GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

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

Report No. 229

August 2009

LAW COMMISSION OF INDIA
(REPORT NO. 229)

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

Submitted to the Union Minister of Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 5th day of August, 2009.

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D.O. No. 6(3)/166 /2009-LC (LS) 5 August, 2009

Dear Dr Veerappa Moily ji,

Subject: 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

I am forwarding herewith the 229th Report of the Law Commission of India on the above subject.

2. 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. All sorts of facts and their consequences, and the values we attach to them, questions of economics, politics, social policies etc. going beyond purely legal disputes, are for determination by the Court.

3. As constitutional adjudication occupies a place of its own, it always merits consideration as to whether there should be a separate constitutional court, as is the position in about 55 countries of the world (Austria established the world's first separate constitutional court in 1920), or at least the Supreme Court should have a Constitutional Division. Many continental countries have constitutional courts as well as final courts of appeal called courts of cassation (*Cour de Cassation* in French) for adjudication of non-constitutional matters. A court of cassation is the judicial court of last resort and has power to quash (*casser* in French) or reverse decisions of the inferior courts.

4. We are today also in dire search for solution for the unbearable load of arrears under which our Supreme Court is functioning as well as

the unbearable cost of litigation for those living in far-flung areas of the country. The agonies of a litigant coming to New Delhi from distant places like Chennai, Thiruvananthapuram, Puducherry in the South, Gujarat, Maharashtra, Goa in the West, Assam or other States in the East to attend a case in the Supreme Court can be imagined; huge amount is spent on travel; bringing one's own lawyer who has handled the matter in the High Court adds to the cost; adjournment becomes prohibitive; costs get multiplied.

5. Whether the Supreme Court should be split into Constitutional Division and Legal Division for appeals, the latter with Benches in four regions – North, South, East and West, is a subject of fundamental importance for the judicial system of the country. This Report considers the question as to 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 four Cassation Benches one each in the four regions.

6. We *suo motu* took up the subject for consideration and have recommended that a Constitution Bench be set up at Delhi to deal with constitutional and other allied issues and four Cassation Benches be set up in the Northern region at Delhi, the Southern region at Chennai/Hyderabad, the Eastern region at Kolkata and the Western region at Mumbai to deal with all appellate work arising out of the orders/judgments of the High Courts of the particular region.

With warm regards,

Yours sincerely,

(Dr AR. Lakshmanan)

Dr M. Veerappa Moily,
Union Minister of Law and Justice,
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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

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I. INTRODUCTION

1.1 Ever since the High Courts were founded in 1860, they were the highest courts of appeal in each province (in the Chief Commissioners' Provinces the Judicial Commissioner's Courts were the highest courts of appellate jurisdiction) 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. Under our Constitution, the Supreme Court of India became the highest court of appeal for the whole of India. Its jurisdiction is wider than that of any Federal Supreme Court. It has original jurisdiction in disputes between the Union and the States, and between the States *inter se*. It has original jurisdiction under article 32 of the Constitution for the protection of fundamental rights. It is the highest court of civil and criminal appeal; and it has 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.[1] It also has advisory jurisdiction under article 143 of the Constitution.

1.2 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. All sorts of facts and their consequences, and the values we attach to them, questions of economics, politics, social policies etc. going beyond purely legal disputes, are for determination by the Court.

1.3 As constitutional adjudication occupies a place of its own, it always merits consideration as to whether there should be a separate constitutional court, as is the position in about 55 countries[2] of the world (Austria established the world's first separate constitutional court in 1920), or at least the Supreme Court should have a Constitutional Division. Many continental countries have constitutional courts as well as final courts of appeal called courts of cassation (*Cour de Cassation* in French) for adjudication of non-constitutional matters. A court of cassation is the judicial court of last resort and has power to quash (*casser* in French) or reverse decisions of the inferior courts.

1.4 We are today in dire search for solution for the unbearable load of arrears under which our Supreme Court is functioning as well as the

[1] H. M. Seervai, Constitutional Law of India – A Critical Commentary, 3rd ed. (1984), Vol. 2, pages 2181-2182

[2] For example, Central African Republic, Colombia, Egypt, France, Germany, Iran, Italy, Myanmar, Russia, South Africa

unbearable cost of litigation for those living in far-flung areas of the country. The agonies of a litigant coming to New Delhi from distant places like Chennai, Thiruvananthapuram, Puducherry in the South, Gujarat, Maharashtra, Goa in the West, Assam or other States in the East to attend a case in the Supreme Court can be imagined; huge amount is spent on travel; bringing one's own lawyer who has handled the matter in the High Court adds to the cost; adjournment becomes prohibitive; costs get multiplied.

1.5 Whether the Supreme Court should be split into Constitutional Division and Legal Division for appeals, the latter with Benches in four regions – North, South, East and West, is a subject of fundamental importance for the judicial system of the country. This Report considers the question as to 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 four Cassation Benches one each in the four regions.

II. RECOMMENDATIONS AND VIEWS EXPRESSED

2.1 The tenth Law Commission in its 95th Report titled "Constitutional Division within the Supreme Court – A proposal for", 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. For effecting these recommendations, it was opined in the said Report, amendment of the Constitution would be necessary; 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.

2.2 It may be noted that the tenth Law Commission had also considered the question as to whether there should be created a Constitutional Court to decide constitutional questions, instead of a Constitutional Division, but keeping in view that creation of a separate Court for dealing with constitutional issues 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, as well as an overwhelming opinion in favour of a Constitutional Division, the Commission did not pursue the idea of creating a Constitutional Court.

2.3 The eleventh Law Commission in its 125th Report titled "The Supreme Court – A Fresh Look", submitted in 1988, reiterated the above recommendation for splitting the Supreme Court into two and gave an additional reason for the same. The Commission stated the additional reason in paragraph 4.17 of the said Report 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[3], 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[4]."

[3] 95th Report of the Law Commission of India
[4] Ibid.

2.4 The problem of delay in trial and disposal of cases and consequent pendency of cases in the apex court and the courts subordinate has been a matter of great concern, debate, discussion and criticism. The Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice in its 28th Report dealing with the Supreme Court (Number of Judges) Amendment Bill 2008 has noted thus:

> "The Committee has felt that inordinate delay in delivering justice to the people defeats the very purpose of the judiciary as an institution. The magnitude of the problem of the pendency of cases in various levels in the judiciary must be understood in the context that the people resort to judicial remedy as a last resort for the redressal of their grievances and to get justice. This is so because people have reposed their ultimate faith and trust in the judicial system above the legislature and executive. In this context pendency of cases hits the common man, seeking justice, the hardest. Perhaps, that is the reason that it is said justice delayed is justice denied. However, in spite of the various measures taken by the Government and the judiciary itself, it is a matter of serious concern that the pendency or arrears of cases has been increasing steadily over the years bringing the judicial system as a whole to near stagnation. 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."

2.5 The background note of the Department of Justice on the Bill for increasing number of Supreme Court Judges presented before the Standing Committee stated:

> "The Chief Justice of India has informed that there were 41,078 cases pending in the Supreme Court as on 01.03.2007 and the Judges feel over-burdened and have been working under acute work pressure. He has further stated that despite satisfactory high rate of disposal, pendency of cases in the Supreme Court has constantly been on the rise due to comparatively higher rate of institution of cases. Pendency of cases in the courts could be

directly ascribed to complex factors, with inadequate judge strength coming at the top".

2.6 What has been stated before the Standing Committee is amply proved by the fact that in 1950, there were 1,215 cases which were instituted (1,037 admission matters and 178 regular matters). The disposal rate 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. The complete chart of institution, disposal and pendency of cases in the Supreme Court from the year 1950 to April, 2008 is at **Appendix**.

2.7 The said chart demonstrates that 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.

2.8 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.

2.9 It is, therefore, evident 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.

2.10 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.

2.11 Dr. P. C. Alexander, former Governor of Tamil Nadu and Maharashtra and Member of Parliament, has thrown considerable light on

the malaise that ails the judicial system. In his article "Justice is pending" published in *The Asian Age*[5] Dr. Alexander has stated:

> "No doubt, increasing the number of judges, promptness in filling up the vacancies and improving working facilities are all very important for the efficiency of the judicial system, but these alone cannot be an adequate solution to the pendency problem. There are many measures which the judiciary can take without waiting for additional financial support from the government, but very little effective action has been taken on these by the judiciary and they continue to cause delays in the disposal of cases. They include laxity shown by the courts in matters like production of witnesses on the dates posted for their examination, granting requests for adjournments of cases without good reasons, inordinate delays in giving copies of documents, allowing lengthy arguments by the advocates, and the practice of judges themselves writing unnecessarily long judgments.
>
> The liberal attitude of the courts in entertaining 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. When the accused are influential politicians or rich businessmen, the cases can go on endlessly, bringing down in this process the reputation of the judicial system itself. 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.
>
> The practice of some judges in delaying the delivery of judgments for several months, and in certain cases, even till they retire from service, has been another cause of delayed justice. Though a maximum time limit of one month has been considered reasonable for the delivery of judgment, there is no mechanism for enforcement of any time limit, and this malpractice on the part of some judges thus goes on unchecked. Again, no serious attempts are being made by the judiciary to make use of the provisions in the Constitution for engaging the services of retired judges both at the Supreme Court and at the High Courts for temporary periods

[5] http://www.asianage.com, visited 22.07.2009

> for help in clearing the backlog of cases. It appears that retired judges are reluctant to serve in this capacity as they consider such service not befitting their status. There is no reason why this issue cannot be sorted out to the satisfaction of the retired judges, but the judiciary does not appear to be very keen about resorting to these Constitutional provisions."

2.12 We have tried some of the above-mentioned measures for the last 59 years of the functioning of the judicial system in our country. The result appears to be far from satisfactory. 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.

2.13 In this context, it may be noted that in its 2nd (2004), 6th (2005) and 15th (2006) Reports the Parliamentary Standing Committee on Law and Justice has repeatedly suggested that in order to promote speedy justice available to the common man, benches of the Supreme Court have to be established in the Southern, Western and North-Eastern parts of the country. 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. Despite these Reports, the Hon'ble Supreme Court has so far not agreed with the suggestion regarding setting up of its benches.

2.14 Paragraph 8.36 of the aforesaid 15th Report reads as under:

> "The Committee is not satisfied with the persistent opposition for establishing benches of the Supreme Court in other parts of the country without giving any convincing reasons or justification thereof. The Committee, therefore, endorses its earlier view that establishment of benches of the Supreme Court in other parts of the country would be of immense help to the poor who can not afford to travel from their native places to Delhi. The Committee, therefore, feels that the Ministry should come forward with a necessary Constitutional amendment to address this deadlock."

2.15 Again, in paragraph 6.8 of the 28th Report of the Standing Committee, the same view has been reiterated in the following words:

> "The Committee in its Second, Sixth, Fifteenth, Twentieth and Twenty-sixth Reports on the Demands for Grants of the Ministry of Law and Justice has impressed upon for setting up of benches of the Supreme Court in Southern, Western and Eastern parts of the country. The Committee's recommendation rests on the premise that it is not possible for the people living in far-flung and remote areas to come to the National Capital for seeking justice for various reasons. **The Committee reiterates this recommendation**."

III. BENCHES UNDER ARTICLE 130 OF THE CONSTITUTION

Cassation Benches in four zones

3.1 A feasible, workable and efficient system of judicial administration could be established if India were to be divided into four zones/regions, namely, (I) Northern Zone – Bench to be established in Delhi dealing with the litigation of the States of Uttar Pradesh, Uttarakhand, Rajasthan, 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 North-eastern States including Sikkim and the Union territory of Andaman and Nicobar Islands; (IV) Western Zone - Bench to be established at Mumbai dealing with the litigation of the States of Maharashtra, Gujarat, Goa and the Union territories of Dadra and Nagar Haveli, and Daman and Diu.

3.2 The said Benches shall act as Cassation Benches to deal with appeals from a High Court in the particular region. The apex court could 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.

Constitution Bench at Delhi

3.3 The apex court would thus be relieved of the backlog of accumulated cases which are causing a burden and continuous strain on the resources of the apex court. Since the accumulated cases pertaining to a particular region would be dealt with by the particular zonal bench, the apex court would be free to deal with only 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. This list is merely illustrative and not exhaustive.

3.4 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.

3.5 The advantage of setting up of benches in the manner aforesaid is that this can be made effective without any delay since the constitution of benches is a matter within the purview and jurisdiction[6] of the Supreme Court itself under the Supreme Court Rules 1966.

[6] Order VII, Supreme Court Rules 1966

3.6 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."

3.7 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. 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.[7]

3.8 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.

3.9 If the judge-strength of each zonal Cassation Bench is confined to six Judges, then only 24 Judges will be required for all the four zones to

[7] Union of India v. S. P. Anand, AIR 1998 SC 2615

constitute Cassation Benches all over India. The other Judges will be available in the apex court, which will have a Constitution Bench at Delhi working on a regular basis.

IV. CONCLUSION AND RECOMMENDATION

4.1 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. 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. 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. Other countries which blend the functions of judicial review and cassation or the review of lower court decisions are Ireland, the United States and Denmark.

4.2 It is, therefore, recommended that:

[1] A Constitution Bench be set up at Delhi to deal with constitutional and other allied issues as aforesaid.

[2] Four Cassation Benches be set up in the Northern region/zone at Delhi, the Southern region/zone at Chennai/Hyderabad, the Eastern region/zone at Kolkata and the Western region/zone at

Mumbai to deal with all appellate work arising out of the orders/judgments of the High Courts of the particular region.

[3] If it is found that article 130 of the Constitution cannot be stretched to make it possible to implement the above recommendations, Parliament should enact a suitable legislation/Constitutional amendment for this purpose.

4.3 We further recommend that with a view to reducing the heavy backlog of cases in the higher courts and meet the problem of finding suitable persons for appointment of judges in these courts, the retirement age for the Supreme Court and High Court Judges be raised to 70 and 65 years, respectively.

(Dr Justice AR. Lakshmanan)
Chairman

(Prof. Dr Tahir Mahmood)
Member

(Dr Brahm A. Agrawal)
Member-Secretary