



## Constitutional requirement for a division within the supreme court of India

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### Abstract

The Constitution has bestowed the Judiciary the task of upholding the principles enshrined in Constitution, toady the functions and scope of Judiciary is consistently evolving. The Indian Judiciary system is based on adversarial system of legal procedures where Judges act as neutral arbitrators and balance the rival contentions.

The Supreme Court is the apex court of the country and the final interpreter of Constitutional provisions. Constitutional adjudication or determination of Constitutional controversies by the Supreme Court has its own importance. This includes the authority to rule on whether or not laws that are challenged are in fact unconstitutional.

The Supreme Court also exercises appellate jurisdiction under the provisions of Article 132 – 136 of the Indian Constitution which is required to be exercised under great caution only when there is a need and not in normal circumstances. Despite this limitation in theory, Supreme Court has adopted a lenient approach while allowing appeals which has led to accumulation of huge back log of cases.

The placing of the seat of Supreme Court at the New Delhi also adds another problem in the form unbearable cost of litigation for those living in far-flung areas of the country. The litigant coming to New Delhi from distant places to attend a case in the Supreme Court undergoes many hardships such as travel expense, advocate fees and other allied expenses

The author opines that to reduce the burden on Supreme Court in relation to backlog of cases and to ensure that the litigant has the access to justice without incurring heavy expenditure, there must be a division of Supreme Court into Constitutional Division to deal with the adjudication cases relating to Constitution and Legal Division in the form of Cassation Courts for adjudication of appeals having non constitutional issues, with Benches in four regions – North, South, East and West,

The author makes an attempts to answer the question whether there is need for creating a Constitutional Court or Division in our Supreme Court that shall exclusively deal with matters of constitutional law and establishment of four Cassation Benches one each in the four regions to deal with appeals. There has been attempt make a comparative study about the concept of Constitutional Courts in continental countries to adopt the best method suitable for Indian context.

The paper tries to suggest a model of Constitution Bench and Cassation Benches of Supreme Court of India based on the recommendations given by the 95<sup>th</sup> and 225<sup>th</sup> Law Commission Report and examines Constitutional procedures to be followed in achieving the said objective.

**Keywords:** constitution of India, supreme court, cassation courts, independent judiciary

### 1. Introduction

In the British India, the Judiciary was decentralized with settled hierarchy among the courts to hear appeals from different provinces. Ever since the High Courts were founded in 1860, they were the highest courts of appeal in each province and an appeal lay from them to the Privy Council in England.

The Government of India Act 1935 created the Federal Court of India with an original jurisdiction in disputes between the provinces inter se and between the provinces and the federation. The Federal Court had jurisdiction only in constitutional matters, but the federal legislature could confer on the court the power to hear appeals in civil matters decided by the High Courts. The jurisdiction of the Privy Council was abolished by the Abolition of the Privy Council Jurisdiction Act 1949, the appeals pending before the Privy Council before October 10, 1949, standing transferred to the Federal Court <sup>[5]</sup>.

The Constitution of India was adopted on January 26<sup>th</sup> 1950 which made the Supreme Court of India the highest court of appeal for the whole of India. Its jurisdiction is wider than that of any Federal Supreme Court in the world.

The Supreme Court of India exercises Multiple Jurisdiction

as per the provisions of Constitution. Article 129 deals with the original jurisdiction which deals with the disputes between the Union and the States, and between the States inter se. It exercises Writ Jurisdiction under Article 32 for protection of Fundamental Rights. It exercises Appellate Jurisdiction in Civil and Criminal Classes under Article 132 to 134. Article 136 provides the Supreme Court the overriding powers to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India except a court or tribunal constituted by or under any law relating to the Armed Forces. It also has advisory jurisdiction under article 143 of the Constitution <sup>[6]</sup>. Constitutional adjudication or determination of constitutional controversies is exercised under Article 32 of the Constitution of the India by the Supreme Court.

### 2. Over Burdening of Cases and Non-Accessibility for Citizens – Twin Problems of Supreme Court

The Supreme Court in *V Vasanth Kumar vs. H C Bhatia and Ors* <sup>[7]</sup> (hereinafter known as Vasanth Kumar case) held that intention of the framers of the Constitution was to create the Supreme Court to be the Apex Court for the purpose of

laying down the law for the entire country and for that purpose it was given the extraordinary jurisdiction to interfere whenever it found that law was not correctly appreciated or applied by lower courts. However the application of discretionary power of the Supreme Court under Article 136 has been leniently applied which has led to the docket expansion of cases. The apex court has been accepting various Civil and Criminal cases under its appellate jurisdiction which aren't Constitutional matters which has caused diversion by the Supreme Court from its primarily task of evolving, interpreting and protecting the Constitutional principles. The Supreme Court in *Bihar Legal Support Society vs. The Chief Justice of India and Anr* <sup>[8]</sup> (hereinafter known as *Bihar Legal Society case*) held that Supreme Court was never intended to be regular court of appeal against orders passed by high Courts, Session and Civil Courts. The Court was sanctioned to deal with issues of people and their fundamental rights. Article 136 of the Constitution must be invoked only in exceptional cases to furthering the cause of justice.

The author opines that, the liberal attitude of the Supreme Court in exercising discretion under Article 136 and allowing appeals from the lower courts has also contributed to the steady increase in the backlog. Those who have the financial resources go on appeal on the decisions of the lower courts to the next higher court, and finally to the Supreme Court, even when no interpretation of the law may be involved. If appeals can be limited to a small number, say one or two, depending on the nature of the crime, it can help a great deal in reducing pendency

Along with backlog of cases, the problem of delay in trial and disposal of cases, consequent pendency of cases in the apex court and the courts subordinate has been a matter of great concern, debate, discussion and criticism. The magnitude of the problem of the pendency of cases in various levels in the judiciary is because people resort to judicial remedy as a last resort for the redressal of their grievances and to get justice. In this context pendency of cases, and increasing expenditure of litigation affects the common man, seeking justice, the hardest. Further, the pendency of cases in the Supreme Court is very reflective of the delays in the judicial system, thus, a cause of extreme concern requiring immediate remedial steps.

The disposal rate of Cases in the Supreme Court was 525 (491 admission matters and 34 regular matters) and pendency of cases at the end of the year was 690 (546 admission cases and 144 regular cases). Therefore, as against 1,215 institutions, the disposal of cases was 690 and the number of Judges was 7. In successive years, the number of Judges rose from 7 in 1950 to 10 in 1956, 13 in 1960, 17 in 1977 and 25 in 1986 and now the strength of Judges in 2009 is 30, excluding the Chief Justice of India. The total number of institution of cases from January to April in the year 2008 was 28,007 and the disposal of cases was 28,559, i.e., 552 cases above the institution of cases. Yet the pendency of cases remained as 46,374. This clearly shows that pendency of cases as accumulated over the years has also been carried forward. In three years notably, i.e., 1989, 1990 and 1991 the pendency-figure crossed over one lakh. <sup>[9]</sup> Increase in number of Judges in the apex court does not result in reduction of pending cases. It is, therefore, clear that there are reasons other than the inadequacy of judge strength which are responsible for accumulation of undecided cases in the Supreme Court.

An important factor which needs to be kept in view is that in India, according to the Law Commission's 120th Report titled "Manpower Planning in Judiciary: A Blueprint", submitted in 1987, the ratio between judges and population is 10.5 judges per million (Shri Justice S. P. Bharucha, a former Chief Justice of India, in his Law Day address in 2001 stated this figure to be 12 or 13), whereas it is 107 per million in USA, 75.2 per million in Canada, 50.9 per million in U.K. and 41.6 per million in Australia. <sup>[10]</sup>

The author infers that the ratio between judges and population is hopelessly low in our country. The same is apparent in the apex court as well since the Judges were 25 and the institution of cases was 28,007 cases in January-April 2008. The ratio works out to 1: 112. The figure given above is of institution of new cases only. If the pending arrears of 46,374 are taken into account, the ratio will be 1: 1855. <sup>[11]</sup>

Therefore, it is argued that the bench-strength of the Supreme Court should be increased drastically to cover the backlog of pending cases and to promote future developmental programmes in the judiciary and thereby minimize delays in the justice-delivery system and promote speedy justice which is the avowed goal of the Constitution. But it is equally effectively argued that mere increase in number of Judges might not help improve the system.

### **3. Need for Constitutional Reforms in working of the Supreme Court of India**

Time has come when the entire judicial set-up will have to be overhauled and refurbished in order to make the goal of speedy justice a pulsating reality. It is quite often argued that the present pattern of working of the Supreme Court needs to be revised if any success in this direction is to be achieved. The indiscriminate acceptance of appeals on trivial issues of facts by the Supreme Court quite often overloads itself. In fact, only important issues need be litigated in the Supreme Court. Also, the present situation makes the Supreme Court inaccessible to a majority of people in the country.

### **4. The Need for a Division within the Supreme Court of India**

The proposal of division among Supreme Court into Constitutional and Legal Division – establishment of 4 cassation courts has been a topic of discussion since many years.

The Supreme Court in *Bihar Legal Support case* (Supra) for the first time spoke about the concept of having National Court of Appeal and held that it was a matter of a policy decision. Again in *Vasanth Kumar case* (Supra), the concept of National Court of Appeal was discussed and the matter has been referred to a Constitution Bench for decision.

The tenth Law Commission in its 95th Report titled "Constitutional Division within the Supreme Court – A proposal for Constitutional Division" submitted in 1984, recommended that the Supreme Court of India should consist of two Divisions, namely, (a) Constitutional Division, and (b) Legal Division. The proposed Constitutional Division of the Supreme Court should be entrusted with matters of constitutional law, i.e., every case involving a substantial question of law as to the interpretation of the Constitution or an order or rule issued under the Constitution and every other case involving a question of constitutional law. Other matters coming to the

Supreme Court will be assigned to its Legal Division. It was further recommended that judges appointed to the Supreme Court would, from the very beginning, be appointed to a particular division.<sup>[12]</sup>

The tenth Law Commission had also considered the question as to whether there Constitutional Court should be established to decide constitutional questions or make a division within Supreme Court called as Constitutional Division. Since establishment of Constitutional Court for dealing with constitutional issues would involve structural changes of a more extensive and complex character than those that would be necessitated for creating a division within the Supreme Court for dealing non-constitutional matters, creation of Constitutional Division was preferred.

To give effect to this proposal of creation of division within the Supreme Court the report opined that amendment of the Constitution would be necessary as ordinary legislation, vide article 246(1) read with Entry 77 of the Union List or statutory rules, vide article 145 of the Constitution would not be adequate.<sup>[13]</sup>

The Eleventh Law Commission in its 125th Report titled "The Supreme Court – A Fresh Look", submitted in 1988, and reiterated the recommendation for splitting the Supreme Court into two divisions. The Commission provided the reasoning to support the proposal in paragraph 4.17 as under:

"The Supreme Court sits at Delhi alone. Government of India, on couple of occasions, sought the opinion of the Supreme Court of India for setting up a Bench in the South. This proposal did not find favour with the Supreme Court. The result is that those coming from distant places like Tamil Nadu in the South, Gujarat in the West and Assam and other States in the East have to spend huge amount on travel to reach the Supreme Court. There is a practice of bringing one's own lawyer who has handled the matter in the High Court to the Supreme Court. That adds to the cost. And an adjournment becomes prohibitive. Adjournment is a recurrent phenomenon in the Court. Costs get multiplied. Now if the Supreme Court is split into Constitutional Court and Court of Appeal or a Federal Court of Appeal, no serious exception could be taken to the Federal Court of Appeal sitting in Benches in places North, South, East, West and Central India. That would not only considerably reduce costs but also the litigant will have the advantage of his case being argued by the same advocate who has helped him in the High Court and who may not be required to travel to long distances. Whenever questions of constitutionality occur, as pointed out in that report<sup>3</sup>, the Supreme Court can sit en banc at Delhi and deal with the same. This cost benefit ratio is an additional but important reason for reiterating support to the recommendations made in that report"

The need for establishing more benches of Supreme Court at different places of the country to provide easy access of justice to all citizens of the country was discussed even in the Parliamentary Standing Reports. 2nd (2004), 6th (2005) and 15th (2006) Reports of Parliamentary Standing Committee on Law and Justice had suggested that Supreme Court must establish additional benches at Southern, Western and North-Eastern parts of the country to promote speedy justice accessible to common man, In its 20th (2007), 26th (2008) and 28th (2008) Reports, the Standing Committee suggested that a bench of the Supreme Court should be established at least in Chennai on trial basis as this would be of immense help to the poor who cannot travel

from their native places to Delhi.

The 229<sup>th</sup> Law Commission Report titled as "Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/ Hyderabad, Kolkata and Mumbai", recommends a model for establishment of Cassation Benches of the Supreme Court in four different zones of the country along with the Constitution Bench at the New Delhi.

However till date in spite of so many recommendations, the Supreme Court has so far not agreed with the suggestion setting up of its benches at different benches or for a division of the Court into Constitutional and Legal Division.

## 5. Constitutional Courts in Continental Courts

The concept of having a Constitution Bench along with a Cassation Bench is nothing new. The democratic transition that occurred in many parts of the world in the late 20th century resulted in the proliferation of courts with constitutional adjudication and powers of cassation being exercised simultaneously; there is a blend of functions of judicial review usually by the constitutional court or constitutional tribunal and also the exercise of powers of cassation.<sup>[14]</sup>

The Constitutional Adjudication is a familiar term among the Continental countries, the first being USA Supreme Court which has a Constitutional Tribunal.

Austria has a Constitutional Court with a wide jurisdiction to pass judgments on Constitutional Matters and violations of International Laws.<sup>[15]</sup>

French has a Constitutional Council but not a Constitutional Court<sup>[16]</sup>. The French Constitution has authorised the Constitutional Council to pass orders about the conformity of statute with the Constitution. However this is analogous to US Supreme Court. The highest court in French legal system is Cour de Cassation.<sup>[17]</sup> The Constitutional Division is not a Judicial or Legal body and consists of 9 members of which one third are appointed by President, one third by Speaker and one third by members of senate.

Italy has a Constitutional Court with the sole power of constitutional review and a Supreme Court of Cassation with the power to review the decisions of the ordinary courts for consistency with the law.<sup>[18]</sup>

Egypt also maintains a Court of Cassation that monitors the uniformity of lower court fidelity to the law but only its Supreme Constitutional Court has the authority to declare laws unconstitutional and to determine and rule upon legislative intent.

Portugal's Constitutional Tribunal has the greatest jurisdiction exercising both concrete review of lower court decisions and abstract review of all laws and legal norms.

Although the above mentioned Constitutional Courts of different courts represent heterogeneous character but reflect a common postulate that constitutional adjudication is by itself a separate class and it is always desirable to have a separate judicial body to adjudicate the same. Such adjudication must not follow same pattern of ordinary legislation and must occupy a special place of its own. Consequently it is necessary to make appropriate legislations not a ordinary legislation as it is a recognition of its special character.

## 6. Proposed model of Constitution Bench and Cassation Courts of the Supreme Court in India

The 229<sup>th</sup> Law Commission Report recommends a model

for establishment of Cassation Benches of the Supreme Court in four different zones of the country along with the Constitution Bench at the New Delhi. For the efficient system of Judicial Administration and to promote efficiency in dispensation of justice, India is to be divided into four zones/regions, namely,

**(I) Northern Zone** – Bench to be established in Allahabad dealing with the litigation of the States of Uttar Pradesh, Uttarakhand, Punjab, Haryana, Madhya Pradesh, Chhattisgarh, Himachal Pradesh, Jammu and Kashmir, the National Capital Territory of Delhi and the Union territory of Chandigarh;

**(II) Southern Zone** – Bench to be established in Chennai/Hyderabad in order to deal with the litigation of the States of Kerala, Tamil Nadu, Andhra Pradesh, Karnataka and the Union territories of Puducherry and Lakshadweep;

**(III) Eastern Zone** – Bench to be established in Kolkata dealing with the litigation of the States of West Bengal, Bihar, Orissa, Jharkhand, Assam and the Northeastern States including Sikkim and the Union territory of Andaman and Nicobar Islands;

**(IV) Western Zone** - Bench to be established at Jaipur dealing with the litigation of the States of Rajasthan Maharashtra, Gujarat, Goa and the Union territories of Dadra and Nagar Haveli, and Daman and Diu.

The said Benches shall act as Cassation Benches to deal with appeals from a High Court in the particular region. The Apex Court or the Constitution Bench would then deal with Constitutional issues and other cases of National Importance on a day to day basis since the accumulated backlog of cases would go to the respective zones to which they pertain.

The author suggests that, Constitutional cases such as interpretation of the Constitution, matters of national importance such as references made by the Zonal benches to larger benches due to conflict of authority or any other reason, cases where the interests of more than one State are involved such as interstate disputes on land, electricity, water, etc., references for advisory opinion made under article 143 of the Constitution, references made under article 317 of the Constitution, election petitions concerning Presidential and Vice-Presidential elections, suits between two or more States, etc could be decided by the Supreme Court. This list is merely illustrative and not exhaustive. It is also suggested that all public interest litigations (PILs) from any part of India should be decided by the apex Constitution Bench so that there are no contradictory orders issued and also to arrest the mushrooming of cases increasingly.

The mechanism to distribute the cases to Supreme Court and Cassation Courts or National Court of Appeal is still a bone of contention and might hamper the establishment of the latter. However the 95<sup>th</sup> Law Commission Report which had proposed the division of Supreme Court into Constitutional and Legal divisions had devised a formula to bifurcate the cases and to allocate the following cases to Constitutional Divisions:

- (1) Every case involving substantial question of law as to the interpretation of Constitution or on order or rule issued under the Constitution.
- (2) Every case involving question of Constitutional Law not

falling within (1) above.

The said rule cannot have blanket application as it will not solve the existing problem. The Legal Division of the Supreme Court may use its judicial mind to bifurcate the cases. The Cassation Courts or the Regional Court of Appeals can determine if the case can be referred to the Supreme Court by issuing Certificate of Fitness after application of its Judicial Mind for adjudication.

## 7. Constitutional Procedure for Division within the Supreme Court

The proposal of setting up of Cassation Courts in 4 regions can be made effective without any delay since the constitution of benches is a matter within the purview and jurisdiction of the Supreme Court itself as provided under Article 130 of the Indian Constitution.<sup>[19]</sup>

Article 130 of the Constitution providing for the seat of the Supreme Court may now be noted, which is extracted below:

“The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of

India may, with the approval of the President, from time to time, appoint.”

Article 130 is an enabling provision which empowers the Chief Justice of India, with the approval of the President, to appoint place or places other than Delhi as the seat of the Supreme Court.

In *Union of India vs. S P Anand*<sup>[20]</sup> it was held that Article 130 cannot be construed as casting a mandatory obligation on the Chief Justice of India to appoint place or places other than Delhi as the seat of the Supreme Court. No court can give a direction either to the Chief Justice of India or the President to exercise the power under article 130

If Article 130 is liberally interpreted, no constitutional amendment may be required for the purpose of setting up of Cassation Benches in four regions and a Constitution Bench at Delhi. Action by the Chief Justice of India with the President’s approval may be enough. It may also be noted that under Article 130 the Chief Justice of India acts as a *persona designata* and is not required to consult any other authority/person. Only Presidential approval is necessary. However, in case this liberal interpretation of Article 130 is not feasible, suitable legislation/Constitutional amendment may be enacted to do the needful.

The 95<sup>th</sup> Law Commission Report opined that for constituting a separate division in Supreme Court as Constitutional Division an Amendment would be necessary Article 246 (1) of the read with Entry 77 of the Union List provides Parliament the exclusive power to make laws in regard to Constitution, Jurisdiction and Powers of the Supreme Court.

The establishment of Constitution Division and Cassation Courts would involve 2 stages, first one being Establishment of separate division within the Supreme Court and second one being appointing set of judges to that division. The changes needed for establishing a Constitutional Division within the Supreme Court can be achieved by enacting legislation as it falls under Entry 77 of the Union List and such a law would supplement a. Article 124 (1) which deals with establishment and constitution of Supreme Court.

For appointing the judges who exclusively with the Constitutional Cases demands an Amendment to the Constitution. The provision 145 which requires that Constitutional Cases should be decided by bench of 5 judges

cannot be invoked here. Hence an ordinary legislation would not serve any purpose here. Moreover as per provisions of Article 368 (2), since this amendment deals with Part V which deals with Judiciary the amendment needs to be ratified by half of the states.

The 225<sup>th</sup> Law Commission Report suggested that instead of creating division of Supreme Court into Constitutional and Legal which requires complex amendment process, the Commission proposed establishing the Constitution bench in Supreme Court and Cassation Courts at 4 different parts of the country which can be achieved by a liberal interpretation of Article 130 of the Indian Constitution.

The authors opine that proposal to establish Constitution Division and Cassation Courts at four different parts of the country shall not affect the Basic Structure of the Constitution. Judicial Review is basic structure of Constitution and nay attempt to restrict shall be futile. But organisational changes such as division of Supreme Court into Constitutional and establishment of cassation courts does not restrict the judicial review or alter the basic structure of the Constitution.

### 8. Conclusion

The on-going debate about establishment of Constitution Bench and Cassation Court has drawn the attention of Supreme Court. In *V Vasanth Kuamr vs. H C Bhatia* <sup>[21]</sup>, the Supreme Court while analysing the feasibility of establishing the benches of Supreme Court in different parts of the country and the scope of Article 136, referred the matter for consideration to the Constitution Bench. Although the Supreme Court has not given any decisive opinion on the said matter, it can be seen that this proposal has been welcomed by many eminent Jurists such as KK Venugopal <sup>[22]</sup> and T R Andhyarujina who were appointed as amicus curiae in the Vasanth Kumar case.

The authors expresses the hope that working of Cassation Courts or National Court of Appeals is complex and would require utmost precariousness in the initial years. It can be said that it go long way in solving problem of backlog of cases and ensure that justice system is made approachable to citizens at their door step with less litigation cost which in essence is spirit of Independent Judiciary.

### 9. References

1. Prof S R Bhansali, *The Constitution of India* Universal Law Publishing Company, New Delhi
2. *V Vasanth Kumar vs. H C Bhatia and Ors* ( 2016 ) 7 SCC 686
3. Law Commission of India, 229<sup>th</sup> Report on Need for division of the Supreme Court into a Constitution Bench at Delhi and Cassation Benches in four regions at Delhi, Chennai/Hyderabad, Kolkata and Mumbai (August 2009)
4. Dr Subash Kashyap *Constitutional Law of India* (Universal Law Publishing Company, New Delhi 2nd Edition)
5. H. M. Seervai, *Constitutional Law of India – A Critical Commentary*, (Lexis Nexis, New Delhi)
6. *Supra* Note 2
7. 1987 SCR (1) 295
8. Law Commission of India, 125<sup>th</sup> Report on Supreme Court – A Fresh Look (1988)
9. Law Commission of India, 120<sup>th</sup> Report on Manpower Planning in Judiciary: A Blueprint (1987)
10. Law Commission of India, 95<sup>th</sup> Report Constitutional Division within the Supreme Court – A proposal for Constitutional Division (1984)
11. *Supra* Note 6
12. *Ibid*
13. Prof C L Anand *Constitutional Law and History of Government of India* Universal Law Publishing Company, Delhi, 8th Edition
14. Article 145 of the Austria Constitution
15. Article 61 of the French Constitution
16. Article 14 of the French Constitution
17. Article 134 and 136 of the Constitution of Italy
18. D D Basu *Indian Constitutional Law* (Kamal Law House, Kolkata 3rd Edition)
19. AIR 1991 SC 631
20. W.P. (C) No. 36 of 2016
21. Attorney General of India