number of questions concerning the functioning of the Supreme Court and certain other aspects of the higher judiciary. We take this opportunity of thanking all those who have responded to the Questionnaire. We should particularly express our gratitude to Shri M. N. Seervai who has taken very elaborate pains to express his views at length on almost every question.

We may also mention here that we had the benefit of ascertaining the views of Dr. Edward McWhinney, the eminent constitutional lawyer, on the questionnaire. We took this opportunity since Dr. McWhinney had recently come to India and could find time to meet the Member-Secretary of the Commission, and to forward to the Commission his very valuable views on various questions contained in the questionnaire. As is well known, Dr. McWhinney has made a special study of constitutional adjudication and constitutional courts in the comparative perspective. We are grateful for the trouble he took.

It was also our good fortune to have with us Mr. Justice Alexander Fera of the Constitutional Court of Yugoslavia, who had recently come to New Delhi. Mr. Justice Fera was good enough to spend some time with the Members of the Commission and give them an idea of the composition and pattern of working of the Constitutional Court of Yugoslavia. Although, for want of time, it was not possible to request him to answer the queries

1. Paragraph 1.2, *supra*.

2. Chapter 6, *infra*.

3. Questionnaire issued by the Law Commission of India—See Appendix.

contained in our questionnaire, we were happy to find that he evinced keen interest in some of the problems that have been sought to be dealt with in the questionnaire.

Of the questions raised in that Questionnaire, some were concerned with the machinery for constitutional adjudication, and the present Report has been prepared after keeping in view the replies received on the above questionnaire. Some of the important points made in the replies to the questionnaire will, in fact, be adverted to later,¹ at the appropriate place. The other issues raised in that questionnaire are outside the scope of this Report, which is confined to the question of creation of a Constitutional Division within the Supreme Court.

1.8. It is needless to say that the present Report does not purport to deal with the totality of the jurisdiction of the Supreme Court, or with all the aspects of its procedure and mode of working. Its scope is a narrow one, as already explained.² Limited scope.

1.9. We may finally mention that in a subsequent Chapter, we are dealing, in brief, with the comparative position regarding constitutional adjudication in a few selected countries.³ Comparative material.

1. Chapters 2 and 4, *infra*.

2. Para 1.2 to 1.7, *supra*.

3. Chapter 5, *infra*.

CHAPTER 2

THE QUESTIONNAIRE AND REPLIES THERETO

The Questionnaire.

2.1. The Questionnaire that had been issued by the Law Commission¹ elicited views, *inter alia*, on the question whether there should be created a Constitutional Court to decide constitutional questions. The replies to the questionnaire — the majority of them — do not favour the creation of a Constitutional Court. However, a large number of them have favoured the creation of a *Constitutional Division* within the Supreme Court, or have made suggestions which substantially run on analogous lines. Replies to any questionnaire naturally do not spell out the details of the points made in the replies. But a shade of opinion does lend its broad support to the creation of a division to be entrusted exclusively with the determination of constitutional controversies, that reach the Supreme Court.²

Having regard to the opposition expressed strongly in certain quarters to the idea of creating a separate Court for dealing with constitutional issues, that idea has not been pursued in this Report. Also, the Commission is aware that any such proposal would involve structural changes of a more extensive and complex character than those that would be necessitated by a proposal for creating, within the Supreme Court as structured at present, separate divisions for dealing with Constitutional and non-Constitutional matters.

In fact that a noticeable shade of opinion received in response to the questionnaire favours the idea of having such divisions is a consideration that weighed with the Commission in exploring the feasibility of creating such divisions (instead of creating a separate Court), and of examining the pros and cons of the matter.

Replies favour in creation of constitutional division of the Supreme Court.

2.2. As already stated,³ the idea of having a constitutional division within the Supreme Court has found favour with several persons and bodies that have responded to the questionnaire or with persons who have (though not in the form of a formal communication to the Law Commission) expressed their views in the matter. They favour the creation of a "constitutional division" a constitutional "wing" or "branch". These include—

- (a) one retired Supreme Court Judge,⁴
- (b) two sitting Chief Justices of High Courts;⁵
- (c) two sitting High Courts Judges;⁶
- (d) one retired High Court Judge,⁷
- (e) Law Department of one State,⁸
- (f) one M.L.A.,⁹

1. Para 1.7, *supra*.

2. For a list of those who have favoured the creation of such a division, see paragraph 2.2, *infra*.

3. Paragraph 2.1, *supra*.

4. Law Commission Collection, pages 1/2 and 1/3, (The Hindu, 8th February, 1982).

5. Law Commission Collection, pages 1/88 and 1/143.

6. Law Commission Collection, pages 1/153 & 1/154. (One of them suggests a constitutional bench of seven Judges).

7. Law Commission Collection, page 1/4. (The Hindu, 8th February, 1982).

8. Law Commission Collection, page 1/102.

9. Law Commission Collection, page 1/93.

- (g) a distinguished economist;¹
- (h) one academic lawyer²
(he would confine the jurisdiction of the Supreme Court to constitutional matters and public interest litigation, with a *permanent bench* for each);
- (i) one lawyers' association³ (it suggests the formation of a regular constitution Bench comprising the five seniormost judges, including the Chief Justice);
- (j) one Secretary of a Chamber of Commerce and Industry⁴ (he suggests a Constitution Bench of not less than seven judges);
- (k) a few Advocates;⁵
- (l) one subordinate judicial officer;⁶
- (m) some other persons.⁷

2.3. Some of the replies to the questionnaire have expressed an anxiety that the Supreme Court of India⁸ should continue to remain at the apex of the administration of justice in India and that nothing should be done to affect the unity and integrity of the Supreme Court. We highly appreciate this concern, and would like to make it clear that the idea put forth in this Report is not intended to lower the status of the Supreme Court in any manner. Rather, the sole object of the present inquiry is to suggest measures needed to maintain a high quality of disposal of judicial business. As will be seen from the detailed issues set out later,⁹ there is no question of making alterations in the Qualifications and modality of appointment of Supreme Court Judges, except such as are absolutely consequential on the creation of a separate division within the Supreme Court for constitutional matters.¹⁰

Some clarifications with reference to points arising out of the questionnaire.

2.4. We may also mention that the questionnaire issued by the commission, covering as it did a very wide field,¹¹ evoked, from a very eminent member of the bar,¹² the comment that the Law Commission ought not to go into the question of establishing a Constitutional Court in an inquiry relating to speeding up of legal proceedings.

The question of arrears.

The questionnaire further evoked the comment that since ordinary remedies are available for remedying the evils of delay, far-reaching amendments of our constitution ought not to be gone into. We value very highly this approach and appreciate the point of view that constitutional amendments ought not to be embarked upon lightly.

2.5. We should like to record at this stage that the principal object of the inquiry into the possible need for creating a constitutional division is not to suggest measures for reducing arrears. Of course, we do anticipate the creation of a constitutional division would, to some extent, help in reducing

Object of the inquiry.

1. Law Commission Collection, page 1/10.
2. Law Commission Collection, page 1/137.
3. Law Commission Collection, page 1/139.
4. Law Commission Collection, page 1/152.
5. Law Commission Collection, pages 1/6 to 1/8, 1/98 to 1/100, 1/121 and 1/132.
6. Law Commission Collection, page 1/153.
7. Law Commission Collection, pages 1/9, 1/11, and 1/90.
8. Law Commission Collection, page 1/18 (A sitting Chief Justice).
9. Chapter 6, *infra*.
10. Paragraph 6.8, *infra*.
11. Chapter 1, *supra*.
12. Law Commission Collection, page 1/156 (Shri H. M. Seedvai).

arrears in the Supreme Court. However, the idea of a separate division in the Supreme Court has not been put forth with that end in view. The idea is, in essence, a response to the realisation¹ that constitutional adjudications possess certain special features, which the judicial process must reflect in its structure and approach.

As regards constitutional amendment, while we are anxious that it should not be recommended as a matter of course, such an amendment seems unavoidable if the proposal for creating a constitutional division is to be implemented.²

Constitutional
Council if feasible
in India.

2.6. In reply to our Questionnaire, there has been a suggestion for the creation of a Constitutional Council, as in France. A retired Judge of the Calcutta High Court has made this suggestion³. However, on a careful consideration, this does not appear to be an idea that can be appropriately included in the Indian Constitution. The composition and functions of the French Constitutional Council,⁴ as envisaged in the French Constitution, and its manner of operation, would hardly harmonise with the total constitutional pattern in India. France had to create this Council because the French Constitution does not contemplate the determination of constitutional questions either by the hierarchy of ordinary courts culminating in the *cour de Cassation*, or by the hierarchy of administrative courts culminating in the *Conseil de Etat*. The position in India is not analogous in this regard. Moreover, the range, depth and variety of constitutional matters⁵ that have arisen so far in India, — and may be expected to arise in future — under the Constitution, would be far beyond the type of body represented by the French Constitutional Council.

Example drawn
from Section 9,
Hindu Marriage
Act, 1955.

2.7. By way of example of the nature of controversies which might arise under the Indian Constitution and which may not be quite appropriately dealt with by a body constituted on the lines of the French Constitutional Council, we may refer to the question that has very recently arisen regarding the constitutional validity of a statutory provision — such as, Section 9, Hindu Marriage Act, 1955 — providing for the restitution of conjugal rights through a decree of the Court. Two High Courts — Andhra Pradesh and Delhi — have had to deal with the question so far, though they have arrived at different conclusions. We are not, in this Report, concerned with the merits of the controversy. The point to make is that such constitutional questions having a legal background (besides their social significance) may not be appropriate for a Constitutional Council of the type that functions in France.

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1. Chapter 3, *infra*.
 2. See Chapter 4, *infra*.
 3. Law Commission Collection, page 1/107.
 4. See paragraphs 5.3 to 5.6 and 6.2, *infra*.
 5. See paragraph 2.7, *infra*.

CHAPTER 3

CONSTITUTIONAL ADJUDICATION

I. General observations : Important aspects of Constitutional adjudication

3.1. For the purpose of the present inquiry, it appears to be desirable to emphasise certain aspects of constitutional adjudication which might show the need for measures facilitating the evolution of a specialised approach, and for allowing adequate time for study and reflection.

Aspects of constitutional adjudication.

3.2. By way of a general observation, it should be emphasised that the adjudication of constitutional controversies by the highest court of the country occupies a place not enjoyed by the determination of other types of controversies. Woodrow Wilson's description of such a court as a "Constituent assembly continuously in session" deserves to be kept in mind, familiar as it is to students of constitutional law. Each generation, it has been said, writes its own constitutional principles (but far from always), through the decisions of the Supreme Court.¹

Importance of constitutional adjudication.

Mr. Justice Frankfurter's appellation—"a very special kind of court"²,—applies almost to every court entrusted with the function of deciding constitutional questions.

3.3. Since, in constitutional adjudication, the Court is confronted with new and unprecedented controversies, the fashioning of rules to suit the new situations is obviously a difficult task. Holmes drew attention to this, by pointing out that the words of a constituent Act "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters"³. Of the U.S. Supreme Court, it has been said that "the Court may be purseless and swordless, but its ability importantly to influence the way the nation functions has proved great, and seems to be growing all the time."⁴

Role of Court in development of constitutional jurisprudence.

3.4. In the light of these general observations, it may now be convenient to deal with certain special features which are either not found in non-constitutional adjudication, or, if found, are found only in a much lesser degree in nonconstitutional adjudication. Because of these peculiarities, some considerations become of special relevance to constitutional adjudication. Of these, we may mention, by way of illustration, four, namely,—

Special features of constitutional adjudication.

- (i) Specialisation;
- (ii) consistency;
- (iii) evolution of constitutional jurisprudence as a body of doctrine, self-contained and coherent;
- (iv) availability of adequate time.

Of course, the considerations enumerated above do not necessarily constitute independent or isolated categories. They dovetail into each other, and the reasons that support the several considerations may also dovetail into each other. However, it may be proper to examine them in some detail.

1. A.S. Miller, *Supreme Court : Myth and Reality*, page 6.
2. Frankfurter, "The Supreme Court in the Mirror of Justice", (1957) 105, *UPa Law, Rev.* 781, quoted by A. S. Millar, *Supreme Court : Myth and Reality*, page 24.
3. *Missouri v. Holland*, (1920) 252 U.S. 416, 435.
4. John Hart Ely, *Democracy and Distrust : A Theory of Judicial Review* (1980), page 45.

II. Specialisation

Special approach 3.5. Taking up the first consideration mentioned above¹, namely, specialisation, it is necessary to state that the most important aspect is the need for special approach. Here, we would like to quote what was said by the famous economist Keynes, whose interests far transcended the realm of economics. Describing the role of the judge deciding a constitutional issue, Keynes said :

“He must contemplate the particular in terms of the abstract and (the) concrete in the same flight of thought. He must study the present in the light of the past, for the purposes of the future. No part of man's nature or his institutions must lie entirely outside his regard. He must be purposeful and disinterested in a simultaneous mood; as aloof and incorruptible as an artist, yet sometimes as near the earth as a politician.”²

Special isation in the Supreme Court of U. S. A. 3.6. In the discharge of the onerous tasks of constitutional adjudication as outlined above, specialisation may help. Again, we have the example of the U.S. Supreme Court. The very fact of exercising judicial review for a period of more than a century and a half has given the U.S. Supreme Court a certain political confidence and political *savoir faire*, and a certain continuing oral tradition of specialist judicial experience in the “constitutional handling and legal moderation” of great political *causes celebres*, particularly when these political *causes celebres* threaten to involve the judiciary in adverse relationships or power struggle with counter-prevailing executive or legislative authority.³

Views expressed by some judges in U. S. A. 3.7. In U.S.A., two Supreme Court justices have urged the development of specialised courts as a way to deal with rising case loads.⁴

Noting that Texas and Oklahoma divide civil and criminal appeals in their highest courts and that a number of states separate intermediate appellate courts, Chief Justice Warren Burger said, “It is clear, therefore, that the concept of separate appellate jurisdiction is not an alien or subversive idea.....”

“Any move towards more use of specialised courts must be carefully thought out. But it must be thought about”, he told those attending the Arthur T. Wanderbilt dinner in New York in November. He said that European countries had been using such courts. “widely and effectively” for centuries. Burger noted that, in the United States, most medical clinics and law firms assign patients or clients to doctors or lawyers with specialised, experience”. If the advocates must be specialist”, he asked, “can we wholly ignore the need for some specialisation in the judicial systems?”⁴

A already stated⁴, Justice Sandra Day O'Connor of the Supreme Court of U.S.A. (herself a former State Appellate Judge) would encourage specialisation. Speaking to the Council of Chief Justices of Courts of Appeal in Chicago, she said that she had found that the fields of criminal law, probate, tax, domestic relations and administrative law were

1. Paragraph 3.4(i), *supra*.
2. J. M. Keynes, “Memorials of Alfred Marshall”, reproduced in Fankfuter and Landis, *The Business of the Supreme Court*, page 318.
3. McWhinney, “Federal Supreme Courts and Constitutional Review” (1967) 45 *Can. Bar Rev.* 578, 592, 593.
4. Report “Speciality Courts” in (January 1983) 69 *A.B.A.J.* 23.

particularly well suited for specialisation. When a judge has a particular expertise in an area or field of law, the judge, she said, can prepare for hearings with less time and can resolve issues more quickly, and perhaps better. At the same time, she added, "Most judges, including myself, prefer to maintain a diversity of subject matter jurisdiction".

III. Constitutional divisions in the Commonwealth and elsewhere

3.8. In Commonwealth jurisdiction, a Constitutional Division in the apex Court has not been created so far. Specialised divisions dealing with matters such as family law and administrative law have come to be established in several jurisdictions but not constitutional divisions.

Constitutional divisions in the Commonwealth.

3.9. Specialisation with reference to constitutional adjudication has been stressed elsewhere also. In regard to Canada, a writer pleading for the establishment of a Constitutional Court, wrote some time ago as under :¹

Suggestions made in Canada.

"All the arguments in favour of specialisation in these fields become even stronger when the interpretation of such a basic document as the Constitution is involved. It may be argued that this type of specialisation belongs to Continental Europe and is foreign to common law countries; but my point is that we should improve our Constitution by adopting the Continental system. As a matter of fact, the Supreme Court of the United States has specialised itself in practice by concentrating almost exclusively on public law cases....."

3.10. The reason why Constitutional Courts or divisions have not been seriously considered, could be the fact that public law, of which constitutional law and administrative law are the two most important branches, itself received recognition rather late in the day. No doubt, the State is a very old institution. Disputes between the State and its citizens, disputes concerning the powers of the sovereign and the working of Governmental machinery, disputes concerning the inter-play of Government agencies—all matters that form the core of constitutional law and administrative law—must have arisen in ancient times as well. The unmatched original thinking of Plato about the State, the vast and comprehensive study made by Aristotle about "Constitutions", and the grand kaleidoscope of statecraft and the science of government to be found in Kautilya, probably had their counterparts in some great legal battles as well. But public law having a personality of its own is regarded more a product of the last ten decades or so, than a heritage of the past. This comparatively late emergence of public law accounts for the late emergence of tribunals specialising in that division of law. The rules did exist, and have existed for centuries. But they did not carry a label of their own, they did not have their individual appellations. Rules defining the liberties of citizens *vis-a-vis* the State were inter-mixed with ordinary rights and liberties of the citizen—a point lucidly expounded by Dicey. These rules rubbed shoulders with the prosaic rules of ordinary law, and could not be identified in a crowd.

Late emergence of public law.

This being the nature and content of rules of constitutional law, no urge was born to create a tribunal specialising in those rules.

Creation of constitutional divisions in the apex courts have not, therefore, been seriously thought of in Commonwealth jurisdictions. Until recently, guarantees of fundamental rights were also almost non-existent in

1. Jacques-Yvan Morin, 43 Can. Bar Rev. 545, 549.

major Commonwealth jurisdictions. No practical need, therefore, arose to think of a specialised division concerned with the violations of such guarantees.

No logical reason for present state of affairs.

3.11. But there is no logical reason why this state of affairs should continue. Many Commonwealth Constitutions, particularly in the "new commonwealth," now entrench fundamental rights. Even earlier, questions of constitutional law, mostly arising from the division of powers between the federation and the Units, have been familiar topics of litigation in many commonwealth countries. In India also, the Federal Court created under the Government of India Act, 1935, was pre-eminently concerned with constitutional issues. In course of time, no doubt, its jurisdiction came to be expanded because of political necessities, but it never lost its role as a constitutional tribunal in the federal sphere. The need for specialisation in regard to Constitutional adjudication is the greater now, in view of the different and intricate questions that arise out of the provisions that elaborately entrench several fundamental rights.

Position in India.

3.12. The Supreme Court of India, for historical reasons, came to be vested with a variety of jurisdictions. In the initial few years, attention was not focussed upon the importance of its role of constitutional adjudication. No doubt, there were many constitutional landmarks, a few *causes celebres* and some pronouncements that laid the foundations of important doctrines of constitutional law. But these came and went as meteors in the sky. They did not mark out the role of the Supreme Court as a constitutional tribunal. Constitutional controversies, floating on the stream of judicial business along with other disputes, did not stand out in the public eye or in the thinking of the profession; they were regarded as merely one species of the manifold jurisdiction of the Court.

The picture is different now. Constitutional jurisprudence is being built up gradually. Now that constitutional adjudication has taken firm roots in India (according to some persons, it even overshadows ordinary litigation), it is appropriate to take stock of the situation and to spare some time for considering its special demands.

McWhinney's view.

3.13. A distinguished writer¹ on public law has this to say about the machinery of judicial review of unconstitutional acts as adopted in the newly independent and self-governing countries of South East Asia and Africa :—

"The main constitutional stereotypes for judicial review have, upto date, been derived from the English-speaking countries whose public law systems,—whether involving a presidential—executive and formal separation of powers on the American model, or else a parliamentary—executive, on the English and general Commonwealth model—have all rested on an essentially common law legal base involving, at least the common law derived notions of precedents, case law, and judicial reasoning. We have tended, in the Commonwealth countries at least, to ignore the advantage of judicial expertise, in terms either of specialist Supreme Courts or else of specialist hence within Supreme Courts whose jurisdiction is limited by subject-matter—forgetting that, for all practical purposes since the reforms effected by the judiciary Act of 1925, the United States Supreme Court has become a specialist public law or constitutional tribunal."

In regard to the United States, Mr. Justice Frankfurter acknowledged this fact when he said,² "Issues of public law, then, constitute the stuff of

1. McWhinney, *Judicial Review* (1969), page 235.

2. Frankfurter in (1928) 42 *Hary, Law Rev.* 18.

Supreme Court litigation". "We have", Chief Justice Warren Burger¹ said "a great court system in the United States, but it is not perfect. The Commission should look at the Court system of every other large highly industrialised country to see whether we could learn something from them".

Chief Justice Warren Burger went on further, to add :

"France, for one, has a nine-member Constitutional Council that resolves only constitutional questions. Another French court is the court of last resort for all administrative matters, and there's another court for everything else. In effect, they have three Supreme Courts. and that is a fairly common pattern throughout Europe, from Sweden on the north down to Italy".

3.14. At this stage, it would be appropriate to mention that Chief Justice Warren Burger, while suggesting the creation of a Commission to look into the problem of case load in the Supreme Court, has further suggested that the Commission (if and when constituted in that country) could also take note of the fact that most European countries have, in effect, two or three courts of last resort, rather than only one such court.^{1,2}

Chief Justice Warren Burger's suggestion

3.15. The aspect of specialisation is also illustrated by the Constitutional Courts created in several Continental countries.³ A striking example of a specialised court is the West German Constitutional Court, which is pre-eminently concerned with constitutional law and certain types of disputes involving issues of administrative law.⁴ Other disputes are dealt with by separate specialised agencies, there being separate Supreme Courts for Administrative Law, Labour Law, Social matters and Taxation Law.

The German Constitutional court

IV. The issues in constitutional adjudication

3.16. A few words now about the nature of issues in constitutional adjudication. Morris Cohen has described these issues:—

Wide scope of questions views of Cohen, Jackson and Frankfurter.

"We cannot pretend that the Supreme Court is simply a court of law. Actually the issues before it generally depend on the determination of all sorts of facts and their consequences, and the values we are attaching to these consequences. These are questions of economics, politics and social policies which legal training cannot solve, unless law includes all the social knowledge."⁵

Speaking of the U.S. Supreme Court, Robert H. Jackson said, "nor can it (the Supreme Court of America) be regarded merely as another law court. The court's place in the constitution was determined by principles drawn from philosophy broader than mere law".⁶

Jackson also quoted the observations of Cardozo to the following effect: "It (the New York Court of Appeals) is a great common law court; its problems are lawyer's problems. But the Supreme Court is occupied

1. "Quality of Justice" (record of an interview) (October 1983) SPAN pages 35-38.

2. As to the question whether a Constitutional amendment would be necessary, see para 4.3, *infra*.

3. Chapter 5, *infra*.

4. Article 93, Constitution of the Federal Republic of Germany. See paragraphs 5.7 to 5.14, *infra*.

5. Morris Cohan, Reason and Law (1950), pages 73-74.

6. Jackson, The Supreme Court in the American System of Government (1955), page 2.

chiefly with statutory construction—Which no man can make interesting—and with politics, but Jackson added “of course, he (Cardozo) used politics in no sense of partisanship but in the sense of policy-making”.¹

Justice Frankfurter has also said—“Let us face the fact that five Justices of the Supreme Court are moulders of policy, rather than impersonal vehicles of revealed truth.”

“People have been taught to believe that when the Supreme Court speaks, it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is they who speak and not the Constitution. And I verily believe that is what the country needs most to understand.”²

V. The Element of Choice

The aspect of choice

3.17. The burden of the constitutional judge is thus a heavy one. One important circumstance accounting for this heavy burden of the judge is that constitutional cases usually involve a choice. This itself is primarily due to two reasons. In the first place, some provisions of the Constitution are (by sheer necessity) stated in wide or ambiguous terms. To decide what they mean in the circumstances of the particular cases involves a choice between competing values. Secondly, some of the critical phrases occurring in the Constitution cannot be intelligently understood or given shape without a substantial injection of content from some source beyond the language and the discoverable intention of those who wrote it. In constitutional adjudication, the choice is not between parties as such, but between goals.

As has been observed : “There is no objectivity in constitutional law, because there are no absolutes”. Every constitutional question involves a weighing of competing values. Some of these values are held by virtually everyone, others by fewer people. Supreme Court justices likewise hold values. “The more widely held are the values in society, the more likely the Supreme Court will hold them, the more controversial the values, the Supreme Court is divided over them.”³

McCloskey's view.

3.18. Robert G. McCloskey has stated about the U.S. Supreme Court as under:—

“For more than half a century scholars and judges have been repudiating the mythology that the court is merely the impersonal voice of indisputable constitutional varieties and have been emphasizing that the judicial process involves an element of choice based on policy judgements.”⁴

Nature of the cases that reach the Supreme Court.

3.19. In the present context, the nature of the cases that reach the Supreme Court should also be emphasised. Cases which reach the Supreme Court are “no law” cases—pathological or “trouble” cases. Generally speaking, a matter reaches the highest court precisely because no readily available rule of law disposes of the issue satisfactorily. Frequently, there is no pre-existing law waiting to be covered. The court must then make its own law by balancing the competing interests.

1. Jackson, *The Struggle for Judicial Supremacy* (1955), page 54.
2. M. Freedman (ed), *Roosevelt & Frankfurter : Their Correspondence 1928-1945* (1967), page 383.
3. Leonard W. Levy (Ed.), *Judicial Review and the Supreme Court : Selected Essays*, page 197.
4. Robert G. McCloskey, *The Modern Supreme Court*, page 298.

3.20. It is also admitted that constitutional adjudication imposes a difficult task upon the judge. He must examine the present issue, assimilate the past experience and transcend both the past and the present, in order to project himself into the future.

The task of the judge, and the requisite mental equipment.

It is obvious that the magnitude and variety of tasks described above demands proper mental equipment. Learned Hand's description of the mental equipment demanded of a Judge cannot be bettered:—

"I venture to believe that it is as important to a Judge called upon to pass on a question of constitutional law to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne, and Rabalais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For, in such matters, everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They (the judges) must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing special tensions in every society which make it an "organism", which demand new schemata of adaptation; which will disrupt it if rigidly confined".¹

3.21. Incidentally, it may be proper to mention that the need for a broad outlook in constitutional matters was emphasised by Lord Haldane also in the Privy Council.² He pointed out that in selecting the judges of the Judicial Committee attention had been paid to certain factors, in which he included the need for "training calculated to give what is called the statesmanlike outlook to the Judge."

Lord Haldane's observations as to adjudication in the Privy Council.

V. Consistency

3.22. The second aspect of constitutional adjudication that needs emphasis is consistency. Desirable in every species of adjudication, this is particularly so in the case of constitutional adjudication. It is not necessary to repeat all that has been said in the preceding paragraph about the importance and impact of constitutional adjudication. Consistency in such matters is of particular importance, because the judgment once pronounced will regulate the working of the State and its numerous agencies and affect the rights and duties of citizens, for years to come.

Consistency adjudication.

3.23. It should, of course, be made clear that when one speaks of "consistency" in such a context, one does not imply that there should be a blind and dogmatic adherence to precedent.³ It is not necessary to discuss for this purpose, the desirability or otherwise of recognising, in any court, a power to overrule its precedents. "Consistency" here means that a decision rendered in the past, and the approach underlying the past decision, should be pondered over by the court when deciding a case wherein that approach may have some relevance. Whether to follow it or not, will be a matter to be decided in each individual case, but the court must be at least conscious of the past decision. This task of the court can be more adequately discharged when there is functioning a specialised division, devoted exclusively to constitutional questions.

Meaning of "Consistency".

1. Learned Hand, *The Spirit of liberty*, page 63.

2. Lord Haldane in 1 *Cambridge Law Journal*, 148.

3. See also paragraph 3.29, *infra*.

Role of the court. 3.24. In such controversies, the role of the Court is that of articulating a broad norm which fits the facts of the dispute before it and also transcends that particular dispute. In this process, the Court is acting as a national conscience for the people of India, and not merely as an arbiter of insignificant disputes. A standard comes to be erected towards which men and governments can aspire. To the extent to which controversies reach the court, it could help articulate, in broad principle, the goals of Indian society. Viewed from this angle, the effects of a given decision, in constitutional law assume great importance. It is for this reason that judges should have adequate materials placed before them, adequate time available to them and, of course, adequate resources at their disposal. More than all this, it is important that they are enabled to develop the broad approach demanded in constitutional adjudication.

The ultimate "spokesman". 3.25. In constitutional cases, the Supreme Court possesses a broad freedom to do as it wishes. But in exercising that freedom it must not create too much confusion.¹

The Supreme Court is the ultimate spokesman in the judicial hierarchy, and the lesser spokesman must pay heed. If the Supreme Court pursues policies which lesser spokesmen using the same techniques which the Supreme Court uses, can twist into opposites, the Supreme Court vitiates its own influence. This may very well be the most effective limitation on the Supreme Court's power. Every word of the Court must be set down with an eye to its meaning in the future in similar situations, in analogous situations, even in irrelevant situations.

Expounding of vague generalities. 3.26. Sam Ervin Jr. emphasised the role of the Court as expounding the "vague generalities" of the constitution, in these words :—

"Hundreds, thousands of cases are required to give the phrase a growing content, but the constitution sets the tone. If it were to be specific, it could not be a Constitution nor hope to maintain a theory and framework of government with general powers and limitations."²

Discretion disciplined system, by 3.27. No one has expressed the limitations of the judicial role more beautifully than Justice Cardozo who, after acknowledging that "the great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges idly by," wisely explained that a judge

"is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'".

Shapiro's view on consistency. 3.28. Professor Shapiro has dealt with another aspect of consistency in these words,³ while describing the role of the judge:

"In other words, his chief concern should not be whether or not a given decision will for the next twenty years facilitate or hinder the rise of the Negro to a position of equality; it should be whether the

1. Robert A. Dahl, "Decision-making in a Democracy" in Levy (Ed.), *Judicial Review and the Supreme Court* 179.
2. Sam J. Ervin Jr., *Role of the Supreme Court: Policy Maker or Adjudicator?* page 24.
3. Martin Shapiro, *Law and Politics in the Supreme Court*, page 18.

standard of equality he enunciates today will, in the “next twenty years support him in the path of logic and consistency or lead him into the temptation of irrationality. Is the standard he enunciates today sufficiently general and rational to be applicable to the cases that will come before him tomorrow?”.

3.29. The emphasis placed above on the aspect of consistency¹ does not mean that there should be no new developments in constitutional adjudication. However, it is important to note the precept that “the court is to decide not by what is good, or just or wise, but according to law, according to a continuity of principle found in the words of the constitution, judicial precedents, traditional understanding and like sources of law”.²

Stability and change.

It would, thus, seem that the Court has to maintain a balance between stability and change, — an aspect frequently emphasised. This aspect assumes importance because, to quote William Hurst,³ “when you are talking about constitutional law, you are talking about the balance of power in the community and the question of how you find meaning boils down completely here to who finds the meaning”.³

Two opposites have to be reconciled by the judicial process — stability and certainty. This may be true of other fields of life also. As Whitehead⁴ has observed: “There are two principles inherent in the very nature of things recurring in some particular embodiments, whatever field we explore — the spirit of change and the spirit of conservation. There can be nothing real without both. Mere change without conservation is a passage from nothing to nothing. Its final integration yields mere transient, non-entity. Mere conservation without change cannot conserve. For after all, there is a flux of circumstances and the freshness of being evaporates under mere repetition.”

3.30. In ensuring consistency, the above aspect will naturally be borne in mind. As has been said: “Surely decision should not go in a specific case, nor should special constitutional preference be given to the rich man, or the white man, or the protestant man, or the poor man, or the insurance company, or the labour union, or the black man, or the Quaker or the witness — unless one can fairly say that the Constitution granted such a preference”.⁵

Importance of consistency.

VII. Evolution of constitutional jurisprudence

3.31. The third consideration to which attention may be usefully drawn is the need for systematic evolution of constitutional jurisprudence. It is desirable that such jurisprudence should be allowed to evolve as a self-contained and coherent body of doctrine, emerging from judicial decisions rendered with that deep knowledge of, and familiarity with, constitutional law that could more easily come from constant contact with work of a specialised character.

Constitutional jurisprudence.

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1. See paragraph 2.23, *supra*.
 2. Archibald Cox, *The Warren Court—Constitutional Decision as an Instrument of Reform*, page 21.
 3. William Hurst, quoted by Raoul Berger, *Government by Judiciary : The transformation of the Fourteenth Amendment (1977)*, page 369.
 4. A. W. Whitehead, *Science and the Modern World (1925)*, page 281 .
 5. Louis Henkin, “Some Reflections on Current Constitutional Controversy” (1960-61) 109 *Univ. Pona, Law Rev.* 637, 653.

Differences from ordinary law.

3.32. Constitutional law does not have the simplicity of ordinary law—a point that has been already made while stressing the need for specialisation.¹ At the same time, its very tendency towards complexity renders it desirable that there should be an awareness of the need to evolve a coherent body of doctrine.

VIII. Time

Time

3.33. The fourth and last consideration of special interest to constitutional adjudication is that of time. It is axiomatic that anything which requires serious reflection, require time. One benefit that would result from creating a special division of the Supreme Court relates to this aspect.

Time is of great importance, having regard to several factors :

- (1) the gravity and complexity of the issues involved;
- (2) the impact that an adjudication of a constitutional issue in a particular direction may possibly have on the future course of public law; and
- (3) the nature and volume of materials that may be needed by the Court, for arriving at a proper conclusion, on constitutional issues.

Complexity of the issues.

3.34. As society becomes complex, the issues that come up for constitutional adjudication will also tend to become complex. The Court may become immersed in the "travail of society"—a phrase aptly used by Pekelis.² This means that much more will be demanded of the law, because the public expects much more of it.

Judges should therefore have adequate time and ease of mind for research, reflection and consideration. In reaching judgements, they need time for critical review when draft judgements are prepared; and they need further time for clarification and revision in the light of all that has gone before. In one of his dissenting judgements, Mr. Justice Frankfurter said, "The far-reaching and delicate problems that call for the ultimate judgement of the nation's highest tribunal require vigour of thought and high effort and their conservation, even for the ablest of Judges."³

Analysis requires time.

3.35. Time is required not only for the primary task of analysing in detail the materials on which the Court relies. It is equally required for adequate reflection upon the meaning of those materials and their bearing on the issues now before the Court. Reflection is a slow process; wisdom, like good wine, requires maturing.

Collective judgments.

3.36. Moreover, the judgements of the highest Court are collective judgements. They are neither solo performances, nor debates between two sides, each of which has its mind quickly made up and then closed. The judgments pre-suppose full consideration and re-consideration by all, of the reasoned views of each. "Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussions; without adequate discussion, there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions."⁴

1. Paragraphs 3.5 to 3.7, *supra*.

2. Alexander Pekelis, "The case for a jurisprudence of welfare" in Konvits (Ed.), *Law and Social Action* 1, 40, cited by A.S. Miller, *Supreme Court: Myth and Reality*, page 195.

3. *Dick v. N. Y. Life Ins. Co.*, (1959) U.S. 437; 3 L.Ed. 2d 935, 943. (Frankfurter J. dissenting).

4. *Dick v. N. Y. Life Ins. Co.*, (1959) 3 L.Ed. 2d 935, 949. See also Schubert, *Constitutional Policies*, pages 149-150.

3.37. Alexander Bickel has pointed out that judges have, or should have, the leisure, the training, and the inclination to follow the ways of the scholar in pursuing the ends of Government. Reason alone cannot tell you anything: it can only connect premises to conclusions. To mean anything, therefore, the reference has to be somewhat richer, to involve the invocation of premises along with the way one reasons from them. The basic idea thus seems to be that moral philosophy is what constitutional law is properly about; that there exists a correct way utilising such philosophy: and that judges are better than others at identifying and engaging in it.

Need for
leisure— Views
of Bickel and
Griswold.

Griswold¹ has also stressed the need for leisure in these words :—

“I have never written an opinion for a court; but I have tried my hand at writing articles and briefs, as well as examination questions, and I know something about the way legal thought develops in one’s mind and the problems and difficulties, the grouping and frustration, the striving for clarity and exactitude, and finally, the sheer labour of English composition involved in written legal work”.

The need for the availability of adequate time for a court of last resort has been lucidly stressed by Sr. Edward McWhinney who was good enough to give us the benefit of his views on our questionnaire.² This is what he says while addressing himself to question 3 :—

“A final appellate tribunal can only function effectively when it has enough time properly to consider, research and decide those cases that do come to it. Some form of discretionary control by a court over the size of its work-load and the number of cases coming to it seems an indispensable and necessary part of the final appellate tribunal function. The implication is that such final tribunal must have an adequate advance screening procedure as to its cases, and thereby have full discretionary power to accept, or to decline to take, matters according to a preliminary conclusion as to their relative public importance. A final appellate tribunal must itself be judged, in the end, not by the sheer quantity of cases it decides, but by their constitutional-legal weight and significance.”

VIII. The benefits summed up

3.38. It is well-known that between a particular event and a person to whom the event happens, the nature and intensity of the reaction depends not merely on the event, but also on what the person experiencing the event puts into it. This is, of course, eminently true of an emotional experience; but, in a large degree, it is also true of most intellectual activity. In order that the judge may be able to give his best, he should have enough time. He should have the benefits resulting from specialisation. He should have an eye for consistency, and yet a desire to avoid rigidity. The pressures of the overall volume of judicial work may not permit a measurable increase in these respects for individual judges. But it may be desirable to ensure, at least, that the institution as a whole is best organised.

The experience
of an event.

3.39. As has been said, greatness in the law is not a standardised quality; nor are the elements, that combine to attain it, “..... greatness may manifest itself through the power of penetrating analysis exerted by a trenchant mind, as in the case of Bradley; it may be due to persistence in a

Factors accounting
for greatness in
the law.

1. Erwin W. Griswold, “Supreme Court—1979 Team: Forward” (1960-61) 74 Harvard Law Review at pages 83-84.

2. See paragraph 1.7, *supra*.

point of view forcefully expressed over a long judicial stretch, as shown by Field; it may derive from a coherent judicial philosophy, expressed with pungency and brilliances, re-inforced by the Zeitgeist, which, in good part, was itself a reflection of that philosophy, as was true of Holmes; it may be achieved by the "resourceful deployment of vast experience and an originating mind, as illustrated by Brandeis, it may result from the influence of a singularly endearing personality in the service of sweet reason, as Cardozo proves; it may come through the kind of vigour that exerts moral authority over others, as embodied in Hughes."¹

Creating a climate.

3.40. No reforms in structure can bring into existence these qualities, where they do not exist. But they can help in the creation of a climate which will make them blossom, where they exist in the seed.

Demands of the judicial process in regard to ordinary law.

3.41. Our emphasis on certain aspects of constitutional adjudication should not be understood as, in any manner, attributing a lesser importance to the adjudication of questions of ordinary law. Nor is the preceding discussion to be taken as implying that the aspects detailed above do not have their importance in the determination of ordinary legal issues. Specialisation may become desirable even in some branches of non-constitutional law. Consistency in adjudication and the evolution of a coherent body of doctrine have their importance in several fields of non-constitutional law (e.g. commercial law). Again, social wisdom and an ability to project oneself into the future are qualities highly to be prized in any area where the law is not yet codified (e.g. the law of torts) or where the law, though codified, must leave a wide discretion to the judge (e.g. the grant of appropriate relief in matrimonial causes, or sentencing in criminal law.) It is also not to be overlooked that the element of choice, to which we have made a reference above while discussing the salient features of constitutional law, may be a crucial factor in many cases of first impression, including cases involving the interpretation of a statutory provision. The literature of the law is replete with landmark decisions where the question being of the first impression, the decision could have gone one way or the other without violating the traditional norms of judicial law-making. The judges, it has been said, are gatekeepers of the status quo. Outside the gates, a host of horses are galloping on the outskirts. But each must first win its spurs. It is, then, the judge who decides which horse won its spurs. This is true of judicial law-making in the sphere of ordinary law, as it is of constitutional adjudication. We are not unaware of this reality, and have no intention of under-rating the importance of the questions of non-constitutional law. But, at the same time, as we have pointed out, the decision of a constitutional question may have far-reaching repercussions, both in point of time and in point of space. Besides this, an expounding of the Constitution is an expounding of the basic document of society, of a law which is fundamental, of principles which are paramount to those of ordinary law. This "higher law" status of constitutional law renders it desirable that the aspects of specialisation, consistency, evolution of a coherent doctrine and time for reflection and mature collective judgment, should be given special attention in constitutional adjudication, because, in such adjudication, they are more eminently needed than everywhere else.

1. Walter F. Murphy and C. Harman Pritchett, *Courts, Judges, Policies* (2nd ed.), pages 179-180.

CHAPTER 4
AMENDMENT OF THE CONSTITUTION

4.1. We should mention at this stage that if ultimately, the proposal for the creation of a Constitutional Division within the Supreme Court is favoured, it may need amendment of the Constitution in certain respects. It will be convenient to set out very briefly the constitutional position in this regard. Under article 246(1) of the Constitution, Parliament has exclusive power to make laws with respect to the matters enumerated in the Union List. Entry 77 of the Union List reads as under:—

Constitutional Division—Need for Constitutional amendment.

“77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein, persons entitled to practice before the Supreme Court.”

4.2. The proposal for a Constitutional Division of the Supreme Court, really consists of two parts. In the first place, it contemplates the creation of a permanent division dealing exclusively with constitutional questions, and another permanent division dealing with non-constitutional matters. Secondly, judges appointed to the Supreme Court would, from the very beginning, be appointed to a particular division.

Proposal in two parts: Constitutional aspect of the first Part

The first part of the proposal may be said primarily to regulate the “constitution and organisation of the Supreme Court”, a subject falling within Union List entry 77 and can be implemented by ordinary legislation enacted under that entry.¹

Legislation creating a Constitutional Division within the Supreme Court would, prima facie, be supplementing article 124(1) of the Constitution, dealing with the establishment and constitution of the Supreme Court, but would not conflict with any of its express provisions. Again, article 145(3) of the Constitution (minimum number of Judges for deciding constitutional questions to be fixed) can still continue to be complied with, under the new scheme.

4.3. We must, however, note that in respect of a proposal that is being mooted in the United States for (inter alia) bifurcating the Supreme Court of that country, Chief Justice Warren Burger seems to have expressed the view that an amendment of the Constitution, may be required. A question and answer session with the Chief Justice has been recorded, and the record reproduced, in the Span magazine.²⁻³ The suggestion that was under discussion was that a Commission be created to look into the problem of the quality of justice in the Supreme Court, having regard to its heavily increasing workload. A point put forth by the Chief Justice was that even without waiting for a commission report, congress should set up a special temporary panel made up of about 26 judges, drawn from the circuit judges and seven member panels of those 26 should take some of the cases that would be otherwise heard by the Supreme Court. The panels should at least hear cases involving conflicting rulings by circuit courts. The rulings of the panel could be reviewed by the Supreme Court. The Chief Justice had also drawn attention to the fact that some countries had different apex

View of Chief Justice Burger of the American Supreme Court.

1. For the text of entry 77, see para 4.1, *supra*.
2. “The Quality of Justice” (record of an interview Oct. 1983), Span, 35, 36.
3. See also para 3.14, *supra*.

courts for *different types of cases*. The question whether these proposals may involve constitutional amendment was then raised and the following is an extract of the questions and answers relevant to this point:—

“Q. Would a constitutional amendment be needed to make drastic changes in our appellate procedure?”

Ans. Creation of a new intermediate court under the Supreme Court would not require such an amendment nor would this temporary panel.

Q. What about setting up two or three Supreme Courts?

Ans. A great many judges, lawyers and legal scholars would be sure to think (that) it required a constitutional amendment, because there is a widely accepted view that Article III of the constitution, which says there shall be “one Supreme Court”, means that the Supreme Court cannot sit in divisions or panels. Creating several Supreme Courts would be a drastic solution, but the Commission should consider all the options.”

The point had, earlier, been dealt with also by Earl Warren in the context of the proposal for creating a National Court of Appeals. Here is the relevant passage from an article¹ in the Journal of American Bar Association.¹ “To restate the problem more precisely the question is whether the Article III mandate that there be but “one Supreme Court” is violated by the proposed division between the National Courts of Appeals and the Supreme Court of the exercise of the certiorari jurisdiction that has been vested only in the Supreme Court. When the jurisdiction of the Supreme Court is exercised by two courts have we not created two Supreme Courts in contravention of this Constitutional limitation?”

Constitutional aspect of the second parts of the proposal.

4.4. The second part of the proposal for creating a constitutional division, contemplates that from the very beginning judges shall be appointed to a particular division. This would involve an amendment of the Constitution. This is for the reason that the scheme elaborated in this Report contemplates that the appointment shall be made *by the President* (and not merely an assignment by the Chief Justice of India). Obviously, this cannot be managed by rules made within the framework of article 145(2) of the Constitution, which reads as under:—

“(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of judges who are to sit for any purpose, and may provide for the powers of single judges and Division Courts.”

Thus, an amendment of the Constitution would become necessary, for achieving the purpose mentioned above. Ordinary legislation or statutory rules would not be adequate for the purpose.

Ratification States.

4.5. Further, since article 124 of the Constitution is at issue and since by that article occurs in Chapter 4 of Part V of the Constitution (Union Judiciary), it follows that besides complying with the procedure prescribed in article 368(2), main paragraph (approval by a majority of the total membership of each House and a majority of not less than two-thirds of the members of each House present and voting), there will also have to be compliance with the *proviso to* article 368(2) (ratification by the *Legislatures* of not less than one half of the States). That proviso applies to Chapter 4 of Part V (Union Judiciary).

1. (1973) A.B.A.J., 721-730, at 729.

4.6. Finally, there is the question whether a proposal for creating a constitutional division would affect a basic feature of the Constitution. Judicial review is generally regarded as a basic feature of the constitution and an attempt to take it away or to restrict it would be futile. But an organisational change of the nature under consideration does not substantially cut down judicial review, and may not therefore affect any basic feature of the Constitution.

Basic feature it affected.

4.7. While amending the Constitution for the purpose mentioned above,¹ it may also be necessary, in such an amendment, to provide for several connected matters. The amendment should provide, or empower Parliament to make a law which will provide, for several consequential matters, including a provision empowering Parliament to regulate, by ordinary legislation, matters of detail arising out of the creation of two divisions of the Supreme Court. Besides the above, certain matters of detail pertaining to the proposed Constitutional Division will also have to be dealt with. These are discussed in a later Chapter of this Report.²

Connected and consequential provisions.

1. Paragraphs 4.4 to 4.6, *supra*.
See also paragraph 6.7, *infra*.

2. Chapter 6, *infra*.

CHAPTER 5

CONSTITUTIONAL COURTS ON THE CONTINENT

Constitutional
Court.

5.1. The idea of a Constitutional Court is not something new. Some of the continental countries have these courts and as such it was in the context of these examples the Questionnaire was issued. The continental experience provides enough justification for embarking on this study for which the Questionnaire was issued.

Before we proceed to make our recommendations, it may be of interest to have a look at the Courts functioning on the Continent, under the title of "Constitutional Courts". Of course, even outside the continent, constitutional adjudication is a familiar phenomenon. The Supreme Court of U.S.A. which is pre-eminently a constitutional tribunal, is an outstanding example. However, for the present purpose, courts titled as "Constitutional Courts" are of special interest.

Austria.

5.2. Constitutional Courts exist in a number of countries on the Continent. Alphabetically, one can begin with Austria.¹ The Constitutional Court of Austria has a very wide jurisdiction. It not only decides constitutional issues, which are set out in detail in Austrian Constitution, but has, in addition, one interesting species of jurisdiction. The Constitution of Austria provides (in article 145) as under :—

"145. The Constitutional Court (of Austria) shall pronounce judgment upon violations of International Law in accordance with the provisions of a special Federal Law".

The Constitutional Court in Austria consists of a President, a Vice-President, twelve other members and six "substitute" members.²

France the French
Constitutional
Council.

5.3. France has a Constitutional Council, but not a Constitutional Court. How far this Council is akin to traditional courts as known to the common law world is highly debatable. In a sense, the French Constitutional Council stands in a category by itself.³

The French Constitution has authorised the Constitutional Council to pronounce on the conformity of a statute with the Constitution. The material portion of the relevant article of the French Constitution reads as under⁴ :—

"61. Organic laws, before their promulgation, and regulations of the Parliamentary Assemblies, before they come into operation, must be submitted to the Constitutional Council, which shall rule on their constitutionality....."

No doubt, the jurisdiction of the Constitutional Council was enlarged later.⁵ But even so, the French Constitutional Council is hardly an analogous of the Supreme Court of India or of the Supreme Court of U.S.A.

The Cour de
Cassation in
France.

5.4. The highest court in the French legal system in the judicial order is the *Cour de Cassation*. The court dates back to the revolution, being established by the Law of November 27, 1790. Its organisation was fixed by the Law of 1800. The court sits in Chambers and in 1967, on the

1. Articles 137-148, Constitution of Austria.

2. Article 147(1), Constitution of Austria.

3. Edward McWhinney, Book Review in Summer (1981) Vol. 29 No. 3 A.J.C.L. 535, 536.

4. Article 61, French Constitution.

5. See para 5.5, *infra*.

occasion of the latest re-organisation of the court, a "mixed chamber" was created. Article 3 of the latest Law (so far as is material) reads as under :—

"Decisions of the *Court of Cassation* are rendered by one of its chambers, or by a mixed chamber or by its plenary assembly".

Article 14 of the latest law provides for occasions when a mixed chamber may be called into being—as where the case raises a question of principle or the question normally falls within the jurisdiction of several chambers, or the solution of the question might be the cause of inconsistency of judgments. Hearing before a mixed chamber is mandatory in several situations, for example, when the procurour general requests such hearing or the First President of the *Council d'Etat* orders it. A hearing of the mixed chamber is presided over by the First President, and the Board normally includes the Presidents and a senior judge and two other judges of several chambers. When the court sits as a mixed chamber, the procurour general must address it.¹

5.5. In its composition and membership, the French Constitutional Council, is not a judicial or even a strictly legal body. It has nine members, a third of whom are nominated by the President of the Republic, a third by the Speaker of the Lower House of Parliament and a third by the Presiding Officer of the Senate.² Its jurisdiction was enlarged in 1974, so as to permit any group of 60 members of the Lower House of Parliament or 60 Senators to seize the Council of a constitutional question, there is, therefore, an emerging tendency³ for the French Constitutional Council to proceed to the control of execution policy-making by passing on the compatibility or otherwise of projects of legislation with more general constitutional questions.

French Constitutional Council: jurisdiction and composition.

In this category fall—

- (a) the ruling of the Constitutional Council on the legalising of abortions, rendered in 1975 at the instance of members of the Government majority in the Lower House of the French Parliament;
- (b) the ruling of the Constitutional Council on the amendments to the general statute on the status of civil servants rendered in 1976;
- (c) the ruling of the Constitutional Council on police powers of search and seizures rendered in 1977; and
- (d) perhaps the ruling of the constitutional Council on the application of the constitutional principle of self determination (article 53) to the proposed secession of one of the territories rendered in 1975.³

5.6. The above material has been presented in order to give a picture of the functions of the French Constitutional Council. We have already expressed our view⁴ that it is not possible to have any such institution in India, having regard to the essential features of our Constitution.

Constitutional Council not feasible in India.

5.7. We now come to West Germany. The basic law for the Federal Republic of Germany lays down the structure of the Federal Republic, her

The Constitutional framework in West Germany.

1. Manfred Simon, "Enforcement of EEC Law in France-II" (1976) 92 L.Q.R. 85, 86.

2. Article 56, Constitution of France.

3. Edward McWhinney, Book Review in (Summer 1981). Vol. 29, No. 3, AJCL 535, 536.

4. Paragraph 2.6, *supra*.

organs and their functions. It includes the basic rules according to which all national life in the Federation and the Federal Laender is to run its course, and above all, it lists the basic rights and liberties to which the individual citizen is entitled. It regards the distribution of the functions of power as an indispensable guarantee of the democratic and constitutional order. The originators of the Basic Law have accorded the Third Power a particularly strong status. They have established a constitutional jurisdiction that is to guarantee that regard is paid to the Constitution (the Basic Law) by all State organs. In many foreign countries, this function is taken care of at the same time by the Supreme Court of Justice—e.g., in the United States, by the United States Supreme Court, which is well-known merely because of its constitutional administration of justice, or in Switzerland, by the Federal Court. On the other hand, in the Federal Republic of West Germany—a Constitutional Court made institutionally independent has been created for this purpose, viz. the Federal Constitutional Court, which was inaugurated in 1951. Like the Federal Court of Justice, it sits in Karlsruhe.

The Court in the eyes of the public.

5.8. Although still a relative by Young Institution—the West German Constitutional Court came into being in 1951—it soon established itself as an institution in the eyes of the public, chiefly because of its jurisdiction in fundamental human rights.¹

Competence.

5.9. The legal bases for the activity of the Federal Constitutional Court are Articles 92-94, 99 and 100 of the Basic Law as well as the Law on the Federal Constitutional Court of March 12, 1951 (which has however, since been amended several times). The competencies of the Federal Constitutional Court² can be divided into the following four groups :

- (a) Norm-checking procedure; (Article 93(1) para 1).
- (b) Dispute procedure of Constitutional organs, between the Federation and individual Laender, and between Laender; (Article 93(1) para 2, 3, 4).
- (c) Complaint of unconstitutionality; (Article 93(1) para 4a, 4b).
- (d) Other procedures (Article 93, para 5).

Jurisdiction in West Germany.

5.10. The (West) German Constitution has the following provision that defines the jurisdiction of the Constitutional Court of the Federal Republic of Germany³ as under :—

“93. (1) The Federal Constitutional Court (of West Germany) shall decide :

1. On the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned who have been endowed with rights of their own by this Basic Law or by rules of procedure of a highest federal organ;
2. In case of differences of opinion or doubts on the formal and material compatibility of federal law or land law with this Basic Law, or on the compatibility of Land law with other federal law, at the request of the Federal Government, of a Land Government, or of one-third of the Bundestag members;

1. Gilbert Brinkmann, “The West German Constitutional Court (Spring 1981), Public Law, 83.

2. Paragraph 5.10, *infra*.

3. Article 93, Constitution of (West) Germany.

3. In case of differences of opinion on the rights and duties of the Federation and the Laender, particularly in the execution of federal law by the Laender and in the exercise of federal supervision.
 4. On other disputes involving *public law*, between the Federation and the Laender, between different Laender or within a Land, unless recourse to another court exists.
 - 4a. On complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of the rights under paragraph (4) of Article 20, under Article 23, 38, 101, 103 or 104 has been violated by public authority.
 - 4b. On complaints of unconstitutionality, entered by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a law other than a Land Law open to complaint to the respective Land Constitutional Court.
 5. In the other cases provided for in the Basic Law.
- (2) The Federal Constitutional Court shall also act in such cases as are otherwise assigned to it by federal legislation."

Of particular interest is the provision in article 93, paragraph 4 (supra) of the West German Constitution, entrusting the Constitutional Court with adjudication of disputes involving public law between the Federation and the Units, between the Units or within a Unit. This would obviously cover points of administrative law also. [Other disputes where they involve points of administrative law go to the Federal Administrative Court].

5.11. "Public Law" in German juristic thought embraces all legal connections directed towards the State or other authorities vested with sovereign power. These are, above all, the spheres in which the State is active on behalf of the public weal. Public law embraces, among other things, constitutional law, administrative law, penal law, the rules on court procedure, international law, canonical law, the law on judges, the law on civil servants, police regulations, the law on education, social law, the law on taxation and the law on industrial administration.¹

Concept of Public law.

5.12. The German Federal Constitutional Court, like the Federal Court of Justice, sits in Karlsruhe.² The Court takes its place independent and autonomous, beside the other constitutional organs (the Legislature, the Federal President and the Federal Government). It has its own budget within the Federal Budget and has no connection with any particular Federal Ministry.

Headquarter and administrative matter.

5.13. The Judges of the Federal Constitutional Court of West Germany must be at least 40 years of age, be eligible for election to the Bundestag and possess the general qualifications for the judiciary. Half of the members are elected by the Bundestag and half by the Bundesrat. The Bundesrat undertakes the election in the plenary session by a two-third majority. The Bundestag first sets up a constituent Committee composed of twelve deputies on the lines of proportional representation. This committee then elects

Judges.

1. Cf. Wolfgang Heyde, *Administration of Justice in the Federal Republic of Germany* (1971), page 38.

2. Wolfgang Heyde, *The Administration of Justice in the Federal Republic of Germany* (1971), pages 86-87.

the judges, a two-thirds majority also being needed. The election of the judges by political organs is regarded as justified because the Federal Constitutional Court is not only a court of justice but also a constitutional organ, and because its jurisdiction extends into the political area. The requirement of a qualified majority in the election of judges ensures that no specific political majority brings a one-sided influence to bear on the composition of the Federal Constitutional Court.¹

Panels in West
Germany.

5.14. From a recent article,² it appears that the court consists of two panels (Senates) independent of each other, and each now consisting of eight judges. Three judges of each panel are elected from the benches of other Superior federal courts [the Federal High Court, Federal Administrative Court, Federal Labour Court, Federal Social Court and Federal Tax Court].

Italy: the jurisdiction of the Constitutional Court.

5.15. Italy also has a Constitutional Court. The jurisdiction of the Constitutional Court is thus defined by the Constitution of Italy.³

"134. The Constitutional Court decides: on controversies concerning the constitutional legitimacy of laws and acts having the force of law, emanating from central and regional government; on controversies arising over constitutional assignment of powers within the State, between the State and the Regions, and between Regions; on impeachments of the President of the Republic and Ministers, according to the norms of the Constitution."

Italy: declaration of un-Constitutionality.

5.16. The Italian Constitution has an interesting provision as to the date from which a judicial pronouncement of unconstitutionality by the Constitutional Courts takes effect. It says⁴ :—

"The decision of the Court is published and is communicated to Parliament and the interested Regional Councils in order that provisions may be made in constitutional form where considered necessary".

Norway.

5.17. Norway also has a constitutional court, but the jurisdiction of that Court seems to be limited to proceedings for implicating holders of high offices. Here is an extract of the material provision,⁵ of the Norwegian Constitution.

"86. (First paragraph)

The Constitutional Court of the Realm (Riksrett) shall pronounce judgment in the first and last instance in such actions as are brought by the Odalsting against members of the Council of State, or against members of the Supreme Court of Justice (Hoyesterett), or against members of the Storting for criminal offences which they may have committed in that capacity.

** * * *

(Third paragraph)

"The ordinary members of the Lagting and the permanent members of the Supreme Court of Justice shall be judges of the Constitutional Court of the Realm. The provisions contained in section 87 shall apply to the constitution of the Constitutional Court of the Realm in each particular case. In the Constitutional Court of the Realm the President of the Lagting takes the Chair".

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1. Wolfgang Heyde, *Administration of Justice in Federal Republic of Germany* (1971), page 89.
 2. Gilbert Brinkmann, "West German Constitutional Court" (Spring 1981), Public Law, 90.
 3. Article 134, Constitution of Italy.
 4. Article 136, Constitution of Italy.
 5. Article 86, 1st and 3rd paragraphs, Constitution of Norway.

5.18. The Constitutional Court of Yugoslavia, apart from deciding question of "conformity" of law and inter-state or jurisdictional disputes, "is also required to decide on" the protection of the rights of self-government and other basic freedoms and rights established by the Constitution, if these freedoms and rights have been violated by an individual decision or action of the federal organs¹."

Yugoslavia:
Jurisdiction of the
Constitutional
Court.

5.19. Further, article 242 of the Constitution (Yugoslavia) has the following very interesting provision :

Power to tender
opinion to Federal
Assembly.

"The Constitutional Court of Yugoslavia shall keep itself informed about manifestations of interest for the attainment of constitutionality and legality, and on these grounds shall offer to the Federal Assembly its opinions and proposals to pass laws and to undertake other measures to secure constitutionality and legality and to protect the rights of self-government and the other freedoms and rights of the citizens and organisations."

5.20. Another interesting provision in the Yugoslavian Constitution relates to the duty imposed on the Federal Assembly. Article 245 reads²—

Duty of Federal
Assembly of
Yugoslavia to
bring law into
conformity with
judicial pronoun-
cement.

"245. Whenever the Constitutional Court of Yugoslavia determines that a federal law does not conform to the Constitution, the Federal Assembly shall bring the law into conformity with the Constitution not later than six months from the date of publication of the decision of the Constitutional Court.

If, the assembly does not bring the law into conformity with the Constitution within this period, the law or those of its provisions that do not conform to the Constitution shall cease to be valid, and the Constitutional Court of Yugoslavia shall declare them invalid by its decision."

5.21. The most interesting provision in the Yugoslavian Constitution is about *locus standi*, Article 249 reads—

Locus standi in
the Constitutional
Court in Yugoslavia

"249. A point of constitutionality and legality may be raised before the Constitutional Court of Yugoslavia by :

- (1) The Federal Assembly and the republican assemblies;
- (2) The Federal Executive Council and the republican executive councils, except when the constitutionality of laws passed by their assemblies is being judged;
- (3) The Supreme Court of Yugoslavia and the other Supreme Courts of the Federation, as well as the republican supreme courts, if the point of constitutionality and legality ensues in court proceedings;
- (4) The Federal public prosecutor, if the point of constitutionality and legality ensues in the work of the public prosecution;
- (5) The republican constitutional courts;
- (6) The assembly of a social-political community, or a working or other autonomous organisation, if any of their rights established by the Constitution of Yugoslavia have been violated.

1. Article 241, Constitution of Yugoslavia.

2. Article 245, Constitution of Yugoslavia.

3. Article 249, Constitution of Yugoslavia.

A point of constitutionality and legality may be raised by the Constitutional Court of Yugoslavia of its own initiative.

"The conditions under which other state organs, organisations and citizens may institute proceedings or move the institution of proceedings raising a point of constitutionality and legality before the Constitutional Court of Yugoslavia shall be determined by federal law."

Points of view expressed in U.S.A.

5.22. In the United States also, the creation of divisions or panels in the apex court has been one of the measures discussed, in the context of specialisation.¹

Significance of provisions as to Constitutional Courts.

5.23. The provisions relating to various constitutional Courts on the Continent, whose gist is stated above, may, no doubt, look heterogenous in character. But, on deeper reflection, they will be found to yield one common postulate. They are all based on the postulate that constitutional adjudication stands in a class by itself, and can be appropriately assigned a separate status. Such adjudication should not necessarily follow the same pattern as ordinary litigation, but can be legitimately regarded as occupying a place of its own. And, consequently, it would be appropriate to make, for such adjudication, special provisions not otherwise made for ordinary litigation. This is in recognition of its special character.

1. Paragraph 3.7, *supra*.

CHAPTER 6

RECOMMENDATIONS

6.1. The matters discussed in the preceding Chapters enable us to formulate the principal issues that need consideration and to make our recommendations thereon.

The first issue: need for creating special division of the Supreme Court.

The first issue, of course, is whether there is need for creating a Constitutional Division within the Supreme Court. It appears to us, on a consideration of the nature of constitutional adjudication and its importance in the Indian context, that if constitutional adjudication is to maintain a certain level of quality, consistency and coherence, the creation of such a division is a desideratum. The peculiar characteristics of such adjudication have been dealt with by us at length in an earlier Chapter,¹ and we need not repeat all that has been stated in that chapter. On giving due weight to the reasons set out in that Chapter, it appears to be desirable to create, within the highest court in the country, a machinery of a specialised character for constitutional adjudication—which is what a constitutional Division envisages.

It may be mentioned that Dr. Edward McWhinney, the eminent constitutional jurist, who was good enough to give us² the benefit of his views, has, addressing himself to Q. 1(a) of our questionnaire, expressed himself thus :—

“Two dominant trends in democratic constitutionalism since 1945, as the record of comparative constitutional law experience amply demonstrates, are the institutionalisation of judicially-based control of constitutionality, as part of the general constitutional system of checks and balances; and the implementation of that judicial control of constitutionality (judicial review) through creation of a specialised constitutional tribunal having both primary and also appellate review jurisdiction over issues of constitutional law. The question whether or not to opt for creation of a Special Constitutional Court cannot, however, be answered in the abstract, for it is a political—legal decision that must be made in the particular historical context of each national legal system and on a cost-benefit analysis of the legal pains and gains thereby involved. In the case of a national legal system that is already a going concern and fully operational, a disproportionate amount of political and legal energy may have to be expended and the quest for a Special Constitutional Court, and it may be better to opt, instead, for the lesser benefits of incremental changes grafted on to the existing court system and simply augmenting its constitutional review competence and capacity.”

6.2. We have already indicated our view³ that the adoption of the French System of Constitutional Council is not feasible for Indian conditions. Nor it is necessary to create any other new institution. What is required is a utilisation of the existing institution, with the above modifications.

No new institution to be created.

1. Chapter 3, *supra*.
2. Paragraph 1.7, *supra*.
3. Paragraph 2.6, *supra*.

Recommendation
for two Divisions
in the Supreme
Court.

6.3. Accordingly, it is our recommendation that the Supreme Court of India should consist of two Divisions, namely.—

- (a) Constitutional Division, and
- (b) Legal Division.

We are suggesting the name "Legal Division" as per (b) above, as a convenient appellation for the Division that will be concerned with all non-constitutional matters. If any other and more appropriate name can be devised, there should be no objection to it.

The second issue:
jurisdiction of the
proposed division,
recommendation.

6.4. If the proposed constitutional division is to be created, it will have to be assigned a part of the business of the Supreme Court within its jurisdiction as at present provided. The second issue that falls to be considered is, what matters should be assigned to that division. In this connection, there are two principal alternatives to be considered as per (a) and (b) below :—

- (a) This division may be entrusted with the adjudication of all public law cases within the Supreme Court's jurisdiction. If this alternative is accepted, its jurisdiction would comprise—
 - (i) every case involving a substantial question of law as to the interpretation of the Constitution,¹ or an order or rule issued under the Constitution;
 - (ii) every case involving a question of constitutional law, not falling within (i) above;²
 - (iii) every appeal against the decision of a High Court, rendered under article 226 of the Constitution;
 - (iv) every appeal against the decision of a tribunal under article 136 of the Constitution (whether such tribunal is created by a law passed by virtue of article 323A or article 323B of the Constitution or otherwise), where a question of administrative law is involved.
- (b) In the alternative, only matters of Constitutional law may be assigned to the proposed Constitutional Division. If this alternative is accepted, its jurisdiction would comprise only the items at (i) and (ii) mentioned in (a) above. The jurisdiction would then cover only the following :
 - (i) every case involving a substantial question of law as to the interpretation of the Constitution³ or an order or rule issued under the Constitution, and
 - (ii) every case involving a question of constitutional law, not falling within (i) above.

Our preference is for alternative (b) above. It is easier to define precisely and locate such matters, confined to constitutional law proper. We appreciate that questions of constitutional and administrative law often dovetail into each other, particularly in proceedings under article 226 of the Constitution (which may reach the Supreme Court on appeal). But, in our opinion, it would be desirable to make the jurisdiction of the proposed division narrow and compact, at least for the present.

1. Compare article 132 of the Constitution.

2. Item (ii) would be needed for covering, for example, enactments supplementing the Constitution.

3. Compare article 132 of the Constitution.

Accordingly, we recommend that the proposed Constitutional Division of the Supreme Court should be entrusted with the cases of the nature mentioned in alternative (b) above. It follows that other matters coming to the Supreme Court will be assigned to its Legal Division.

6.5. Of course, the creation of two divisions in the abstract does not end the matter. For practical implementation of the proposed scheme, it will be necessary to deal with at least two concrete matters, namely, (i) when can a constitutional issue be said to be "involved" and (ii) what will be the machinery for allocating cases as between the two divisions.

Criteria to be adopted for determining when constitutional issue involved

As to the first matter, which relates to the criterion to be adopted, we should make it clear that a case should be regarded as "involving a" constitutional issue only when the decision of that issue is absolutely necessary for the disposal of the controversy. The mere fact that a party has raised a constitutional issue is not enough. Although it may not always be possible to determine, at the outset (at the time of allocation of the case), whether the case "involves" a constitutional issue in the above sense, it may still be useful to bear this aspect in mind.

6.6. We may mention that in the United States there have come to be recognised a number of propositions regarding the circumstances in which the Courts will embark upon a consideration of constitutional questions. These have been conveniently collected in the judgment of Brandeis J. in one of the decisions of the U.S. Supreme Court.¹ One of the propositions laid down is—

Criteria laid down in U.S.A.

It is not the habit of the court to decide questions of a constitutional nature, unless absolutely necessary to a decision of the case².

6.7. The above point concerns the criteria to be adopted. It will also be necessary to create a machinery for allocating cases to the division concerned, on the criterion mentioned in the preceding paragraphs. The matter, we think, can be dealt with by a suitable provision in consequential legislation of the nature already indicated by us,³ or (if not so dealt with), by rules to be made by the Supreme Court.

Machinery for allocation of business.

Allocation of cases to the two divisions of the Supreme Court would not admit of any precise mathematical formula. While clear-cut cases may not present much difficulty in the matter of allocation, border-line cases are likely to pose a problem. That apart, there must be safeguard provided to check the ingenuity of Counsel who might endeavour to invoke (even if it be too tenuous or artificial an attempt), one or other constitutional provision so as to bring before the Constitutional division a case which does not properly belong to it. To avoid any such attempt, we would suggest that in the proposed machinery, a provision should be made which would require counsel appearing for a party to certify that a prior decision of constitutional issue is absolutely necessary for the disposal of that particular case.

In addition, we contemplate the appointment in the Supreme Court of a Senior District Judge as Additional Registrar, who would, from his experience and expertise, verify the certificate so issued by counsel. This

1. *Ashwander v. T.V.A.*, (1936) 297 U.S. 288, 347; 80 L.Ed. 688, 711.

2. *Burion v. U.S.*, 196 U.S. 283, 293; 49 L.Ed. 482, 485.

3. Paragraphs 4.4 to 4.7, *supra*.

would be an additional safeguard and would go a long way in preventing the Constitutional Division from being cluttered with other cases. In our opinion, it will be appropriate to give to the Chief Justice a power to create such a machinery and to regulate the details of such allocation.

We would, in this context make the following concrete suggestions for settling controversies that may arise as to the division which should properly deal with a particular case :—

- (i) If, after initial scrutiny of the case by the officer of the Supreme Court, suggested by us above, the case is allocated to the Constitutional Division in the Supreme Court and if the Constitutional Division is of the opinion that it is not a fit case to be decided by it, it may either dismiss the matter or put up the matter for orders of the Chief Justice for transferring the same to the Legal Division to be dealt with by it.
- (ii) The same procedure may be followed in the converse case where a case is allotted to the legal Division which is of the view that the matter should be heard by the Constitutional Division.

These suggestions are made so that in case of any conflict between the Constitutional Division and any other Division in the Supreme Court as to which Division should deal with the particular case, the matter has to be placed before Hon'ble Chief Justice of India for his ultimate decision.

Legality of disposal not to be questioned.

6.8. We also consider it necessary that there should be inserted, at the appropriate place, a provision which will, in effect, censure,¹ by employing suitable legislative language, that the validity of the disposal by a division of the Supreme Court of a case assigned to it shall not be questioned merely on the ground that—

- (a) the case disposed of by the Constitutional Division did not involve a question of constitutional law, or
- (b) the case disposed of by the Legal Division involved a question of constitutional law.

Such situations will be very rare, particularly if the procedure suggested by us is adopted.² Nevertheless, it is proper to have such a provision, in order to avoid possible challenges.

The third issue: Composition of the Constitutional Division.

6.9. *The third* issue that arises concerns the composition of the proposed Constitutional Division. Our recommendations in this regard are as under :—

- (a) The Constitutional Division should consist of not less than seven Judges, subject to what is stated in (b) below.
- (b) In matters requiring more than seven Judges or similar situations, the Chief Justice of the Supreme Court should have the power to assign temporarily Judges to this division from the other division. If there is a temporary increase in the work of the other division, the Chief Justice should have a power to assign temporarily a Judge from the Constitutional Division to the other Division.

1. This is not a draft of the provision contemplated.
2. Paragraph 6.7, *supra*.

- (c) The Judges belonging to and functioning in, the Constitutional Division should sit *en banc* for hearing all cases assigned to that Division.

6.10 The *fourth* issue relates to the qualifications to be required of the judges to be posted to the Constitutional division. We envisage that the judges to be so appointed should, besides satisfying the qualifications laid down in article 124 (3) of the Constitution for appointment as a judge of the Supreme Court, have special knowledge of, or experience in constitutional law. We do not, however, recommend the insertion in the Constitution (or in related legislation) of any provisions as such on the above point. It is expected that when appointing judges to that division, the above consideration will be borne in mind.

The fourth issue: qualification of judges.

6.11. The *fifth* issue concerns the posting of judges to each division. In this regard two alternatives are open as mentioned in (a) and (b), below :

The fifth issue: posting of judges to each Division.

- (a) A judge may, from the date of his very appointment, be appointed to a particular Division for his entire judicial tenure (subject to such adjustments as may be necessary for temporary periods to meet temporary situations).
- (b) In the alternative, the appointment may be only to the court and not to a particular division, and the judges may be transferable *inter se*.

We prefer the first alternative.

In our view the appointment of prospective judges to a particular Division should, from the very beginning, be made to that Division, of course temporary adjustments as already recommended,¹ will be possible. The procedure for appointment to the Supreme Court as provided in the Constitution will, of course, continue to apply, subject to what is stated *above*.

6.12 *Sixthly*, as regards the Chief Justice, he should be entitled to sit in either division of the Supreme Court, whatever be the division to which he may have been assigned on his initial appointment to the Supreme Court.

Chief Justice to be entitled to sit in any division.

6.13. Apart from the above substantive provisions, transitional provisions will obviously be required in relation to several matters, including, in particular (and without purporting to be exhaustive)—

Transitional provisions.

- (a) the posting to each division of the judges already in office at the time when the new scheme comes into force; and
- (b) saving or other provisions regarding pending cases.

1. Paragraph 6.9, *supra*.

Amendment of the Constitution and consequential provisions. 6.14. The recommendations that we have set out in this Chapter are subject to, and are to be read along with, certain recommendations made in an earlier Chapter when discussing the need for constitutional amendment and consequential provisions.¹

(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 1-3-1984.

1. Paragraphs 4.4 to 4.7, *supra*.

APPENDIX
LAW COMMISSION OF INDIA
QUESTIONNAIRE

The background notes appearing below each of the questions *do not* represent the views of the Commission and have been appended so as to raise issues and promote discussion. Replies to be sent to V. V. Vaze, Member Secretary, Law Commission, 730-'A' Wing, Shastri Bhavan, New Delhi-110 001 by 1st June, 1983.

1. (a) Should the Supreme Court be replaced by a constitutional court dealing exclusively with constitutional matters?
- (b) Should such a court invariably sit en banc (as against in benches as is the present practice)?
- (c) What should be the qualifications and modalities of appointment as a Judge of that court?

A federal constitutional court was established in West Germany in 1951 which has the power to declare statutes unconstitutional as well as to outlaw political parties which seek to impair or abolish a free democratic basic order or which endanger the existence of West Germany. The Court consists of eight Judges in two panels, six out of them being elected by two-thirds majority. The Court has been criticised as being subservient to the Government of the day and if no party enjoys two-third majority, the selection procedure is reduced to a matter of haggling between the political parties : 'If you accept our SPD candidate we accept your CDU candidate' (West German Federal Constitutional Court: Political Control Through Judges, Gisbert Brinkman (1981) Public Law 83 at page 84). The criticism that a single judge of the Supreme Court can carry some of his colleagues to his way of thinking and the verdict in a case depends upon the composition of a bench would to some extent be diluted if the court sits on bench in each and every case. Even in U.S.A. leading advocates find it difficult to predict the range of first amendment in view of the change in the personnel of the Court. (Floyd Abrams quoted in Hindustan Times dt. 23-12-1981 page 12).

2. Are you in favour of the establishment of a Court of appeal as the final arbitrator of disputes of law (other than constitutional law) leaving the Supreme Court to concentrate on only constitutional issues?

Views have been expressed that questions of law (other than constitutional law) and facts should terminate at an intermediate court of appeal so that the Supreme Court is able to devote its uninterrupted attention to issues of constitutional law affecting the various segments of the variegated populace of this sub-continent.

3. Should the Supreme Court only take up that much work which it can dispose of within three months ?

The United States Supreme Court receives about 5,000 cases per year and selects only 200 out of the total filing as being fit for hearing. At least 4 out of 9 justices must vote to hear a case.

In England during 1970s the average number of appeals heard annually by the House of Lords has been only 23 so that the Judges could devote greater time to matters of public importance.

4. Do you feel that the Supreme Court is acting as a third chamber?

The judiciary appears to have been divided into two classes: the activists who believe that if the legislative text is too bold to be self acting the Judges must make the provisions viable by evolution of supplementary principles even if it may appear to possess the flavour of law making (*Rajendra Prasad v. State of U.P.*, A.I.R. 1979 SC 916, 924). The other school of strict constructionalists does not countenance reading into a statute conditions which are not to be found therein by process of construction. [*Gurbaksh Singh Sibba v. State of Punjab* (1980) 2 SCR 565]. The latter school abhors the theory of judicial legislation even though on facts of a particular case the court is satisfied that the existing law requires an urgent reappraisal. [*Techno Impex v. Gebr. Van Weelde*, (1981) 2 W.L.R. 821, at page 842]. Some legal writers feel that the court speculates and pontificates about society and economics mostly from non-evidence, without staff investigation, opinions of experts on law enforcements, industry and in general without the tools necessary for legislative work.

5. Have the judgments of the Supreme Court regarding compensations payable upon the abolition of feudal rights brought to nought the process of social reform?

One of the Judges of the Supreme Court expressed his view that the legislation relating to abolition of the zamindari system met its waterloo at the hands of the judiciary and the benefits of independence have not percolated to the masses. Even in New Zealand, views are being expressed that the decision of the House of Lords in *R. v. Sang* (1979) 2 All E.R. 1222 concerning judicial discretion to exclude evidence on the ground that it was illegally or unfairly obtained has been criticised as being not based on the social conditions prevailing in New Zealand. Justice Black of the U.S. Supreme Court disfavoured courts assuming roles such as running school systems and making decisions about racial proportion of faculty members for which they are not trained. Justice Stuart was also of the view that courts should not be in the business of creating new rights. Justice Black accused his colleagues of allowing the court to turn professional criminal loose to prey upon society with impunity and a theory is gaining ground that the court has no business forcing its views on the State because it lacks accountability and is not the voice and conscience of contemporary society.

6. Are courts grasping at jurisdiction in matters which lie squarely within the competence of the executive branch of Government?

At the instance of a Congresswoman Elizabeth Holtzman a District Court in New York had issued an injunction in July, 1973 halting the bombing of Cambodia but the injunction was vacated immediately so that not a single bombing schedule was upset. (The Brethren Inside the Supreme Court—Bob Woodward and

Scott Armstrong—for short 'Br thren' p. 277-278). Opinions have been expressed that if the Supreme Court had not entertained the challenge to the Bearer Bond Scheme, Government could have raised resources to the tune of Rs. 1,000/- crores. In New Zealand fast track legislation like the National Development Act, 1979, limits judicial challenges to works of national importance. The judgment of the Supreme Court stalling the attempt of the Maharashtra Government to clear up footpaths in the city, of unauthorised dwellers has evoked a comment from a former Judge: "Under what law are the trespassers entitled to alternative accommodation? What Judges will do if trespassers set up shanties in the specious lawns of the Court or their houses?"

7. Should appointees to judgeships of Supreme Court and High Courts have a political background?

Earl Warren was a former crusading prosecutor, three-term Governor of California and Republican Vice-Presidential nominee with the result that when he was appointed as Chief Justice of the Supreme Court of the United States of America, some felt that he had a greater impact on the country than even some Presidents. In Italy a constitutional court which has come into existence in 1955 consists of 15 members, one-third of whom are nominated for 12 years term by the Head of the State, one-third by the legislature and one-third by the judiciary.

8. Is the criticism that persons of humble origin or low economic status are not likely to be appointed as High Court Judges in India justified?

The English judiciary is criticised as being inevitably out of sympathy with modern social tendencies and has long failed to have any understanding of the working conditions, attitudes and aspirations of the mass of the population. Most of the English Judges of High Court and Appeal Court had received public school education followed by legal studies at Oxbridge and then called to the Bar. [K. Edley's English Legal System (2nd Ed. 1977)]. In India the Chief Justices are criticised for recommending lawyers belonging to a particular caste or group for judgeship.

9. Will it be correct to say that the Judges of the Supreme Court and the High Courts are not commanding that prestige which they used to command in the past only because their salaries are very much lower than the earnings of leading advocates?

From time to time successive Law Ministers have ruefully lamented about the unwillingness of the leading advocates to accept judgeships because of the poor financial benefits. Even in the United States of America the salaries of Supreme Court Judges are very much lower than the emoluments of leading lawyers and Justice Fortes had to suffer 90 per cent cut in his emoluments when he was appointed as Judge of the Supreme Court. [The Brethren—page 20]. The Chief Justice of the United States gets a salary of \$ 92,400 while the Associated Judges got \$ 88,700 per annum. Sometimes the Chief Justices of the State Supreme Courts were getting salaries more than

that of the Chief Justice of the United States. Some bright boys fresh out of a law school were starting at \$ 40,000 a year while law firm partners in the age group 49-51 were making \$ 194,600 on the basis of 90th percentile. Even amongst the federal Judges who get a salary of about \$ 57,500, 7 had resigned in the 1950s while the number of resignation has risen to 24 during the past decade. Because of the poor economic compensation 56 of the Federal Judges are continuing to work full time even though they became entitled to retire as long back as in June, 1960.

10. Is much of the delay in the courts occasioned by lawyers seeking adjournments on flimsy grounds?

One of the Judges of the Supreme Court felt that certain bar associations behave like trade unions and resent refusal of adjournments to counsel resulting in unnecessary delay. Chief Justice of a High Court also referred to accommodation sought by leading lawyers disturbing the court calendar.

11. Should the Supreme Court evolve its own procedure in criminal cases?

Commenting on the unusual procedure followed by the Supreme Court in putting court questions to an accused in a murder case, a legal journal observed that a court or tribunal should not evolve its own procedure in each case according to its opinion about the circumstances of the case and lay down a precedent which is not warranted by the Code of Criminal Procedure. (1980-81) 85 C.W.N. (Editorial Notes) 85.

12. Is not much of the time of the Supreme Court and High Courts taken up by constitutional writs which ultimately are dismissed?

On an average not more than 5 per cent of the writ petitions filed in Indian courts ultimately succeed while in West German constitutional courts the percentage is as low as 1.18.

13. Presently the judicial system is based on the Anglo-Saxon jurisprudence. Should it be replaced by an Indian system of Administration of Justice?

The present judicial system has sometimes been characterized as a legacy of British Raj and the prized values of British jurisprudence such as equality before the law, independence of the judiciary and judicial review have been disfavoured. Some have gone hammer and tongs at the contents of the recent lectures delivered by the American Lawyer Abrams and the English Judge Lord Templeman labelling it as irrelevant to the country and branding the invitation to these lectures as "fraternising by a handful of judges, advocates and journalists thwarting the emergence of an indigenous Third World legal system". (Hindustan Times 29th December, 1981, page 9). Ever so, no concrete suggestions have been offered spelling out as to what exactly is meant by 'Indianising of the judicial system'.

14. Do you feel that the High Courts grasp at jurisdictions in matters where the petitioner has not exhausted an equally efficacious remedy provided by the relevant statute?

The principle that a petitioner must exhaust all the equally efficacious statutory alternative remedies not being unduly onerous before coming to a court is well settled. (*Than Singh v. Collector of Customs*, A.I.R. 1964 S.C. 1419; *British I.S.W. Co. v. Jasjit Singh*, A.I.R. 1964 S.C. 1451; *K. K. Srivastava v. D. K. Jain*, A.I.R. 1977 S.C. 1703). However, the ambit of the expression 'equally efficacious' has given rise to difficulties of interpretation. [*Malwa Vanaspati & Chemical Co. Ltd., Indore v. Union of India*, 1980 M.P. L.J. 84, *Meteor Satellite Ltd. v. I.T.O. Companies Circle-II, Ahmedabad* (1980) 121 I.T.R. 311 (Guj.); *Tapan Kumar Jana v. The General Manager, Calcutta Telephones*, 1980 Lab. I.C. 508; *Bavaji and Motibhai v. Inspector of Central Excise*, 83 C.W.N. 689; *Rabindra Nath Mukherjee v. S. R. Das*, 1979 Lab. I.C. 1287; *Ashok Industries v. State of Bihar*, A.I.R. 1979 Patna 217; *Dharam Singh v. Bank of India*, 1979 Lab. I.C. 1079; *K. S. Siddalingaiah v. State of Karnataka*, A.I.R. 1979 Kar. 190]. Justice Frankfurter felt that it is imperative that the docket be kept down so that its volume does not preclude wide adjudication. In England the House of Lords has been hearing about 33 appeals per annum: while looking at the pendency in our higher court, a criticism is being levelled that they 'assume role of a knight errant' grasping at jurisdiction by entertaining any case.

15. Can the judicial process be scientized?

Recent trends in computer technology and work of robots has given rise to the question: "If we can land on the moon, can we not solve our disputes by technology?" There are attempts to computer-predict appellate decisions by remote psychoanalysis of the panel of judges i.e. by reading the tea leaves in their prior opinions. (Needed: A judicial welcome for technology—*Star Wars* or State decisions, by Hon. Howard T. Harkey, 79 *Federal Rules Decisions* 1979, page 209).

16. Do you feel that some leading advocates take up most of the court's working time arguing for interim relief in cases having no merits and thus upset the day's regular fixtures?

In April 1981, Chief Justice of India sharply pulled up four Senior Advocates for taking over two hours of the working time of a five Judge Bench on a mere application for interim stay which was ultimately refused.

17. Has the practice of 'Bench fixation' by lawyers, taken roots in the Supreme Court and the High Courts?

Two of the Judges of the Supreme Court have brought into focus a current practice among the lawyers to ensure that certain cases are listed before a particular Bench and that in collusion with the Registry officials non-urgent matters are given precedence.

18. Are certain advocates being related to sitting Judges earning by way of 'negative practice' inasmuch as they are engaged only to ensure that the matter gets transferred from the court of a particular Judge?

Rule 6 of Chapter II of the Bar Council of India Rules states that an advocate shall not enter appearance or practise before a court if the Judge is related to him as father, grandfather, son, grandson, uncle, brother, nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece, father-in-law, mother-in-law, son-in-law, brother-in-law, daughter-in-law or sister-in-law. It is alleged that clients who do not wish their case to be heard by a particular bench engage one of the listed relatives practising in that court to file a vakalatnama on their behalf and secure a transfer of the case.

19. Are over-zealous Government departments responsible for increasing the court's calendar?

When the Inland Revenue pursued an appeal agitating the question whether a teacher who was being paid £ 13 as mileage allowance for driving to meetings outside her hours of duty is liable to pay tax on that allowance. Mr. Justice Walton gave vent to the uncomfortable feeling that the Crown spends so much time and effort persecuting minnows that it is small wonder there is no energy left to pursue the real sharks.

20. Should the Supreme Court encourage public interest litigation?

Dinosaur cases of Bombay pavement dwellers, conditions in women's re-settlement homes in Delhi and Agra flesh trade have evoked mixed reaction. Some have dubbed those cases as political stunts and an attempt by journalists to run the country; while others have commended the Court for taking issues affecting millions of people.

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

As against the practice in our Higher Courts where counsel address the court for months together, the United States Supreme Court permits oral arguments for half an hour on either side. An exception was made in desegregation cases where twice the normal time was allowed.
(The Brethern pp. 2, 41).

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

Fixation of half an hour time for arguments in the American courts is rendered possible because of their practice of insisting upon briefs (called Brandeis brief). Preparation of briefs will lend to exactitude and narrowing down of matters in controversy as well as afford opportunities for young lawyers to do research. As the briefs would be eventually printed by some law journals counsel would necessarily have to devote more time at the desk and the practice of reading law reports in court in extense would disappear.

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

In the Supreme Court of Iowa, 66 cases were submitted to the court in 1973 without oral arguments which total increased to 128 in 1974. Even where oral arguments were permitted lawyers were allowed 10 to 15 minutes for arguing each side and an additional five minutes for appellant's rebuttal. (Appellate Congestion in Iowa : Dimensions and Remedies Hon'ble Mark Mc Cormick 25 Drake Law Review 1975-76 p. 133).

24. Will it not make for better interpretation of statutes if the rule putting an embargo against citing of debates in Parliament as a legitimate aid to construction is abrogated?

The time honoured practice of the English rules of interpretation of statutes that Hansard can never be relied by the court in construing a statute or for any other purpose is being challenged in England. Lord Denning thought of a way of overcoming the obstacle by referring to the debates quoted in the works of jurists [Regina v. Local Commissioner, Ex-parte Brandford Council (1979) 1 Q.B. 387]. But this device of looking into a text book containing the quotation from Hansard has been criticised by a writer as 'not edifying' [Statutory Reform : The Draftsman and the Judge—(1981) 30 I.C. L. Q. 141 at 163]. The Indian Law closely followed the English Law [Administrator General of Bengal v. Premlal Mullick, ILR 22 Calcutta 788 (PC) pp. 799, 800]. But pleas have been made for whittling down the rule (State of Mysore v. R. V. Bidap A.I.R. 1973 S.C. 2555 Fagu Shaw v. State of West Bengal A.I.R. 1974 S.C. 613 at 629). But sometimes even speeches of Ministers while piloting a Bill are not looked into [Satpal & Co. v. Lt. Governor of Delhi (1979) 4 S.C.C. 232 at 245]. Lord Devlin has cited an instance [Stafford v. D.P.P. (1974) A.C. 878] where had their Lordships looked back at the parliamentary debates in which some of them had themselves participated in their legislative capacity they would have seen that Parliament had not the slightest intention of making a great change in the law [lecture delivered at All Souls College, Oxford on 2nd May, 1978 quoted in Devlin : The Judge (1979) pp. 148.]

25. Should the present practice of plurality and separate judgments be substituted by one of writing—

- (a) Per curiam opinion;
- (b) a single judgment representing the highest common denominator of the bench;
- (c) one majority and one minority opinion?

The separate opinions delivered by the Supreme Court in Delhi Laws Act case (A.I.R. 1951 S.C. 332) covering 370 pages of reports had created confusion about the ratio decidendi in the case and even Chief Justice Patanjali Sastri felt that no particular principles were laid down (Kathi Raning Rawat V. Saurashtra, A.I.R. 1952 S.C. 123). It was given to Bose J. to analyse the several situations and indicate how the judges split on each situation (Rajnarain Singh v. Chairman, Patna Administration

Committee, A.I.R. 1954 S.C. 569). The plurality decision regarding death penalty case gave rise to considerable difficulties in the United States of America (*George v. Georgia*, 428 U.S. 153; *Furman v. Georgia*, 408 U.S. 238) as well as in our Supreme Court (*Rajendra Prasad v. State of U.P.*, A.I.R. 1979 S.C. 916). In the area of obscenity confusion prevails in the U.S.A. as to whether the "prurient interest" test has been replaced by "Redeeming social value" test (*Roth v. United States*, 354 U.S. 476; *Fanny v. Hill*, 383 U.S. 413, *United States v. Marks*, decision of Court of Appeals for Sixth Circuit, quoted in *Columbia Law Review*; May 1980 at page 777). Lord Denning was also not permitted by the other Law Lords in the Privy Council to publish his dissenting opinion [In *Re: Parliamentary Privilege Act, 1770*, 1958 A.C. 331, Lord Denning; *The Family Story* (1981), pages 192-194].

26. Will it not make for certainty in Law if the higher courts write shorter judgments?

As against 243 pages of Judgment in a death penalty case by the United States Supreme Court, our Supreme Court has written a 782 pages judgment in *Keshvananda Bharti v. State of Kerala* (1973) 4 SCC 225. But in a later case of death penalty (*Gregg v. Georgia* 428 US 153) when the United States Supreme Court chose to write *per curiam opinion* it covered hardly two pages of the Law reports. Lord Kilbrandon has observed that lack of economy in judgment writing is a notoriously discreditable feature of the English jurisprudence, [*Cassell & Co. v. Broome* (1972) 1 All E.R. 801 H.L.].

27. Should an appellate court necessarily write a reasoned judgment—

(a) in every case irrespective of its outcome?

(b) only when it reverses the verdict of the lower court?

The practice of dismissing criminal appeals in limine with one word "dismissed" has been frowned upon by the Supreme Court (*K. K. Jain v. State of Maharashtra* (A.I.R. 1972 S.C. 243), *Sakharam v. State of Maharashtra* (1969) 3 S.C.R. 730, *Shaikh Mohd. Ali v. State of Maharashtra* (A.I.R. 1973 S.C. 43), *Shankar v. Gangubai* (A.I.R. 1976 S.C. 2506). The practice in the United States Supreme Court of passing a four word order "the judgment is affirmed" has been criticised by Professor Gerald Guather as being 'irresponsible' and 'lawless'. (*Doc v. Commonwealth's Attorney, The Brothren* page 425).

28. Should not the statute provide for only one appeal?

Considering the congestion in courts views have been expressed that if fallibility is the *raison detre* providing for two appeals, a litigant would not be satisfied even if the statute confers upon him the right to file multiple appeals.

29. Should matters involving a point of law of general public importance leap-frog directly to the Supreme Court?

Under the (U.K.) *Administration of Justice Act, 1969*, appeals leap-frog direct to the House of Lords under certain circum-

32. Should the statute provide for a compulsory attempt to arrive at a compromise at the appellate stage?

In U.S.A. a central funded scheme called the "Civil Appeal Management Plan (CAMP)" was launched in December, 1973 to ascertain whether the appellate work load could be reduced by attempts to compromise made by an independent agency. The judges agreed that the CAMP did cause a reduction in the average time taken for the disposal of appeals because the discussion which the staff counsel had with the opposing parties improved the quality of counsel preparation and narrowing down of the matters in controversy. [Jerry Goldman, Asstt. Professor of the Political Science, Northwestern University, Columbia Law Review (1978) Vol. 78, page 1209].

33. The above questions mainly cover the problems of fresh institutions. As regards the disposal of arrears, can you suggest any method other than appointment of retired judges?

The proceeding questions focus on reducing fresh admissions and quicker disposal of pending matters. As regards the huge backlog of cases, a more or less uniform opinion has been expressed that unless sufficient number of judges are appointed, the arrears cannot be cleared.

34. Any other matter?

It would be appreciated that it is well-nigh impossible to compress and encompass in a questionnaire of this type all the problems relating to the judicial system and hence your comments on any facet of the matter would be highly appreciated. Chief Justice of India has welcomed an objective analysis of the functioning of the judicial institutions in the country if a constructive change was desired in their outlook. (Presidential Address : Centenary Celebrations of the Nutan Marathi Vidyalaya, Pune : 1-1-1982).

tances. *American Cyanamid Co. v. Upjohn Co.*, [(1970) 3 All E.R. 785], a case concerning a petition for revocation of a patent was the first 'leap-frog' appeal heard by the House of Lords. Lord Denning in a recent case of *A.C.T. Construction Ltd. v. Customs & Excise Commissioners* [(1981) 1 W.L.R. 49 at 54] was dismayed at the prospect of different tribunals in U.K. giving different rulings as to whether under-pinning work which involved construction of additional foundation fell within the ordinary and natural meaning of the word 'maintenance' and wondered what Customs and Excise authorities should do when they are faced with conflicting decisions of various tribunals.

30. Should judicial review, revision or appeal against interlocutory order be abolished?

Recently, the House of Lords observed that matters reaching them for preliminary decisions do not serve the cause of justice [*Allen v. Gulf Oil Ltd.*, (1981) 2 W.L.R. 188 (H.L.) at page 190]. In the United States of America, the "final judgment rule" has been evolved to maximise available judicial resources and to avoid piecemeal litigation [*U.S. v. Nixon*, 418 U.S. 683 at 690 (1974)]. The question as to what is an interlocutory order and whether an appeal lies has also given rise to difficulties (*Amar Nath v. State of Haryana*, A.I.R. 1977 S.C. 2185 at 2190; *Mohan Lal v. Prem Chand*, A.I.R. 1980 H.P. 36 at 38; *Pranab Kumar v. Yusuf Ali*, 1979 Cr. L.J. 95 at 98; *Inayatullah Rizvi v. Rahimatullah*, 1981 Cr. L.J. 1398).

31. To what extent is the criticism that the Supreme Court is reversing the High Courts in matters falling within latter's discretion justified?

A judge of the Supreme Court expressed displeasure over the manner in which the Supreme Court interferes in small matters and thus arrogates to itself the jurisdiction of all subordinate courts and try to do everything itself. In U.K. the Privy Council in a 3½ page judgment dismissed an appeal in a murder case after refusing the counsel to make a new point [*Ragho Prasad v. The Queen*, (1981) 1 W.L.R. 469] though in another murder case when an injustice of substantial character was brought to their notice, the Privy Council permitted a new point to be canvassed. [*Ajodha v. The State*, (1981) 2 All E.R. 193 at 202]. While interfering with a conviction in a Magistrate's court for a driving offence the High Court in England observed that it was the first case in which the sentence by the Crown Court had been challenged on the ground that it was harsh and oppressive. (*R. v. Crown Court at St. Albans* 1981 1 All E.R. 802 at 804). American Law Professors are dismayed at the tendency of the Appellate courts in allowing appeals and quote the admonition of a famous judge 'Never unnecessarily make a monkey out of a trial judge. Remember, he may be as good as a lawyer as you are'. (Appellate Review of Trial Court Discretion 79 Federal Rules Decisions, p. 173 at 174). Sometimes strictures have been passed on the trial judge by the House of Lords describing his decision as 'astonishing' [*B. v. W.* (1979) 3 All E.R. 83].

ERRATA

- Page (i) In line 1, for "MATHEU" read "MATHEW".
- Page 1 — In para 1.2, in line 18, for 'controvesy' read 'controversy'.
- Page 2 — In para 1.6, in line 9, for 'for' read 'far'.
- Page 2 — In para 1.7, in line 7, for 'M. N. Seervai' read 'H. M. Seervai'.
- Page 4 — In para 2.2, (i) in line 1, for 'state' read 'stated'.
(ii) in line 9, for 'siting High Courts' read 'sitting High Court'.
- Page 5 — In para 2.5, in line 3, for 'anticipate the' read 'anticipate that the'.
- Page 10 — In para 3.13, in line 13 for 'hence' read 'banes'.
- Page 12 — In para 3.17, in line 17, for 'held' read 'hold'.
- Page 15 — In footnote 1 for '2.23' read '3.23'.
- Page 16 — In para 3.33, (i) in line 2, for 'exiomatic' read 'axiomatic'.
(ii) in line 3, for 'require' read 'requires'.
- Page 16 — In para 3.34, in line 10, for 'discenting' read 'dissenting'.
- Page 16 — In para 3.36, in line 2, for 'not' read 'nor'.
- Page 16 — In footnote 3, (i) for '(1959) U. S. 437' read '(1959) 359 U. S. 437'.
(ii) for 'discenting' read 'dissenting'.
- Page 16 — In footnote 4, for 'Policies' read 'Politics'.
- Page 17 — In para 3.37, (i) in line 14, for 'grouping' read 'groping'.
(ii) in line 18, for 'Sr.' read 'Dr.'.
- Page 18 — In para 3.39, in line 3, for 'brilliances' read 'brilliance'.
- Page 18 — In para 3.41, in line 5, for 'ordiary' read 'ordinary'.
- Page 23 — In para 5.4, in lines 10 and 14, for 'procurour' read 'procureur'.
- Page 23 — In para 5.5., in line 9, for 'execution' read 'executive'.
- Page 27 — In para 5.21, in lines 11 and 14, for 'ensures' read 'ensues'.
- Page 29 — In para 6.1, in line 34, for 'expended and the' read 'expended on the'.
- Page 32 — In para 6.8, in line 2, for 'censure' read 'ensure'.
- Page 35 — In line 4 from top, for '1983' read '1982'.
- Page 35 — In para 1, in line 23, for 'on bench' read 'en banc'.
- Page 35 — In para 2, in line 2, for 'arbitrator' read 'arbiter'.
- Page 36 — In para 3, in line 2, for '23' read '33'.
- Page 36 — In para 4, in line 12, for '2 SCR 565' read '2 SCC 565'.
- Page 37 — In para 6, in line 12, for 'specious' read 'spacious'.
- Page 37 — In para 9, (i) in line 13, for 'Associated' read 'Associate'.
(ii) in line 14, for 'got' read 'get'.
- Page 40 — In para 22, in line 6, for 'lend' read 'lead'.
- Page 42 — In para 25, in line 3, for 'George' read 'Gregg'.
- Page 42 — In para 27, (i) in line 7, for 'AIR 1972 SC' read 'AIR 1973 SC'.
(ii) in line 8, for '(1969) 3 SCR 730' read '(1969) 3 SCC 730'.
(iii) in line 14, for 'Brothren' read 'Brethren'.
- Page 44 — In para 33, in line 4, for 'proceeding' read 'preceding'.